BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

WILLIAM WILKIE, Claimant, vs. KELLY SERVICES, Employer, and INDEMNITY INSURANCE COMPANY OF N.A., Insurance Carrier, Defendants.	File No. 5064366 ARBITRATION DECISION Head Note Nos.: 1402, 1700, 1804, 1806, 2206, 2700, 4000

STATEMENT OF THE CASE

Claimant William Wilke filed a petition in arbitration seeking workers' compensation benefits from defendants Kelly Services, Inc., employer, Indemnity Insurance Company of North America, insurer. The hearing occurred before the undersigned on August 20, 2019, in Des Moines, Iowa.

The parties filed a hearing report at the commencement of the arbitration hearing. In 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 evidentiary record consists of: Joint Exhibits 1 through 7, Claimant's Exhibits 1 through 6, and Defendants' Exhibits A through F. Claimant testified on his own behalf, and no other witnesses were called to testify. The evidentiary record closed on August 20, 2019, and the case was considered fully submitted upon submission of post-hearing briefs on September 19, 2019.

ISSUES

The parties submitted the following disputed issues for resolution:

1. Whether the stipulated March 28, 2018 work injury caused a material aggravation of claimant's pre-existing low back condition and resulted in permanent disability.

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.

2. If claimant sustained any permanent disability, whether claimant's claim for permanent and total disability or industrial disability is ripe for determination.

3. If ripe for determination, the extent of claimant's industrial disability.

    a. Whether claimant is permanently and totally disabled.

    b. Whether claimant is an odd-lot employee.

    c. Whether the number of years claimant was reasonably anticipated to work into the future requires a reduction in his award.

    d. Whether claimant's industrial disability, if any, should be apportioned pursuant to Iowa Code section 85.34(7).

4. The commencement date for any permanent disability benefits.

5. Whether claimant is entitled to temporary disability benefits.

6. Whether claimant is entitled to penalty benefits.

7. Whether claimant is entitled to medical expenses.

8. Whether claimant is entitled to an order designating Farid Manshadi, M.D., as the authorized treating physician.

9. Whether claimant is entitled to reimbursement for his independent medical examination (IME) and costs.

FINDINGS OF FACT

The parties agree claimant sustained a work-related injury on March 28, 2018, when he slipped on a pencil and landed on his back. (Hearing Report, Hearing Transcript, page 22) Unfortunately for claimant, who was 70 years old at the time of the hearing, this incident was another addition to an already-long list of prior back injuries.

In fact, by 2000, claimant had undergone at least five back surgeries. (See Hrg. Tr., pp. 27, 40-47; Joint Exhibit 1, p. 1 [discussing the history of claimant's back condition]). Claimant's back condition in the early 2000s was so debilitating that he ended his career as an engineer in 2001 and began drawing Social Security Disability payments. (Hrg. Tr., pp. 13-14, 47)

By 2002, claimant was evaluated by Arnold Delbridge, M.D., as part of a workers' compensation claim for his back against his then-employer, Auto-Tech, Inc. (Hrg. Tr., p. 48) In his report, Dr. Delbridge assigned a 25 percent whole person impairment for claimant's back and a six percent impairment for claimant's neck. (Defendants' Exhibit F, pp. 41-42) Claimant then settled his claim against Auto Tech via a compromise settlement in 2004. (Def. Ex. F, pp. 29-31)

Around this time claimant initiated treatment with Farid Manshadi, M.D., for pain management. (See Hrg. Tr., p. 24; Claimant's Ex. 1, p. 1) Claimant came to Dr. Manshadi on "quite a bit of pain medication including Methadone and well as high dose Oxycodone for breakthrough pain." (Cl. Ex. 1, p. 1) Over the course of the next decade, however, Dr. Manshadi was able to cut back on claimant's narcotics while implementing other treatment modalities, such as injections. (See Cl. Ex. 1, p. 1)

Claimant's back condition improved to the point that he was able to take a part-time job as a courtesy shuttle driver in 2014. (Hrg. Tr., p. 16) He worked roughly 30 hours a week for $8.00 per hour, and the only physical requirements were getting in and out of the vehicle and driving. (Hrg. Tr., pp. 16-17) Claimant performed this job until he was terminated in late-2016. (See Def. Ex. E, p. 25) During his employment as a shuttle driver, claimant received a few injections for his back symptoms, the last of which was administered in 2015. (See JE 3, pp. 48-49)

Claimant's condition continued to improve through the summer of 2017, at which time he was no longer on any breakthrough pain medications. (Cl. Ex. 1, pp. 1-2; Hrg. Tr., pp. 25-26) He was able to get back to golfing, fishing, and caring for his grandkids. (Hrg. Tr., p. 25)

Claimant was then hired by defendant-employer in early 2018 to be a tour guide at a John Deere tractor assembly plant. (Hrg. Tr., pp. 17, 22) At the time of claimant's hire, he remained off of all narcotic pain medications except methadone. (Hrg. Tr., p. 26) Although claimant's back symptoms were considerably more well-managed in 2017 than they were in 2000, claimant told defendant-employer he was not physically capable of being on his feet for the duration of the four-hour walking tour. (Hrg. Tr., pp. 18-19) As a result, claimant was hired to give the driving tour. Claimant worked 24 hours per week at the rate of $12.45 per hour. (Hrg. Tr., p. 21)

In this position, claimant was required to drive the vehicle—a train pulled by a John Deere tractor—and place radios and headsets in the guests' seats prior to their arrival. (Hrg. Tr., p. 19) The headsets and radios were contained in a large hardback suitcase, which is what claimant was carrying and ultimately landed on when he slipped on the pencil and fell on March 28, 2018. (Hrg. Tr., pp. 21-22)

Claimant testified his "back landed across the hardback suitcase." (Hrg. Tr., p. 22) He was unable to get up, and he lost consciousness due to pain. (Hrg. Tr., p. 22) An ambulance was called, and claimant was transported to Allen Hospital. (Hrg. Tr., p. 23)

While at the hospital, claimant was evaluated by Dr. Manshadi, who administered IV opioids due to claimant's severe pain. (Cl. Ex. 1, p. 2; Hrg. Tr., p. 23) After he was discharged, claimant returned to Dr. Manshadi, who added oxycodone to claimant's pain regimen and referred claimant to Frank Hawkins, M.D., for injections based on claimant's ongoing severe pain. (JE 5, pp. 103-108; Hrg. Tr., p. 26) As noted above, just prior to March 28, 2018, claimant was not taking narcotic pain medication for breakthrough pain and had not required an injection for several years.

Dr. Hawkins administered an epidural steroid injection on April 19, 2018, which provided minimal benefit. (JE 3, pp. 50, 53) Dr. Hawkins told claimant to return for consideration of a transforaminal injection after his surgical consultation with Kevin Eck, M.D.

That consultation took place on March 22, 2018. (JE 7) Dr. Eck did not recommend further surgery but instead suggested consideration of a spinal stimulator. (JE 7, p. 127) This recommendation was seconded by providers at the Mayo Clinic. (See JE 1, p. 29) As a result, claimant proceeded with a spinal cord stimulator trial in September of 2018. (JE 3, pp. 59-60)

Claimant obtained good relief from the trial, so a permanent stimulator was eventually implanted. (Hrg. Tr., p. 29) Unfortunately, the permanent stimulator was not as successful as the trial despite several attempts at reprogramming. (Hrg. Tr., p. 29)

Notably, a spinal cord stimulator had been recommended to claimant before March 28, 2018, but he "steered away from it" because his acquaintances with stimulators advised against it due to "more bad results than good results." (Hrg. Tr., p. 29) Claimant testified he decided to attempt the stimulator after his March 28, 2018 injury, however, because he was "desperate with the pain." (Hrg. Tr., p. 30)

After the spinal cord stimulator failed, claimant resorted back to regular treatment with Dr. Manshadi. (Hrg. Tr., p. 30) At his visit with Dr. Manshadi on January 9, 2019, claimant reported that even basic activities of daily life were difficult. (JE 5, p. 117) As a result, Dr. Manshadi issued a work excuse that excused claimant from work "indefinitely." (JE 5, p. 118)

At the time of the hearing, claimant was on a medication regimen of methadone and gabapentin. (Hrg. Tr., p. 30) Dr. Manshadi also referred claimant back to Mayo for a possible surgical consultation, but that referral was in abeyance at the time of the hearing due to claimant's ongoing treatment for cancer. (See JE 4, p. 121; Hrg. Tr., pp. 28-29)

Claimant testified he is no longer able to golf, fish, or pick up his grandkids or anything that weighs more than 5 to 10 pounds. (Hrg. Tr., pp. 31-34) Claimant now has difficulties with basic daily activities such as getting dressed, showering, or using the restroom. (Hrg. Tr., p. 31) While claimant acknowledged he had "bad days" before March 28, 2018, he also testified he no longer has "good days" and his "bad days" are worse than before. (Hrg. Tr., pp. 32-33) I find claimant's testimony credible. His testimony regarding the increase in the severity of his symptoms is consistent with his need for additional treatment after March 28, 2018, including medications, injections, and a spinal cord stimulator.

Shortly before hearing, Dr. Manshadi issued an opinion that claimant's March 28, 2018 work injury significantly aggravated claimant's back condition. (Cl. Ex. 1, p. 4) While Dr. Manshadi acknowledged claimant's history of multiple back surgeries and "significant" pre-existing degenerative arthritis of the lumbar spine, he also pointed to

evidence of a "worsening" of claimant's spine, including "some worsening of the narrowing at L4-L5" on claimant's most recent MRI. (Cl. Ex. 1, pp. 4, 6) He assigned a 10 percent whole person impairment and recommended restrictions of no lifting more than 3 to 5 pounds and avoiding activities that require bending, stooping or twisting at the waist. (Cl. Ex. 1, p. 4)

Dr. Manshadi's opinion is in contrast to the opinion of Chad Abernathey, M.D., which was initially provided to defendants' counsel at defendants' request on July 30, 2018. Per Dr. Abernathey, claimant's March 28, 2018 injury caused only a "temporary aggravation" of claimant's underlying condition based on the absence of "any new objective findings." (Def. Ex. B, p. 5) Dr. Abernathey further opined claimant required no work restrictions due to the March 28, 2018 injury, and that all future treatment "would simply be related to his chronic underlying condition." (Def. Ex. B, p. 5)

In August of 2019, Dr. Abernathey provided an updated opinion in response to Dr. Manshadi's opinions. Dr. Abernathey disagreed that claimant's updated MRI revealed any anatomic changes attributable to the March 28, 2019 incident. (Def. Ex. B, pp. 6-7) He again opined that claimant did not sustain any new impairment or require any new restrictions from the March 28, 2018 incident because "[t]here is no evidence to suggest any significant change in his underlying condition." (Def. Ex. B, p. 6)

As discussed in detail above, however, after March 28, 2018, claimant required narcotic pain medication for breakthrough pain, which he had not used since July of 2017; injections, which he had not required since several years prior; and a spinal cord stimulator, which claimant had previously declined but then consented to because he was "desperate" from pain. In contrast to the months and years just prior to March 28, 2018, when claimant was able to work, golf, and fish, claimant after March 28, 2018 had difficulties with even basic activities of daily living. I therefore am unpersuaded by Dr. Abernathey's opinion that there is no evidence of any significant change in claimant's condition.

Further, even assuming Dr. Abernathey is correct that the March 28, 2018 incident caused no progression or worsening of claimant's anatomic structures, Dr. Abernathey overlooks the severe and ongoing increase in claimant's symptoms after March 28, 2018. Dr. Abernathey failed to explain why claimant had such a marked and continuing influx in the intensity of his symptoms if the March 28, 2018 incident was truly only a "temporary" flare-up. For these reasons, I do not find Dr. Abernathey's opinions to be convincing.

Instead, I am persuaded by the opinions of Dr. Manshadi, who was claimant's treating physician for more than a decade, and whose opinions are most consistent with the increase in claimant's symptoms set forth both in claimant's medical records and claimant's testimony. I therefore find claimant sustained a significant and material aggravation of his underlying back condition, and I find this aggravation caused permanent impairment.

Claimant did not return to work with defendant-employer after his March 28, 2018 work injury. (Hrg. Tr., pp. 35-36) He testified that before his work injury he had planned to work for defendant-employer for an additional ten years. (Hrg. Tr., p. 36) When asked why, he explained, "Just because that's how I felt, you know, with my wife - - she's a little younger than me and with my age and how I physically felt, and I enjoyed it, it was fun, I thought yeah, ten years." (Hrg. Tr., p. 37)

Defendants argue this testimony is not believable "given [claimant's] well-documented chronic back symptoms and degenerative changes." (Def. Brief, p. 25) While claimant had significant pre-existing issues with his back, however, his condition when he was hired by defendant-employer was much improved when compared to his condition in the early 2000s. He was physically capable of performing a part-time job as a shuttle driver, he was off of narcotics for breakthrough pain, and he had not required an injection in years. Defendants' argument that claimant's lumbar spine condition would have deteriorated to the point that claimant was unemployable is conjecture. Thus, at the time of his injury, I find claimant reasonably anticipated working for an additional 10 years.

As discussed, however, claimant did not return to work with defendant-employer after March 28, 2018, nor did he receive any offers from defendant-employer to return to work. (Hrg. Tr., pp. 35-36) Claimant likewise did not return to work with any other employers or receive any offers to do so. (See Hrg. Tr., p. 36) While I acknowledge claimant did not make a genuine attempt to return to the workforce after his work injury, that work injury resulted in a three- to five-pound lifting restriction and caused him to be taken off of work "indefinitely" by Dr. Manshadi. Claimant also credibly testified he now has difficulties with even basic activities of daily living, and as such, could not return to his job with defendant-employer or his job as a shuttle driver. (Hrg. Tr., pp. 16-17; 20-21) It is difficult to imagine a job in the competitive labor market that claimant would now be capable of performing.

Thus, while I acknowledge claimant in this case failed to put forth a good faith effort to return to the workforce, I find any attempt to do so would have been futile. Instead, I find claimant is now precluded from performing jobs that his experience, training, education, intelligence, and physical capacities would otherwise permit him to perform.

Defendants' denial of claimant's claim was based on the opinion of Dr. Abernathey. As mentioned, Dr. Abernathey first provided his opinions to defendants' counsel on July 30, 2018 after a request from defendants' counsel on July 27, 2018. (See Def. Ex. B, p. 3; Def. Ex. C, p. 8) Based on the evidentiary record before me, I am unable to determine when Dr. Abernathey's opinions were provided to claimant or when, if at all, defendants communicated to claimant that Dr. Abernathey's opinion served as the basis for their denial.

It appears from the record that defendants' first attempt to obtain an opinion to support their denial was in late-July of 2018, when they contacted Dr. Abernathey to perform an IME. Defendants offered no explanation as to why they did not seek an

opinion from Dr. Abernathey (or any other physician) until this point, which was roughly four months after claimant's admitted injury. There is therefore insufficient evidence for me to find that defendants were conducting a reasonable investigation between claimant's date of injury and July 27, 2018.

As of late-July of 2018, however, I find defendants conducted a reasonable investigation, which resulted in the opinion from Dr. Abernathey. While I ultimately did not find Dr. Abernathey's opinions to be persuasive, his opinions created a disputed factual issue that made the issue of claimant's permanent disability fairly debatable.

Although defendants admitted claimant sustained an injury on March 28, 2018, it does not appear from the record that they authorized or paid for claimant's emergency room visit that day. (See Cl. Ex. 6, p. 24) Given defendants' ultimate denial of claimant's claim, they likewise did not authorize or pay for additional medical benefits after March 28, 2018, as set forth in Claimant's Exhibit 6.

As a result, claimant sought treatment on his own, largely through Dr. Manshadi, with whom he had a long-standing relationship. I find the care claimant sought on his own (as set forth in Claimant's Exhibit 6) provided a more favorable medical outcome than would have likely been achieved by the care authorized by defendants, which was nothing. In other words, I find the treatment claimant sought and received to manage his pain was more beneficial than no care at all. In light of claimant's extreme increase in symptoms, I also find the care claimant sought and received to manage his pain was reasonable.

CONCLUSIONS OF LAW

As an initial matter, many of the disputes in this case arise out of the legislature's 2017 amendments to Iowa Code Chapter 85. As a result, many of my determinations will turn on interpretation of the legislature's changes. I recognize the Iowa Supreme Court has repeatedly stated this agency lacks the legislature's expressly vested authority to interpret workers' compensation statutes. See, e.g., Ramirez-Trujillo v. Quality Egg, L.L.C., 878 N.W.2d 759, 770 (Iowa 2016), reh'g denied (May 27, 2016). Practically speaking, however, this agency acts as the front-line authority in interpreting statutory workers' compensation provisions, particularly when statutory amendments are enacted. Thus, while the appellate courts may have the final say, statutory interpretation by this agency is a necessary inevitability.

Temporary or Permanent Disability

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

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).

While a claimant is not entitled to compensation for the results of a preexisting injury or disease, its mere existence at the time of a subsequent injury is not a defense. Rose v. John Deere Ottumwa Works, 247 Iowa 900, 76 N.W.2d 756 (1956). If the claimant had a preexisting condition or disability that is materially aggravated, accelerated, worsened or lighted up so that it results in disability, claimant is entitled to recover. Nicks v. Davenport Produce Co., 254 Iowa 130, 115 N.W.2d 812 (1962); Yeager v. Firestone Tire & Rubber Co., 253 Iowa 369, 112 N.W.2d 299 (1961).

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).

As discussed above, I found Dr. Manshadi's opinion to be most persuasive. As a result, I found claimant sustained a material and significant aggravation of his underlying back condition that resulted in a permanent impairment. For these reasons, I conclude claimant satisfied his burden to prove he sustained a permanent disability as a result of his March 28, 2018 work injury.

Ripeness of Permanent and Total Disability/Industrial Disability Claim

After a brief colloquy at hearing regarding the hearing report, counsel for defendants clarified that while defendants agree claimant's injury is unscheduled and to the body as a whole, they dispute whether claimant's claim for permanent total disability benefits/industrial disability is "ripe" for determination. (See Hearing Report; Hearing Transcript, pp. 5-6)

This particular dispute comes from the amendment to the Iowa Code section governing "unscheduled" injuries, which was amended to include the following sentence regarding when an assessment of loss of earning capacity is proper:

> If an employee who is eligible for compensation under this paragraph returns to work or is offered work for which the employee receives or would receive the same or greater salary, wages, or earnings than the employee received at the time of the injury, the employee shall be

> compensated based only upon the employee's functional impairment resulting from the injury, and not in relation to the employee's earning capacity.

2017 Iowa Acts (87 G.A.) ch. 23; Iowa Code § 85.34(2)(v) (post-July 1, 2018) (formerly Iowa Code § 85.34(2)(u)).

Defendants appear to have conceded this issue, as it was not referenced in their post-hearing brief. Regardless, I conclude claimant's claim for permanent and total disability or industrial disability is appropriate for consideration. Claimant did not return to work after March 28, 2018, nor did he receive any offers for work. As such, I conclude claimant can be compensated beyond his functional impairment. See Iowa Code section 85.34(2)(v) (limiting compensation to functional impairment when claimant "returns to work or is offered work for which the employee receives or would receive the same or greater salary, wages, or earnings than the employee received at the time of the injury").[1]

Extent of Industrial Disability

Claimant claims he is permanently and totally disabled by his March 28, 2018 injury. In the hearing report, claimant also asserted a claim for odd-lot status, but because claimant did not address his odd-lot claim in his post-hearing brief, I conclude claimant failed to carry his burden under the odd-lot doctrine.

---

[1] Of note, based on the plain language of the statute, it does not appear this new provision that limits compensation to functional impairment applies in cases of permanent and total disability. Subpart (v) of Iowa Code section 85.34(2), to which this new provision was added, begins with the phrase, "In all cases of permanent partial disability other than those hereinabove described or referred to in paragraphs 'a' through 'u.'" Iowa Code § 85.34(v) (emphasis added). Thus, when the above-stated new provision refers to eligibility "under this paragraph," it is specific to permanent partial disability for unscheduled injuries. Permanent total disability is addressed in an entirely separate subsection—Iowa Code section 85.34(3).

In Drake University v. Davis, 769 N.W.2d 176, 184-85 (Iowa 2009), the court addressed the applicability of the apportionment provisions under Iowa Code section 85.34(7) to permanent total disability benefits under Iowa Code section 85.34(3). The court noted "[t]he plain and unambiguous language of section 85.34(7)(b) indicates the only benefits subject to apportionment are those awarded under section 85.34(2)"—not to permanent total disability benefits under section 85.34(3). See id. at 184-85. As such, the court held permanent total disability benefits were not subject to apportionment under section 85.34(7).

Applying the court's logic from Davis to this case, the plain and unambiguous language of above-stated new provision in subpart (v) of section 85.34(2) indicates it applies only to employees who are eligible for permanent partial disability under section 85.34(2)(v)—not to employees who are eligible for benefits under any other paragraph, including permanent total disability benefits under section 85.34(3). See id. As such, I conclude this new provision in section 85.34(2)(v) that limits compensation to functional impairment in certain circumstances is inapplicable when a claimant is entitled to permanent total disability benefits under section 85.34(3). Thus, if claimant in the instant case is found to be permanently and totally disabled, this new provision is inapplicable.

With respect to his claim of permanent and total disability, total disability does not mean a state of absolute helplessness. Permanent total disability occurs where the injury wholly disables the employee from performing work that the employee's experience, training, education, intelligence, and physical capacities would otherwise permit the employee to perform. See McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Diederich v. Tri-City R. Co., 219 Iowa 587, 258 N.W. 899 (1935).

A finding that claimant could perform some work despite claimant's physical and educational limitations does not foreclose a finding of permanent total disability, however. See Chamberlin v. Ralston Purina, File No. 661698 (App. October 1987); Eastman v. Westway Trading Corp., II Iowa Industrial Commissioner Report 134 (App. May 1982).

As discussed above in my findings of fact, I acknowledged claimant made no attempt to return to the workforce after his work injury, but I also found that any attempt to do so would have been futile. Because of claimant's ongoing symptoms and severe work restrictions, he is now wholly disabled from performing the work that he was capable of performing prior to March 28, 2018. I therefore find claimant is permanently and totally disabled.

Impact of Number of Years Claimant Reasonably Anticipated Working

Defendants argue any award of permanency should be mitigated by a new provision in Iowa Code section 85.34(2)(v). That new provision states: "A determination of the reduction in the employee's earning capacity caused by the disability shall take into account the permanent partial disability of the employee and the number of years in the future it was reasonably anticipated that the employee would work at the time of the injury." Iowa Code § 85.34(2)(v).

Based on the plain language of the statute, however, it does not appear this new provision applies in cases of permanent and total disability. Subpart (v) of Iowa Code section 85.34(2), to which this new provision was added, begins with the phrase, "In all cases of permanent partial disability." Iowa Code § 85.34(v) (emphasis added). Permanent total disability is addressed in an entirely separate subsection—Iowa Code section 85.34(3)—to which the legislature did not add a similar provision.

As mentioned above in Footnote 1, in Drake University v. Davis, 769 N.W.2d 176, 184-85 (Iowa 2009), the court addressed the applicability of the apportionment provisions under Iowa Code section 85.34(7) to permanent total disability benefits under Iowa Code section 85.34(3). The court noted "[t]he plain and unambiguous language of section 85.34(7)(b) indicates the only benefits subject to apportionment are those awarded under section 85.34(2)"—not to permanent total disability benefits under section 85.34(3). See id. at 184-85. As such, the court held permanent total disability benefits were not subject to apportionment under section 85.34(7).

Applying the court's logic from Davis to this case, the plain and unambiguous language of above-stated new provision in subpart (v) of section 85.34(2) indicates it

applies only to employees who are eligible for permanent partial disability under section 85.34(2)(v)—not to employees who are eligible for benefits under any other paragraph, including permanent total disability benefits under section 85.34(3). See id. Thus, I conclude consideration of the number of years into the future a claimant reasonably anticipates working under Iowa Code section 85.34(2)(v) is not applicable when a claimant is permanently and totally disabled under Iowa Code section 85.34(3).

I recognize the loss of earning capacity analysis under former section Iowa Code section 85.34(2)(u)—now subsection (v)—was also generally the analysis that was used, in large part, to determine whether a claimant was permanently and totally disabled. In other words, it may have been assumed by the legislature that this new provision in subsection 85.34(2)(v) would apply in cases of permanent total disability under 85.34(3) because, practically speaking, the analysis is one and the same. As noted by the Iowa Supreme Court, however, I must "follow what the legislature actually drafted . . ., not what it might have wanted to draft." JBS Swift & Co. v. Ochoa, 888 N.W.2d 887, 899 (2016). As discussed, this new provision regarding the number of years an employee reasonably anticipated working in the future was not added to Iowa Code section 85.34(3) in 2017.

Ultimately, however, even if I assume this new provision applies in this case, it does not change my determination that claimant is permanently and totally disabled. Claimant credibly testified he planned to work an additional ten years before his work injury prevented him from doing so. While he was nearing the latter portion of his working life, the March 28, 2018 work injury rendered him wholly incapable of performing any portion of the working life that remained. Thus, taking into account the number of years in the future claimant reasonably anticipated working, I still find claimant to be permanently and totally disabled.

Defendants argue in their brief that the number of years claimant in this case anticipated working should be a mitigating factor toward his loss of earning capacity. As correctly noted by claimant, however, the legislature did not specify what impact this consideration should have on a determination of earning capacity, nor did the legislature indicate this consideration should be given any greater weight than the other industrial disability factors.

Before the 2017 amendments, this agency stated in countless decisions over several decades that "[t]here are no weighting guidelines that indicate how each of the industrial disability factors is to be considered." See, e.g., Logan v. ABF Freight System, Inc., File No. 5047979 (App. April 25, 2018). Had the legislature intended to give this new consideration additional weight, it could easily have said so. See Celotex Corp. v. Auten, 541 N.W.2d 252, 256 (Iowa 1995); see also Roberts Dairy v. Billick, 861 N.W.2d 814, 821 (Iowa 2015) (setting forth proposition that the legislature is presumed to be familiar with court decisions relative to legislature enactments).

In sum, as directed by statute, I considered the number of years in the future claimant reasonably anticipated he would work at the time of his injury. However, because claimant's work injury precluded him from performing any of that remaining

work, the fact that claimant is nearing the end of his working life did not change my determination that claimant is permanently and totally disabled.

Apportionment

Defendants also argue their responsibility for claimant's permanent disability benefits is mitigated, if not eliminated, by the legislature's amendments to the successive disability provisions in Iowa Code section 85.34(7). For the reasons that follow, I disagree.

First, former section 85.34(7) was intended to apply to cases of permanent partial disability—not permanent total disability—and it does not appear from the legislature's changes in 2017 that this limited application was modified. As noted in the legislature's statement of intent in 2004 when subsection (7) was added, the legislature's goal was to "prevent all double recoveries and all double reductions in workers' compensation benefits for permanent partial disability." 2004 Iowa Acts 1st Extraordinary Sess. ch. 1001 § 20 (emphasis added). The legislature noted specifically that subsection (7) "does not alter . . . benefits for permanent total disability under section 85.34, subsection 3." Id. (emphasis added).

Relying in part on this legislative history and in part on the plain language of the statute, the Iowa Supreme Court in 2009 held "[p]ermanent total disability benefits are not subjection to apportionment under section 85.34(7)."[2] Davis, 769 N.W.2d at 185. The court went on to state, "Without an apportionment statute that applies to an award of permanent total disability benefits, there is no basis for the agency to apportion the award." 769 N.W.2d at 185.

As frequently noted by the Iowa Supreme Court, it is presumed the legislature is aware of the court's holdings when it crafts new legislation. See, e.g., Roberts Dairy, 861 N.W.2d at 821. Yet, when the legislature amended Iowa Code section 85.34(7) in 2017, it did not offer a corresponding statement of legislative intent like it did in 2004 to clarify whether it intended the amended version of the statute to apply to permanent total disability benefits. Furthermore, the plain language of the amended version of the statute does not clearly direct an expanded application to awards of permanent total disability. See 2017 Iowa Acts (87 G.A.) ch. 23. Thus, without a clear directive to expand its application, I conclude apportionment under the amended version of Iowa Code section 85.34(7) does not apply to awards of permanent total disability. See JBS Swift & Co., 888 N.W.2d at 899 ("[O]ur job is to follow what the legislature actually drafted in 2004, not what it might have wanted to draft.").

[2] I acknowledge the issue in Drake University v. Davis, 769 N.W.2d 176 (Iowa 2009) was apportionment of permanent total disability benefits under subpart (b) of Iowa Code section 85.34(7), which deals with successive injuries with the same employer. While this case involves injuries with different employers and/or injuries unrelated to employment, the Iowa Supreme Court did not appear to limit its holding to subpart (b). Relying on the legislative history, the court broadly stated, "Without an apportionment statute that applies to an award of permanent total disability benefits, there is no basis for the agency to apportion the award." Id. at 185.

Because I found claimant in this case to be permanently and totally disabled, I conclude Iowa Code section 85.34(7) does not apply. In other words, defendant-employer is therefore not entitled to apportion its liability for permanent total disability benefits in this case.

But even assuming apportionment is proper in cases of permanent and total disability, I disagree with defendants' assertion that the 2017 amendments "abandon[ed] the so called 'fresh-start'/'full-responsibility' rule interpreted by the Iowa Supreme Court in pre-amendment cases." (Def. Brief, p. 19)

Prior to the legislature's amendments in 2017, Iowa Code section 85.34(7) stated, in relevant part:

> 7. Successive disabilities.
>
> a. An employer is fully liable for compensating all of an employee's disability that arises out of and in the course of the employee's employment with the employer. An employer is not liable for compensating an employee's preexisting disability that arose out of and in the course of employment with a different employer or from causes unrelated to employment.
>
> b. (1) If an injured employee has a preexisting disability that was caused by a prior injury arising out of and in the course of employment with the same employer, and the preexisting disability was compensable under the same paragraph of subsection 2 as the employee's present injury, the employer is liable for the combined disability that is caused by the injuries, measured in relation to the employee's condition immediately prior to the first injury. In this instance, the employer's liability for the combined disability shall be considered to be already partially satisfied to the extent of the percentage of disability for which the employee was previously compensated by the employer.
>
> (2) If, however, an employer is liable to an employee for a combined disability that is payable under subsection 2, paragraph "u", and the employee has a preexisting disability that causes the employee's earnings to be less at the time of the present injury than if the prior injury had not occurred, the employer's liability for the combined disability shall be considered to be already partially satisfied to the extent of the percentage of disability for which the employee was previously compensated by the employer minus the percentage that the employee's earnings are less at the time of the present injury than if the prior injury had not occurred.

Iowa Code 85.34(7) (2016); see 2004 Iowa Acts 1st Extraordinary Sess. ch. 1001 § 11.

As mentioned, subsection (7) was added by the legislature in 2004 to address the fresh start and full responsibility rules that had been adopted by the Iowa Supreme Court in a series of cases. 2004 Iowa Acts 1st Extraordinary Sess. ch. 1001 § 20. In its statement of legislative intent, the legislature explained that subsection (7) was intended

to modify these rules in a way to "prevent all double recoveries and all double reductions in workers' compensation benefits for permanent partial disability." Id.

The legislature further explained:

> The general assembly recognizes that the amount of compensation a person receives for disability is directly related to the person's earnings at the time of injury. The competitive labor market determines the value of a person's earning capacity through a strong correlation with the level of earnings a person can achieve in the competitive labor market. The market reevaluates a person as a working unit each time the person competes in the competitive labor market, causing a fresh start with each change of employment. The market's determination effectively apportions any disability through a reduced level of earnings. The market does not reevaluate an employee's earning capacity while the employee remains employed by the same employer.
>
> The general assembly intends that an employer shall fully compensate all of an injured employee's disability that is caused by work-related injuries with the employer without compensating the same disability more than once. This division of this Act creates a formula that applies disability payments made toward satisfaction of the combined disability that the employer is liable for compensating, while taking into account the impact of the employee's earnings on the amount of compensation to be ultimately paid for the disability.

Id.

The Iowa Supreme Court first addressed these changes in Roberts Dairy v. Billick, 861 N.W.2d 814 (Iowa 2015):

> One of the new sections reads, "An employer is not liable for compensating an employee's preexisting disability that arose out of and in the course of employment with a different employer...." Iowa Code § 85.34(7)(a). This might suggest that when an employee is determined to have suffered a work-related industrial disability, any resulting award of disability should be offset to account for any previous work-related industrial disability sustained in the course and scope of employment with, and compensated by, a previous employer. However, the section does not expressly say that, and even more importantly, Iowa Code section 85.34 provides no mechanism for apportioning the loss between the present and previous employers. This is in direct contrast to Iowa Code section 85.34(7)(b), which explains exactly how the offset is to be calculated when an employee suffers successive injuries while working for the *same* employer. If the legislature wanted to require a credit or offset of disability benefits in cases of successive unscheduled injuries with different employers, it logically would have prescribed how it should be determined.

We also give considerable weight to the general assembly's statement of purpose when it adopted the 2004 amendments. *See* Iowa Code § 4.6(7) (stating that we may rely on the legislature's "preamble or statement of policy" in interpreting an ambiguous statute); *Taft v. Iowa Dist. Ct.,* 828 N.W.2d 309, 317 (Iowa 2013). In this case, the general assembly's statement of purpose was unmistakably clear. The legislature recognized that market forces "reevaluate [ ] a person as a working unit each time the person competes in the competitive labor market, causing a fresh start with each change of employment." 2004 Iowa Acts 1st Extraordinary Sess. ch. 1001, § 20. We conclude therefore the general assembly unmistakably reaffirmed the vitality of the fresh-start rule in cases involving successive injuries in the course and scope of employment with different employers. With each fresh start, the employee's earning capacity is reset. If a percentage of that refreshed earning capacity is subsequently lost as a consequence of a permanent partial unscheduled injury, compensation for that percentage is owed. The measure of such compensation is based on "the number of weeks in relation to five hundred weeks as the reduction in the employee's earning capacity caused by the disability bears in relation to the earning capacity that the employee possessed when the injury occurred." Iowa Code § 85.34(2)(*u*). When a successive injury is sustained in the course and scope of employment with a different employer, the earning capacity possessed by the employee when the injury occurred is an earning capacity refreshed by market forces when the new employment began.

. . . .

We respectfully disagree with the district court's conclusion that the commissioner's interpretation of the amendments—preserving the fresh-start rule in cases of successive unscheduled injuries with different employers—cannot be squared with the clear language of section 85.34(7)(a), which provides that "[a]n employer is not liable for compensating an employee's preexisting disability that arose out of and in the course of employment with a different employer...." Iowa Code § 85.34(7)(a). Under the modified fresh-start rule, the new employer is not liable for disability arising out of unscheduled injuries sustained during past employment with a former employer. The new employer's liability under section 85.34(2)(u) for permanent partial disability caused by a successive injury is measured by comparing the claimant's earning capacity "when the injury occurred" with "the reduction in earning capacity caused by the disability." *Id.* § 85.34(2)(u). The earning capacity when the injury occurred is a refreshed capacity provided by the fresh-start rule. When, as a consequence of a successive work-related injury, part of that refreshed earning capacity is lost, compensation is owed under section 85.34(2)(u). *See id.* In this context, the fresh-start rule holds the employer liable for a work-related permanent partial loss of the new earning capacity refreshed by market forces and existing at the time of the successive

> injury—not for a preexisting disability arising from employment with a different employer. . . .
>
> The district court also concluded the commissioner's understanding of section 85.34—as amended by the 2004 enactment—violated the general assembly's purpose of preventing double recoveries for successive work-related injuries. We again disagree. As we have explained, the 2004 amendments preserve the fresh-start rule for an employee sustaining successive injuries resulting in permanent partial disability in the course of employment with different employers. Under the rule, the injured employee recovers for a permanent partial loss of a fully refreshed earning capacity redefined by market forces at the time new employment began—not for an additional loss of whatever earning capacity may have been extant prior to commencement of the new employment. In this sense, the employee's recovery for a successive loss of earning capacity sustained in the employment with a new employer is not a double recovery for a prior loss. It is instead a full recovery of that which has been lost as a consequence of the successive injury: a percentage of the refreshed earning capacity.

861 N.W.2d at 822–23 (emphasis added).

Thus, per Roberts Dairy and Iowa Code section 85.34(7)(a), when a worker changed employment after sustaining permanent partial disabilities, the modified fresh-start rationale was applied and that workers' earning capacity was deemed "reset" by the competitive labor market. See Warren Properties v. Stewart, 864 N.W.2d 307, 316 (Iowa 2015) (explaining the holding in Roberts Dairy).

In 2017, however, the legislature overhauled the successive disabilities statute. Subparts (b) and (c) of subsection were removed in their entirety, and subsection (a) was replaced as follows[3]:

> ~~a.~~ An employer is ~~fully~~ liable for compensating ~~all~~ only that portion of an employee's disability that arises out of and in the course of the employee's employment with the employer and that relates to the injury that serves as the basis for the employee's claim for compensation under this chapter, or chapter 85A, 85B, or 86. An employer is not liable for compensating an employee's preexisting disability that arose out of and in the course of employment from a prior injury with the employer, to the extent that the employee's preexisting disability has already been compensated under this chapter, or chapter 85A, 85B, or 86. An employer is not liable for compensating an employee's preexisting disability that arose out of and in the course of employment with a different employer or from causes unrelated to employment.

[3] Language that was removed is identified by strikethrough and language that was added is identified by underline.

2017 Iowa Acts (87 G.A.) ch. 23.[4]

Claimant's pre-existing disability in this case arose out of and in the course of employment with a different employer and/or from causes unrelated to employment. Thus, the removal of subpart (b) and the addition of the sentence regarding any preexisting disability with the same employer is irrelevant to this case. In other words, for purposes of this case, only the first and third sentences of amended subsection (7) are relevant.

Notably, the third sentence—"[a]n employer is not liable for compensating an employee's preexisting disability that arose out of and in the course of employment with a different employer or from causes unrelated to employment"—is also contained in the pre-amendment version of Iowa Code section 85.34(7) and was not altered in any way by the legislature's amendments in 2017. This, of course, was the same sentence that was interpreted by the court in Roberts Dairy, as discussed above. The legislature's decision to preserve this sentence in its original form is significant, as there is a presumption "that when the legislature amends a statute and leaves some of it unchanged, the unchanged provision retains its prior meaning." JBS Swift & Co., 888 N.W.2d at 899. The "prior meaning" in this scenario is the court's holding in Roberts Dairy.

Defendants argue the first sentence of amended subsection (7) eliminates the fresh-start and full-responsibility rules because under the "the plain language" of the amendment "an employer is only liable to Claimant for the work-related injury that arose out of and in the course of employment with that employer rather than for any other reason that may have previously affected Claimant's earning capacity or physical/mental function." (Def. Brief, pp. 21-22) While I recognize the amended version of the statute states employers are only liable for the portion of the work-related disability that relates to the injury that serves as the basis of the claim, this remains consistent with the modified fresh-start rule.

As the court in Roberts Dairy made clear, "the fresh-start rule holds the employer liable for a work-related permanent partial loss of the new earning capacity refreshed by

---

[4] In its entirety, Iowa Code section 85.34(7) now states:

> An employer is liable for compensating only that portion of an employee's disability that arises out of and in the course of the employee's employment with the employer and that relates to the injury that serves as the basis for the employee's claim for compensation under this chapter, or chapter 85A, 85B, or 86. An employer is not liable for compensating an employee's preexisting disability that arose out of and in the course of employment from a prior injury with the employer, to the extent that the employee's preexisting disability has already been compensated under this chapter, or chapter 85A, 85B, or 86. An employer is not liable for compensating an employee's preexisting disability that arose out of and in the course of employment with a different employer or from causes unrelated to employment.

Iowa Code § 85.34(7) (post-July 1, 2017).

market forces and existing at the time of the successive injury—not for a preexisting disability arising from employment with a different employer." 861 N.W.2d at 823 (emphasis added). In other words, under the fresh-start rule "the employee's recovery for a successive loss of earning capacity sustained in the employment with a new employer is not a double recovery for a prior loss" but "is instead a full recovery of that which has been lost as a consequence of the successive injury: a percentage of the refreshed earning capacity." Id. at 824. Thus, rather than abrogating the fresh-start rule, the legislature's 2017 amendment appears to be consistent with it.

Furthermore, in Roberts Dairy, the court offered the following: "If the general assembly had intended to eliminate the fresh-start rule and require apportionment of successive injuries producing permanent partial disability in the course and scope of employment with different employers, we think it would have said so." 861 N.W.2d at 824 (citations omitted). The legislature's 2017 amendments to Iowa Code section 85.34(7) do not expressly say so. See id. (noting legislative intent is gleaned "'from the words chosen by the legislature, not what it should or might have said.'" (quoting Auen v. Alcoholic Beverages Div., 679 N.W.2d 586, 590 (Iowa 2004))); see also id. at 821 (outlining the presumption that legislature is aware of the court's holdings when it crafts statutes).

For these reasons, I conclude the legislature's 2017 amendments did not modify the fresh-start rule for claimants sustaining successive work-related unscheduled injuries with different employers. As such, because claimant gained a fresh start when he began his employment with defendant-employer in 2016, defendant-employer is not entitled to apportion its liability for permanent disability benefits in this case. See id. at 825.

Commencement Date/Temporary Benefits

Permanent total disability benefits are payable during the period of the employee's disability. Iowa Code § 85.34(3)(a). As a result, permanent total disability benefits generally commence on the date of injury. See Sandhu v. Nordstrom, Inc., File No. 5046628 (App. Jan. 24, 2019). Thus, the commencement date for claimant's permanent total disability benefits is March 28, 2018. This renders claimant's claim for temporary disability benefits moot. (See Hearing Report, p. 1)

Penalty Benefits

Claimant asserts a claim for penalty benefits pursuant to Iowa Code section 86.13. Claimant contends defendants did not perform a timely investigation and failed to convey a basis for their denial of the claim.

If weekly compensation benefits are not fully paid when due, section 86.13 requires that additional benefits be awarded unless the employer shows reasonable cause or excuse for the delay or denial. Robbennolt v. Snap-on Tools Corp., 555 N.W.2d 229 (Iowa 1996). It is defendants' burden to prove a reasonable cause or

excuse for the delay or denial. Christensen v. Snap–On Tools Corp., 554 N.W.2d 254, 260 (Iowa 1996).

The applicable statutory standard for penalty benefits is codified at Iowa Code section 86.13(4), which provides:

> (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 of 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.
>
> (c) In order to be considered a reasonable or probable cause or excuse under paragraph "b", an excuse shall satisfy all of the following criteria:
>
> > (1) The excuse was preceded by a reasonable investigation and evaluation by the employer or insurance carrier into whether benefits were owed to the employee.
> >
> > (2) The results of the reasonable investigation and evaluation were the actual basis upon which the employer or insurance carrier contemporaneously relied to deny, delay payment of, or terminate benefits.
> >
> > (3) The employer or insurance carrier contemporaneously conveyed the basis for the denial, delay in payment, or termination of benefits to the employee at the time of the denial, delay, or termination of benefits.

Iowa Code § 86.13(4)(b)-(c).

Delay attributable to the time required to perform a reasonable investigation is not unreasonable. Kiesecker v. Webster City Meats, Inc., 528 N.W.2d 109 (Iowa 1995).

It also is not unreasonable to deny a claim when a good faith issue of law or fact makes the employer's liability fairly debatable. An issue of law is fairly debatable if viable arguments exist in favor of each party. Covia v. Robinson, 507 N.W.2d 411 (Iowa 1993). An issue of fact is fairly debatable if substantial evidence exists which would support a finding favorable to the employer. Gilbert v. USF Holland, Inc., 637 N.W.2d 194 (Iowa 2001).

An employer's bare assertion that a claim is fairly debatable, however, is insufficient to avoid imposition of a penalty. The employer must assert facts upon which

the commissioner could reasonably find that the claim was "fairly debatable." Meyers v. Holiday Express Corp., 557 N.W.2d 502 (Iowa 1996).

In this case, I found defendants did not perform a reasonable investigation until July 27, 2018, when defendants' counsel requested an expert opinion from Dr. Abernathey. Thus, I conclude defendants' failed to prove they had a reasonable cause or excuse for their denial until July 27, 2018. Claimant, therefore, is entitled to penalty benefits from the date of injury through July 27, 2018.

After July 27, 2018, however, I found defendants performed a reasonable investigation that resulted in an opinion from Dr. Abernathey that made the claim fairly debatable. Thus, after July 27, 2018, defendants had a reasonable or probable cause or excuse for the denial.

Although defendants had a reasonable basis for their denial, I found insufficient evidence to determine whether defendants ever conveyed that basis to claimant. As claimant correctly asserts, the statute requires defendants to "contemporaneously" convey the basis for their denial "at the time" of the delay or denial. See Iowa Code § 86.13(4)(c)(3). The Iowa Supreme Court, however, has held that an employer's failure to contemporaneously communicate the reason for its nonpayment of benefits is not an independent ground for imposition of a penalty. Keystone Nursing Care Center v. Craddock, 705 N.W.2d 299, 308-09 (Iowa 2005). As such, I conclude claimant is not entitled to penalty benefits after July 27, 2018 despite its failure to inform claimant of the basis for its denial.

In this case, I determined penalty benefits are warranted from the period of March 28, 2018 through July 27, 2018, which is 17 weeks and 2 days of benefits. At the stipulated rate of $238.64, this amounts to $4,125.13 in delayed benefits (17.286 x $238.64). Thus, I must next decide the amount of penalty benefits to assess.

The purpose of Iowa Code section 86.13 is both punishment for unreasonable conduct but also deterrence for future cases. Robbennolt, 555 N.W.2d at 237. In this regard, the Commission is given discretion to determine the amount of the penalty imposed with a maximum penalty of 50 percent of the amount of the delayed, or denied, benefits. Christensen, 554 N.W.2d at 261.

In exercising its discretion, the agency must consider factors such as the length of the delays, the number of delays, the information available to the employer regarding the employee's injury and wages, and the employer's past record of penalties. Meyers, 557 N.W.2d at 505.

Having considered the relevant factors and the purposes of the penalty statute, I conclude a penalty in the amount of $2,000.00 is appropriate in this case. As noted in Claimant's Exhibit 3, there are several examples of defendant-insurer being assessed with penalties due to the failure to communicate the basis for the denial, which is also what occurred in this case. This amount is appropriate to punish defendants for failing

to communicate the basis of their denial to claimant, and it serves as a deterrent against future conduct.

Medical Benefits

Claimant also seeks medical expenses as set forth in Claimant's Exhibit 6. While defendants asserted on the hearing report that these expenses were not authorized, defendants lost their authorization defense upon their denial of the claim. See Bell Bros. Heating & Air Conditioning v. Gwinn, 779 N.W.2d 193 (Iowa 2010). It appears all of the expenses contained in Claimant's Exhibit 6 were for treatment of claimant's back condition on or after March 28, 2018. Having found claimant's ongoing back symptoms to be related to the March 28, 2018 injury, I conclude defendants are responsible for the expenses contained in Claimant's Exhibit 6.

Even assuming defendants maintained their authorization defense, claimant is entitled to recover the expenses contained in Claimant's Exhibit 6 because I found the care he sought on his own was reasonable and provided a more favorable outcome than the lack of treatment being offered by defendants. Id. at 206. As such, I conclude defendants are responsible for the unauthorized medical expenses set forth in Claimant's Exhibit 6 because claimant satisfied his burden to show the unauthorized care was reasonable and beneficial.

Authorized Treating Physician

In Bell Bros. Heating and Air Conditioning v. Gwinn, the Iowa Supreme Court explained:

> [T]he employer has no right to choose the medical care when compensability is contested. . . . If the employee establishes the compensability of the injury at a contested case hearing, then the statutory duty of the employer to furnish medical care for compensable injuries emerges to support an award of reasonable medical care the employer should have furnished from the inception of the injury had compensability been acknowledged.

779 N.W.2d at 204. Presumably, therefore, once liability is established through an arbitration decision, the employer's burden to provide care also permits the employer to exercise its statutory right to select the necessary medical care, and the employee again bears the burden to establish that the care offered by the employer is not reasonable. Iowa Code § 85.27(4); Gwinn, 779 N.W.2d at 206 ("The statute only requires the employer to furnish reasonable medical care.").

This case, however, is unique in the sense that claimant has a longstanding relationship with Dr. Manshadi, the doctor whom I found to be most convincing in this case. Given Dr. Manshadi's familiarity with claimant's complicated history and his relationship with claimant, I conclude it is appropriate in this case to designate Dr. Manshadi as the authorized treating physician going forward.

IME/Costs

Claimant first seeks reimbursement for expenses related to his IME with Dr. Manshadi under Iowa Code section 85.39. Iowa Code section 85.39, as amended in 2017, provides in relevant part:

> If an evaluation of permanent disability has been made by a physician retained by the employer and the employee believes this evaluation to be too low, the employee shall, upon application to the commissioner and upon delivery of a copy of the application to the employer and its insurance carrier, be reimbursed by the employer the reasonable fee for a subsequent examination by a physician of the employee's own choice, and reasonably necessary transportation expenses incurred for the examination. The physician chosen by the employee has the right to confer with and obtain from the employer-retained physician sufficient history of the injury to make a proper examination.
>
> An employer is only liable to reimburse an employee for the cost of an examination conducted pursuant to this subsection if the injury for which the employee is being examined is determined to be compensable under this chapter or chapter 85A or 85B. An employer is not liable for the cost of such an examination if the injury for which the employee is being examined is determined not to be a compensable injury. A determination of the reasonableness of a fee for an examination made pursuant to this subsection, shall be based on the typical fee charged by a medical provider to perform an impairment rating in the local area where the examination is conducted.

Iowa Code § 85.39(2) (post-July 1, 2017). While the legislature added the second paragraph with its 2017 amendments, it did not modify the provision that allows reimbursement upon "an evaluation of permanent disability has been made by a physician retained by the employer" that the claimant believes "to be too low." Id.

In this case, Dr. Abernathey opined that claimant sustained no functional disability or impairment as a result of the March 28, 2018 incident. This evaluation of permanent disability triggered claimant's right to reimbursement for an IME under Iowa Code section 85.39. Furthermore, defendants admitted in their responses to requests to admissions that claimant was entitled to an IME at defendants' expense under section 85.39. (Cl. Ex. 3, p. 16) For these reasons, I conclude claimant is entitled to reimbursement for his IME with Dr. Manshadi in the amount of $1,400.00 pursuant to Iowa Code section 85.39. (Cl. Ex. 5, pp. 21, 23)

Claimant also seeks a costs assessment for Dr. Manshadi's supplemental report and his filing fee. Assessment of costs is a discretionary function of the agency. Iowa Code § 86.40.

Because claimant was generally successful in his claim, I conclude it is appropriate to assess claimant's costs in some amount. These costs for the filing fee and Dr. Abernathey's opinion are reasonable and are assessed to defendants pursuant to 876 IAC 4.33 subsections (6) and (7). In total, defendants are taxed with costs in the amount of $500.00 ($400.00 + $100.00). (Cl. Ex. 5, pp. 21-22)

ORDER

THEREFORE, IT IS ORDERED:

Defendants shall pay claimant permanent total disability benefits commencing on March 28, 2018 at the stipulated rate of two hundred thirty-eight and 64/100 dollars ($238.64)

Defendants shall pay accrued weekly benefits, including but not limited to the underpayment of the weekly rate, in a lump sum together with interest. 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 Gamble v. AG Leader Technology, File No. 5054686 (App. Apr. 24, 2018).

Defendants shall pay directly to the medical provider, reimburse claimant for any out-of-pocket expenses, and hold claimant harmless for all medical expenses contained in Claimant's Exhibit 6.

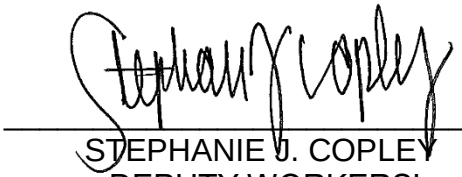
Defendants shall immediately authorize and timely pay for care with Dr. Manshadi.

Defendants are ordered to reimburse claimant for his IME bill in the amount of one thousand four hundred and 00/100 dollars ($1,400.00).

Defendants shall reimburse claimant's costs in the amount of five hundred and 00/100 dollars ($500.00).

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 _____28th_____ day of October, 2019.



STEPHANIE J. COPLEY
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

John Rausch (via WCES)

Charles W. Showalter (via WCES)

Peter John Thill (via WCES)

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.