

## BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

PETER DUOK,

Claimant,

vs.

SEABOARD TRIUMPH FOODS, LLC,

Employer,

and

ACE AMERICAN INSURANCE CO.,

Insurance Carrier,  
Defendants.

File No. 21000113.01

## ARBITRATION DECISION

Headnotes: 1801, 1803, 2501, 2502

## STATEMENT OF THE CASE

Claimant, Peter Duok, filed a petition in arbitration seeking workers' compensation benefits from Seaboard Triumph Foods, LLC (Seaboard), employer, and Ace American Insurance Company, insurer, both as defendants. This matter was initially heard on April 14, 2022. Due to problems with internet connections for the translator, the hearing was continued and completed on May 3, 2022. Final submission of this case was on June 17, 2022.

The record in this case consists of Joint Exhibits 1 through 8, Claimant's Exhibits 1 through 9, Defendants' Exhibits A through D, and the testimony of claimant. Serving as interpreter was Goi Yol.

Because this hearing was conducted on two different dates, there are two different transcripts. Most of the hearing occurred on May 3, 2022. For clarity of the record, the hearing for May 3, 2022, is referred to as "transcript or Tr." The hearing occurring on April 14, 2022, is referred to in the record as "transcript, volume 1," or Tr., Vol. 1."

## STIPULATIONS

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 the injury is a cause of a permanent disability; and if so,
2. The extent of claimant's entitlement to permanent partial disability benefits.
3. Whether the injury is a cause of a temporary disability.
4. Commencement date of permanent partial disability benefits.
5. Rate.
6. Whether there is a causal connection between the injury and the claimed medical expenses.
7. Whether claimant is entitled to reimbursement for an independent medical evaluation (IME) under Iowa Code section 85.39.
8. Whether claimant is entitled to alternate medical care under Iowa Code section 85.27.
9. Costs.

### FINDINGS OF FACT

Claimant was 48 years old at the time of hearing. Claimant has lived in Ethiopia and South Sudan. Claimant immigrated to the United States in 1995 or 1996. His wife and children still live in Ethiopia. (Hearing Transcript pages 8-9; Claimant's Exhibit 6, pages 43-45) Claimant became a US citizen in 2006. (Ex. 6, p. 43)

Claimant has taken ESL classes. His native language is Nuer. Claimant graduated from high school in Minnesota. He has taken classes to become a minister. (Tr., pp. 34-35, 76; Ex. 6, pp. 43-45)

Claimant has worked as a minister and on meat production lines for different companies. Claimant has had periods of employment where he worked both in meat processing jobs and as a pastor.

Claimant began employment with Seaboard on or about December 10, 2018. Claimant began working as a dry back – leaf lard puller. Claimant said the job required him to stand on a metal platform. Claimant removed “leaf lard” from carcasses moving down the line on a chain. Claimant did this job with a machine that sucked fat off of carcasses. Claimant said he sometimes had to manually pull fat off of carcasses with his hands. Claimant said this job required him to work with approximately 1,050 carcasses an hour. (Ex. 8, p. 64; Tr. Vol. 1, p. 17) Claimant said the job was physically demanding. (Ex. 8, p. 64; Tr., p. 10; Tr. Vol. I, pp. 17-20)

On June 23, 2019, claimant went to pull down a pig carcass that was not properly set on a hook and slipped. Claimant fell on his left rear buttock and left leg. Claimant said he also lost consciousness when he fell. (Tr., pp. 10-12, 45)

Claimant was treated with the on-site nurse at Seaboard. Claimant had left knee and hip pain. (Ex. A, p. 12) Claimant returned to work the next day. (Tr., pp. 15, 52)

Claimant was seen at the nurse station at Seaboard between July 24, 2019, and July 28, 2019, with no change in his condition. On July 30, 2019, claimant requested to be seen by a doctor due to unresolved and continuing left knee and hip pain. (Ex. A, p. 12)

On July 31, 2019, claimant was evaluated at UnityPoint Health-St. Luke's Occupational Medicine by Sarah Plueger, PA-C, for lower back pain after a fall at work. Claimant had pain radiating down the left leg. Claimant was assessed as having left lower back pain and hip pain, left proximal forearm pain, and left hip osteoarthritis. Claimant was prescribed Naproxen and told to ice three times a day. He was also sent to physical therapy 2-3 times a week for four weeks for back and hip pain. (Joint Exhibit 2, pp. 9-10)

Claimant underwent physical therapy for his hip and low back from approximately July 31, 2019, through October 10, 2019. (JE 3) Claimant testified he worked during this period but was transferred to a fecal monitoring job. Claimant said he remained on the fecal monitoring job for approximately one year. (Tr., p. 17; Defendants' Exhibit A, page 11) Claimant said the fecal monitoring job was an easier position. (Tr., p. 35) He testified he was able to do his job and did not require any accommodation. (Tr., pp. 51-52)

On September 10, 2019, claimant returned to physician's assistant Plueger. Claimant indicated his pain had resolved. Records indicate claimant had no pain or concerns. Claimant was advised to continue with physical therapy. Claimant was released to return to work at full duty. (JE 2, pp. 17-19)

Claimant testified at hearing physician's assistant Plueger told him, on September 10, 2019, his hip was broken. (Tr., p. 49)

In an October 7, 2019, report, Douglas Martin, M.D., gave his opinions of claimant's condition following an IME. Claimant indicated he continued to have issues with left hip and left elbow pain. (Ex. B, pp. 1-3) A review of claimant's x-rays showed advanced degenerative changes in claimant's left hip. (Ex. B, p. 3)

Dr. Martin did not have any further care recommendations. Given his advanced degenerative joint disease of the left hip, Dr. Martin suggested claimant required further orthopedic evaluation. (Ex. B, p. 5)

Dr. Martin found claimant had no permanent impairment from the July 2019 fall at work. He found that claimant was at maximum medical improvement (MMI). He agreed claimant could be returned to work as of September 10, 2019. (Ex. B, pp. 6-7)

On October 16, 2019, claimant had his last physical therapy appointment. Claimant was found to have “. . . significant difficulty with standing and weightbearing on the LLE. Pt has extreme pain at the hip and LE when performing his job demands.” (JE 3, p. 57) Claimant was released from physical therapy on that date. (JE 3, p. 57)

On August 24, 2020, claimant was involved in a motor vehicle accident and hit a truck while turning into the Seaboard facility. (Ex. 9, p. 68; Tr., pp. 22-23) Claimant worked his shift. Claimant said the accident aggravated his symptoms. (Tr., p. 23) Claimant said he worked all day, then reported the accident to the plant nurse. After work, claimant went to Siouxland Community Health Center (Siouxland). (Tr., pp. 23-24)

On August 24, 2020, claimant was evaluated at Siouxland by Elizabeth Wessling, PA-C. Claimant had left hip and knee pain and had chronic left hip and knee pain. Claimant was taken off work until August 26, 2020. (JE 4, pp. 60-65)

On August 31, 2020, claimant was evaluated by Zachary Boltjes, D.C., at Meylor Chiropractic. Claimant had lower back and left hip pain. Claimant said the pain began in 2009 after twisting wrong. (JE 5, p. 95)

Claimant testified the notes from Meylor Chiropractic are mistaken and he told the doctor there that his pain began in 2019 after a fall at work. Claimant said he also told Dr. Boltjes that he broke his hip in the fall at work. (Tr., p. 59) Claimant said Dr. Boltjes recommended he have hip surgery. (Tr., pp. 59-60) There is no mention of surgery in the records from Dr. Boltjes.

Claimant testified he was given work boots by Seaboard that were too small. He said the boots caused sores on his legs. (Tr., pp. 20-21) On September 28, 2020, claimant was evaluated at Siouxland by physician's assistant Wessling. Claimant was assessed as having open wounds on the right leg. He was taken off work from September 28, 2020, through October 4, 2020. (JE 4, pp. 67-73)

Claimant said he thought the off-work note, from P.A. Wessling, was sent to Seaboard. (JE 4, p. 73) Claimant did not return to work at Seaboard on October 5, 2020. He said he did not return to work on October 5, 2020, because Kevin Liudahl, M.D., had signed a note for him for short-term disability and that claimant needed to take this time off for hip surgery. (Tr., p. 63)

The record indicates that claimant did not see Dr. Liudahl until October 27, 2020, or approximately 22 days after claimant was to return to work on October 6, 2020. (JE 6)

On October 8, 2020, claimant returned to Siouxland for open wounds of the right leg. Claimant was evaluated by Elizabeth Pratt, ARNP. Claimant was treated with medication. (Ex. A, pp. 7-8) The records suggest claimant was taken off work until on or about October 15, 2020. (Ex. A, p. 7; JE 4, p. 79) Claimant did not tell Seaboard regarding the off-work excuse slip as he believed a letter was sent to his employer. (Tr., p. 64)

On October 15, 2020, claimant returned to Siouxland and was evaluated by Amy Payne, PA-C. Claimant complained of left hip pain. Claimant was referred to Tri-State Orthopedics for severe left hip arthritis. (JE 4, pp. 77-81)

Defendant employer's records indicate that claimant was off work from October 14, 2020, through October 21, 2020, as a no call/no show. (Ex. A, p. 21) On October 22, 2020, claimant was terminated due to absenteeism. (Ex. A, p. 16)

On October 27, 2020, claimant was evaluated by Dr. Liudahl for left sciatic-like pain. Claimant indicated pain came from the lower back to his legs. Claimant was assessed as having an atypical appearance of end-stage arthritis. Dr. Liudahl recommended an MRI of the left hip and aspiration of the hip and other diagnostic testing. (JE 6, pp. 112-114) Claimant was given a work slip to return to work full duty. Claimant's condition was not found to be work related. (JE 6, p. 116)

Claimant returned to Siouxland on October 29, 2020, and was evaluated by physician's assistant Payne. Claimant was assessed as having arthritis of the left hip. (JE 4, p. 91)

On November 2, 2020, claimant underwent an MRI of the left hip. The MRI showed severe hip osteoarthritis. (JE 6, pp. 121, 123) On the same date, Dr. Liudahl completed FMLA certification forms for claimant. Dr. Liudahl indicated it was unknown if claimant's condition was work related. (JE 6, p. 119) Dr. Liudahl opined claimant would be incapacitated from October 27, 2020, through November 27, 2020. (JE 6, p. 119)

Claimant testified because of the new work restrictions, and due to a union representative's intervention, Seaboard reinstated claimant's employment effective October 26, 2020, given the pending FMLA leave. (Tr., pp. 30-32, 67-71)

Claimant returned to Dr. Liudahl on November 3, 2020, in follow-up. Claimant's MRI showed severe left hip osteoarthritis. Dr. Liudahl again requested aspiration of the left hip and other diagnostic testing. Dr. Liudahl assessed claimant as having osteoarthritis of the left hip, but the severity and ethnicity of claimant made him concerned about the cause of the osteoarthritis. Dr. Liudahl again recommended further diagnostic testing. (JE 6, pp. 122-124)

Claimant did not return to work to Seaboard after November 27, 2020. Claimant was terminated from employment on November 30, 2020, for failure to return to work after his FMLA leave had expired. (Ex. A, p. 22) Claimant testified he did not return to work because his doctor told him he would require surgery. (Tr., p. 69) He testified a union representative told him Seaboard would never allow him to return to work. (Tr., p. 70) He also testified the union representative told him he could return to work at Seaboard if he reapplied for the job. (Tr., p. 71)

Claimant testified he does not think Seaboard would rehire him as he has a broken hip. (Tr., p. 78)

In a January 12, 2022, report, Sunil Bansal, M.D., gave his opinions of claimant's condition following an independent medical examination (IME). Claimant had back pain

radiating down both legs to his knees. He had numbness and tingling in both legs. Claimant had left hip pain. (Ex. 1, pp. 7-8)

Dr. Bansal assessed claimant as having a concussion, left-sided sacroiliitis, and an aggravation of left hip degenerative joint disease. He found claimant at MMI as of January 4, 2022. (Ex. 1, p. 10)

Dr. Bansal opined claimant aggravated his left hip condition after his July 23, 2019, fall at work. (Ex. 1, p. 11) He opined the mechanism of claimant's fall "... is also consistent with development of acute left-sided sacroiliitis." (Ex. 1, p. 12)

Dr. Bansal found claimant had a 10 percent permanent impairment to the body as a whole for the left hip condition, and a 5 percent permanent to the body as a whole for his lower back condition. He restricted claimant to no sitting or standing more than 20 minutes at a time and no lifting greater than 25 pounds. He recommended claimant avoid frequent bending, twisting, kneeling, or squatting. (Ex. 1, p. 13)

In a February 17, 2022, report, Dr. Martin gave his opinions of claimant's condition following a records review. Dr. Martin noted he found inconsistencies in Dr. Bansal's IME. He opined Dr. Bansal failed to make a complete range of motion evaluation for claimant's left hip. Dr. Martin also found it inappropriate to give a rating for claimant's left hip as claimant was allegedly a candidate for left hip replacement. (Ex. B, p. 9)

Dr. Martin believed claimant was at MMI on September 10, 2019. He found that any treatment claimant received between October 7, 2019 through April 22, 2021, was not necessary to treat the work injury. He opined claimant had no permanent impairment. Dr. Martin reiterated that claimant's left hip condition was pre-existing and not caused by the July 23, 2019, work injury. He opined that claimant did not require future medical care or permanent restrictions for the July 23, 2019, work injury. (Ex. B, pp. 9-10)

In a March 16, 2020, supplemental report, Dr. Bansal opined that claimant's fall at work aggravated his left hip condition. Dr. Bansal did not change his opinions regarding causation of claimant's injury or his permanent impairment. (Ex. 1, pp. 14-15)

In a March 24, 2022, supplemental report, Dr. Martin responded to Dr. Bansal's March 16, 2020, report. Dr. Martin indicated that if there was a posttraumatic component to claimant's osteoarthritic hip condition, there would have been an acute abnormality on imaging studies to support that position. Dr. Martin noted imaging studies did not support this component to claimant's osteoarthritis hip condition. (Ex. B, p. 11)

Dr. Martin reiterated that a rating could not be provided to claimant's hip as he is not yet at MMI because claimant will likely require hip replacement. (Ex. B, p. 12) He noted Dr. Bansal's range of motion measurements for the back were normal, and they did not support a finding that claimant had permanent impairment to the lumbar spine. (Ex. B, p. 12) He also noted Dr. Bansal failed to include a range of motion measurement for claimant's sacral hip flexion, suggesting an incomplete IME. (Ex. B, p.

12) He also noted that Dr. Bansal's evaluation of claimant's lumbar spine indicated normal range of motion with no neurological problems and no strength deficits. Dr. Martin contended that Dr. Bansal's documentation suggested claimant has no permanent impairment regarding the lumbar spine. (Ex. B, p. 12)

Claimant testified he has not worked since being terminated from Seaboard. (Tr., p. 34) He said he has applied for jobs with Smithfield, Tyson, and Wal-Mart, but has not been hired. (Tr., p. 76) Claimant said that, at the time of hearing, he volunteers with his church. Claimant also takes classes in English and in computer writing at a community college. (Tr., pp. 35, 75-76) Claimant testified he believes he is not being hired for the jobs he has applied for as he has a broken hip. (Tr., pp. 76-77)

The fourteen weeks claimant worked before his injury are detailed below:

Week #	Pay Date	Pay Rate	Reg Hrs	OT Hrs	Holiday	Hours	Total
1	7/26/2019	\$16.70	39.73	10.27		50.34	\$840.68
2	7/19/2019	\$16.70	39.73	10.13		50.20	\$838.34
3	7/12/2019	\$16.70	39.73	21.48	10.00	71.66	\$1,201.72
4	7/5/2019	\$16.70	39.73			40.27	\$672.51
5	6/28/2019	\$16.70	39.73	10.27		50.34	\$840.68
6	6/21/2019	\$16.70	39.73	10.27		50.34	\$840.68
7	6/14/2019	\$16.70	39.73	10.27		50.34	\$840.68
8	6/7/2019	\$16.70	39.73	10.27	10.00	60.34	\$1,007.68
9	5/31/2019	\$16.70	39.73	10.27		50.34	\$840.68
10	5/24/2019	\$16.70	39.73	10.27		50.34	\$840.68
11	5/17/2019	\$16.70	39.73	14.17		54.30	\$906.81
12	5/10/2019	\$16.70	30.00		20.00	50.67	\$851.19
13	5/3/2019	\$16.70	39.73	10.27		50.34	\$840.68
14	4/26/2019	\$16.70	39.67	28.97		69.14	\$1,159.64

(Ex. 7, p. 49; Ex. C)

### CONCLUSION OF LAW

The first issue to be determined is whether claimant's injury is the cause of a permanent disability.

The party who would suffer loss if an issue were not established has the burden of proving that issue by a preponderance of the evidence. Iowa R. App. P. 6.904(3).

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 parties stipulate that claimant had an injury that arose out of and in the course of employment on July 23, 2019. The parties dispute whether claimant's injury resulted in a permanent disability.

After his date of injury, claimant was transferred to a fecal monitoring position and worked in that job from approximately July 31, 2019, until October 10, 2020, as per the hearing report. (Claimant's Post-Hearing Brief, page 15) Claimant testified the fecal monitoring job was physically easier than his prior position. (Tr., p. 35) Other than his testimony, there is no evidence in the record that the fecal monitoring position was light-duty work.

In an October 7, 2019, report, Dr. Martin found claimant was at MMI. He also found claimant had no permanent restrictions and no permanent impairment from the July 23, 2019, date of injury. At the time of the report, claimant still complained of left hip and left elbow pain. Based, in part, on imaging studies, Dr. Martin found that claimant had advanced degenerative changes in his left hip, not related to the July 23, 2019, date of injury. (Ex. B, pp. 1-7)

Claimant was released from physical therapy on October 16, 2019. At that time, claimant still had pain in the left hip. There is no opinion in the physical therapy report if claimant's issues with his left hip were caused by osteoarthritis or by the work injury. (JE 3, p. 53)

From October 16, 2019, until on or about August 24, 2020, claimant worked at Seaboard in the fecal monitoring position. There is no evidence claimant sought medical treatment for his hip or lower back during this period of time. In brief, claimant worked over 300 days after being released from care without any medical treatment for his hip or lower back.

On August 24, 2020, claimant was involved in a motor vehicle accident. It was only after the August 24, 2020, motor vehicle accident that he began seeking additional treatment for his left hip.



Three experts have opined regarding the causation of claimant's left hip pain after August 24, 2020. Dr. Liudahl, an orthopedic surgeon, examined claimant on at least two occasions. Dr. Liudahl assessed claimant as having end-stage arthritis. (JE 6, pp. 112-114) On October 27, 2020, Dr. Liudahl indicated claimant's hip and lower back condition was not work related. (JE 6, p. 116) Dr. Liudahl indicated it was unknown if claimant's condition was work related on November 2, 2020, in the FMLA paperwork. (JE 6, p. 119)

Dr. Martin saw claimant once for an IME. He also opined that claimant's left hip condition was a pre-existing condition not caused or materially aggravated by the July 23, 2019, work accident. (Ex. B, pp. 9-10) His opinion was based, in part, on the finding that if there was a posttraumatic component to claimant's osteoarthritic hip condition, an acute abnormality would have appeared on imaging studies. Dr. Martin noted that imaging studies did not support that claimant's July 23, 2019, injury caused or aggravated his osteoarthritic condition in his hip. (Ex. B, p. 11)

Dr. Bansal evaluated claimant once for an IME. Dr. Bansal opined that claimant aggravated his left hip condition from the July 23, 2019, fall. He also diagnosed claimant with having left-sided sacroiliitis caused by the July 23, 2019, fall. (Ex. 1, pp. 12, 14-15)

Dr. Bansal's opinion regarding causation of claimant's left hip and alleged sacroiliitis is problematic for several reasons. As noted above, claimant was released to return to work in mid-October of 2019. He did not seek medical treatment for his lower back or left hip until sometime after the August 24, 2020, motor vehicle accident. Dr. Bansal offers no rationale or explanation for the ten-month gap in treatment, or why the August 24, 2020, motor vehicle accident is not an intervening cause.

Second, as noted, Dr. Bansal found that claimant sustained an acute left-sided sacroiliitis from the July 23, 2019, fall. (Ex. 1, p. 12) No other medical provider has assessed claimant as having acute left-sided sacroiliitis. Dr. Liudahl, the orthopedic specialist, did not opine that claimant had an acute left-sided sacroiliitis.

Third, as noted by Dr. Martin, imaging studies do not support a posttraumatic component to claimant's osteoarthritic hip condition. (Ex. B, p. 11) Dr. Bansal offers no response to the lack of support for causation in imaging studies.

Finally, as noted in Dr. Martin's supplemental report, Dr. Bansal's range of motion studies for claimant's lumbar spine suggest that claimant had a normal range of motion. (Ex. B, p. 12)

Dr. Bansal offers no rationale for the over 300-day gap in treatment. He offers no rationale why the August 2020 motor vehicle accident was not an intervening cause to claimant's condition. He offers no response to Dr. Martin's opinion that imaging studies do not support a posttraumatic component to claimant's osteoarthritic hip condition. Dr. Bansal offers no rationale why no other provider, including an orthopedic specialist, has assessed claimant as having left-sided sacroiliitis. Given these issues, it is found that

Dr. Bansal's opinion regarding causation and permanent impairment to claimant's left hip and alleged lower back condition are found not convincing.

Claimant was released from physical therapy in October of 2019. He had no medical treatment for over 300 days for his hip or lower back. He did not have treatment for his hip or lower back until the August 24, 2020, motor vehicle accident. Dr. Martin and Dr. Liudahl opined that claimant's hip and alleged lower back condition are not caused or materially aggravated by the July 23, 2019 date of injury. Dr. Bansal's opinion regarding causation and permanent impairment are found not convincing. Given this record, claimant has failed to carry his burden of proof that his July 23, 2019, work injury resulted in a permanent disability.

As claimant failed to carry his burden of proof his July 23, 2019, work injury resulted in a permanent disability, the issues regarding claimant's entitlement to permanent partial disability benefits, commencement date of permanent partial disability benefits, and entitlement to alternate medical care are moot.

The next issue to be determined is whether claimant is entitled to temporary benefits.

Healing period compensation describes temporary workers' compensation weekly benefits that precede an allowance of permanent partial disability benefits. Ellingson v. Fleetguard, Inc., 599 N.W.2d 440 (Iowa 1999). Section 85.34(1) provides that healing period benefits are payable to an injured worker who has suffered permanent partial disability until the first to occur of three events. These are: (1) the worker has returned to work; (2) the worker medically is capable of returning to substantially similar employment; or (3) the worker has achieved maximum medical recovery. Maximum medical recovery is achieved when healing is complete and the extent of permanent disability can be determined. Armstrong Tire & Rubber Co. v. Kubli, Iowa App., 312 N.W.2d 60 (Iowa 1981). Neither maintenance medical care nor an employee's continuing to have pain or other symptoms necessarily prolongs the healing period.

When an injured worker has been unable to work during a period of recuperation from an injury that did not produce permanent disability, the worker is entitled to temporary total disability benefits during the time the worker is disabled by the injury. Those benefits are payable until the employee has returned to work, or is medically capable of returning to work substantially similar to the work performed at the time of injury. Section 85.33(1).

Claimant seeks temporary benefits from October 10, 2020, through January 4, 2022. (Claimant's Post-Hearing Brief, p. 14) In the alternative, claimant seeks a running award of temporary disability commencing on October 10, 2020. (Claimant's Post-Hearing Brief, p. 15)

As detailed above, claimant failed to carry his burden of proof he sustained a permanent disability from his July 23, 2019, injury. The records indicate that claimant

had a temporary aggravation of a pre-existing osteoarthritis condition in his hip, and reached maximum medical improvement as of September 10, 2019.

Claimant was taken off work from approximately October 8, 2020, until October 15, 2020, after his visit at Siouxland. (Ex. A, p. 7) Claimant was also taken off work by Dr. Liudahl from October 27, 2020, through November 27, 2020, for his hip condition. (JE 6, p. 122) However, Dr. Liudahl opined that claimant's left hip condition was not work related. (JE 6, p. 116) As noted, Dr. Martin found that claimant had reached MMI for his July 23, 2019, injury on October 10, 2019. (Ex. B, pp. 6-7) Any time off work for the above-detailed periods was not for a work-related condition.

As detailed above, claimant received FMLA benefits from approximately October 27, 2020, through November 27, 2020, while off work from Dr. Liudahl's restrictions. The FMLA paperwork indicates that this period of time that claimant was off work was for a non-work-related condition. (JE 6, pp. 119-120; Tr., p. 68)

Claimant was off work for his FMLA leave until November 27, 2020. Claimant never returned to work after that date. The record indicates he never contacted Seaboard regarding a return to work. Claimant's testimony regarding the return to work at Seaboard after November 27, 2020, is contradictory. Claimant testified he believed he had to reapply to Seaboard to return to work, but did not do so as he believed his employer would not re-hire him. (Tr., p. 78) He also testified he spoke to a union representative on November 24, 2020, who told claimant he would never be allowed to return to work at Seaboard. (Tr., p. 70) Claimant also testified the union rep told him Seaboard would hire him if he did reapply. (Tr., p. 71)

As noted in the record, Seaboard terminated claimant on November 30, 2020, for failure to return to work. (Ex. A, p. 22)

Dr. Liudahl opined that claimant's work leave slip for his hip condition was not work related. Dr. Martin found claimant at MMI as of October 10, 2019. Dr. Martin also opined that any treatment after that date, and any problems claimant had with his left hip, were not due to his work-related injury. Claimant was given FMLA time off work for a non-work-related condition. Claimant failed to make any effort to return to work after November 27, 2020. As detailed above, Dr. Bansal's opinion regarding causation and permanency are found not convincing. Given this record, claimant has failed to carry his burden of proof he is entitled to temporary benefits from October 10, 2020, through January 4, 2022, or a running award of temporary benefits commencing on October 10, 2019.

The next issue to be determined is rate

Iowa Code section 85.36 provides as follows:

The basis of compensation shall be the weekly earnings of the injured employee at the time of the injury. Weekly earnings means gross salary, wages, or earnings of an employee to which such employee would have

been entitled had the employee worked the customary hours for the full pay period in which the employee was injured, as regularly required by the employee's employer for the work or employment for which the employee was employed, computed or determined as follows and then rounded to the nearest dollar:

Subsection 7 of Iowa Code section 85.36 provides the method to calculate weekly earnings for employees employed fewer than 13 weeks at the time of the injury.

7. In the case of an employee who has been in the employ of the employer less than thirteen calendar weeks immediately preceding the injury, the employee's weekly earnings shall be computed under subsection 6, taking the earnings, including shift differential pay but not including overtime or premium pay, for such purpose to be the amount the employee would have earned had the employee been so employed by the employer the full thirteen calendar weeks immediately preceding the injury and had worked, when work was available to other employees in a similar occupation. If the earnings of other employees cannot be determined, the employee's weekly earnings shall be the average computed for the number of weeks the employee has been in the employ of the employer.

Representative hours are those hours typically or customarily worked by an employee during a typical or customary full week of work. Jacobson Transp. Co. v. Harris, 778 N.W.2d 192, 197 (Iowa 2010).

"Customary" means "based on or established by custom"; "commonly practiced, used or observed"; or "usual." Merriam-Webster's Collegiate Dictionary 285 (10th ed. 2002). We have previously defined "customary" as "typical." Ascertainment of an employee's customary earnings does not turn on a determination of what earnings are guaranteed or fixed; rather, it asks simply what earnings are usual or typical for that employee. Jacobson, 778 N.W.2d at 199.

As the Court in Jacobson noted, statutes for computation of wage bases are meant to be applied with the goal of reflecting fairly the claimant's probable future earning loss. Id. at 197.

Claimant credibly testified he was married and had three children. He credibly testified he sent money back his family in Ethiopia when he was working. (Tr., pp. 8-9)

Claimant did indicate on his tax forms he was single. (Ex. 4) Pay records from Seaboard indicate defendant employer listed claimant as married. (Ex. C).

I recognize this agency routinely relies on tax records to determine exemptions. However, because claimant is a minister, because I found his testimony credible and

because Seaboard records indicate claimant was considered married, I find claimant was married and had three children.

Wage records for the 14 weeks prior to the date of injury indicate claimant worked over 50 hours per week. Given these records, the week of July 5, 2019, where claimant worked 39.73 hours, is excluded from the calculation to determine claimant's average weekly wage (AWW).

The 13 weeks used to calculate claimant's AWW result in a total of \$11,850.12. This results in an AWW of \$911.55 ( $\$11,850.12 \div 13$ ).

Claimant was married with five exemptions. His rate is \$606.85 per week.

The next issue to be determined is whether there is a causal connection between the injury and the claimed medical expenses.

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).

As detailed above, claimant failed to carry his burden of proof his July 2019 work injury resulted in further disability, either temporary or permanent, after his last physical therapy appointment of October 16, 2019. Any medical expenses incurred after that date are not the liability of defendants.

The final issue to be determined is whether claimant is entitled to reimbursement for his IME.

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). Claimant need not ultimately prove the injury arose out of and in the course of employment to qualify for reimbursement under section 85.39. See Dodd v. Fleetguard, Inc., 759 N.W.2d 133, 140 (Iowa App. 2008).

Regarding the IME, the Iowa Supreme Court provided a literal interpretation of the plain language of Iowa Code section 85.39, stating that section 85.39 only allows the employee to obtain an independent medical evaluation at the employer's expense if dissatisfied with the evaluation arranged by the employer. Des Moines Area Reg'l Transit Auth. v. Young, 867 N.W.2d 839, 847 (Iowa 2015).

Under the Young decision, an employee can only obtain an IME at the employer's expense if an evaluation of permanent disability has been made by an employer-retained physician.

Iowa Code section 85.39 limits an injured worker to one IME. Larson Mfg. Co., Inc. v. Thorson, 763 N.W.2d 842 (Iowa 2009).

The Supreme Court, in Young noted that in cases where Iowa Code section 85.39 is not triggered to allow for reimbursement of an independent medical examination (IME), a claimant can still be reimbursed at hearing the costs associated with the preparation of the written report as a cost under rule 876 IAC 4.33. Young at 846-847.

Dr. Martin, the employer-retained physician, found that claimant had no permanent impairment in an October 7, 2019 report. Dr. Bansal, the employee-retained physician, found that claimant had permanent impairment in a January 12, 2020 report. Given the chronology of the IMEs, claimant has carried his burden of proof he should be reimbursed for costs associated with Dr. Bansal's IME.

#### ORDER

THEREFORE IT IS ORDERED:

That claimant shall take nothing in the way of additional benefits in this matter.

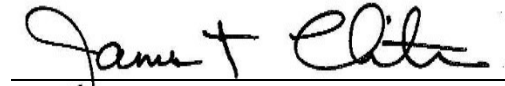
That claimant's rate is found to be \$606.85 per week.

That defendants shall reimburse claimant for costs associated with Dr. Bansal's IME.

That both parties shall pay their own costs.

That defendants shall file subsequent reports of injury as required by this agency under rule 876 IAC 3.1(2).

Signed and filed this 2<sup>nd</sup> day of August, 2022.

  
\_\_\_\_\_  
JAMES F. CHRISTENSON  
DEPUTY WORKERS'  
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Mary Hamilton (via WCES)

Meredith Ashley (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.