BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JEREMY A. MARVEL, Claimant, vs. MARK HUGHES CONSTRUCTION, Employer, and NATIONWIDE MUTUAL INSURANCE CO., Insurance Carrier, Defendants.	File No. 5063753 A R B I T R A T I O N D E C I S I O N Head Note Nos.: 1704, 2500, 2600, 3400

STATEMENT OF THE CASE

Jeremy A. Marvel, claimant, filed a petition in arbitration seeking workers' compensation benefits from Mark Hughes Construction (Mark Hughes), employer and Nationwide Mutual Insurance Company (Nationwide) as a result of an injury he sustained on April 12, 2016 that arose out of and in the course of his employment. This case was heard in Des Moines, Iowa and fully submitted on August 18, 2019. The evidence in this case consists of the testimony of claimant, Katy Marvel, Joint Exhibits 1–5 and 7-16, Defendants' Exhibits A-F and Claimant's Exhibits 1-13. Both parties submitted briefs.

The parties stipulated after the hearing claimant is currently permanently and totally disabled under Iowa workers' compensation laws. The claimant's injury has had a devastating impact upon the claimant and his family. It is clear that it also had a lasting impact upon Mr. Hughes as well as the business.

This case presents issues concerning the calculation of the credit defendants are entitled to receive and procedure of payment of medical bills pursuant to Iowa Code sections 85.22 and 85.27. Claimant filed a third-party case and reached a settlement. Claimant also recovered from an underinsured motorist policy (UIM). The other disputes concern whether certain medical conditions that claimant has received treatment for arose out of his admitted work injury and how medical payments are to occur with the defendants' credit.

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.

ISSUES

1. Whether claimant's recovery under his underinsured motorist policy should be included in determining defendants' pro rata contribution for litigation expenses.

2. How to calculate the reduction of credit and payment towards claimant's attorney fees for ongoing authorized medical care through exhaustion of the credit against claimant's third-party recovery.

3. Whether claimant's shoulder surgery and medical care is related to his work injury.

4. Whether claimant's dental medical care is related to his work injury.

5. Whether claimant's blood clot and medical care is related to his work injury.

6. Whether claimant should be reimbursed for unauthorized medical care for bilateral upper extremities and care with Richard Bose, M.D. and Chad Whyte, M.D.

7. Assessment of costs.

FINDINGS OF FACT

This deputy workers' compensation commissioner having heard the testimony and considered the evidence in the record finds that:

Jeremy Marvel, claimant was involved in a motor vehicle accident on April 16, 2016. Claimant was driving a pickup and was hit from behind by a semi-trailer. (Joint Exhibit 1, pages 1–5; Exhibits 10 and 11) He had serious injuries. From the accident site he was taken by LifeFlight to a hospital in Omaha. This injury arose out of and in the course of his employment with Mark Hughes Construction (Mark Hughes). Claimant has no memory of the accident or most of the events immediately following his accident. The defendants have stipulated that as a result of this injury claimant is permanently and totally disabled. Claimant testified at the hearing as well as by deposition. Due to claimant's traumatic brain injury (TBI) claimant has difficulty with some aspects of his memory. Considering this limitation, I found claimant to be credible and provided truthful testimony to the best of his abilities.

Claimant was 43 years old at the time of the hearing. Claimant has resided in Southwest Iowa most of his life. Claimant graduated from high school. Claimant went to a community college and obtained an associate's degree in computer programing. (Transcript p. 32)

Claimant testified that after he left college he started working for Mark Hughes Construction. Claimant knew Mr. Hughes' family most of his life. (Tr. p. 34) Claimant began working for Mark Hughes around 1997. Before claimant's work accident claimant worked as a type of project manager for Mark Hughes, although he had no formal title. Mark Hughes primarily builds homes and does some limited amount of commercial building. (Tr. p. 39) Claimant would work with home buyers and subcontractors to see that the construction was completed. Claimant spent most of his time in his truck, on the phone and at work sites. Claimant worked beyond regular business hours. (Tr. p. 89)

Claimant testified that he can no longer multitask and was advised by his doctor not to try. (Tr. p. 42) Claimant said that he has had headaches since the accident. He said medication has it knocked down, but they are still present. (Tr. p. 43) Claimant attempted to return to work part-time after his accident but was not able to handle working. Claimant stopped working in June 2017 for Mark Hughes. (Tr. pp. 45, 47) Claimant said that Mark Hughes was not able to keep him employed due to his restrictions. (Ex. C; Deposition p. 26) He has not worked for anyone else since his injury.

Claimant said that Morgan LaHolt, M.D. at the Madonna Rehabilitation Center recommended that he find some volunteer activities outside the home to be involved with. Claimant now volunteers at his children's school and helps set up equipment for after school athletic practices. (Tr. p. 48) Claimant testified that Dr. LaHolt is managing his care for his brain injury. (Tr. p. 54) Claimant said his wife keeps track of finances and his doctor appointments.

Claimant agreed that he had a fracture in his left upper arm due to the work injury. Claimant also agreed that he had a football injury to his left shoulder and surgery to his left shoulder in 1997. (Tr. p. 55) Claimant testified that he had a cortisone injection in 2011 in his left shoulder and was not receiving treatment for his shoulder at the time of his accident. (Tr. p. 56)

Claimant was asked questions on cross-examination concerning whether he had been told by Dr. Goebel in 2007 that claimant needed a glenohumeral joint replacement. Claimant could not remember. (Tr. p. 60)

Claimant had knee surgery due to the work accident on December 8, 2016. (JE 3, p. 1) Claimant agreed that he did not complain of right knee pain for a long time afterward. (Tr. p. 63) Defendants' questioning suggested that the first report to a medical provider of leg pain was on December 12, 2017; however, claimant was unclear or did not remember any dates regarding treatment in his testimony.

Katy Marvel, claimant's spouse, was called to testify. Ms. Marvel arrived at the crash seen on April 12, 2016 and saw her husband unconscious in his truck and taken by air ambulance to Nebraska Medicine. (Tr. p. 84) Ms. Marvel noticed behavioral changes in her husband when he was in his hospital room shortly after the accident. (Tr. pp. 85, 86) Ms. Marvel described claimant's personality change after the accident as:

> And the new Jeremy was angry, aggravated, mean, confused, dizzy, off balance and had a total - - he was totally detached from reality of the situation.

(Tr. p. 87) Ms. Marvel testified that with medication claimant is able to make it through the day. (Tr. pp. 88, 89) Ms. Marvel said that Dr. LaHolt does not want claimant in any position that requires responsibility or high-level thinking. She said the local school is aware of his situation and allows him to volunteer and help do things like getting items set up for football practice. (Tr. p. 97) Ms. Marvel said she noticed that claimant was forgetting to change his clothes, showering and brushing his teeth. (Tr. p. 104)

Ms. Marvel handles the workers' compensation benefits claimant receives and medical bills concerning the work injury. Ms. Marvel acknowledged that claimant's indemnity benefits were reduced by two-thirds due to the settlement in a third-party action against the driver of the truck that hit claimant. (Tr. p. 99) Up until settlement of the third-party lawsuit Nationwide was paying all of the medical bills. (Tr. p. 111) Ms. Marvel testified that concerning medical bills the defendants, who used a third-party administrator, are to process the medical claims, pay one-third, and claimant was to pay two-thirds of the medical bill. (Tr. pp. 99, 100) At one point Ms. Marvel said she questioned whether the defendants were paying the correct amount of the medical bills. (Tr. p. 100) Ms. Marvel said that she agreed to pay the prescription bills and then submit the bills to defendants for reimbursement of one-third of the bills. (Tr. p. 101) Ms. Marvel said she started to submit prescription bills to claimant's Blue Cross/Blue Shield (BC/BS) insurance policy. The BC/BS policy is a policy that claimant paid for and is his private insurance. (Tr. p. 102) Claimant has had the policy since 2010. (Tr. p. 110) Claimant 's attorney notified Nationwide and defendants' attorney on May 23, 2019 that the claimant would be presenting all of his bills to BC/BS. (Ex. E, pp. 32, 38) Ms. Marvel said she started this procedure about using the BC/BS policy about six to eight weeks before the hearing. Ms. Marvel said she has submitted the cost of the prescriptions to Nationwide and has not been reimbursed. (Tr. p. 102)

Ms. Marvel acknowledged that the claimant received $1,000,000.00 based upon an underinsured motorist policy that was purchased by Mark Hughes. Claimant also recovered $985,812.99 from the driver and employer of the driver who hit claimant. (Tr. pp. 106, 107) Ms. Marvel testified that she experienced problems in getting bills paid by Joann Kottlowski of Nationwide. (Tr. p. 112) Claimant agreed under cross-examination that she is now submitting her medical bills to BC/BS. Ms. Marvel testified that Dr. LaHolt's bills for services were being sent to claimant to pay, as Ms. Marvel believes Ms. Kottlowski told this provider that claimant was to pay 100 percent of the bill and

then claimant would send the bill to Nationwide for one-third reimbursement. (Tr. pp. 121, 122)

Ms. Marvel was questioned about Exhibit E, pages 39 and 40. The billing shows a "usual and customary" price of $1,425.99. (Tr. p. 116; Ex. E, p. 39; Ex. 7, p. 10) Claimant submitted the bill to BC/BS, which paid the entire bill, as claimant had met his deductible and copay. (Tr. p. 117; Ex. E, p. 40)

Defendants used TechHealth to arrange payment of medical bills. TechHealth would negotiate with medical providers to reduce some costs. For example, defendants showed a December 4, 2017 billing for the prescription Modafinil, with a usual and customary charge of $1,438.57. It appears that TechHealth obtained a net price of $660.43 for this prescription. (Ex. F, p. 43)

Claimant had a significant fracture of the left humerus as a result of his work injury. Claimant had an open reduction and internal fixation of the humerus at the Nebraska Medical Center. (JE 3, p. 5) Claimant had right knee surgery on December 8, 2016. The post-operative diagnosis was "Acute tear of posterior horn medial meniscus." (JE 3, p. 1)

Claimant received dental care for chipped teeth after his accident, which was provided by the defendants in April 2016. (Tr. p. 61; JE 11, p. 1) On December 6, 2017 Paul Albertson, D. D. S., examined claimant. Dr. Albertson noted claimant had periodontal problems and noted,

> Home Care: Fair- He is not flossing and states he brushes very hard and is using a toothpick in between his teeth. Oral Home Care Instructions: Brushing and flossing instructions given- I had patient feel the clicks of calculus as I was exploring, I showed him the perio chart and explained my findings along with showing him the radiographs and areas of calculus present on those. I explained that since its [sic] been a few years since his last cleaning and he is not flossing all the bacteria that is constantly forming on his teeth has turned into the hard deposits of calculus that is causing damage to his gingiva (inflammation, bleeding) and causing bone loss in some areas. I explained that our goal is to remove all the bacteria, improve his homecare and by doing that it will stop the progression of bone loss from happening. Explained that we'll do a deep cleaning where we split the cleaning into two visit [sic] and he is numb, along with 3MRC for at least the first year depending on how well his homecare improves. Patient understood.

(JE 11, p. 1) On December 6, 2016, claimant was diagnosed with generalized chronic slight periodontitis. Dr. Albertson noted that periodontal disease is a lifelong disease and claimant will need periodic treatment. (Ex. 6, p. 1)

Claimant first saw Dr. LaHolt at the Madonna Rehabilitation Hospital on May 16, 2016. Dr. LaHolt's impressions were,

1. 40-year-old gentleman status post motor vehicle collision with resultant traumatic brain injury and orthopedic multitrauma. Injuries including a left humerus fracture as well as multiple thoracic fractures, likely rib fractures, persistent difficulties with:

    a. Posttraumatic headaches.

    b. Cognitive inefficiency.

    c. Fatigue.

    d. Emotional difficulties including difficulties with irritability.

    e. Persistent right knee, low back, neck, sternal, left upper extremity pain.

    f. Decreased balance.

2. Hypertension.

(JE 16, p. 9) Dr. LaHolt recommended a referral to the Madonna Traumatic Brain Injury Clinic.

On November 2, 2016, Michael Morrison, M.D. performed an independent medical examination (IME) of claimant's left shoulder. Dr. Morrison noted claimant had shoulder surgery due to a football injury in December 1996. (Ex. A, p. 2) Claimant returned to his shoulder surgeon in December 2006 and claimant was diagnosed with degenerative arthritis of the glenohumeral joint causing shoulder pain. In January 2007 an MRI confirmed claimant had severe degenerative arthritis of the glenohumeral joint. In March 2007 claimant received an injection to his shoulder. (Ex. A, p. 1) Dr. Morrison noted that in September 2016 Dr. Rosipal, an orthopedic surgeon, recommended total shoulder replacement. Dr. Morrison wrote that Dr. Rosipal felt the accident of April 12, 2016 aggravated the degenerative arthritis of his left shoulder. (Ex. A, p. 2)

Dr. Morrison's opinion concerning causation was,

> Therefore, it would be my position that the degenerative arthritis of his left shoulder joint preexisted the incident of April 12, 2016, it obviously was very symptomatic for him to the extent that he required cortisone injections but also a description by Dr. Goebel that he would need shoulder replacement in the near future. Therefore, within a reasonable degree of medical certainty, it would be my opinion that his left shoulder was significantly symptomatic prior to April 12, 2016, to the extent that his examining doctors recommended to him a shoulder replacement would be

carried out in the future and this is the same recommendation of Dr. Rosipal's after the motor vehicle accident of April 12, 2016.

(Ex. A. p. 3)

Kirk Hutton, M.D. examined claimant's left shoulder on December 2, 2016. Dr. Hutton noted:

> Jeremy is a 40-year-old, right hand dominant gentleman who presents today along with his wife for evaluation of his left shoulder. Jeremy was involved in a motor vehicle accident in which he was a restrained driver on 04/12/16 in rural Malvern, Iowa. He was stopped and was rear-ended by a semi-truck and trailer. His hands were on the steering wheel of his Ford F-350. He was life flighted to Nebraska Medicine. He was treated for a traumatic brain injury at the Nebraska Medical Center and also as outpatient at Madonna in Lincoln. He also had a fracture to his right humerus for which he underwent ORIF at the Nebraska Medical Center with Dr. Daccarett. He had a knee injury and has seen Dr. Dave Brown regarding such. He also had drastic spine fractures of T3, T4 and T5.
>
> He has had complaints of left shoulder pain since the motor vehicle accident. He has seen Dr. Teusink and Dr. Rosipal regarding his shoulder and they have discussed possible surgery including total versus hemiarthroplasty. His shoulder has been injected on two occasions without relief of his pain symptoms.
>
> Mr. Marvel did have a college football injury to his left shoulder and underwent Bankart repair in 1996 with Dr. Mike Walsh. He had a follow-up with Dr. Walsh in 2007 and was noted to have degenerative changes of his glenohumeral joint at that time. He was treated conservatively and has done very well. He describes no symptoms of shoulder pain since 2007, until his motor vehicle accident on 04/12/16.

(JE 8, p. 1) Dr. Hutton's assessment was,

1. Left shoulder glenohumeral degenerative joint disease, exacerbated by accident in April of 2016, with possible posterior instability.
2. Healed humerus fracture following ORIF.
3. Traumatic brain injury.
4. Left knee meniscus pathology, treated by Dr. Dave Brown.

(JE 8, p. 3)

On August 14, 2017, in response to a request from claimant's counsel, Dr. Hutton opined,

> After reviewing the patient's history, I feel that within a reasonable degree of medical certainty it is more likely than not that the motor vehicle accident exacerbated his preexisting glenohumeral arthritis of his left shoulder subsequently requiring him to undergo the arthroplasty at this early age.

(Ex. 1, p. 3)

In a letter signed September 27, 2017, Dr. LaHolt wrote to claimant's counsel that he agreed with Dr. Hutton that claimant's need for the total shoulder replacement was directly related to claimant's motor vehicle collision. (Ex. 3, p. 1)

On October 3, 2018 Dr. LaHolt provided additional opinions concerning the claimant's injuries and care he was provided. (Ex. 3, pp. 6–8) Dr. LaHolt stated that the care Dr. Whyte provided claimant for chronic post-traumatic headaches was reasonable, necessary and beneficial. (Ex. 3, p. 7) Dr. LaHolt also stated that the referral to Dr. Bose was medically reasonable, necessary and beneficial to the claimant. (Ex. 3, p. 7)

Dr. LaHolt was asked whether the dental care claimant received for his periodontal disease was related to his work injury. Dr. LaHolt wrote,

> Yes. In my medical opinion the need for dental care provided by Dr. Paul Albertson for Mr. Marvel's periodontal disease was necessary secondary to his brain injury. It is very common for individuals with brain injury to suffer from short-term memory and attention difficulties which affect them on a day-to-day basis. This can lead to failure to accomplish everyday tasks even with significant prompting from outside sources. These tasks can include general hygiene, eating, as well as dental care.

(Ex. 3, p. 8)

Claimant had a preoperative examination on January 27, 2017 before his left shoulder surgery. Ronald Silvius, D.O. noted,

> Patient has a history of football injury in the past with a Bankart repair having been done. He had a serious motor vehicle accident over a year ago. He's had laxity, pain and decreased range of motion since then.

(JE 4, p. 1)

On February 2, 2017 claimant had a left total shoulder arthroplasty. (JE 8, p. 5) Dr. Hutton wrote,

> Jeremy Marvel is a 40-year-old right hand dominant gentleman who has a long history of left shoulder pain. He initially underwent left posterior Bankart by Dr. Mike Walsh in 1996 and then was seen by Dr. Walsh in 2007 and was noted to have degenerative changes in his glenohumeral joint. He did well from 2007 until 04/12/2016 when he was involved in a severe motor vehicle accident in rural Malvern, Iowa. He was Life Flighted to the Nebraska Medical Center where he had a traumatic brain injury as well as a significant left humerus fracture. Dr. Daccarett performed open reduction and internal fixation of the humerus. His symptoms have worsened since that time to the point where he cannot perform everyday activities. He had retained plate and screws with a well-healed humerus fracture. He had multiple metallic anchors in the humerus and in the glenoid from his previous surgery back in 1996. He had severe degenerative changes.

(JE 3, p. 5)

Claimant reported to Dr. Silvius on May 3, 2017 with a left knee that was red, warm and fluctuant. Dr. Silvius assessed claimant with patellar bursitis of the left knee. (JE 4, pp. 9, 10)

Dr. Silvius referred claimant to Todd Gaddie, M.D. for examination of his left hand numbness. Claimant wanted to know if it was related to his work injury. (JE 8, p. 14) On August 15, 2017 Dr. Gaddie assessed claimant with left cubital tunnel syndrome. (JE 8, p. 16) On November 3, 2017 claimant had left cubital tunnel release surgery. (JE 8, p. 27) Dr. Gaddie assessed bilateral upper extremity ulnar nerve compression. (JE 8, p. 20)

Dr. Silvius noted claimant had left ulnar nerve surgery on November 14, 2017. (JE 4, p. 15) Dr. Silvius cleared claimant for right ulnar nerve surgery on April 25, 2018. (JE 4, p. 22) Claimant had this surgery on May 1, 2018. (JE 8, p. 25)

On December 11, 2017 claimant was seen in the emergency department by Eric Ernest, M.D. for pain in his right leg. Dr. Ernest wrote,

> Jeremy A Marvel is a 41 y.o. male, chart review / seen, examined; presents / presented with; states he has had right leg swollen and with intractable calf pain for 7 to 10 days presented to the emergency room where he was found to have DVT he has a history of multiple injuries following MVA in 2016 for which he had surgeries on his spine for ORIF of fractures. He had a home sleep study in the recent past for which he anticipates to follow up with his primary care physician to address the

> report. Though patient is able to give history his wife gave most of the history.
>
> Causes likely combination of multiple factors with underlying risk in the setting of PMHx including in 2016 he was involved in a motor vehicle accident in which he was hit by a semi-tractor trailer. He had multiple thoracic compression fractures and spinous process fractures.

(JE 5, p. 4) Claimant was diagnosed with deep vein thrombus (DVT). (JE 5, p. 6) On December 27, 2017 Dr. Silvius was treating claimant after he was diagnosed with DVT. Dr. Silvius wrote,

> I discussed that we couldn't know for sure what the etiology of the DVT was. It could be that this has been developing since time of his motor vehicle accident or any [sic] the subsequent surgeries. His evaluation was negative. I'm not sure that we could attribute causation for this DVT.

(JE 4, p. 16)

On December 19, 2017 John Elsaesser, ARNP of the Advanced Vascular Vein Center wrote to Dr. Silvius that they could not write a causation opinion concerning claimant's DVT. (JE 9, p. 2) David Vogel, M.D. provided treatment for claimant's DVT on March 19, 2019. He noted that after claimant finished his current medication he could stop medication treatment. (JE 9, p. 5) On May 29, 2018 Dr. Vogel noted claimant had another incident of DVT after a long car ride. Lifelong anticoagulation was recommended for the claimant. (JE 9, p. 7)

On May 14, 2019 Dr. Vogel responded to a series of questions from claimant's counsel. Dr. Vogel was asked whether the accident of April 12, 2016 was a substantial factor in bring about his DVT condition. Dr. Vogel wrote,

> Yes, because of his accident his is not as mobile. This decreased activity is the major factor contributing to his DVT. This factor has been recognized for decades as Vicrow's triad of immobility, injury and hypercoagulability. Immobility is the most common cause of in hospital DVTs in otherwise healthy patients.

(Ex. 5, p. 1) Dr. Vogel said that claimant would need lifelong anticoagulation treatment. (Ex. 5, p. 1)

On April 25, 2018 Dr. Whyte, a neurologist, examined claimant for headaches. Claimant reported he started having headaches after his work accident. (JE 10, p. 1) Dr. Whyte assessed claimant with,

1. Chronic post-traumatic headache, not intractable

2. Chronic migraine without aura without status migrainosus, not intractable

3. Migraine without aura and without status migrainosus, not intractable

4. Musculoskeletal disorder and symptoms referable to neck

5. Traumatic brain injury, with loss of consciousness of 31 minutes to 59 minutes, subsequent encounter

6. Hypersomnia

(JE 10, p. 5)

> Jeremy is someone who did not have headaches prior to a traumatic brain injury and then immediately had them afterward meaning he has chronic post-traumatic headache. More than 2/3 of post-traumatic headache take on a clinical phenotype of migraine and therefore he also has chronic migraine.

(JE 10, p. 5)

On December 27, 2018 Dr. Whyte noted claimant had reported a 30-40 percent improvement in his migraines though they were still frequent. (JE 10, p. 8)

Dr. Bose of the Midwest Pain Clinic saw claimant on April 26, 2018. (JE 12, p. 1) Dr. Bose noted that claimant had been referred by Dr. LaHolt. (JE 12, pp. 1, 9, 14) While Dr. Bose noted that claimant could have been referred by Dr. Whyte, he listed Dr. LaHolt as the referring physician. Dr. Bose also recorded the insurance adjuster for this matter was Joann Kottlowski. (JE 12, p. 1) On one occasion Dr. Bose listed both Dr. LaHolt and Dr. Whyte as the referring physician. (JE 12, p.18)

Dr. LaHolt referred claimant to Walter Duffy, M.D. for evaluation of depression, anger and memory. Dr. Duffy summarized the results of evaluations on April 23, 2019 and May 8, 2018 as:

Active Problems Summary

Problem	Chronicity	Status	Onset	Last Assessment	User	Last Upd
Major depress disord, Single epsd, sev w/o psych features	Chronic	Active	05/08/18	Unchanged	Walter J. Duffy	05/08/2018
Oth symptoms and signs w cognitive functions and awareness	Chronic	Active	05/08/18	Unchanged	Walter J. Duffy	05/08/2018

Personality change due to known physiological condition	Chronic	Active	05/12/18	Unchanged	Walter J. Duffy	05/08/2018
Postconcussional syndrome	Chronic	Active	05/08/18	Unchanged	Walter J. Duffy	05/08/2018
Generalized anxiety disorder	Chronic	Active	04/23/19	Unchanged	Walter J. Duffy	04/23/2019
Major depress disorder, recurrent severe w/o psych features	Chronic	Active	04/23/19	Unchanged	Walter J. Duffy	04/23/2019
Mild cognitive impairment, so stated	Chronic	Active	04/23/19	Unchanged	Walter J. Duffy	04/23/2019
Oth symptoms and signs involving the circ and resp systems	Chronic	Active	04/23/19	Unchanged	Walter J. Duffy	04/23/2019
Other idiopathic peripheral autonomic neuropathy	Chronic	Active	04/23/19	Unchanged	Walter J. Duffy	04/23/2019
Pseudobulbar affect	Chronic	Active	04/23/19	Unchanged	Walter J. Duffy	04/23/2019
Syncope and collapse	Chronic	Active	04/23/19	Unchanged	Walter J. Duffy	04/23/2019

(JE 13, p. 9) (Columns on code and specialty omitted)

Dr. Bose's assessment was,

1. Chronic pain syndrome
2. Cervical spondylosis
3. Arthropathy of cervical spine facet joint
4. Degeneration of cervical intervertebral disc
5. Neck pain

6. Cervicogenic headache

7. Traumatic brain injury with loss of consciousness

(JE 12, p. 5) On May 10, 2018 Dr. Bose performed a cervical branch block. (JE 12, p. 11)

On November 13, 2018 Dr. Gaddie wrote to claimant's counsel about the treatment and surgery he provided to claimant for bilateral cubital tunnel release. (Ex. 4, pp. 1–3) Dr. Gaddie performed a left cubital tunnel release on November 14, 2017 and a right cubital tunnel release on May 1, 2018. (Ex. 4, p. 2) Dr. Gaddie wrote,

> As a result of the fact that Mr. Marvel did not have numbness and tingling in his upper extremities prior to his work injury noted on April 12, 2016, it is my medical opinion that the accident on April 12, 2016, was a substantial factor in bringing about his cubital tunnel syndrome in the bilateral upper extremities.

(Ex. 4, p. 1) Dr. Gaddie wrote that the treatment he provided was reasonable and necessary, as claimant had failed conservative treatment measures. (Ex. 4, p. 2) Dr. Gaddie wrote claimant had a resolution of his left upper extremity after surgery and that claimant did fairly well after his right upper extremity surgery. (Ex. 4 p. 2)

Claimant provided a detailed listing of medical bills, expenses, reimbursement and medical mileage in Exhibits, 7, 8, and 9.

On October 23, 2018 Dean Wampler, M.D. provided a report concerning causation of claimant's DVT and the need for extensive treatment for gingivitis. (Ex. B) Dr. Wampler noted that the incidence of DVT following minor knee surgery ranges between 7 and 10 percent in all cases. Dr. Wampler stated that persons who develop DVT after minor knee surgery generally develop DVT almost immediately. (Ex. B, p. 8) Dr. Wampler noted and opined that claimant's development of a second blood clot strongly suggests a cause that is not related to his knee surgery. Dr. Wampler stated that claimant's right leg DVT had no causal connection to his original accident or knee surgery. (Ex. A, p. 8)

Concerning claimant's gingivitis, Dr. Wampler noted that Dr. Albertson noted claimant told Dr. Albertson he brushed hard and used a toothpick. (Ex. A, p. 8) Due to the lack of any billing records from Dr. Albertson from 2010 through April 26, 2016, Dr. Wampler assumed claimant received no dental care for that time period, and the lack of routine cleaning was the cause of his dental problems. (Ex. B, p. 9) Dr. Wampler stated,

> For these reasons, it is my opinion within a reasonable degree of medical certainty that Mr. Marvel's gingivitis was due to long standing lack of routine dental care, rather than short term infrequent brushing, as alleged

by Mrs. Marvel.

(Ex. B, p. 9)

Claimant incurred litigation costs of $14,151.82 in his underinsured motorist and tort claim. Claimant asserted the following concerning the defendants' lien and costs that were to be pro-rated:

> With respect to the lien, we agree the net return to Nationwide is $123,559.50 after attorney fee is deducted from $185,339.25.
>
> On the costs, we don't agree that the UIM recovery can be considered by Nationwide when doing the math. Our incurred costs at the time of distribution totaled $14,151.82. Mr. Marvel's total recovery was $985,812.99. $185,339.25 is 18.8% of $985,812.99. 18.8% of $14,151.82 is $2,660.54.
>
> If it is easier to combine these, we can send a check today to Nationwide in the amount of $120,898.96. Please confirm.

(Ex. D, p. 31) Defendants disagreed with the calculation concerning costs. (Ex. D, p. 31)

I find that the claimant's gross earnings at the time of his injury was $1,386.74 and that he was married and entitled to four exemptions. Using the applicable rate book claimant's weekly workers' compensation rate for permanent benefits is $870.14.

Claimant's TBI has adversely impacted claimant's ability to remember and to process information. It was clear from claimant's testimony that he was trying to answer questions fully, but was not able to do so due to his TBI. Claimant's recollection of his treatments was not always accurate and medical information he told some of his medical providers was not always accurate or consistent due to the TBI.

CONCLUSIONS OF LAW

The first issues to decide are whether certain conditions were causally related to the April 12, 2016 work injury.

Shoulder injury

Defendants have pointed out that claimant was told he was going to need shoulder replacement surgery before his accident on April 12, 2016. The record supports this fact. The record also shows that at the time prior to his work accident it was only causing minimal problems. Claimant last had an injection in his shoulder in March 2007. Dr Morrison opined that claimant's left shoulder was very symptomatic prior to his April 2016 work injury. The medical evidence submitted does not show

significant symptomology shortly before his work injury. I do not find his opinions convincing.

Dr. Silvius noted that claimant had laxity, pain and decreased range of motion since his accident in his left shoulder. Dr. Hutton assessed that claimant's shoulder condition was exacerbated by his work injury. Dr. LaHolt agreed with Dr. Hutton that claimant's work injury caused the need for the shoulder replacement. I find Dr. Silvius, Dr. LaHolt and Dr. Hutton's opinions to be convincing. I find that claimant has shown by a preponderance of the evidence that his work injury lighted up his prior shoulder condition. I find the shoulder surgery and treatment is causally related to his work injury.

DVT

Dr. Wampler opined that claimant's DVT was not related to his knee surgery and pointed out that claimant had no symptoms for over a year after his knee surgery. Dr. Wampler focused on the knee surgery as not being the cause of his DVT. Dr. Vogel opined the DVT was caused by a lack of activity after his work injury as causing his DVT. Dr. Vogel, the treating physician for the DVT, wrote the DVT was causally related to his work injury. As the physician who was most familiar with claimant's DVT, I find his opinion to be convincing. I find that claimant has proven that his DVT was causally related to his work injury.

Periodontal disease

Dr. Wampler concluded that claimant's dental condition was a result of lack of dental care prior to his work accident. Dr. LaHolt opined that claimant's periodontal disease was related to his TBI and memory cognitive functioning. Ms. Marvel's testimony about claimant's lack of self-care was credible. While claimant reported to Dr. Albertson he brushes hard and used a toothpick, claimant was not always accurate in relaying his conditions and symptoms to his care providers due to his TBI. Dr. LaHolt is an expert in working with patients who have brain injuries. I find his opinion convincing. I find that claimant has proven that his periodontal disease was causally related to his work injury.

The next issue to determine is payment of certain medical expenses.

Unauthorized medical care

Iowa Code section 85.27 provides in relevant part;

1. The employer, for all injuries compensable under this chapter or chapter 85A, shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance and hospital services and supplies therefor and shall allow reasonably necessary transportation expenses incurred for such services.

Defendants denied causation for claimant's left shoulder replacement, DVT and periodontal conditions. As such, defendants do not have an authorization defense for these medical expenses. I find that the care claimant received for these conditions was reasonable and necessary. Defendants shall pay these medical expenses and medical mileage in connection to these conditions.

Defendants argue that they should not be responsible for the costs of unauthorized medical care. The Iowa Supreme Court has outlined the criteria for payment or denial of payment for unauthorized medical care in two relatively recent cases.

In Bell Bros. Heating and Air Conditioning v. Gwinn 779 N.W.2d 193 (Iowa, 2010) the court allowed a claimant to have a defendant pay for unauthorized medical care if the claimant could show that the unauthorized medical care resulted in a more beneficial outcome than the care offered by defendant.

> We do not believe the statute can be narrowly construed to foreclose all claims by an employee for unauthorized alternative medical care solely because the care was unauthorized. Instead, the duty of the employer to furnish reasonable medical care supports all claims for care by an employee that are reasonable under the totality of the circumstances, even when the employee obtains unauthorized care, upon proof by a preponderance of the evidence that such care was reasonable and beneficial. In this context, unauthorized medical care is beneficial if it provides a more favorable medical outcome than would likely have been achieved by the care authorized by the employer. The allocation of this significant burden to the claimant maintains the employer's statutory right to choose the care under section 85.27(4), while permitting a claimant to obtain reimbursement for alternative medical care upon proof by a preponderance of the evidence that such care was reasonable and beneficial.

Bell Bros. Heating & Air Conditioning v. Gwinn, 779 N.W.2d 193, 206 (Iowa 2010).

> The protections for employees provided under this statute basically modify the employer's right to choose medical care in three ways. First, an employee is permitted to choose his or her own medical care at the employer's expense "[i]n an emergency" when the employer "cannot be reached immediately." Iowa Code § 85.27(4). Second, the employee and employer may consent to alternative medical care paid by the employer. *Id.* Finally, the workers' compensation commissioner may order alternative care paid by the employer following a prompt, informal hearing when the employee is dissatisfied with the care furnished by the employer and establishes the care furnished by the employer was unreasonable. *Id.*

> Beyond these circumstances, the employer has the right to select the medical care. Nevertheless, the employer's right to choose medical care does not prevent the employee from choosing his or her own medical care at his or her own expense under two circumstances. Both of these circumstances normally arise when a dispute occurs between the parties.

Bell Bros. Heating & Air Conditioning v. Gwinn, 779 N.W.2d 193, 203–04 (Iowa 2010).

Brewer-Strong v. HNI Corp., 913 N.W.2d 235 (Iowa 2018) affirmed the holding on Bell Bros. held,

> Once an employer acknowledges that the injured employee is seeking medical care for an injury compensable under the workers' compensation statute, Iowa Code section 85.27(4) provides that an "employer is obliged to furnish reasonable services and supplies to treat an injured employee, and has the right to choose the care." Iowa Code § 85.27(4). We have previously noted the rationale for allowing the employer to choose medical care for the injured employee is because an injured employee might "select a doctor, because of personal relationship or acquaintance, who is not qualified to deal with the particular kind of case, or who at any rate is incapable of providing service of the quality required for the optimum rehabilitation process." Bell Bros., 779 N.W.2d at 203 (quoting 5 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law § 94.02[2], at 94-13 (2009). However, Iowa Code section 85.27(4) also outlines situations in which an employee may select his or her own medical care, including those situations where a dispute may arise between the employer and injured employee over the employer's choice of medical care. Specifically, Iowa Code section 85.27(4) provides,
>
> If the employee has reason to be dissatisfied with the care offered, the employee should communicate the basis of such dissatisfaction to the employer, in writing if requested, following which the employer and the employee may agree to alternate care reasonably suited to treat the injury. If the employer and employee cannot agree on such alternate care, the commissioner may, upon application and reasonable proofs of the necessity therefor, allow and order other care.
>
> Iowa Code § 85.27(4).
>
> This statutory provision essentially provides three situations in which employees may receive alternate medical care paid for by the employer. First, employees may choose their own medical care at the employer's expense during an emergency in which the employer "cannot be reached immediately." Id.; see also Bell Bros., 779 N.W.2d at 203–04. Second, an employee may receive alternate medical care at the employer's expense when the employee and employer consent to such an agreement. Iowa

> Code § 85.27(4); *Bell Bros.*, 779 N.W.2d at 204. Third, "the workers' compensation commissioner may order alternative care paid by the employer following a prompt, informal hearing when the employee is dissatisfied with the care furnished by the employer and establishes the care furnished by the employer was unreasonable." *Bell Bros.*, 779 N.W.2d at 204; see also Iowa Code § 85.27(4).
>
> Outside of these situations, the employer retains the right to choose the employee's medical care. However, the employer's statutory right to choose medical care for the employee's compensable injuries does not prohibit the employee from seeking his or her own medical care, at his or her own expense, when the employer denies compensability for the injury or the employee "abandons the protections of section 85.27 or otherwise obtains his or her own medical care independent of the statutory scheme." Bell Bros., 779 N.W.2d at 204. Thus, in *Bell Bros.*, we held an employer's duty to furnish reasonable medical care includes those claims for care by the employee that are unauthorized if the employee can prove "by a preponderance of the evidence that such care was reasonable and beneficial" under the totality of the circumstances. *Id.* at 206. "[U]nauthorized medical care is beneficial if it provides a more favorable medical outcome than would likely have been achieved by the care authorized by the employer." *Id.* This burden of proof honors the employer's statutory right to choose the injured employee's medical care under Iowa Code section 85.27(4), yet provides the employee with reimbursement for unauthorized medical care when he or she can show by a preponderance of the evidence that the care was reasonable and beneficial. *Id.* It also aligns with the balance Iowa Code section 85.27(4) seeks to maintain between the employer's right to control medical care and the medical needs of the employee. See Ramirez-Trujillo, 878 N.W.2d at 770–71.

Brewer-Strong v. HNI Corp., 913 N.W.2d 235, 247–48 (Iowa 2018).

There is no evidence that claimant informed defendants before he obtained the care for the bilateral upper extremity treatments and surgeries. There was no evidence of a dispute between the parties.

The only opinion about causation and claimant's bilateral upper extremities was by Dr. Gaddie. He opined that the claimant's bilateral upper extremity condition was related to his work accident. Defendants admitted that this was a work injury. The defendants state that claimant did not provide evidence that he had a more beneficial outcome. While claimant did complain of some symptoms at the hearing, the report by Dr. Gaddie stated claimant had a beneficial outcome for his two surgeries. Claimant testified to a beneficial outcome. In this case it appears that claimant's primary care physician, Dr. Silvius, referred claimant to Dr. Gaddie. Dr. Silvius was not a physician authorized by the defendants. It does not appear that claimant provided any notice to

the defendants concerning his care with Dr. Gaddie. As defendants were never provided the opportunity to provide care, claimant cannot meet his burden to show that the care he obtained was more beneficial than what was offered by defendants. Claimant's request for reimbursement of the expenses for the bilateral upper extremities treatment is denied.

Care by Dr. Whyte and Dr. Bose.

Dr. Whyte's records did not reflect who referred claimant to him for treatment. However, Dr. LaHolt stated he made the referral, which made Dr. Whyte an authorized physician. The record is somewhat confusing as to whether claimant was referred to Dr. Bose by Dr. LaHolt or by Dr. Whyte. Dr. Bose recorded that Dr. LaHolt was the referring physician. (JE 12, p. 1) Claimant was uncertain as to who made the referrals and thought it was Dr. Silvius. Claimant's testimony is not always reliable as to his treatment history due to his TBI. It matters little, however, as an authorized physician, Dr. LaHolt referred claimant to Dr. Whyte, who becomes an authorized physician. When a designated physician refers a patient to another physician, that physician acts as the defendant employer's agent. Permission for the referral from defendants is not necessary. Kittrell v. Allen Memorial Hospital, Thirty-fourth Biennial Report of the Industrial Commissioner, 164 (Arb. 1979) (Aff'd by Industrial Commissioner); See also Limoges v. Meier Auto Salvage, I Industrial Comm'r Rep. 207 (April 16, 1981).

Referral by an authorized physician to another practitioner routinely is found to be authorized. The doctor making the referral acts as the employer's agent. Limoges v. Meier Auto Salvage, I Industrial Comm'r Rep. 207 (April 16, 1981); Kittrell v. Allen Memorial Hosp., 34 Biennial Rep., Iowa Ind. Comm'r 164 (1979). Referrals from a treating authorized physician authorizes the subsequent provider. Verwers v. Wal-Mart Stores, Inc., File No. 5031547 (Alt Care Decision April 19, 2010). Dr. Bose' notes indicated that Nationwide's adjuster, Ms. Kottlowski, was part of the case and that Dr. Bose sought authorization from Nationwide for treatment. (JE 12, p. 7)

Dr. LaHolt wrote that the treatment provided by Dr. Whyte and Dr. Bose was reasonable, necessary and beneficial. (Ex. 3, p. 7) I find that the care provided by Dr. Whyte and Dr. Bose was authorized and the cost is the responsibility of the defendants.

In summary concerning medical costs, defendants shall pay the medical expenses, including prescriptions and medical mileage for all the care claimant received for his left shoulder replacement, DVT and periodontal expenses as set forth in Exhibits 7 and 8. Defendants shall provide future medical care for those conditions that are related to his work injury. Claimant is not entitled to reimbursement of the care provided by Dr. Gaddie as well as medical mileage and prescriptions.

Apportionment of costs

The next item to decide is whether the litigation costs should be prorated on both recoveries or just the tort recovery.

Iowa Code section 85.22(1) provides:

> If compensation is paid the employee ... under this chapter, the employer by whom the same was paid, or the employer's insurer which paid it, shall be indemnified out of the recovery of damages to the extent of the payment so made, with legal interest, except for such attorney fees as may be allowed... and shall have a lien on the claim for such recovery and the judgment thereon for the compensation for which the employer or insurer is liable. In order to continue and preserve the lien, the employer or insurer shall, within thirty days after receiving notice of such suit from the employee, file, in the office of the clerk of the court where the action is brought, notice of the lien.

[T]he purpose of ... section 85.22(1) is to permit the employer to recoup monies it has been required to pay under the provisions of chapter 85 from a tortious third party whose conduct has produced the injury which necessitated such payments." Johnson v. Harlan Community Sch. Dist., 427 N.W.2d 460 462 (Iowa 1988). The statutory scheme of section 85.22(1) is intended "to prevent double recovery by the injured worker in compensation in a law action as well as workers' compensation for the same injury." Liberty Mutual Ins. Co. v. Winter, 385 N.W.2d 529, 532 (Iowa 1986).

Under Iowa law, a workers' compensation carrier is required to pay attorney's fees, to the employee's attorney in a third-party action, even if the amount settled for is less than the total of the workers' compensation insurer's lien. Ahlers v. Emcasco Ins. Co., 548 N.W.2d 892, 894 (Iowa 1996).

The parties agree that the defendants are not entitled to a lien against the claimant's recovery under the UIM policy that was purchased by Mark Hughes. The Iowa Supreme Court held so in Michael Eberhart Const. v. Curtin, 674 N.W.2d 123 (Iowa 2004).

> In this case, the employer and its insurer contend that *March*[1] must be distinguished because in that case the underinsured-motorist coverage had been purchased by the employee while in the present case the insurance was provided by the employer. We read nothing in *March,* however, that suggests that it makes any difference which party furnished insurance coverage; the right to subrogation turns on whether the fund against which subrogation is sought arose through an action for tort or breach of contract, and *March* controls; only a fund created through an action for tort may be the subject of subrogation under section 85.22. The fund at issue here was based on a contract recovery. We affirm the decision of the district court on this issue.

Michael Eberhart Const. v. Curtin, 674 N.W.2d 123, 129 (Iowa 2004).

[1] March v. Pekin Insurance Co., 465 N.W.2d 852 (Iowa 1991).

Defendants argue that they should be able to prorate the litigation cost against the tort recovery and the UIM recovery. Defendants have provided no authority for such a legal conclusion. There is nothing in the law and policy recognized by the court in the Michael Eberhart Const. v. Curtin case that would indicate that the defendant is entitled to offset litigation costs for a claimant that is based in contract rather than tort.

I find the calculation of costs by claimant found in Exhibit D is correct and should be used in determining the amount of defendants' lien. Claimant's costs shall be apportioned only against the tort recovery of $985,812.99.

Submission of medical bills for payment

The last and very different issue in this case is how medical bills are being paid so that they are counted against the lien that defendants have against the tort recovery. Claimant is to pay two-thirds of any medical bill and defendants are to pay one-third. Sometime in February 2019 the claimant started paying the medical bills using his BC/BS policy[2] and then requesting defendants to reimburse him the one-third. Under this arrangement the defendants have lost the ability to negotiate a lower price for the medical expenses.

Mark Hughes has proposed that they will receive the medical bills for review and negotiate reduction, then pay the full amount and request reimbursement of two-thirds by the claimant. Also, defendants have proposed that claimant be ordered to reimburse defendants within 30 days of the time he receives the request from the defendants. (Def. Brief, pp. 4, 5)

Claimant has asserted that he has a right to submit his medical bills to BC/BS and that defendants have no right to interfere with claimant's arrangement with BC/BS. Claimant asserts that he is entitled to the full cash price charged for his medical expenses against his lien and the defendants should not be able to benefit for the privately contracted health insurance claimant has obtained. (Claimant's Brief, p. 9)

Under Iowa Code section 85.27 employers have the right to control medical care. While claimant and Ms. Marvel were frustrated with their interactions with the claims adjuster and the third-party administrator, defendants maintain the right to control treatment, which included payment of expenses.

I find, as defendants proposed, the defendants shall receive all medical bills and can negotiate payment with the providers, pay one-hundred (100) percent of the bill and request the claimant reimburse the defendants two-thirds of the costs. I decline to place a specific limit on reimbursement by claimant of the two-thirds other than to say that the

[2] The parties did not ask this agency to rule on the propriety of using the BC/BS policy to pay expenses in this case. As recognized by the parties, this agency has no authority to review the claimant's agreement with BC/BS.

claimant shall reasonably reimburse the two-thirds expenses, which generally should be within 30 days or receipt of the bill from the defendants.

As claimant has generally prevailed, I award costs for the filing fee of one hundred dollars ($100.00).

ORDER

As stipulated by defendants, claimant is permanently and totally disabled as a result of the work injury and defendants shall pay claimant permanent total benefits for so long as he is totally disabled at the weekly rate of eight hundred seventy and 14/100 dollars ($870.14) commencing June 19, 2017.

Defendants shall pay the expenses related to claimant's left shoulder replacement, DVT and periodontal condition and future medical care.

Defendants have the right to control payment of medical expenses. Defendants shall pay any medical expenses and then request claimant to pay two-thirds of the bill until the defendants' lien is satisfied.

Claimant shall not be reimbursed by defendants for the unauthorized bilateral upper extremity care, medical mileage or prescriptions related to this condition.

Defendants, for lien purposes, may only apportion litigation costs against the tort recovery.

Defendants shall pay claimant the one hundred dollar ($100.00) filing fee in this case.

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 Gamble v. AG Leader Technology File No. 5054686 (App. Apr. 24, 2018).

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

Signed and filed this 12th day of November, 2019.

James F. Elliott

JAMES F. ELLIOTT
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Michelle Epstein (via WCES)
Deborah Stein (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.