BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

RAFAEL GOMEZ PONCE, Claimant, vs. BRAND SERVICES, INC., Employer, and INDEMNITY INSURANCE COMPANY OF NORTH AMERICA, Insurance Carrier, Defendants.	:	File No. 5058013 A R B I T R A T I O N D E C I S I O N Head Notes: 1108.50, 1402.20, 1402.60, 1802, 2501, 2701, 2907, 4000.2

STATEMENT OF THE CASE

Rafael Gomez Ponce, claimant, filed a petition in arbitration seeking workers' compensation benefits from Brand Services, Inc., employer and Indemnity Insurance Company of North America, insurance carrier as defendants. Hearing was held on September 5, 2018 in Sioux City, Iowa.

Claimant, Rafael Gomez Ponce, was the only witness to testify live at trial via the use of an interpreter. The evidentiary record also includes joint exhibits JE1-JE9, claimant's exhibits 2-5, and defendants' exhibits A-K.

The parties filed a hearing report at the commencement of the arbitration hearing. On the hearing report, the parties entered into various stipulations. All of those stipulations were accepted and are hereby incorporated into this arbitration decision and no factual or legal issues relative to the parties' stipulations will be raised or discussed in this decision. The parties are now bound by their stipulations.

The parties submitted post-hearing briefs on October 8, 2018.

ISSUES

The parties submitted the following issues for resolution:

1. The extent of industrial disability claimant sustained as a result of the stipulated November 8, 2016 work injury.

2. The number of exemptions claimant is entitled to claim for purposes of determining his weekly workers' compensation rate.

3. Whether claimant is entitled to payment of past medical expenses?

4. Whether claimant is entitled to alternate medical care?

5. Whether penalty benefits are appropriate?

6. Assessment of costs.

FINDINGS OF FACT

The undersigned, having considered all of the evidence and testimony in the record, finds:

On November 8, 2016, claimant, Rafael Gomez Ponce, sustained a work injury. He and several co-workers attempted to move a heavy generator when he felt something pop in his testicle and he felt his gut go down into his testicle. He immediately laid down. He was then taken to the office where they obtained a urine sample from him. The safety person from the defendant-employer took him to the medical clinic in Sioux City. (Testimony)

Claimant was initially seen at Mercy Business Health Services. The notes state that the patient presented "doubled over in pain and holding his left testicle and lower abdomen with his hands." (Joint Exhibit 1, page 1) The doctor was very concerned that the bowel was incarcerated so he did not wait for a surgical referral. Instead, claimant was sent to Mercy Emergency Room for immediate evaluation. (JE1, p. 1)

At the Mercy ER claimant was diagnosed with an incarcerated left inguinal hernia and immediately taken to surgery. William Rizk, M.D. performed laparoscopic repair of incarcerated left inguinal hernia with mesh, laparoscopic right inguinal hernia repair with mesh, and laparoscopic assisted bilateral TAP blocks. Claimant was discharged on November 9, 2016. The instructions stated, "Avoid crossing you [sic] legs while lying down or sitting. Do not lift more than 10 pounds. No strenuous activity until cleared by your physician." (JE3, p. 5) The note also advised no work or driving until the claimant was released by his primary physician in Georgia. (JE1-JE3)

Rafael testified that at the time he was discharged from the hospital he was in pain and could only walk a small amount. Prior to his employment with Brand Energy and Infrastructure Services, Inc., claimant lived in Georgia; he moved to the Sioux City area for work. Approximately three or four days after he was discharged from the hospital claimant flew home to Georgia. He paid for his friend to travel to Iowa and drive his vehicle back to Georgia. Rafael testified that he was assured by his supervisor that the defendants would provide medical care for him in Georgia. However, when he returned to Georgia there were not any appointments scheduled for him. Rafael contacted his supervisor several times about financial help and medical treatment. He was repeatedly told that he would receive some assistance, but he did not receive any help voluntarily. (Testimony; Cl. Ex. 4, p. 5)

On November 15, 2016, Rafael saw Richard L. Manrique, M.D. The note indicates he was there to establish care after a hernia repair. He presented complaining of severe swelling and purple discoloration of his entire groin area. He was taking hydrocodone four times a day. (JE4, pp. 1-2)

There is a Broadspire letter addressed to Rafael dated November 18, 2016. The letter that was sent to the claimant was written in Spanish and is contained at defendants' exhibit C, page one. Unfortunately, there is no English interpretation of this letter in evidence. (Def. Ex. C)

There are field case management notes in evidence. One note dated November 18, 2016, indicates that the field case manager (FCM) had attempted to contact Rafael, but that the phone number she had for him was not a working number. (Cl. Ex. 3, p.1) Rafael testified that he has had the same phone number for years. In early December a senior adjuster indicated that the phone number for Rafael was a working number. The notes indicate that the senior adjuster spoke with Rafael the previous day but needed an interpreter. (id.)

Rafael went to the emergency room at Piedmont Healthcare on November 25, 2016. He reported left testicular swelling and pain. He underwent a CT of his abdomen and pelvis. The CT showed a complex collection of fluid within the left inguinal canal; infection could not be excluded. The doctor suspected a post-op hematoma. He advised Rafael to attend his follow up appointment with Joel Rosenfeld, M.D., at Georgia Urology. (JE 5)

Rafael was seen at Georgia Urology on December 2, 2016. Rafael reported sharp pain that was getting worse. Rafael was diagnosed with infected hydrocele. The treatment plan included medications. The notes indicate that the doctor felt that Rafael's symptoms may be slow to improve but he did expect some improvement within 7 to 10 days. (JE 6, pp. 1-4)

A vocational case manager (VCM), Shari Rubin, called Rafael on December 7, 2016 with the help of an interpreter. Rafael stated that he had an appointment on December 13, 2016 with Dr. Joel Rosenfeld at Georgia Urology. Rafael advised the

VCM that he was having difficulty walking and was in a lot pain. The VCM was also advised that Rafael had excessive fluid in his scrotum and that the PA they saw felt that something was not done correctly at the time of his hernia surgery. (Cl. Ex. 3, p. 2)

Rafael returned to Georgia Urology on December 13, 2016. His severe pain and swelling in the scrotum continued. Fluid was aspirated from his scrotum. Rafael was to continue with conservative treatment. (JE 6, pp. 5-9)

According to the FCM notes, the FCM emailed attorney Freking on January 23, 2017 requesting approval to contact Rafael to assist him in getting medical treatment for his work injury. The FCM noted Rafael was scheduled to see Dr. Rosenfeld with Georgia Urology on February 7, 2017, but Rafael did not keep the appointment. The FCM planned to reschedule the appointment. (Cl. Ex. 3, p.1)

On January 24, 2017, Rafael was seen again at Georgia Urology. The note stated he was a "self pay workmans [sic] comp Spanish speaking pt" (JE6, p. 10) He reported worsening, unchanged left testicular pain that radiated to the left inguinal/groin. He also complained of lower abdominal pain radiating to his low back for the past three weeks. Dr. Rosenfeld ordered a repeat CT scan and advised Rafael to return in 2 weeks. The doctor excused Rafael from work "today" as of January 24, 2017. (JE6, pp. 10-14)

Also on January 24, 2017, Broadspire Field Based Case Manager (FCM), Stacy Hartman, attempted to send correspondence to Attorney Freking. The letter requested access to claimant to help facilitate his recovery. However, it is unclear if Attorney Freking ever received the letter because the address on the letter indicates it was sent to Charles C. Goodman, the Work Comp Senior Claims Examiner, in Lexington, Kentucky, but the letter does state "Dear Ms. Freking". (Def. Ex. H, p. 1) Unfortunately, defendants did not offer any testimony or explanation about this correspondence.

Rafael testified that he did not go to the February 13, 2017 appointment with Dr. Rosenfeld because he did not have the money to pay for medical care. (Testimony; Ex. I, p. 13)

On February 14, 2017, the attorney for the defendants sent a letter to claimant's counsel advising that Rafael did not show up for the February 13, 2017 appointment. Again, defendants requested permission to allow the NCM to contact Rafael directly. (Def. Ex. F, p. 1; Def. Ex. G, p. 2) Defendants' answer to interrogatory number 16 states that Dr. Rosenfeld was authorized to treat Rafael. However, because claimant did not show for the February 13, 2017 appointment no further treatment was authorized. (Def. Ex. D, p. 4) Those answers are not dated but it appears they were not served until sometime in November of 2017.

On March 6, 2017, the VCM sent an email to attorney Freking which stated she was following up on her email dated January 23, 2017 wherein she requested the attorney's permission to contact Rafael to assist him in getting treatment. The VCM

again requests permission to contact Rafael directly. The FCM contacted Georgia Urology who advised her they had not been able to reach Rafael. (Cl. Ex. 3, p. 4; Def. Ex. G, p. 2)

On March 10, 2017, Attorney Freking gave the FCM permission to contact Rafael. However, she stated that she thought Rafael had a new attorney. (Def. Ex. G, p. 3) On March 13, 2017, Attorney Freking filed a motion to withdraw as claimant's counsel. The motion was granted on April 13, 2017 and claimant was ordered to file a written notification of his intent to proceed pro se or to cause substitute counsel to enter an appearance within 20 days. Claimant did not comply with the order and his case was involuntarily dismissed on June 1, 2017. (Agency file)

On March 20, 2017, the adjuster wrote to Dr. Rosenfeld seeking his opinion regarding maximum medical improvement (MMI) and impairment. Additionally, the adjuster stated that she had not received any bills from his office. The adjuster requested that the bills be forwarded to the adjuster. (Def. Ex. G, p. 3)

Dr. Rosenfeld saw Rafael again on May 17, 2017. Rafael presented with groin pain. He continued to have left groin pain, back pain, throat pain, and umbilical pain. The notes indicate that the hematoma had almost completely resolved. Rafael was advised to return in one year. (JE6, pp. 15-18)

On July 10, 2017, Rafael returned to Richard Manrique, M.D. He reported acute onset of left testicular pain for the past several days and more back pain for the past three months. The doctor recommended supportive care with warm compresses, ice packs for pain, and to avoid narcotics and start anti-inflammatory medication. The doctor also made some recommendations for Rafael's hypertension. (JE4, pp. 3-7)

Rafael saw Dr. Manrique again on August 31, 2017 for follow-up of testicular pain and high blood pressure. There was a discussion about diet and weight management. The doctor also recommended an antibiotic to treat underlying left epididymitis. Rafael was to follow up as needed. (JE4, pp. 8-11)

On November 3, 2017, Attorney Freking re-filed this workers' compensation action. (Agency File) A review of the agency file demonstrates that a petition for alternate medical care was never filed.

The next time Rafael received treatment was on February 14, 2018, when he returned to see Dr. Rosenfeld. Rafael reported continued left sided testicular pain since his hernia repair. Dr. Rosenfeld ordered an ultrasound. The ultrasound demonstrated a small varicocele but the doctor felt this was not the cause of Rafael's pain. In April Rafael underwent an injection. Unfortunately, the injection did not help. (JE6, pp. 19-30; testimony)

On May 1, 2018, at the request of the defendants, Rafael attended an IME with Daniel Wolens, M.D. at Kentuckiana Occupational Health Associates, Ltd. (JE8, pp. 1-

8) Rafael's chief complaints were left scrotal pain, low back pain, and periumbilical pain. Dr. Wolens noted that he was limited to addressing the post-herniorrhaphy orchalgia only. Rafael advised Dr. Wolens that Dr. Rosenfeld had raised the issue of a potential testicle removal. Rafael's pain level was so high at the time of the independent medical examination (IME) that he stated he would be willing to undergo the procedure to remove his left testicle if he were given the opportunity. Rafael estimated his scrotal pain levels to be 5-7 out of 10. The only pain medication that Rafael was using was acetaminophen. He had previously been using tramadol but he was no longer able to afford it. Dr. Wolens diagnosed Rafael with left-sided orchalgia, status post left inguinal herniorrhaphy, low back pain with left lower extremity radicular symptoms, and periumbilical pain. Dr. Wolens stated, "Orchalgia following a herniorrhaphy is a well-recognized complication of the same. Therefore, I would consider there to be a causal connection between the left inguinal hernia, herniorrhaphy, and residual orchalgia." (JE8, p. 7) With regard to future treatment Dr. Wolens stated:

> Mr. Gomez improved somewhat with the use of oral tramadol. This may be helpful again on an as-needed basis. One ilioinguinal nerve block has been conducted and was ineffective. It would not be necessary to repeat this. The last option in this case is that or orchiectomy. The scientific literature does support that orchiectomy is a reasonable option for post herniorrhaphy orchalgia. Unfortunately, the statistics are modest regarding the degree of relief that can be experienced. It is, however, again an acceptable procedure for this individual's complaints."

(JE8, p. 8)

Dr. Wolens also sent a letter to the attorney for the defendants on July 31, 2018. The doctor stated that if claimant were not going to have the surgery then he would consider him to be at MMI. The doctor was asked his opinion regarding permanent impairment. Dr. Wolens stated that because Rafael's fascial defect within his abdominal wall had been repaired there would be no impairment for an inguinal hernia. Additionally, there would not be any impairment for the associated peri-umbilical pain because it was not associated with a hernia. Dr. Wolens noted that The Guides did allow impairment for pain under Chapter 18. He noted that Rafael's complaints were valid, moderate in intensity, and had an adverse effect on his activities of daily living. Thus, he assigned the maximum 3 percent whole person impairment for pain. Dr. Wolens did not address the issue of restrictions in his letter. (JE8, pp. 9-10)

On July 31, 2018, Dr. Rosenfeld responded to a check-the-box letter sent to him on behalf of the defendants. Dr. Rosenfeld indicated that Rafael was capable of working at that time. He also indicated that Rafael had reached MMI as of May 1, 2018 and that he did not have any permanent restrictions. (JE6, p. 31)

On August 15, 2018, defendants sent correspondence and workers' compensation benefits to claimant's counsel. (Def. Ex. F, p. 7)

Claimant has alleged that the November 8, 2016 incident injured his back. He testified that he experiences low back pain and that he never had this before the injury. Although it may well be that Rafael's back was injured by the work injury, the claimant has not submitted any expert evidence to support this claim. Unfortunately, there is not one medical expert in this file who opines that Rafael's back complaints are causally connected to the work injury. I find that claimant has failed to carry his burden of proof to show that his back complaints are related to the work injury. Therefore, all other issues with regard to Rafael's back are rendered moot.

Claimant has demonstrated by a preponderance of the evidence that the November 8, 2016 work injury caused the left inguinal hernia, herniorrhaphy, and residual orchalgia. Rafael continues to have pain and symptoms. His pain level is such that he is willing to undergo surgical removal of his testicle if he were given the opportunity to have that surgery. Defendants' IME doctor, Dr. Wolens, stated that this was an acceptable procedure. Dr. Wolens also stated that Rafael's complaints were valid, moderate in intensity, and had an adverse effect on his activities of daily living. Rafael testified that his pain is the worst when he walks. Walking also causes his testicle to swell and hurt. He would like to return to work so that he could provide for his family. He is willing to travel to wherever work would be available. However, he feels that he needs his pain removed before he can work. Rafael testified that he does not have any restrictions placed on his activities from a doctor. However, he does not feel he can work as he did prior to the injury. For example, he cannot lift heavy items, bend over, or walk without pain. He does not believe he is physically capable of performing any of his prior jobs. Due to his physical condition, he feels that about the only job he could perform would be a driving only job.

Claimant is seeking alternate medical care. Claimant would like additional treatment as recommended by the IME doctor hired by the defendants. Claimant hopes that additional treatment will allow him to be able to return to the workforce. Defendants deny that claimant is entitled to additional medical treatment. As noted above, there appears to have been a lack of communication between the defendants and claimant with regard to medical treatment. Defendants deny claimant is entitled to additional treatment.

First, defendants argue that no treatment offered to the claimant to date has helped his symptoms and therefore he should not be allowed any additional treatment. The undersigned does not find this argument to be persuasive. Defendants' argument is not even supported by their own IME doctor who feels that the additional treatment claimant is seeking is appropriate. (JE8, p. 8)

Second, defendants also argue claimant should be denied alternate medical care because claimant has not introduced any evidence that defendants have denied authorization for treatment. Claimant testified that he had to pay for his appointments with Dr. Rosenfeld. This testimony is supported by Dr. Rosenfeld's clinical notes which state Rafael was a self-pay patient. While there is one adjuster note that indicates the defendants requested Dr. Rosenfeld's bills be sent to them, there is no evidence that

the defendants ever paid the bills or advised claimant that Dr. Rosenfeld was an authorized doctor who he could see for treatment. I find claimant's testimony to be credible. I do not find defendants' argument to be persuasive.

Finally, defendants argue claimant's request for alternate medical care should be denied because they did not know of claimant's dissatisfaction with the care. In their post-hearing brief defendants stated "[c]laimant introduced no evidence that he was (1) dissatisfied with care being offered; or (2) that he had communicated the basis of any such dissatisfaction to Defendants as required by Iowa Code section 85.27(4). Claimant's request for alternate medical care should likewise be denied." (Def. Brief p. 10) This is not accurate. In his answers to interrogatories claimant specifically stated, "[r]easonable medical care has not been provided." (Cl. Ex. 4, p. 5) Additionally, defendants hired Dr. Wolens to conduct an IME. As a result of that IME, Dr. Wolens issued a report directly to the defendants. In that report, Dr. Wolens stated that Rafael's pain level was so high that he is willing to have his testicle removed if he were given the opportunity to have that treatment. (JE8, p. 2) Defendants' argument that they did not know of claimant's dissatisfaction with his care is disingenuous and not persuasive.

Defendants are not currently offering any treatment. I find that the treatment claimant is seeking is superior to what defendants are offering. It is unclear to the undersigned why a petition for alternate care was not filed long before the arbitration hearing. The Iowa workers' compensation system has an expedited procedure that allows claimant to seek alternate medical care without having to wait for the arbitration hearing. Nonetheless, I find that claimant has demonstrated entitlement to alternate medical care at this time. Defendants shall authorize additional treatment for the work injury as recommended by Dr. Wolens.

I accept the parties' stipulation that the November 8, 2016 work injury is the cause of permanent disability. However, because defendants are to authorize the additional treatment recommended by Dr. Wolens, which could also include additional surgery, I find that claimant has not yet reached MMI. As such, the issue of claimant's entitlement to industrial disability is not ripe for determination. The issue of permanent impairment is hereby bifurcated.

As the file currently stands, there is no evidence that Rafael has any restrictions placed on his activities from a medical expert. The IME conducted at the request of the defendants did not address the issue of restrictions. In July of 2018 Dr. Rosenfeld indicated that Rafael did not have any restrictions. Based on Rafael's convincing testimony regarding his ongoing symptoms and his abilities, I am skeptical of his no restriction status. However, the claimant has not offered any evidence to show that any doctor has restricted his activities; as such, I must find that he is capable of returning to substantially similar work. Thus, the evidence does not support an award of healing period benefits from November 8, 2016 through the present. Defendants previously paid healing period benefits through February 14, 2017. (Def. Ex. F, p. 7) Thus, payment of permanent partial disability benefits commence on February 15, 2017.

We now turn to the issue of rate. The parties have stipulated that Rafael's gross weekly earnings at the time of the injury were one thousand eight hundred twenty-two and 62/100 dollars ($1,822.62). However, there is a dispute between the parties about the number of exemptions Rafael is entitled to claim for the purposes of determining his weekly workers' compensation rate. Claimant testified that he is married and had one child living with him and in high school at the time of the injury. (Def. Ex. I) I find that the claimant's child who was in high school and living with them at the time of the injury was a dependent. I find claimant has carried his burden of proof to show that he was married and entitled to three exemptions. Thus, I find that the appropriate weekly workers' compensation rate is one thousand one hundred four and 59/100 dollars ($1,104.59). Defendants shall pay any underpayment, plus interest to the claimant.

Claimant is seeking payment of past medical expenses. Rafael is seeking reimbursement for paying an associate to drive his car from Sioux City to Georgia. Claimant fails to provide any legal authority for the basis of his request. I find that this expense is not the responsibility of the defendants.

Rafael is seeking medical mileage for attendance at his appointments as set forth in the attachment to the hearing report. I find that the appointments were necessary as a result of the work injury. I find that defendants shall pay claimant mileage at the applicable rate for those medical appointments.

Next, Rafael is asking for reimbursement in the amount of $1,132.00 for his co-pays and payments towards medical expenses, as attached to the hearing report.

Rafael went to the emergency room at Piedmont Healthcare on November 25, 2016 for left testicular swelling and pain. (JE 5) Rafael paid one hundred fifty dollars to Piedmont Healthcare on November 25, 2016. (H.R. attachment) This treatment was related to the work injury and defendants are responsible for the expenses incurred for this treatment, including reimbursement to Rafael. Rafael also seems to be seeking reimbursement in the amount of $300.00 for a money order. Unfortunately, there is no evidence to explain what this money order was used for and thus the undersigned must find that claimant has failed to carry his burden of proof to show that defendants are responsible for this expense. (Hearing Report)

Rafael has failed to offer evidence to support payment of the remaining requested expenses. Thus, I find he has failed to carry his burden of proof to show that the remaining submitted expenses are the responsibility of the defendants.

Rafael is seeking penalty benefits for denied healing period benefits from February 2017 to the present. However, I found claimant failed to prove entitlement to healing period benefits during that period of time. Therefore, I conclude that claimant failed to prove that defendants unreasonably denied benefits during that same period of time.

Rafael is seeking penalty benefits because defendants denied claimant's back claim. Again, I found claimant failed to carry his burden of proof on this issue. Thus, I conclude that claimant also failed to carry his burden of proof to show that defendants' denial was unreasonable.

It appears Rafael is also seeking penalty benefits for failure to schedule medical appointments. Claimant fails to cite any legal authority for awarding penalty benefits for failure to provide medical benefits. The Iowa Workers' Compensation system has a mechanism in place which allows claimant to seek an expedited ruling to help the injured worker receive medical treatment in a timely fashion; that remedy is to file a petition for alternate medical care. Failure to provide medical care is not a basis for penalty benefits. Claimant's request for penalty benefits is denied.

Finally, claimant is seeking an assessment of costs. I find that claimant was generally successful in his claim. I exercise my discretion and find that an assessment of costs against the defendants is appropriate. I find that the $100.00 filing fee and the $6.47 cost of service are both appropriate costs under 876 IAC 4.33(3) and (7). Thus, I assess costs in the amount of $106.47.

CONCLUSIONS OF LAW

The party who would suffer loss if an issue were not established ordinarily has the burden of proving that issue by a preponderance of the evidence. Iowa R. App. P. 6.14(6)(e).

The claimant has the burden of proving by a preponderance of the evidence that the injury is a proximate cause of the disability on which the claim is based. A cause is proximate if it is a substantial factor in bringing about the result; it need not be the only cause. A preponderance of the evidence exists when the causal connection is probable rather than merely possible. George A. Hormel & Co. v. Jordan, 569 N.W.2d 148 (Iowa 1997); Frye v. Smith-Doyle Contractors, 569 N.W.2d 154 (Iowa App. 1997); Sanchez v. Blue Bird Midwest, 554 N.W.2d 283 (Iowa App. 1996).

The question of causal connection is essentially within the domain of expert testimony. The expert medical evidence must be considered with all other evidence introduced bearing on the causal connection between the injury and the disability. Supportive lay testimony may be used to buttress the expert testimony and, therefore, is also relevant and material to the causation question. The weight to be given to an expert opinion is determined by the finder of fact and may be affected by the accuracy of the facts the expert relied upon as well as other surrounding circumstances. The expert opinion may be accepted or rejected, in whole or in part. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); IBP, Inc. v. Harpole, 621 N.W.2d 410 (Iowa 2001); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995). Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417 (Iowa 1994). Unrebutted expert medical testimony cannot be summarily rejected. Poula v. Siouxland Wall & Ceiling, Inc., 516 N.W.2d 910 (Iowa App. 1994).

Since claimant has an impairment to the body as a whole, an industrial disability has been sustained. Industrial disability was defined in Diederich v. Tri-City R. Co., 219 Iowa 587, 258 N.W. 899 (1935) as follows: "It is therefore plain that the legislature intended the term 'disability' to mean 'industrial disability' or loss of earning capacity and not a mere 'functional disability' to be computed in the terms of percentages of the total physical and mental ability of a normal man."

Compensation for permanent partial disability shall begin at the termination of the healing period. Compensation shall be paid in relation to 500 weeks as the disability bears to the body as a whole. Section 85.34.

The employer shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance, and hospital services and supplies for all conditions compensable under the workers' compensation law. The employer shall also allow reasonable and necessary transportation expenses incurred for those services. The employer has the right to choose the provider of care, except where the employer has denied liability for the injury. Section 85.27. Holbert v. Townsend Engineering Co., Thirty-second Biennial Report of the Industrial Commissioner 78 (Review-Reopening October 1975).

Based on the above findings of fact, I conclude Rafael demonstrated by a preponderance of the evidence that the November 8, 2016 work injury caused the left inguinal hernia, herniorrhaphy, and residual orchalgia. However, he failed to carry his burden of proof to show that the low back is related to the work injury.

Claimant is seeking alternate medical care for his work injury. An application for alternate medical care is not automatically sustained because claimant is dissatisfied with the care he has been receiving. Mere dissatisfaction with the medical care is not ample grounds for granting an application for alternate medical care. Rather, the claimant must show that the care was not offered promptly, was not reasonably suited to treat the injury, or that the care was unduly inconvenient for the claimant. Long v. Roberts Dairy Co., 528 N.W.2d 122 (Iowa 1995).

In Pirelli-Armstrong Tire Co. v. Reynolds, 562 N.W.2d 433, 437 (Iowa 1997), the supreme court held that "when evidence is presented to the commissioner that the employer-authorized medical care has not been effective and that such care is 'inferior or less extensive' than other available care requested by the employee, . . . the commissioner is justified by section 85.27 to order the alternate care."

Based on the above findings of fact, I conclude that claimant has demonstrated entitlement to alternate medical care as recommended by Dr. Wolens. Defendants shall authorize additional treatment for the work injury as recommended by Dr. Wolens.

I accept the parties' stipulation that the November 8, 2016 work injury is the cause of permanent disability. However, because defendants are to authorize the additional treatment recommended by Dr. Wolens, which could also include additional

surgery, I conclude that claimant has not yet reached MMI. Thus, the issue of claimant's entitlement to industrial disability is not ripe for determination and is bifurcated.

While claimant has not yet reached MMI, he has not shown entitlement to additional healing period benefits. Section 85.34(1) provides that healing period benefits are payable to an injured worker who has suffered permanent partial disability until (1) the worker has returned to work; (2) the worker is medically capable of returning to substantially similar employment; or (3) the worker has achieved maximum medical recovery. The healing period can be considered the period during which there is a reasonable expectation of improvement of the disabling condition. See Armstrong Tire & Rubber Co. v. Kubli, 312 N.W.2d 60 (Iowa App. 1981). Healing period benefits can be interrupted or intermittent. Teel v. McCord, 394 N.W.2d 405 (Iowa 1986). Based on the above findings of fact, I conclude that claimant is medically capable of returning to substantially similar employment.

We now turn to the rate issue. The parties also dispute the appropriate weekly rate at which benefits should be paid to claimant. Based on the above findings of fact, I conclude that claimant's weekly worker's compensation rate should be calculated using three exemptions. Thus, I find that the appropriate weekly workers' compensation rate is one thousand one hundred four and 59/100 dollars ($1,104.59). Defendants shall pay any underpayment, plus interest to the claimant.

As previously noted, the employer shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance, and hospital services and supplies for all conditions compensable under the workers' compensation law. Defendants are also responsible for medical mileage. Based on the above findings of fact, I conclude that defendants are responsible for the submitted mileage request for claimant's attendance at his doctor's appointments. Iowa Code section 85.27; 876 IAC 8.1.

Further, based on the above findings of fact, I conclude claimant carried his burden of proof to show that defendants are responsible to reimburse him for the $150.00 he paid to Piedmont. However, I conclude that claimant failed to offer enough evidence to carry his burden of proof on the remaining submitted medical bills and co-pays.

Next, we turn to the penalty claim. Iowa Code section 86.13(4) provides:

> a. If a denial, a delay in payment, or a termination of benefits occurs without reasonable or probable cause or excuse known to the employer or insurance carrier at the time of the denial, delay in payment, or termination of benefits, the workers' compensation commissioner shall award benefits in addition to those benefits payable under this chapter, or chapter 85, 85A, or 85B, up to fifty percent of the amount of benefits that

were denied, delayed, or terminated without reasonable or probable cause or excuse.

b. The workers' compensation commissioner shall award benefits under this subsection if the commissioner finds both of the following facts:

(1) The employee has demonstrated a denial, delay in payment, or termination in benefits.

(2) The employer has failed to prove a reasonable or probable cause or excuse for the denial, delay in payment, or termination of benefits.

In Christensen v. Snap-on Tools Corp., 554 N.W.2d 254 (Iowa 1996), and Robbennolt v. Snap-on Tools Corp., 555 N.W.2d 229 (Iowa 1996), the supreme court said:

> Based on the plain language of section 86.13, we hold an employee is entitled to penalty benefits if there has been a delay in payment unless the employer proves a reasonable cause or excuse. A reasonable cause or excuse exists if either (1) the delay was necessary for the insurer to investigate the claim or (2) the employer had a reasonable basis to contest the employee's entitlement to benefits. A "reasonable basis" for denial of the claim exists if the claim is "fairly debatable."
>
> Christensen, 554 N.W.2d at 260.

However, based on my findings of fact, I conclude that claimant failed to carry his initial burden to show that penalty benefits were appropriate in this case.

Finally, claimant is seeking an assessment of costs. Costs are to be assessed at the discretion of the deputy hearing the case. Based on the above findings of fact, I conclude defendants are assessed costs in the amount of $106.47.

ORDER

THEREFORE, IT IS ORDERED:

All weekly benefits shall be paid at the rate of one thousand one hundred four and 59/100 dollars ($1104.59). Defendants shall pay any underpayment of benefits, plus interest.

Defendants shall pay accrued weekly benefits in a lump sum together with interest at the rate of ten percent for all weekly benefits payable and not paid when due which accrued before July 1, 2017, and all interest on past due weekly compensation benefits accruing on or after July 1, 2017, shall be payable at an annual rate equal to

the one-year treasury constant maturity published by the federal reserve in the most recent H15 report settled as of the date of injury, plus two percent. See Deciga Sanchez v. Tyson Fresh Meats, Inc., File No. 5052008 (App. Apr. 23, 2018) (Ruling on Defendants' Motion to Enlarge, Reconsider or Amend Appeal Decision re: Interest Rate Issue).

Defendants shall be entitled to credit for all weekly benefits paid to date.

Defendants shall authorize medical treatment as set forth above.

Defendants shall pay medical expenses including mileage, as set forth above.

Defendants shall reimburse claimant costs as set forth above.

Defendants shall file subsequent reports of injury (SROI) as required by this agency pursuant to rules 876 IAC 3.1 (2) and 876 IAC 11.7.

Signed and filed this 17th day of December, 2018.

ERIN Q. PALS
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

Copies To:

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EQP/sam

Right to Appeal: This decision shall become final unless you or another interested party appeals within 20 days from the date above, pursuant to rule 876-4.27 (17A, 86) of the Iowa Administrative Code. The notice of appeal must be in writing and received by the commissioner's office within 20 days from the date of the decision. The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday. The notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 1000 E. Grand Avenue, Des Moines, Iowa 50319-0209.