

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

---

JAMES DALE HARRIS,  
Claimant,

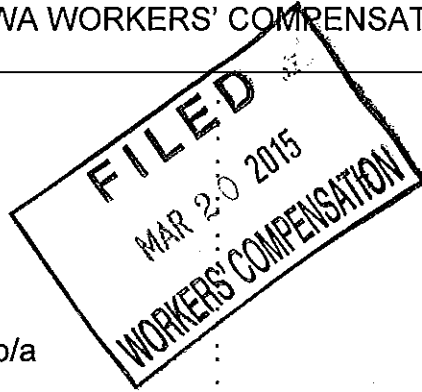
vs.

LL PELLING CO., INC., d/b/a  
LANDA PAINTING,  
Employer,

and

THE CINCINNATI INSURANCE  
COMPANIES,

Insurance Carrier,  
Defendants.



File No. 5034392

ARBITRATION  
DECISION

Head Note Nos.: 2500, 1108.50

---

JAMES DALE HARRIS,  
Claimant,

vs.

IOWA GOLD DISTRIBUTING,  
Employer,

and

LIBERTY MUTUAL INSURANCE,

Insurance Carrier,  
Defendants.

File No. 5045405

ARBITRATION  
DECISION

Head Note No.: 1100

---

STATEMENT OF THE CASE

James Harris, claimant, filed a petition in arbitration seeking workers' compensation benefits from LL Pelling Company, Inc. and The Cincinnati Insurance

Companies. James Harris, claimant, filed a second petition in arbitration seeking workers' compensation benefits from Iowa Gold Distributing and Liberty Mutual Insurance. Hearing was held on January 15, 2015.

Claimant was the only witness testifying live at trial. The evidentiary record also includes claimant's exhibits 1-10 and defendants, Iowa Gold & Liberty Mutual Insurance exhibits A-Q. Defendants LL Pelling Co., Inc. and The Cincinnati Insurance Companies did not offer any additional exhibits. The parties submitted a hearing report for each file at the commencement of the evidentiary hearing. On the hearing reports, the parties entered into certain stipulations. Those stipulations are accepted and relied upon in this decision. No findings of fact or conclusions of law will be made with respect to the parties' stipulations.

The parties requested the opportunity for post-hearing briefs, which were submitted on February 14, 2015.

#### ISSUES

File No: 5034392 (DOI: 7/26/06) (LL Pelling Co., Inc. and The Cincinnati Insurance Companies):

The parties submitted the following issues for resolution:

1. Whether Mr. Harris' medical bills are causally related to the alleged July 26, 2006 work injury.
2. Assessment of costs.

File No.: 5045405 (DOI: 12/05/12) (Iowa Gold Distributing and Liberty Mutual Ins.):

The parties submitted the following issues for resolution:

1. Whether Mr. Harris sustained an injury arising out of and in the course of his employment with Iowa Gold Distributing on December 5, 2012.
2. What, if any, permanency he sustained as a result of the alleged injury.
3. Whether any portion of his industrial disability should be apportioned.
4. Whether Mr. Harris' medical bills are causally related to the alleged December 5, 2012 work injury.
5. Assessment of costs.

### FINDINGS OF FACT

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

Mr. Harris originally injured his left hip on July 26, 2006, while working for LL Pelling. The claim was accepted by LL Pelling, and their workers' compensation carrier, The Cincinnati Insurance Companies (hereinafter both parties shall be referred to as "LL Pelling"). As part of that accepted workers' compensation claim claimant underwent an authorized right total hip replacement in February of 2008. The parties entered into a Compromise Settlement of that claim on April 6, 2011. The settlement closed out claimant's right to future weekly indemnity benefits but preserved his right to future medical benefits under Iowa Code section 85.27. (Exhibit P)

Subsequent to the settlement of his July 26, 2006 workers' compensation claim Mr. Harris went to work for Iowa Gold Distributing. On December 5, 2012 Mr. Harris fractured his right hip while he was at work for Iowa Gold. Mr. Harris contends that the December 5, 2012 hip injury arose out of and in the course of his employment with Iowa Gold. Defendants Iowa Gold and Liberty Mutual (hereinafter both parties shall be referred to as "Iowa Gold") have denied claimant sustained an injury arising out of and in the course of his employment and contend the fracture of claimant's prosthesis on December 5, 2012 was not the result of claimant's work activities but was due to the failure of the prosthesis. Defendants LL Pelling Co., Inc. and Cincinnati Insurance Companies contend the December 5, 2012 event is a new injury which arose out of and in the course of claimant's employment with Iowa Gold.

There is no dispute that Mr. Harris was working and near his truck when he sustained an injury to his hip. An ambulance was eventually called, and he was transported via ambulance to IHS Quad Cities Rock Island. However, throughout the record there are several different versions of the events that occurred at the time of the 2012 hip injury.

The December 5, 2012 Trinity Ambulance records indicate that Mr. Harris had been about to climb back into the truck when "it felt like it just popped out." Mr. Harris stated that he did not lose consciousness and denied striking his head or a hard fall to the ground. (Ex. 6b, p. 36) The note from IHS Quad Cities states Mr. Harris "was stepping up to his truck and his Rt hip 'went out on him'". (Ex. 6b, p. 38) On that same date the notes of Pamela S. Esparza, RN state Mr. Harris was "attempting to climb back into his semi truck. His right hip dislocated." (Ex. 6b, p. 46) X-rays were performed and the clinical impression was a fracture of his prosthetic hip and mechanical failure of prosthetic joint. (Ex. 6b, p. 44) That same day Mr. Harris was transferred via ambulance from the Quad Cities to Mercy Medical Center in Cedar Rapids where he was treated by Matthew J. White, M.D. Dr. White's history indicates that Mr. Harris had a total hip arthroplasty performed by Richard Naylor, D.O. about five years ago. The note states that he did not have any postoperative issues but:

recently had been feeling a 'wobble' in his hip when he walked. Today he was at work as a truck driver when he was stepping up into his truck and he felt a crack in his right hip. He was subsequently unable to bear any weight on the right side.

(Ex. E, p. 21) Another of Dr. White's notes states: "[t]oday he was in Illinois, and he was trying to get up to his truck, and he felt like his right hip gave away." (Ex. 6c, p. 47)

Mr. Harris saw Jeffrey Nassif, M.D. on December 6, 2012 for a consultation. The history states: "patient is a 52-year-old man who was walking when he felt a pop and had severe pain to his right hip yesterday." Dr. Nassif's impression at that time was catastrophic failure of the right total hip arthroplasty. He recommended exchange of neck versus revision of the femoral component versus revision of the entire metal-on-metal hip replacement. (Ex. 6c, p. 49) After Dr. Nassif spoke with a representative from the hip manufacturer he spoke with Mr. Harris again on the afternoon of December 6, 2012. Dr. Nassif explained that the old necks were made out of titanium, which was a softer metal and prone to fracture. He informed Mr. Harris that there was now a new neck made out of cobalt chrome that has a much lower fracture risk. (Ex. 6c, p. 50) Another note from December 6, 2012 states: "He has a very good understanding about what occurred." The notes indicate that Mr. Harris was trying to get a hold of his attorneys because the original injuries were workers' compensation injuries. (Ex. 6c, p. 51)

On December 7, 2012, Dr. Nassif performed a revision of his right total hip arthroplasty. The history in the notes indicates the patient was walking a couple of days ago when he felt a snap and had severe hip pain. (Ex. 6c, pp. 53-54)

Mr. Harris' recorded statement was taken on December 13, 2012. A transcript of the recorded statement is contained in Exhibit K. When he was asked what happened on the date of the injury he replied:

A. Well (inaudible) I thought I might have stepped on a rock sideways or something 'cause my my leg just went completely (inaudible) actually I was stepping up on the side of the truck and I had my weight on my ah right right leg -

Q. Um-hum.

A. And ah it just (inaudible) just all of a sudden just went out from underneath me.

(Ex. K, pp. 79-80)

Mr. Harris went on to explain that he fell off the trailer. (Ex. K, p. 81) He also stated that prior to the injury his hip had felt kind of sloppy like it was loose in there. (Ex. K, p. 85)

Mr. Harris had his sworn statement taken on March 19, 2013 by counsel for LL Pelling. The transcript of this statement is in evidence as Exhibit L. Mr. Harris explained that at the time of the injury he was a roll off truck driver. He drove a 30-yard container, and it was basically a no-touch load. (Ex. L, p. 4) In his sworn statement Mr. Harris said he was stepping up on the side of his truck and he felt something give. He said he had placed all the weight on his right foot while climbing up the side of the truck. He felt something and then he was on the ground after that. (Ex. L, pp. 8-9)

It is noted that in Iowa Gold's answers to interrogatories Bob Walters, an employee of Iowa Gold, stated that Mr. Harris told him he was merely walking on the ground when his right leg gave out on him and he fell. (Ex. M, p. 95) In claimant's answers to interrogatories Mr. Harris simply stated that at the time of the injury he was "climbing on the trailer . . ." (Ex. 7, p. 64)

Mr. Harris' history seemed to change a bit at the time of his February 10, 2014 deposition, which was taken over a year after the December 5, 2012 injury. Mr. Harris testified he "got ready to climb up on the truck, took the first step and slipped, fell back on the ground and felt the excruciating pain, knew right then my hip was broke." (Ex. A, p. 28) Defendants point out that it was not until his deposition testimony that he stated the first time he felt pain was when he hit the ground. At the time of his deposition Mr. Harris did not remember ever previously stating he felt his hip crack. (Ex. A, pp. 35-36) Claimant also testified that when he said he felt something give in his recorded statement he must have meant that his foot slipped. (Ex. A, p. 31) However, later in his deposition testimony claimant was shown treatment records from close in time to his injury which stated that "his right hip gave away" and claimant said "gave away, caught, yeah." Claimant then testified that at the time of the injury he was in excruciating pain and that everything just blurred together. (Ex. A, p. 51) Based on claimant's varying accounts I find the records generated close in time to the injury are more reliable than claimant's later accounts and testimony.

I note this testimony is not consistent with the treatment records immediately following the injury. For example, the ambulance history indicates that claimant denied a hard fall to the ground. (Ex. 6b, p. 36) Additionally, the treatment records indicate that claimant felt something give or slip in his hip prior to his hitting the ground. Further, claimant's own interrogatory answer does not indicate there was any type of slip.

At the arbitration hearing Mr. Harris testified at the time of the injury he was walking around getting ready to walk up the steps on his truck. He took the first step to get up onto the ladder when his leg gave out or locked up or something and he fell back onto the concrete. He testified that the first pain he felt was when he hit the ground and fell on his right hip. He does not know what caused his leg to give out on him. He also testified that after he had the original total hip replacement but prior to December 5,

2012, he would experience catching or popping every once in a while and his hip would lock up. He testified he still had ongoing right hip pain, tingling, and numbness.  
(Testimony)

I find the preponderance of the evidence shows that on December 5, 2012 Mr. Harris was stepping up onto his truck when his right hip went out. The evidence shows while he was stepping up to his truck he felt his right hip give way or crack, his leg suddenly went out from under him, and he fell to the ground. The records generated close in time to the injury indicate that his right hip popped, cracked, or gave way prior to the impact of the ground. (Ex. 6, p. 38, 46-47; Ex. E, p. 21, 23; Ex. K, pp. 79-80; Ex. L, pp. 89-91; Ex. A, p. 54) I further find that the preponderance of the evidence does not support the theory that Mr. Harris fell, landed on the ground, and the ground caused his hip problems.

The next issue to be addressed is the conflicting expert opinions on the issue of causation in this case.

Dr. Naylor is the surgeon who performed the hip arthroplasty on Mr. Harris on February 22, 2008. He is a board-certified orthopedic surgeon. On May 28, 2013 he issued an opinion which indicated that Mr. Harris' problem was twofold. One, he had "an underlying problem in the titanium neck of his prosthesis and the other would be the stresses he put on that neck with his current job." He went on to state that the patient's heavy work increased the risk of femoral neck fracture of the prosthesis. This opinion was based on Dr. Naylor's understanding that Mr. Harris was doing "a lot of heavy work" around the time of the injury. (Ex. 3) However, Dr. Naylor's opinion changed after he reviewed the sworn statement of Mr. Harris wherein he described his job duties. On January 12, 2014, Dr. Naylor indicated that now that he had a better understanding of Mr. Harris' work activities for the time leading up to the December injury he can no longer state within a reasonable degree of medical certainty that the work activities at Iowa Gold were "a substantial factor in causing the neck of the prosthesis to fail." (Ex. B, p. 6) Rather, it was Dr. Naylor's opinion that "the cracking of the neck of the prosthesis was more related to the original injury which resulted in the total hip replacement using a titanium neck . . . than Mr. Harris' work activities since April 2010." (Ex. B, p. 6)

At the request of Iowa Gold, Scott B. Neff, D.O., an orthopaedic surgeon, performed a records review in this matter. He reviewed all of the medical records and the sworn statement of Mr. Harris taken on March 19, 2013. It was Dr. Neff's opinion that claimant's injury was the result of a "femoral neck/stem failure, which occurred as a result of the biomechanical failure of the prosthesis." He felt it was unrelated to simply stepping up into the truck. He opined it was an unfortunate situation which resulted from a "failure of the mechanical construct." (Ex. G, pp. 28-29)

On September 9, 2014, Dr. Neff saw Mr. Harris for an IME. Prior to the IME Iowa Gold provided Dr. Neff with updated information, which included medical records and claimant's deposition. After examining the patient Dr. Neff issued a report with his

findings and opinions. Dr. Neff noted claimant's deposition testimony regarding the hip symptoms he had leading up to the time of the injury date in question. Dr. Neff specifically noted the catching symptoms and the wobble in Mr. Harris' hip. According to Dr. Neff these were indications that his hip was beginning to fail. (Ex. G, p. 35) In Dr. Neff's report he also pointed out that at the time of the hip revision surgery in December of 2012 Dr. Nassif used the Wright Medical drills and taps to remove the fractured pieces. Dr. Neff advised that "this additional instrumentation was provided by the Wright Medical Company because of the number of fractures of the femoral necks that had been occurring and because the fractured piece was commonly broken and down in the trunion it was almost impossible to remove, so special instruments were constructed to allow removal of these broken pieces." (Ex. G, p. 36) Dr. Neff also noted that FDA recalled this hip system and "required redesign because of the high instance of failure of this particular femoral neck system." (Ex. G, p. 37) Dr. Neff further stated that "[f]ractures of the femoral stem commonly were not related to any injury and were commonly not related to any specific type of activity." (Ex. G, p. 38) After interviewing and examining Mr. Harris and reviewing the updated documentation provided to him Dr. Neff stood by his prior opinion that the injury was "simply an unfortunate circumstance where a femoral stem failed. This was a coincidence of location." Dr. Neff stated that the opinion was substantiated by "literally hundreds of lawsuits around the country, and a certain number of articles in the medical literature which discuss this circumstance." (Ex. G, p. 39)

At the request of his attorney Mr. Harris saw Robin Sassman, M.D., an occupational and environmental medicine doctor, for an IME on July 16, 2014. (Ex. 1) With regard to the date of injury in question her report states: "He was walking to untarp a truck. He states that he took a step with his right leg and fell landing on his right hip." (Ex. 1, p. 2) It is Dr. Sassman's opinion that "the fracture of the prosthetic hip and the need for the revision is directly and causally related to the incident that occurred on December 5, 2012. Supporting this opinion is the mechanism of injury being consistent in terms of direct trauma from the fall causing the failure." (Ex. 1, p. 6)

On December 15, 2014, Craig A. Dove, D.O. with St. Luke's Physical Medicine & Rehabilitation answered a series of questions from LL Pelling's attorney. Dr. Dove did not ever see Mr. Harris, but he did review numerous documents provided to him by defense counsel. Based on his records review Dr. Dove answered the following series of questions:

2) Your opinions in this case are based on your review of the records regarding Mr. Harris' work activities while employed by Iowa Gold Distributing at the time of the hip fracture.

Yes       No

3) If while performing his job activities while employed by Iowa Gold Distributing Mr. Harris was actually "stepping up on the side of the truck" "to take a tarp off at the landfill and had his "weight" on his "right leg," and

then fell backwards to the ground on his hip as described by Mr. Harris, then I believe that the work activity at Iowa Gold Distributing caused the hip failure and specifically the femoral neck fracture. of prosthetic hip.

Yes       No

4) If Mr. Harris was stepping on the first step of his truck by pulling himself up and putting his weight on this right foot and then fell backwards to the ground on his hip, then it is my opinion that Mr. Harris' work activity at Iowa Gold Distributing was a substantial cause of the hip failure.

Yes       No

5) If Mr. Harris fell off the truck step of the truck he drove for Iowa Gold Distributing and onto the ground then that fall could have caused the femoral neck to fracture and fail. of prosthetic hip.

Yes       No

(Ex. 4, pp. 18-19)

Unfortunately, based on Exhibit 4 it is not clear what the basis or rationale is for any of Dr. Dove's opinions. Given that Dr. Dove has never interviewed or examined Mr. Harris and he failed to provide any rationale or basis for his opinions it is difficult to give much weight to his opinions. I do not find the opinions of Dr. Dove to be helpful.

In the present case, I also do not find the opinions of Dr. Sassman to be persuasive. It is her opinion that Mr. Harris fell to the ground and the impact is what caused the need for the revision surgery. I note Dr. Sassman's report never indicates what caused the claimant to fall. In the history section of the report she states Mr. Harris was "walking to untarp a truck. He states that he took a step with his right leg and fell landing on his right hip." (Ex. 1, p. 2) Dr. Sassman did not have the opportunity to evaluate Mr. Harris until July 16, 2014, approximately 18 months after the injury. The history she relies on does not fit with the medical records or the statement of Mr. Harris that were generated closer in time to the date of the injury. There is no mention of stepping up to the truck, of the hip giving way, or the hip catching. Additionally, Dr. Sassman's opinions are not persuasive because the report does not demonstrate that she understands the complexity of the factual situation in this matter. Her report does not show that she gave any consideration to the type of implant that Mr. Harris had at the time of the injury and whether the type of implant he had played a role in the events of December 5, 2012. Dr. Sassman's opinions regarding causation are given little to no weight.

I find the opinions of Dr. Naylor and Dr. Neff carry the greatest weight. Both are orthopaedic surgeons, and their opinions are consistent with one another. Furthermore, both surgeons provided their opinions and the basis for them. It is Dr. Neff's opinion



that claimant's hip condition is not related to his work. Dr. Neff stated: "This situation is unfortunate and has resulted from a failure of the mechanical construct. It is not in any way related to simply stepping up into a vehicle or truck or a work injury. This is simply a coincidence of location." (Ex. G, p. 29) Dr. Neff's opinion is consistent with that of Dr. Naylor's opinion. Dr. Naylor cannot state within a reasonable degree of medical certainty that the work activities for Iowa Gold were a substantial factor in causing the neck of the prosthesis to fail. Dr. Naylor opined the cracking of the neck of the prosthesis was more related to the original injury which necessitated the total hip replacement in February of 2008 than to claimant's work at Iowa Gold. In this case, there simply is no reliable expert opinion to support claimant's contention that he sustained an injury to his hip arising out of and in the course of his employment with Iowa Gold on December 5, 2012. Rather, the expert opinions of Dr. Neff and Dr. Naylor demonstrate that the fracture of the prosthesis is related to the original hip injury of July 26, 2006. Therefore, I find that the December 5, 2012 fracture of the prosthesis is related to the original injury of July 26, 2006. Claimant has failed to show he sustained an injury that arose out of his employment on December 5, 2012.

Because claimant failed to show he sustained an injury to his right hip which arose out of and in the course of his employment with Iowa Gold on December 5, 2012 the remaining issues regarding weekly and section 85.27 medical benefits are rendered moot.

With regard to the initial injury date of July 26, 2006, claimant is seeking payment for medical expenses as set forth in Exhibit 10. The parties entered into a prior settlement which ended any entitlement to weekly indemnity benefits claimant may have had as a result of his July 26, 2006 claim. However, the settlement did not affect claimant's entitlement to medical benefits for the right hip pursuant to the terms and conditions of section 85.27. Claimant has shown that the fracture of his hip prosthesis is related to the July 26, 2006 injury. The only dispute with regard to the medical bills was whether the treatment was the result of the July 26, 2006 injury or the alleged December 5, 2012 injury. Based on the finding that the fracture was the result of the December 5, 2012 injury I find that LL Pelling is also responsible for the medical bills and treatment contained in Exhibit 10.

The next issue to address is whether claimant is entitled to reimbursement from Iowa Gold for the expense of Dr. Sassman's IME. Iowa Gold argues claimant is not entitled to reimbursement because the provisions of Iowa Code section 85.39 were not met. Specifically, at the time of Dr. Sassman's IME no physician retained by the defendants had issued an impairment rating. Defendants argue that there was no triggering instance of a low impairment rating. Defendants cite Dodd v. Fleetguard, Inc., 759 N.W.2d 133, 139-40 (Iowa App. 2008) as holding that there must be a rating even if the claimant's claim has been denied. The undersigned does not see such a holding in the Dodd case, and indeed the holding would be contradictory because a denied claim should not result in any impairment rating. Indeed, a rating of no impairment is determined to be a rating. Vaughn v. Iowa Power Inc., File No. 925283 (Arb.

Dec. 1992). Dr. Neff's December 30, 2013 opinion that claimant's hip injury was not related to the work injury is sufficient to trigger defendants' responsibility under Iowa Code section 85.39. According to the evidentiary record, Dr. Sassman's IME was performed on July 16, 2014. Therefore, I find claimant has shown entitlement to reimbursement for the IME pursuant to Iowa Code section 85.39.

Because claimant generally did not prevail in the matter of the alleged December 5, 2012 injury I find it is not appropriate to award claimant costs in File No. 5045405.

Claimant filed a petition seeking medical benefits for the July 26, 2006 date of injury and did prevail on that issue. Therefore, I find an assessment of costs pursuant to rule 876 IAC 4.33 is appropriate. Claimant submitted a statement of costs.

First, claimant is seeking reimbursement for expert witness fees for Dr. Sassman (\$2,150.00) and Dr. Naylor (\$250.00) for a total of \$2,400.00. Agency rule 876 IAC 4.33(6) permits the assessment of the expense of obtaining reports from two practitioners. The expert fee sought for Dr. Sassman has been ordered to be reimbursed pursuant to Iowa Code 85.39 to claimant by Iowa Gold and therefore is no longer an issue. It appears the \$250.00 fee for Dr. Naylor is appropriate and therefore will be awarded. LL Pelling shall reimburse claimant for the \$250.00 fee for Dr. Naylor.

Claimant is also seeking recovery of \$278.90 for the procurement of necessary testimony and records. This is not a recovery allowed under Rule 4.33, and therefore, I find it is not appropriate to assess this as a cost.

Claimant is seeking reimbursement for his filing fees with the agency in the amount of \$200.00. I find that it is appropriate for claimant to be reimbursed for the filing fee on the claim he was successful on. Therefore, LL Pelling shall reimburse claimant in the amount of \$100.00 for the filing fee.

#### CONCLUSIONS OF LAW

The claimant has the burden of proving by a preponderance of the evidence that the alleged injury actually occurred and that it both arose out of and in the course of the employment. Quaker Oats Co. v. Ciha, 552 N.W.2d 143 (Iowa 1996); Miedema v. Dial Corp., 551 N.W.2d 309 (Iowa 1996). The words "arising out of" referred to the cause or source of the injury. The words "in the course of" refer to the time, place, and circumstances of the injury. 2800 Corp. v. Fernandez, 528 N.W.2d 124 (Iowa 1995). An injury arises out of the employment when a causal relationship exists between the injury and the employment. Miedema, 551 N.W.2d 309. The injury must be a rational consequence of a hazard connected with the employment and not merely incidental to the employment. Koehler Electric v. Wills, 608 N.W.2d 1 (Iowa 2000); Miedema, 551 N.W.2d 309. The Iowa Supreme Court has stated: "injuries that occur in the course of employment or on the employer's premises do not necessarily arise out of employment." Miedema, 551 N.W.2d 309, 311; Lakeside Casino v. Blue, 743 N.W.2d

169, 174 (Iowa 2007). For an injury to arise out of employment, there must be some causal nexus between the nature of that employment and the risk which gives rise to the injury. Thayer v. State, 653 N.W.2d 595, 600 (Iowa 2002). An injury occurs "in the course of" employment when it happens within a period of employment at a place where the employee reasonably may be when performing employment duties and while the employee is fulfilling those duties or doing an activity incidental to them. Ciha, 552 N.W.2d 143.

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

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

The preponderance of the evidence does not show that the December 5, 2012 injury arose out of the employment with Iowa Gold. The evidence does not show that his work at Iowa Gold was the cause or source of his injury. There is no reliable expert medical opinion to prove there was a causal relationship between the fracture of the neck of the prosthesis and his stepping up onto a truck. Rather, based on the above findings I found the failure of the prosthesis was related to the July 26, 2006 injury which necessitated the total hip arthroplasty.

As the record demonstrates, the claimant and defendants for the July 26, 2006 injury previously entered into a compromise settlement but left the claimant's medical benefits open. Under Iowa Code section 85.27, the employer shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance, and hospital services and supplies for all conditions compensable under the workers' compensation law. Based on the above findings, LL Pelling is responsible for the bills contained in Exhibit 10.

Section 85.39 permits an employee to be reimbursed for subsequent examination by a physician of the employee's choice where an employer-retained physician has previously evaluated "permanent disability" and the employee believes that the initial evaluation is too low. Based on the findings above, I conclude that Iowa Gold is responsible for reimbursing claimant for the IME performed by Dr. Sassman.

Pursuant to rule 876 IAC 4.33, costs are to be assessed at the discretion of the deputy commissioner or workers' compensation commissioner hearing the case unless otherwise required by the rules of civil procedure governing discovery. Claimant failed to establish that he is entitled to any additional weekly benefits as a result of the December 19, 2012 injury. Generally, claimant did not prevail in this matter. Therefore, I conclude that it is not appropriate to assess claimant's costs in this action.

Pursuant to rule 876 IAC 4.33, costs are to be assessed at the discretion of the deputy commissioner or workers' compensation commissioner hearing the case unless otherwise required by the rules of civil procedure governing discovery. Based on the above findings, I conclude that LL Pelling shall reimburse claimant's costs in the amount of \$350.00.

#### ORDER

THEREFORE, IT IS ORDERED:

**File No: 5034392 (DOI: 7/26/06) (LL Pelling Co., Inc. and The Cincinnati Insurance Companies):**

That defendants are ordered to pay for the reasonable medical care of the injury to claimant's right hip, which was the result of a work injury suffered on July 26, 2006.

That defendants are ordered to pay three-hundred fifty and no/100 dollars (\$350.00) under Rule 876 IAC 4.33.

That defendants are ordered to pay the medical costs including medical bills and mileage incurred as a result of treatment for injuries to the claimant's right hip caused by a work injury of July 26, 2006.

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.

**File No.: 5045405 (DOI: 12/05/12) (Iowa Gold Distributing and Liberty Mutual Ins. Co.):**

That defendants are ordered to pay two-thousand one-hundred fifty and no/100 dollars (\$2,150.00) for Dr. Sassman's IME under Iowa Code section 85.39.

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 20<sup>th</sup> day of March, 2015.



---

ERIN Q. PALS  
DEPUTY WORKERS'  
COMPENSATION COMMISSIONER

Copies To:

Emily Anderson  
Attorney at Law  
425 – 2<sup>nd</sup> St. SE, Ste. 1140  
Cedar Rapids, IA 52401  
[eanderson@fightingforfairness.com](mailto:eanderson@fightingforfairness.com)

J. Richard Johnson  
Attorney at Law  
1636 – 42nd St. NE  
Cedar Rapids, IA 52402  
[rjohnson@jllawplc.com](mailto:rjohnson@jllawplc.com)

Jeffrey W. Lanz  
Attorney at Law  
2700 Westown Pkwy, Ste. 170  
West Des Moines, IA 50266  
[jlantz@desmoineslaw.com](mailto:jlantz@desmoineslaw.com)

EQP/sam

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