BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JAMIE THROCKMORTON, Claimant, vs. SEABOARD FOODS OF IOWA, LLC, Employer, and INDEMNITY INS. CO. OF N. AMERICA, Insurance Carrier, Defendants.	File No. 21001872.01 ARBITRATION DECISION Head Note Nos.: 1108.50, 1402.40, 1803, 2502, 2907

STATEMENT OF THE CASE

Jamie Throckmorton, claimant, filed a petition in arbitration seeking workers' compensation benefits from Seaboard Foods of Iowa, LLC, employer and Indemnity Insurance Company of North American, insurance carrier as defendants. Hearing was held on September 27, 2021. This case was scheduled to be an in-person hearing occurring in Des Moines. However, due to the declaration of a pandemic in Iowa, the Iowa Workers' Compensation Commissioner ordered all hearings to occur via video means, using CourtCall. Accordingly, this case proceeded to a live video hearing via CourtCall with all parties and the court reporter appearing remotely.

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.

Jamie Throckmorton was the only witness to testify live at trial. The evidentiary record also includes joint exhibits JE1-JE8, claimant's exhibits 1-6, and defendant's exhibits A-D. All exhibits were received without objection. The evidentiary record closed at the conclusion of the arbitration hearing.

The parties submitted post-hearing briefs on October 29, 2021, at which time the case was fully submitted to the undersigned.

ISSUES

The parties submitted the following issues for resolution:

1. Whether claimant sustained any permanent impairment as the result of the stipulated October 10, 2019, work injury. If so, the nature and extent of disability.
2. If claimant did sustain permanent disability, what is the appropriate number of exemptions claimant is entitled to for purposes of the weekly workers' compensation rate.
3. If claimant did sustain permanent disability, whether defendants are responsible for pre-existing disability pursuant to Iowa Code section 85.34(7).
4. Whether defendants are responsible for payment of the past medical expenses as set forth in claimant's exhibit 1.
5. Whether claimant is entitled to reimbursement for his Independent Medical Examination pursuant to Iowa Code section 85.39.
6. Assessment of costs.

FINDINGS OF FACT

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

Claimant, Jamie Throckmorton, was 37 years old at the time of hearing. He sustained an injury to his right lower back on October 10, 2019, which arose out of and in the course of his employment with Seaboard Foods of Iowa, LLC ("Seaboard"). Prior to working for Seaboard, Mr. Throckmorton sustained two work-related injuries while working for JBS, USA, LLC ("JBS"). The first injury sustained by Mr. Throckmorton occurred in May 2017. He was loosening a bolt when he felt immediate pain in his lower right back. (JE1, p. 1) Mr. Throckmorton sustained another work-related injury with JBS on February 15, 2018, which caused symptoms primarily in the thoracic spine and bilateral SI joints. (JE4, p. 53) Mr. Throckmorton settled his workers' compensation claims with JBS in June 2019. (Def. Ex. B) The central dispute in this case is whether Mr. Throckmorton sustained any permanent disability as the result of the stipulated October 10, 2019, work injury with Seaboard.

Due to the prior injuries, an understanding of the timeline in this case is important. Trevor Schmitz, M.D., provided treatment to Mr. Throckmorton for all three dates of injury. Mr. Throckmorton was released from treatment for his May 8, 2017, injury on August 15, 2017. Dr. Schmitz assigned 5 percent permanent impairment of the whole person for the lumbar injury. Mr. Throckmorton was released from treatment for his February 15, 2018, injury on August 27, 2018. Dr. Schmitz did not assign any additional impairment. Dr. Schmitz did not assign any permanent restrictions for either date of injury. (Testimony)

Mr. Throckmorton returned to work for full duty at JBS. He described some days at work as horrible, depending on his load. If he performed a lot of strenuous work, he would be sore and sometimes miss work due to pain. At some point, he was terminated by JBS because he missed work due to his back symptoms. (Testimony)

At the beginning of February 2019, Mr. Throckmorton was hired by Seaboard as a maintenance mechanic. The job at Seaboard was a far easier physical job than the job he was performing at JBS. Mr. Throckmorton did not do a lot of the heavy lifting that he did at JBS and the pace was not as rushed as it was at JBS. At Seaboard he was not working on the ground as much or lifting heavy objects above his head. (Testimony)

As noted, Mr. Throckmorton was hired by Seaboard in February 2019. The injury in this case occurred in October 2019. The only doctor that Mr. Throckmorton saw between his Seaboard date of hire and the date of the injury he sustained at Seaboard was David H. Segal, M.D. (Testimony)

On February 14, 2019, at the request of his attorney, Mr. Throckmorton underwent an IME with Dr. Segal for the May 8, 2017, and February 15, 2018 dates of injury. At the time of the IME, Mr. Throckmorton reported low back pain that was worse than his upper back pain. His right-sided pain was constant and more severe than the left side. Mr. Throckmorton reported that initially he had constant pain that radiated from right low back into the right buttock and hip, wrapping around into the right groin, and down the right leg into his foot with severe numbness in the right leg. His back, buttock, and leg pain felt like one pain syndrome. However, his radiating pain got better over a few months to where it is now intermittent and stops at the anterior thigh just above the knee. Mr. Throckmorton stated that sitting is terrible, especially if he must sit erect; he cannot sit erect more than 20 minutes. Lifting causes pain if it is more than 50 pounds for any extended period. Mr. Throckmorton also reported that kneeling and squatting were very difficult. He also noted weakness in his right leg with a lot of activity. His low back pain averaged 5-6/10 with activity. Mr. Throckmorton informed Dr. Segal that the 2017 and 2018 injuries greatly affected his life including his ability to play with his children, fish, and work out. He was unable to enjoy activities as much as he once did because of his constant pain. He was able to secure employment with a different company; he is able to do his job, but it is sometimes difficult. (JE6; Testimony)

With regard to the May 8, 2017, work injury, Dr. Segal noted an immediate onset of right radicular pain in correlation with the MRI that shows a disc herniation with impingement on the descending S1 nerve root. He also noted that he still had right radicular symptoms at the time of the IME. Dr. Segal noted that on the MRI, at the level of the herniation, there was an annular tear that explained more widespread symptoms of bilateral leg numbness. Dr. Segal recommended numerous restrictions for Mr. Segal, including but not limited to: sitting in a straight-backed chair up to 20 minutes, 60 minutes in a reclined chair. Occasional bending and no lifting over 50 pounds. Dr. Segal noted that Mr. Throckmorton had not exhausted all treatment options and that he remained significantly symptomatic. Dr. Segal stated that if conservative treatments do not help Mr. Throckmorton could be a candidate for lumbar discectomy. (JE6; Testimony)

In June 2019 Mr. Throckmorton entered into a full and final settlement of the 2017 and 2018 workers' compensation claims with JBS. (Def. Ex. B) Approximately four months after the JBS settlement he sustained the work injury at Seaboard that is the focus of this case.

It was on October 10, 2019, that Mr. Throckmorton sustained the stipulated work injury with Seaboard. At the time of the October 2019, injury, Mr. Throckmorton was picking up 35-pound hog gates and putting them into the back of a three-quarter-ton pickup truck. He picked the gates up one at a time. He felt a sharp pain on the right side of his back and was not able to move. He had to grab the truck, stood still for a bit, and then limped around to the driver's side. He drove back to the shop and reported the injury to his supervisor. (Testimony)

From the time Mr. Throckmorton was hired by Seaboard in February 2019 until the October 10, 2019 injury, he did not miss any time from work due to back pain. At the hearing, Mr. Throckmorton testified that he would be "sore on occasion." (Tr. p. 26) He had some pain, but it was tolerable. On average his pain was a three or a four out of ten. (Testimony)

The defendants authorized several medical appointments for Mr. Throckmorton. These included just shy of ten appointments with an occupational medicine provider. Defendants also authorized an MRI of the lumbar spine and several appointments with Dr. Schmitz.

On April 6, 2020, Dr. Schmitz authored a missive to the defendants. In that missive he responded to a series of questions posed to him by the defendants. Dr. Schmitz stated:

> I do have a lengthy history of treating Mr. Throckmorton dating back to July 2017. At that time, he did have a right paracentral disc protrusion causing moderate to severe right-sided lateral recess stenosis. He has a new MRI, which, once again, does demonstrate the same findings from January 10, 2020. He has had a significant amount of treatment including physical therapy and injections without drastic relief of his overall symptomatology.

(JE4, p. 91)

Dr. Schmitz was asked to provide his opinion regarding causation. He stated:

> I would state, at this time, that the reported incident on October 10, 2019, did not cause his low back symptoms. It does not appear as though his disc herniation is drastically changed from his previous lumbar spine MRI and, as such, I cannot, in any way, state that this was an underlying cause of the disc herniation necessitating treatment in question.

(Id.)

The defendants also sought Dr. Schmitz's opinion regarding whether the October 10, 2019, work incident substantially aggravated, accelerated, or worsened any preexisting condition. Dr. Schmitz stated:

> I would, once again, state that the work incident in question did not likely substantially aggravate, accelerate, or worsen the preexisting condition. He had a known disc herniation at L5-S1 on the right, and I do think that his current clinical presentation is a natural underlying progression of the disc herniation in question.

(Id.)

Dr. Schmitz opined that the October 2019 work incident "did not have any significant material effect on his need for surgery." He felt that Mr. Throckmorton "was likely going to progress on to surgery whether or not he had the workplace incident on October 10, 2019, or not." (JE4, pp. 91-92)

Based on Dr. Schmitz's opinions, defendants denied further treatment. Mr. Throckmorton decided to seek treatment with a provider of his choosing. (Testimony)

On May 29, 2020, Mr. Throckmorton saw Chad D. Abernathey, M.D. He recorded a seven-month history of low back and right leg pain that began when he was lifting a gate at work on October 14, 2019. He reported pain, numbness, and tingling radiating into the right lower extremity with weakness on plantar flexion of the ankle and toes. Dr. Abernathey noted that Mr. Throckmorton had low back pain three years ago which responded to epidural steroid injections. Dr. Abernathey's impression was that the patient presented with right S1 radiculopathy secondary to a right L5-S1 disc extrusion. It was decided that Dr. Abernathey would proceed with surgical intervention. On June 8, 2020, Dr. Abernathey performed a right L5-S1 partial hemilaminectomy, diskectomy, microscope. Mr. Throckmorton continued to follow-up with Dr. Abernathey post-surgery. He made excellent progress. Dr. Abernathey gave him permission to return to regular duty on October 5, 2020. The surgeon noted he would be available for further consultation if so desired. (JE5, p. 93-95)

Seaboard terminated Mr. Throckmorton's employment in June 2020. At the time of his termination, he still had temporary restrictions placed on his activities by Dr. Abernathey following the surgery. Seaboard was not able to accommodate those restrictions; they told him he could reapply if his condition improved. Dr. Abernathey ultimately released Mr. Throckmorton from his care with no restrictions. (Testimony)

At the request of his attorney, Mr. Throckmorton underwent an IME on July 19, 2021, with Mark C. Taylor, M.D. In addition to examining Mr. Throckmorton, Dr. Taylor reviewed 154 pages of records that were provided to him by claimant's counsel. Dr. Taylor's diagnoses included back injury with low back pain, herniated disc, and radicular symptoms; and right-sided L5-S1 partial hemilaminectomy and discectomy with Dr. Abernathey on June 8, 2020. Dr. Taylor noted the two prior work injuries sustained by Mr. Throckmorton in 2017 and 2018. He also noted that the 2017 injury resulted in Dr.

Schmitz assigning 5 percent whole person impairment and no additional impairment for the 2018 injury. Dr. Taylor stated:

> Given the history, and the currently available medical records, it is my opinion that Mr. Throckmorton's October 14, 2019, incident at work represented a significant aggravating factor to his pre-existing condition, which was a small, herniated disc at L5-S1. There was a substantial change in his pain in the back, and he was also experiencing pain and symptoms into the right lower extremity. Based on these findings, Dr. Schmitz recommended surgery, whereas he previously recommended against surgery for the prior MRI findings and prior exam findings. In my opinion, this is consistent with a material change. Also, the MRI revealed changes in the disk herniation was now described as large, and was impinging and displacing the nerve root. Regardless of the MRI changes, there was also a clear change in his symptomatology, which also contributed to the need for surgery.

(CE4, p. 29)

Since Mr. Throckmorton was released by Dr. Abernathey without restrictions Mr. Throckmorton has not reapplied at Seaboard. By that time, Mr. Throckmorton was already employed at Vermeer. He did undergo a pre-employment physical with Vermeer wherein Mr. Throckmorton denied any problems. That physical did not place any restrictions on his activities. Additionally, on March 18, 2021, Dr. Abernathey reiterated that Mr. Throckmorton was cleared to return to work full duty, no restrictions. Since working at Vermeer Mr. Throckmorton has gone to the Vermeer medical providers for any medical needs; they have not placed any restrictions on his activities. (Testimony; Def. Ex. A, p. 9, 13, 16; Def. Ex. C)

We now turn to the central dispute in this case; whether the October 2020 work injury caused any permanent impairment. Mr. Throckmorton argues that a comparison of the MRI reports is highly probative of whether there was a new injury. In support of this argument, claimant points to the impression portions of the 2017 and 2020 radiology reports. The 2017 MRI was performed at Pella Regional Health Care Center. The impression from the report states in pertinent part, "[s]mall right L5-S1 HNP with no critical nerve impingement or edema." (JE1, p. 7) The 2020 MRI was performed at Southern Iowa Open MRI. The impression states in pertinent part, "[l]arge right paracentral disc protrusion/annular fissure at L5-S1 which results in moderate to severe right lateral recess narrowing with impingement and posterior displacement of the non-exited right S1 nerve root." (JE3, p. 43)

Claimant also relies on the opinions of Dr. Taylor, whom he selected to perform his IME for this pending litigation. Dr. Taylor is Board Certified in Occupational and Environmental Medicine. Unfortunately, Dr. Taylor's opinions are based, at least in part, on an incorrect history. In August 2021, approximately 21 months after the October 2019 injury, Mr. Throckmorton reported to Dr. Taylor that prior to the October 2019 injury, he had essentially recovered from the prior injuries. However, this is not

consistent with what Mr. Throckmorton told Dr. Segal just a few short months before the October 2019 injury. (CE 4, p. 29; JE6)

I find that the records generated contemporaneously with Mr. Throckmorton's symptoms are more accurate than Mr. Throckmorton's recollection. There were several instances in Mr. Throckmorton's hearing testimony that demonstrated that he is a poor historian. For example, his recollection of what his condition was before the October 2019 injury differs from what he described to Dr. Segal. Additionally, Mr. Throckmorton testified that Dr. Segal did not give him any permanent restrictions and also did not discuss possible surgery with him. However, Dr. Segal's report sets forth his recommendations for restrictions and also discusses potential surgery. (Testimony; JE6)

While the radiology reports and Dr. Taylor's opinions are noteworthy, I place greater weight on the opinions of the surgeons' and their interpretations of the MRIs. Dr. Segal is Board Certified in Neurosurgery, Brain, and Spine. Additionally, Dr. Segal was the doctor selected by claimant's attorney to perform an IME with regard to the 2017 and 2018 injuries. Because he was selected by the claimant's attorney, it can hardly be argued that he is biased against the claimant. Dr. Segal was also the last doctor to examine Mr. Throckmorton before he sustained the October 2019 injury. In his February 2019 IME report, Dr. Segal noted that the 2017 MRI "shows a disc herniation with impingement on the descending S1 nerve root . . ." (JE6, p. 110) He also felt that surgical intervention, specifically lumbar discectomy was certainly a possibility for Mr. Throckmorton. (JE6, p. 112-113) Dr. Segal attached portions of the MRI pictures to his report and drew arrows to show the disc herniation, annular tear, and nerve impingement that were present in 2017. (JE6, pp. 117-125)

Dr. Schmitz is the orthopaedic surgeon who treated Mr. Throckmorton for all three of his workers' compensation injuries. Dr. Schmitz treated Mr. Throckmorton both before and after the October 2019 work injury. He provided his opinion on the MRI results. As noted above, he opined that the new MRI demonstrated the same findings from January 10, 2020. (JE4, p. 91)

Dr. Schmitz felt the work incident did not likely substantially aggravate, accelerate, or worsen the preexisting condition. He felt that Mr. Throckmorton's current clinical presentation was a natural underlying progression of the disc herniation. (Id.)

Dr. Schmitz felt that Mr. Throckmorton "was likely going to progress on to surgery whether or not he had the workplace incident on October 10, 2019, or not." (JE4, pp. 91-92)

The record is void of any type of causation opinion from Dr. Abernathey. However, it should be noted that the surgery he performed on June 8, 2020 was related to the diagnosis of "[r]ight S1 radiculopathy, right L5-S1 disk extrusion." (JE5, p. 95) This is the same diagnosis made by Dr. Schmitz on August 9, 2017 and by Dr. Segal on February 14, 2019. (JE4, p. 50; JE6, p. 10)

I find the opinions of the surgeons, Dr. Segal and Dr. Schmitz, carry greater weight than those of Dr. Taylor. I further find that the opinions of Dr. Segal and Dr. Schmitz are more consistent with the record as a whole. I find the opinion of Dr. Schmitz to be the most persuasive in this case. He is an orthopaedic spine surgeon and is in the unique position of seeing Mr. Throckmorton on numerous occasions since 2017. I find the surgery performed by Dr. Abernathey was not related to the October 2019 injury. Rather, it was a natural underlying progression of the disc herniation. I further find claimant failed to demonstrate by a preponderance of the evidence that he sustained any permanent disability as the result of the October 2019 work injury with Seaboard. As such, claimant has failed to demonstrate entitlement to any weekly permanency benefits.

Claimant is seeking payment of past medical expenses as set forth in claimant's exhibit 1. As previously noted defendants denied medical treatment to Mr. Throckmorton after Dr. Schmitz's letter dated April 6, 2020. In that letter, Dr. Schmitz opined that the October 2019 work incident did not substantially aggravate, accelerate, or worsen the preexisting condition. Dr. Schmitz felt that Mr. Throckmorton's current clinical presentation was the natural underlying progression of the prior disc herniation. (JE4, p. 91) The bills claimant is seeking payment for were all incurred after April 6, 2020. I find claimant failed to demonstrate by a preponderance of the evidence that these expenses are causally connected to the October 2019 work injury. As such, defendants are not responsible for the expenses set forth in claimant's exhibit 1.

Mr. Throckmorton is also seeking reimbursement for his IME with Dr. Taylor pursuant to Iowa Code section 85.39. Defendants dispute that claimant is entitled to reimbursement under Iowa Code section 85.39. (Hearing Report) As previously noted, on April 6, 2020, Dr. Schmitz opined that Mr. Throckmorton's current clinical presentation was the natural underlying progression of the prior disc herniation. Dr. Schmitz was a physician retained by the employer. I find that his determination that Mr. Throckmorton's clinical presentation were not caused by the October 2019 work injury was effectively an opinion that he suffered no impairment as the result of that work injury. Mr. Throckmorton disagreed with that opinion and obtained an IME from Dr. Taylor on August 12, 2021 which found he did sustain permanent disability caused by the October 2019 injury. I find that Dr. Taylor's evaluation of permanency occurred after an evaluation of permanent disability had been made by a physician retained by the employer.

Finally, Mr. Throckmorton is seeking an assessment of costs. I find that Mr. Throckmorton was generally not successful in his claim and therefore exercise my discretion to not assess costs against the defendants. Each party shall bear their own costs.

Because Mr. Throckmorton has failed to demonstrate entitlement to weekly benefits, all other issues are rendered moot.

CONCLUSIONS OF LAW

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

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

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

When an expert's opinion is based upon an incomplete history, it is not necessarily binding on the commissioner or the court. It is then to be weighed, together with other facts and circumstances, the ultimate conclusion being for the finder of the fact. Musselman v. Central Telephone Co., 154 N.W.2d 128, 133 (Iowa 1967); Bodish v. Fischer, Inc., 257 Iowa 521, 522, 133 N.W.2d 867 (1965).

The commissioner as trier of fact has the duty to determine the credibility of the witnesses and to weigh the evidence, together with the other disclosed facts and circumstances, and then to accept or reject the opinion. Dunlavey v. Economy Fire and Casualty Co., 526 N.W.2d 845 (Iowa 1995).

Based on the above findings of fact, I conclude that claimant failed to demonstrate by a preponderance of the evidence that the surgery performed by Dr. Abernathey was related to the October 2019 injury. Rather, I concluded Dr. Schmitz's opinions were the most persuasive in this matter and that the need for surgery was a

natural underlying progression of the prior disc herniation. I conclude claimant failed to demonstrate by a preponderance of the evidence that he sustained any permanent disability as the result of the October 2019 work injury with Seaboard. As such, claimant has failed to demonstrate entitlement to any weekly permanency benefits.

Claimant is seeking payment of past medical expenses as set forth in claimant's exhibit 1. 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).

Based on the above findings of fact, I conclude that claimant has failed to carry his burden of proof to demonstrate by a preponderance of the evidence that the medical bills set forth in his exhibit 1 are causally connected to the October 2019 work injury. The benefits claimant seeks payment for were all incurred after Dr. Schmitz opined that claimant's clinical presentation was the natural underlying progression of the prior disc herniation and defendants stopped authorizing treatment. As such I conclude that the defendants in this case are not responsible for those expenses under Iowa Code section 85.27.

Claimant seeks reimbursement pursuant to Iowa Code section 85.39 for the IME he obtained with Dr. Taylor. Defendants dispute that claimant is entitled to reimbursement under Iowa Code section 85.39. 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 Iowa Workers' Compensation Commissioner has noted that the Iowa Supreme Court adopted a strict and literal interpretation of Iowa Code section 85.39 in Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839 (Iowa 2015) (hereinafter "DART"). See Cortez v. Tyson Fresh Meats. Inc., File No. 5044716 (App. December 2015). If an injured worker wants to be reimbursed for the expenses associated with a disability evaluation by a physician selected by the worker, the process set forth by the legislature in Iowa Code section 85.39 must be followed. This process permits the employer, who must pay the benefits, to make the initial arrangements for the evaluation and only allows the employee to obtain an independent evaluation at the employer's expense if dissatisfied with the evaluation arranged by the employer. DART, 867 N.W.2d at 847 (citing Iowa Code § 85.39).

In Mr. Throckmorton's case, defendants asked Dr. Schmitz to address causation. Because Dr. Schmitz did not find causation, he did not provide an impairment rating. In September 2021, the Iowa Court of Appeals provided additional guidance with respect to these types of situations. See Kern v. Fenchel, Doster & Buck, P.L.C., 966 N.W2d.

326 (Iowa Ct. App., 2021) (unpublished). The court reiterated that the "primary purpose of the workers' compensation statute is to benefit the worker and his or her dependents, insofar as statutory requirements permit." See Kern, at 4 (citations omitted). Thus, the statutes are to be interpreted liberally. Id. In Kern, the physician selected by the employer found there was no causation and the doctor was silent on the issue of impairment. Kern disagreed with that opinion and sought an IME under section 85.39 at the defendants' expense. In Kern, the court concluded an employer-chosen physician's opinion that there was no causation was tantamount to a zero percent impairment rating. (Id.) The Court of Appeals found there was no conflict in applying the Supreme Court's interpretation of section 85.39 in DART to a finding that a lack of causation opinion is tantamount to a zero impairment rating. Id. Based on this additional guidance from the Court of Appeals, I conclude that the no causation opinion from Dr. Schmitz was tantamount to a zero percent impairment rating.

More recently the Commissioner issued an appeal decision that addresses reimbursement of IMEs under Iowa Code section 85.39. See Lopez v. Maple Valley Feeders Co., File No. 1663048.01 (App. December 9, 2021). In Lopez, the deputy commissioner interpreted a return to work slip from a chiropractor as an assessment of disability. On appeal, the Commissioner found there was no evidence that the chiropractor intended that note to be an evaluation of permanent disability. The Commissioner also noted that the release was provided early in claimant's treatment and claimant received additional treatment after the work release was issued. The Commissioner also noted that there was no evidence that the providers were asked to assess claimant's disability. Further, the Commissioner noted there was insufficient evidence that defendants paid for claimant's treatment at the time the return to work slip was issued, so there was insufficient evidence to show that the chiropractor was a provider retained by the employer. The Commissioner concluded that the reimbursement provisions of Iowa Code section 85.39 were not triggered.

In the Lopez appeal decision, the Kern case is not mentioned so it is unknown if it was considered. Regardless, the present case is distinguishable from Lopez. In the present case, the record is clear that Dr. Schmitz was a physician retained by the employer when he issued his no causation opinion. Thus, the Lopez decision is not applicable to the present case.

Based on the above findings of fact, I conclude that Dr. Taylor's evaluation of permanency occurred after an evaluation of permanent disability had been made by a physician retained by the employer. I conclude that the no causation opinion from Dr. Schmitz was tantamount to a zero percent impairment rating. As such, I conclude that the prerequisites of section 85.39 were met, and defendants shall reimburse claimant for the costs of the IME in the amount of $3,055.50.

All costs incurred in the hearing before the commissioner shall be taxed in the discretion of the commissioner. 876 IAC 4.33. Claimant is seeking an assessment of costs in this matter. However, I found claimant was generally not successful in his claim. Therefore, I exercise my discretion and do not assess costs against the defendants. Each party shall bear their own costs.

Because Mr. Throckmorton has failed to demonstrate entitlement to weekly benefits, all other issues are rendered moot.

ORDER

THEREFORE, IT IS ORDERED:

Claimant shall take no weekly benefits from these proceedings.

Defendants shall reimburse claimant for the IME as set forth above.

Each party shall bear their own costs.

Defendant 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 _21st_ day of February, 2022.

ERIN Q. PALS
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Brian Keit (via WCES)

Timothy Clausen (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.