BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JUAN PABLO LOPEZ, Claimant, vs. MAPLE VALLEY FEEDERS CO., Employer, and GRINNELL MUTUAL REINSURANCE CO., Insurance Carrier, Defendants.	File No.1663048.01 ARBITRATION DECISION Head Note Nos. 1108, 1803, 2500

STATEMENT OF THE CASE

The claimant, Juan Pablo Lopez, filed a petition for arbitration and seeks workers' compensation benefits from Maple Valley Feeders Company, employer, and Grinnell Mutual Reinsurance Company, insurance carrier. The claimant was represented by Willis Hamilton. The defendants were represented by Aaron Oliver

The matter came on for hearing on October 8, 2020, before Deputy Workers' Compensation Commissioner Joe Walsh via Court Call video conferencing system. The record in the case consists of Joint Exhibits 1 through 7, Claimant's Exhibits 1 through 3, and Defense Exhibits A through M. The claimant testified at hearing, in addition to Devon Wiig. Jane Fitzgerald was appointed the official reporter. The matter was fully submitted on November 16, 2020, after helpful briefing by the parties.

ISSUES

The parties submitted the following issues for determination:

1. Whether the claimant sustained an injury which arose out of and in the course of his employment on March 10, 2019.

2. Whether the alleged injury resulted in any permanent disability.

3. The nature and extent of any permanent partial disability, if any, including the commencement date for benefits.

4. Whether claimant is entitled to any medical treatment for his low back condition.

5. Whether the claimant is entitled to 85.39 IME expenses.

6. The claimant's appropriate rate of compensation and specifically, claimant's marital status and exemptions.

STIPULATIONS

Through the hearing report, the parties stipulated to the following:

1. The parties had an employer-employee relationship on the date of the alleged injury.

2. Claimant is not seeking any temporary disability benefits at this time.

3. Claimant is not seeking payment of past medical expenses.

4. The claimant's gross earnings at the time of injury were $665.40 per week.

5. There is no credit issue. This is a denied claim and no benefits have been paid.

6. Affirmative defenses have been waived.

FINDINGS OF FACT

Juan Pablo Lopez (hereafter, Mr. Lopez) was 51 years old as of the date of hearing. He was referred to as both Juan and Pablo throughout the hearing. He has resided in Correctionville, Iowa for the past 15 years. He testified live and under oath at hearing. His credibility is a key issue in the case and shall be discussed in more detail below. I find him to be generally credible although he was not a stellar historian, nor a particularly sophisticated witness.

Mr. Lopez testified at hearing that he is married with two minor children at home. While he and his wife never had a wedding ceremony, he testified they have lived together for 15 years as husband and wife and she relies on him for support. He testified that he has two older children who live with their mother in Nevada. He testified that he is required to pay child support for the older children. In an answer to interrogatory dated September 2020, Mr. Lopez listed himself as single with 2 dependents. (Claimant's Exhibit 3, page 34) There are no tax records in evidence, or any other evidence of marital status or dependents.

Mr. Lopez came to the United States as a child. He graduated from high school in California. This is the extent of his formal education. He speaks English fluently. His work history is primarily manual labor, including operating a forklift and working in a packing plant. He began working for Maple Valley Feeders in 2014.

Maple Valley Feeders is a confined hog feeding facility which focuses on farrowing hogs. Mr. Lopez performed a number of manual labor tasks with baby pigs, which generally weighed around 20 pounds. He was required to feed and inoculate them. He was required to clean their area, including using a power washer. He repaired damaged crates and removed dead hogs when necessary. I find the job required a strong back and was otherwise physically demanding. He was paid a salary, rather than on an hourly basis.

Mr. Lopez testified that on March 10, 2019, he sustained an injury to his low back which arose out of and in the course of his employment. He testified specifically that while he was moving a heavy feed cart, he turned the cart wrong and heard (and felt) a snap in his back. (Transcript, page 34) This occurred on a Sunday, so no supervisor was present. He testified that he informed his co-worker, John, of the injury and eventually spoke to his supervisor, Doug, on the phone.

Q. And did you report to anybody else at Maple Valley?

A. Well, that day I left I think I called Doug. He is the second supervisor.

(Tr., p. 35) Mr. Lopez told him of the injury. "He told me to go to the chiropractor the next day, that he was going to take care of the paperwork." (Tr., p. 36) Mr. Lopez testified that he was specifically directed to go to Kingsley Chiropractic by Doug. He testified that when his back had been hurt at work previously, the employer had directed him to this chiropractor and had taken care of the associated medical costs.

Brad Magill was the production manager for the employer. Devon Wiig also worked as a manager. Both testified under oath on behalf of the employer. They confirmed that the employer had a practice of paying for workers' medical bills at times since the employer does not offer medical insurance. (Tr., pp. 110, 122) Both witnesses denied they send injured employees to Kingsley Chiropractic for treatment of work injuries. In fact, both denied they even knew Mr. Lopez was claiming he was injured at work initially. Unfortunately, the supervisor named "Doug" did not testify.

The Kingsley Chiropractic records are in evidence. Mr. Lopez first sought treatment there on August 25, 2015. (Joint Exhibit 1, page 1) Grinnell Mutual is listed as the insurance company for this visit. (Jt. Ex. 1, p. 1) Mr. Lopez sought treatment for low back pain at that time. He sought treatment from Kingsley Chiropractic on at least two more occasions, September 27, 2016 and March 28, 2017; both of those visits also listed the insurance company as Grinnell Mutual. (Jt. Ex. 1, pp. 4-7) Mr. Lopez testified that on the previous occasions he sought low back treatment from Kingsley, it was for general work-related low back pain. (Tr., p. 84) In addition, while there is no office note, there is an "excused absence" form in evidence dated March 2, 2019, indicating Mr. Lopez was supposed to work light-duty until he was seen at Kingsley Chiropractic on March 14, 2019. (Jt. Ex. 1, p. 8) Mr. Lopez testified that this form was, in fact, for his low back. He testified he had some general low back pain which he believed was work-related a short time prior to his work injury. (Tr., p. 84)

Mr. Lopez testified that he went to the chiropractor on March 11, 2019, as directed by Doug. The insurance company is listed as Jim Harvey Insurance Agency. The following is documented.

> Juan presents today with a primary complaint of back pain. He describes having an immediate sharp pain in his lower back yesterday while pulling a heavy cart at work. He admits he has been having some back discomfort over the past month or so which he attributes to his daily activity but after yesterday he has been having more severe intense type pain than like anything before.

The chiropractor at Kingsley Chiropractic recommended adjustments a few times per week and other treatments on him including electrical stimulation, moist heat and cryotherapy. (Jt. Ex. 1, pp. 9-10) Mr. Lopez testified that he underwent this treatment for a period of time after the work injury and the employer paid for these expenses.

In addition, Mr. Lopez testified that on March 11, 2019, Kingsley Chiropractic provided him a work excuse. He testified that he took this work excuse to Doug at Maple Valley on that date. (Tr., p. 37) Mr. Lopez testified that after he provided the excuse to Doug, he spoke to Mr. Wiig. Mr. Wiig directed him to talk to Mr. Magill. (Tr., pp. 46-47) He testified that he understood Doug had already briefed Mr. Wiig about the work injury. When he talked to Mr. Wiig again, Mr. Wiig told him that "Brad [Magill] will take your two weeks' notice." (Tr., p. 47) Mr. Lopez testified he protested and denied this is what he had said, however, he did acknowledge that he may provide such a notice in the future.

Mr. Magill and Mr. Wiig both testified that they never saw any such work excuse. Mr. Magill testified that Jim Harvey Insurance Agency is the employer's insurance agent. (Tr., p. 123) Mr. Magill testified that he could not remember when he first learned that Mr. Lopez was claiming he was injured at work. (Tr., p. 124)

The employer contends Mr. Lopez voluntarily resigned his employment following his work injury. Mr. Wiig testified Mr. Lopez had ongoing attendance issues at work. He further testified Mr. Lopez called in on March 13, 2019 and gave his two-week notice. (Tr., pp. 98-99) Mr. Wiig testified he spoke to his boss, Mr. Magill, and the decision was made to accept his resignation and pay out his remaining vacation. Before Mr. Wiig could call Mr. Lopez back, Mr. Lopez called Mr. Magill. The employer's contemporaneous notes, written by Mr. Wiig, however, indicate that Mr. Lopez called in sick on March 11, 12, and 13. (Def. Ex. F, p. 12) These notes, prepared by Mr. Wiig, also indicate Mr. Lopez left a doctor's note on March 13, 2019. Mr. Wiig testified that he did not receive a doctor's slip. (Tr., p. 110)

Mr. Magill confirmed Mr. Wiig's testimony that Mr. Lopez called in on March 13 and provided his two-week notice. (Tr., p. 118) He also could not recall ever seeing the doctor's slip that is documented in the employer's personnel file. (Tr., p. 134) Mr. Magill acknowledged that the employer contested Mr. Lopez's unemployment claim and lost. He further clarified that Mr. Lopez asked if he could continue working until he

found another job and Mr. Magill denied this request. (Tr., p. 136)

I find that the greater weight of evidence supports a finding that Mr. Lopez sustained an injury which arose out of and in the course of his employment on March 10, 2019. I find that the employer likely directed Mr. Lopez to see a chiropractor at Kingsley Chiropractic. When Mr. Lopez was unable to work and presented a doctor's slip to this effect, the employer chose to terminate him.

There is some important information which is not in the record; for example, the doctor's slip which Mr. Lopez provided and the testimony of the supervisor named Doug. This information may have cleared up the gaps in evidence. I find, however, that it is most likely that this information was not favorable to the employer and that is why it is not in evidence. In making this finding, I am specifically not finding that the employer has been dishonest. There are a number of possibilities for what has occurred here. It is possible, for example, that Mr. Lopez provided the information of the work injury and the doctor's excuse to Doug and this was never relayed properly to Mr. Wiig and Mr. Magill due to misunderstanding or mistake. Nevertheless, based upon the evidence, which is actually in the record, I find it most likely that Mr. Lopez told his employer about the work injury and provided an excuse shortly after his work injury. The employer then initiated a termination of his employment. Moreover, this employer clearly had a practice of paying for workers' health treatment for minor injuries so they could return to work quickly. (Tr., pp. 110-111; 122) The medical notes at Kingsley Chiropractic listed both the employer's workers' compensation insurance company, as well as the employer's insurance agent. Mr. Lopez is not a particularly sophisticated individual. I find it highly unlikely that Mr. Lopez would have had the knowledge to provide this information to Kingsley Chiropractic without direction or assistance from the employer.

Regarding the injury itself, Mr. Lopez has been quite consistent in describing how the injury occurred. He testified that he had been having general back pain from working prior to the injury and then on March 10, 2019, experienced a "snap" in his back while pulling a heavy cart. (Tr., pp. 33-35) This is also what is reflected in his patient update form in his chiropractic records from the treatment the following day. (Jt. Ex. 1, p. 11) This is the same explanation documented by the chiropractor himself. (Jt. Ex. 1, p. 9) He saw his primary physician on March 15, 2019, and related the injury. Some of the specific details were mixed up in the medical note, however, the gist of it was consistent. (Jt. Ex. 2, pp. 27-28) He provided a consistent history to the specialist. (Jt. Ex. 3, p. 40) He provided a consistent history to his chosen IME physician. (Cl. Ex. 2, p. 20) His deposition testimony was also consistent. (Def. Ex. L, Lopez Depo, pp. 22-26)

Mr. Lopez testified that he followed through with the treatment at Kingsley Chiropractic. (Tr., pp. 37-39) He testified he followed the treatment plan, and it helped a little at the time, but did not resolve all his complaints. Those notes are not in evidence, however, there is a work release dated May 14, 2019, releasing him to normal activities. (Jt. Ex. 1, p. 12) He simultaneously began treating with his primary physician. He initially provided some medications and instructed him to continue to follow up with the chiropractor. (Jt. Ex. 2, p. 31) It is noted that Mr. Lopez had just

established care through this clinic on February 15, 2019. At that time, he had no complaints of back pain, however, he was experiencing and being treated for a host of other unrelated health problems. (Jt. Ex. 2, pp. 15-25) In April 2019, his primary provider prescribed hydrocodone, provided some activity restrictions and recommended radiographic testing. (Jt. Ex. 2, pp. 36-37) The x-rays showed degenerative changes. (Jt. Ex. 2, p. 39)

By September 2019, Mr. Lopez was finally evaluated by a back specialist at CNOS. He underwent an MRI and was fully evaluated under the direction of Michael Espiritu, M.D., on September 17, 2019. The diagnosis following the MRI was neuroforaminal stenosis of the lumbosacral spine. (Jt. Ex. 3, p. 46) Dr. Espiritu noted conservative care had failed and recommended an epidural steroid injection, which was performed subsequently. Mr. Lopez returned on November 5, 2019. It was noted that the injection helped for about three weeks and then the symptoms returned. Dr. Espiritu recommended surgery at this time. (Jt. Ex. 3, p. 49) Mr. Lopez testified that insurance would not cover the surgery. (Tr., pp. 40-41) He did also have some pain management and chiropractic care.

Mr. Lopez testified he drew unemployment for several months. The checks did not begin coming in for over a month, and in the meantime, Mr. Lopez testified he helped a relative of his wife with some scrapping activities to earn some income. (Tr., p. 53) The employer placed surveillance on Mr. Lopez and there is a surveillance video and photographs showing him engaging in this scrapping activity on May 25, 2019. (Def. Exs. K, M) The short video clip shows him loading some type of compressor on a truck by himself. Mr. Lopez testified that he was somewhat desperate for money at this time. Of course, he had been released at this point to resume normal activities. (Jt. Ex. 1, p. 11) In any event, this is evidence of his condition at that time. He was able to do some moderately heavy work.

Mr. Lopez eventually became employed with Windwalker Transportation in January 2020. He completed a training course and was approved for a commercial drivers' license in December 2019, passing a DOT physical. In his application with Windwalker, he certified that he would be able to complete the essential functions of the job, including lifting up to 60 pounds. (Def. Ex. J) He testified that he does not have to do this and that his job is to hook up the trailer and drive. There is no lifting. (Tr., pp. 29-32) He is an over-the-road driver.

Mr. Lopez testified that he still suffers from constant symptoms in his low back which causes numbness in the left leg. (Tr., p. 42) He testified that he manages by limiting his activities and taking breaks from driving. He continues to take Tramadol which is prescribed by his primary physician. At the time of hearing, he continues to work full time for Windwalker. He apparently earns 52 cents per mile. His net pay varied dramatically in 2020, however, he earned as much as $1,044.00 in a week. Many weeks, however, were under $500.00. (Def. Ex. J)

Robin Sassman, M.D., performed an independent medical evaluation on behalf of the claimant on August 12, 2020. (Cl. Ex. 2) She prepared an expert report on

September 3, 2020, which provided a number of expert medical opinions. She reviewed the appropriate records, took a medical history, and examined Mr. Lopez. She diagnosed low back pain with radiculopathy and assigned a 13 percent whole body impairment rating. (Cl. Ex. 2, pp. 25-26) She opined the condition is directly causally related to the work injury. I find that she did have a correct history of the work injury itself, as well as claimant's treatment prior to the injury. She recommended some medical restrictions which Mr. Lopez is not following. As noted, Mr. Lopez is working full duty without restrictions for Windwalker. She recommended Mr. Lopez return to Dr. Espiritu for further treatment including surgical consultation or further epidural steroid injections. She opined in the absence of further treatment he is at maximum medical improvement.

CONCLUSIONS OF LAW

The first and primary question submitted is whether the claimant sustained an injury which arose out of and in the course of his employment.

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" refer 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 Elec. v. Wills, 608 N.W.2d 1 (Iowa 2000); Miedema, 551 N.W.2d 309. 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.

A personal injury contemplated by the workers' compensation law means an injury, the impairment of health or a disease resulting from an injury which comes about, not through the natural building up and tearing down of the human body, but because of trauma. The injury must be something that acts extraneously to the natural processes of nature and thereby impairs the health, interrupts or otherwise destroys or damages a part or all of the body. Although many injuries have a traumatic onset, there is no requirement for a special incident or an unusual occurrence. Injuries which result from cumulative trauma are compensable. Increased disability from a prior injury, even if brought about by further work, does not constitute a new injury, however. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); Ellingson v. Fleetguard, Inc., 599 N.W.2d 440 (Iowa 1999); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995); McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985). An occupational disease covered by chapter 85A is specifically excluded from the definition of personal injury. Iowa Code section 85.61(4)(b); Iowa Code section 85A.8; Iowa Code section 85A.14.

I have detailed in my findings of fact the reasons that the greater weight of evidence supports a finding that claimant sustained an injury which arose out of and in the course of his employment. This is an intensely factual question. Much of the determination comes down to an assessment of Mr. Lopez's credibility. In essence, is he to be believed that he suffered this unwitnessed injury at work on a Sunday when his supervisor was not present?

The defendants attacked claimant's credibility from many angles. I find that Mr. Lopez was not a particularly reliable historian. He appears to sometimes estimate dates poorly and he is not a sophisticated witness. I believe he got confused on occasion answering questions both in his live hearing testimony as well as his deposition testimony.[1] He also may not have been Maple Valley's best employee, having significant attendance problems prior to his work injury. Having observed the claimant testify live, I believe him that he was in fact injured at work on March 10, 2019. His story is highly believable in part because his back had begun to hurt prior to the work injury. In fact, Kingsley Chiropractic had recommended on March 2, 2019, that he not engage in heavy pushing and pulling which is exactly what he was doing when his back "snapped." (Jt. Ex. 1, p. 8) Having considered all the evidence in the record, the greater weight of evidence supports the finding that this is precisely what happened.

The next issue is medical causation.

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

[1] *See* Def. Ex. L, Lopez Depo, pages 24-27. This is an excellent example of Mr. Lopez becoming confused by questions he was asked.

testimony cannot be summarily rejected. Poula v. Siouxland Wall & Ceiling, Inc., 516 N.W.2d 910 (Iowa App. 1994).

The employer correctly points out that Mr. Lopez had back issues prior to the March 10, 2019, work injury. (Jt. Ex. 1, pp. 1-7) Mr. Lopez contends these instances were work-related and that his condition improved on each occasion. He was, in fact, most likely sent to Kingsley Chiropractic by the employer in 2015, 2016 and 2017 to help him get back to work quicker. While there is no definitive evidence in the record that his condition at that time was work-related, claimant's expert, Dr. Sassman, clearly understood that he had been treated during this period when rendering her expert opinions. I find that the greater weight of evidence supports a finding that claimant's work injury was a substantial factor in his permanent disability.

The next issue is claimant's marital status and dependents which is necessary to determine his rate of compensation.

In calculating the rate of compensation, the injured worker's marital status and number of dependents entitled to be claimed are necessary. "The weekly benefit amount payable to any employee for any one week shall be upon the basis of eighty percent of the employee's weekly spendable earnings, . . ." Iowa Code Section 85.37 (2015) Weekly spendable earnings is defined as the amount remaining after payroll taxes are deducted from gross weekly earnings. Iowa Code Section 85.61(9) (2015).

Iowa Code Section 85.61(6) defines payroll taxes:

> "Payroll taxes" means an amount, determined by tables adopted by the workers' compensation commissioner pursuant to chapter 17A, equal to the sum of the following:
>
> a. An amount equal to the amount which would be withheld pursuant to withholding tables in effect on July 1 preceding the injury under the Internal Revenue Code, and regulations pursuant thereto, as amended, as though the employee had elected to claim the maximum number of exemptions for actual dependency, blindness and old age to which the employee is entitled on the date on which the employee was injured.

Iowa Code Section 85.61(6) (2019).

The agency "has long held that actual exemptions claimed on the income tax return controls. . . . A claimant is typically limited to those exemptions claimed on his tax returns." Kayser v. Farmers Cooperative Society, File No. 5034699 (Arb. March 13, 2012) *citing* DeRaad v. Fred's Plumbing & Heating, File No. 1134532 (App. Jan. 16, 2002) *and* Webber v. West Side Transport, Inc., File No. 1278549 (App. Dec. 20, 2002). In essence, the agency recognizes a presumption that the claimant is entitled to the number of exemptions which were actually claimed on their tax returns. The party seeking to overcome that presumption must present sufficient evidence at hearing to

rebut the presumption.

The claimant testified at hearing that he was married in March 2019, with four dependent children – two who live with him and two who he is required to pay support for. The claimant's tax returns are not in evidence. Mr. Lopez testified that he never had an actual marriage ceremony. He apparently contends he is married under the common law. He also testified his spouse did not work outside the home in March 2019 and was an actual dependent. The employer really presented no evidence on this topic. In an answer to interrogatory filed under oath and presented as an exhibit by the claimant, Mr. Lopez listed himself as single with two children. Having reviewed all of the evidence, I find that the claimant has failed to carry his burden of proof that he was married with four dependent children. The conflict between the claimant's interrogatory answer and his live, sworn testimony is unexplained. Of course, there may be a good explanation for this, however, it is not in the record. I find the best evidence of claimant's status is his interrogatory answer. Therefore I find he was single with three exemptions at the time of his injury.

The next issue is whether the claimant has suffered any permanency as a result of his work injury, and, if so, the extent of such disability.

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

Functional impairment is an element to be considered in determining industrial disability which is the reduction of earning capacity, but consideration must also be given to the injured employee's age, education, qualifications, experience, motivation, loss of earnings, severity and situs of the injury, work restrictions, inability to engage in employment for which the employee is fitted and the employer's offer of work or failure to so offer. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963); Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961).

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

Mr. Lopez was 51 years old as of the date of hearing. He has a high school diploma and speaks fluent English. He has a manual labor work history which is somewhat inconsistent. He sustained a low back injury which has resulted in some permanent impairment. While I accept Dr. Sassman's expert opinion that the condition is permanent, I suspect that her actual rating and recommended restrictions are excessive. She assigned a 13 percent whole body rating and significant lifting and activity restrictions. Her opinions, however, are the only such opinions in the record.

Mr. Lopez is not currently working under any medical restrictions and has demonstrated the ability to perform medium work, including intermittent scrapping in May 2019 and over-the-road truck driving in January 2020 through the time of hearing. He probably would have been able to return to work with this employer with some treatment had he not been terminated. At the time of hearing, he is able to perform higher paying full-time work as an over-the-road truck driver. There is very little lifting involved in the job, but the sitting does increase the radicular symptoms in his leg. He may need surgery in the future, however, the surgery recommendation is now outdated.

Considering all of the relevant factors of industrial disability, I find that claimant has sustained a 20 percent industrial disability as a result of his March 10, 2019, work injury. I conclude this entitles him to 100 weeks of compensation commencing March 11, 2019.

The next issue is future medical care.

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

Under Iowa law, the employer is required to provide care to an injured employee and is permitted to choose the care. Pirelli-Armstrong Tire Co. v. Reynolds, 562 N.W.2d 433 (Iowa 1997).

> [T]he employer is obliged to furnish reasonable services and supplies to treat an injured employee, and has the right to choose the care. . . . The treatment must be offered promptly and be reasonably suited to treat the injury without undue inconvenience to the employee. 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.

By challenging the employer's choice of treatment – and seeking alternate care – claimant assumes the burden of proving the authorized care is unreasonable. See Iowa R. App. P. 14(f)(5); Long v. Roberts Dairy Co., 528 N.W.2d 122 (Iowa 1995). Determining what care is reasonable under the statute is a question of fact. Id. The employer's obligation turns on the question of reasonable necessity, not desirability. Id.; Harned v. Farmland Foods, Inc., 331 N.W.2d 98 (Iowa 1983). In Pirelli-Armstrong Tire

Co., 562 N.W.2d at 433, the court approvingly quoted Bowles v. Los Lunas Schools, 109 N.M. 100, 781 P.2d 1178 (App. 1989):

> [T]he words “reasonable” and “adequate” appear to describe the same standard.
>
> [The New Mexico rule] requires the employer to provide a certain standard of care and excuses the employer from any obligation to provide other services only if that standard is met. We construe the terms "reasonable” and “adequate” as describing care that is both appropriate to the injury and sufficient to bring the worker to maximum recovery.

The commissioner is justified in ordering alternate care when employer-authorized care has not been effective and evidence shows that such care is “inferior or less extensive” care than other available care requested by the employee. Long, 528 N.W.2d at 124; Pirelli-Armstrong Tire Co., 562 N.W.2d at 437.

The employer has offered no medical treatment to the claimant other than Kingsley Chiropractic. I find that claimant has established appropriate medical care with Dr. Espiritu, a low back specialist. Dr. Espiritu shall be deemed the authorized treating physician should Mr. Lopez seek future treatment.

The next issue is whether the claimant is entitled to payment of an independent medical evaluation.

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. The section also permits reimbursement for reasonably necessary transportation expenses incurred and for any wage loss occasioned by the employee attending the subsequent examination.

Defendants are responsible only for reasonable fees associated with claimant's independent medical examination. Claimant has the burden of proving the reasonableness of the expenses incurred for the examination. See Schintgen v. Economy Fire & Casualty Co., File No. 855298 (App. April 26, 1991).

I find that the conditions precedent to receiving an 85.39 evaluation have been met. The employer denied the injury claim altogether but did authorize and pay for treatment with Kingsley Chiropractic in March 2019. In May 2019, Kingsley Chiropractic released Mr. Lopez with no activity restrictions, which I interpret as an assessment of no disability. At that time, Mr. Lopez was entitled to a second opinion IME.

ORDER

THEREFORE IT IS ORDERED:

Defendants shall pay the claimant one hundred (100) weeks of permanent partial disability benefits at the rate of four hundred thirty-nine and 91/100 ($439.91) per week commencing March 11, 2019.

Defendants shall pay accrued weekly benefits in a lump sum.

Defendants shall pay interest on unpaid weekly benefits awarded herein as set forth in Iowa Code section 85.30.

Dr. Espiritu is the authorized treating physician for future care.

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

Costs are taxed to defendant.

Signed and filed this _____25th____ day of June, 2021.

JOSEPH L. WALSH
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Willis Hamilton (via WCES)

Aaron Oliver (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 filed via Workers' Compensation Electronic System (WCES) unless the filing party has been granted permission by the Division of Workers' Compensation to file documents in paper form. If such permission has been granted, the notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 150 Des Moines Street, Des Moines, Iowa 50309-1836. The notice of appeal must be received by the Division of Workers' Compensation 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 legal holiday.