BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

BRET BAHMLER, Claimant, vs. IAC IOWA CITY, LLC, Employer, AMERICAN ZURICH INSURANCE CO., Insurance Carrier, Defendants.	FILED AUG 14 2019 WORKERS' COMPENSATION	File Nos. 5064091, 5064092 ARBITRATION DECISION Head Note Nos.: 1402.40, 1803, 1804, 2206, 2209, 2501, 2502, 2907

STATEMENT OF THE CASE

Bret Bahmler, claimant, filed two petitions for arbitration against IAC Iowa City, LLC, as the employer, and American Zurich Insurance Co., as the insurance carrier. File No. 5064091 involves a claim for a left shoulder injury with an injury date of December 8, 2013. File No. 5064092 involves a claim for a low back injury allegedly occurring on October 7, 2016.

These contested cases proceeded to a consolidated in-person hearing in Cedar Rapids on June 26, 2019. The parties filed hearing reports in each file at the commencement of the hearing. On the hearing reports, the parties entered into numerous stipulations. Those stipulations were accepted and no factual or legal issues relative to the parties' stipulations will be made or discussed. The parties are now bound by their stipulations.

The evidentiary record includes Joint Exhibits 1 through 7, Claimant's Exhibits 1 through 5, and Defendants' Exhibits A through D. Claimant testified on his own behalf. No other witnesses testified live. The evidentiary record closed at the conclusion of the arbitration hearing and the case was considered fully submitted to the undersigned.

ISSUES

In File No. 5064091, the parties submitted the following disputed issues for resolution:

1. The extent of claimant's entitlement to permanent partial disability benefits as a result of the December 8, 2013 left shoulder injury.

2. Whether defendants should be ordered to reimburse claimant's independent medical evaluation expense.

3. Whether claimant's costs should be taxed.

In File No. 5064092, the parties submitted the following disputed issues for resolution:

1. Whether claimant sustained a low back injury arising out of and in the course of his employment on October 7, 2016.

2. Whether the alleged injury caused permanent disability and, if so, the extent of claimant's entitlement to permanent disability benefits.

3. Whether claimant is entitled to an order directing defendants to pay, reimburse, or otherwise satisfy past medical expenses contained at Claimant's Exhibit 5.

4. Whether defendants should be ordered to reimburse claimant's independent medical evaluation expense.

5. Whether claimant's costs should be taxed.

FINDINGS OF FACT

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

Bret Bahmler is a 55-year-old gentleman. He has a high school diploma and obtained a welding certificate after completing high school. Mr. Bahmler has worked in food manufacturing for several months, as a gas station attendant briefly, and for a friend painting small steel parts. However, claimant's primary employment has been with IAC and its predecessors. Mr. Bahmler worked at the IAC plant from July 1984 through October 7, 2016. Claimant worked as an apprentice tooling mechanic for the employer at times relevant to his alleged injuries. Mr. Bahmler is clearly a motivated employee with a long work history for only a few employers. (Claimant's Ex. 3, pages 3-4; Claimant's testimony)

Mr. Bahmler sustained a stipulated left shoulder injury at work on December 8, 2013. The parties stipulated that the left shoulder injury resulted in permanent disability. (Hearing Report) However, there is a dispute as to the extent of permanent disability caused by the left shoulder injury.

As a result of that fall, Mr. Bahmler sustained a left shoulder injury. He had a prior left shoulder surgery performed in 2004. (Joint Exhibit 2, page 1; Claimant's Ex. 1, p. 21) Nevertheless, he returned to work after the previous shoulder injury and surgery.

Following the fall in December 2013, the employer authorized medical care, and an MRI of the left shoulder was obtained. Following the MRI, claimant was referred to an orthopaedic surgeon, Fred J. Pilcher, M.D., for treatment. (Joint Ex. 1-2) Dr. Pilcher interpreted claimant's left shoulder MRI to demonstrate multiple rotator cuff abnormalities and expressed concerns about a torn left biceps tendon as well. (Joint Ex. 2, p. 1)

Dr. Pilcher took claimant to surgery and performed a left rotator cuff repair and biceps tenodesis on January 30, 2014. (Joint Ex. 3) After a period of recovery, Dr. Pilcher declared claimant to have achieved maximum medical improvement on August 11, 2014. He opined that claimant did not require any permanent work restrictions or ongoing medical treatment for his right shoulder. Dr. Pilcher identified a ten percent permanent impairment of the whole person as a result of Mr. Bahmler's left shoulder injury in December 2013. (Joint Ex. 2, p. 3)

Mr. Bahmler returned to work at IAC after his left shoulder injury. Claimant describes ongoing pain and weakness in his left shoulder and arm even after his medical release and return to work. Mr. Bahmler described difficulties with ordinary daily tasks such as reaching and lifting. He described difficulties showering and having to use his shoulder. (Claimant's testimony)

Claimant obtained an independent medical evaluation performed by Sunil Bansal, M.D. on August 17, 2018. (Claimant's Ex. 1) Dr. Bansal records that claimant experiences occasional locking in his left shoulder and difficulties raising his left arm overhead or out to the side. Dr. Bansal further records that claimant indicated he cannot lift over ten pounds with the left arm and that he was missing work because of pain. (Claimant's Ex. 1, p. 21)

Dr. Bansal's physical examination demonstrated some restrictions in claimant's left shoulder range of motion, but identified no tenderness to palpitation. Dr. Bansal concurred with Dr. Pilcher and opined that Mr. Bahmler sustained a ten percent permanent impairment of the whole person as a result of the left shoulder injury. (Claimant's Ex. 1, p. 24) Dr. Bansal also opined that claimant requires a ten-pound occasional lifting restriction as a result of the left shoulder injury and that he should not lift above shoulder level with the left arm or perform any frequent reaching with the left arm. (Claimant's Ex. 1, p. 25)

Considering the competing medical opinions pertaining to claimant's left shoulder, I find that the full-duty release by Dr. Pilcher was likely appropriate and that claimant was capable of returning to work after the left shoulder injury and performing all of his necessary job duties at IAC. However, it is not realistic that claimant could return to any potential job with his previously injured and now surgically repaired left

shoulder. I accept claimant's testimony that he experienced ongoing symptoms in the left shoulder and find that a full-duty release for any type of employment would not be reasonable. Claimant's testimony that his left arm is now "basically useless" is not accepted, however. His left arm is not "useless" but is limited.

Claimant testified that his job as a tooling mechanic required frequent reaching. Claimant was clearly capable of performing that type of job duty because he returned to work and actually performed those job duties prior to his subsequent alleged low back injury in 2016. Yet, Dr. Bansal opines that claimant cannot perform frequent reaching with the left arm. (Claimant's Ex. 1, p. 25) I do not find this restriction from Dr. Bansal to be consistent with claimant's actual job performance after the left shoulder injury or credible. Nevertheless, I find that claimant likely would require some permanent restrictions and would likely be precluded from some types of employment as a result of his left shoulder injury if he were to seek employment on the open labor market.

Mr. Bahmler testified that, as a result of his left shoulder injury, he would be precluded from returning to work as a maintenance oiler, finish operator, welder, in a service job that supplied parts on a line, or as a roto operator. Given the job duties described by claimant for these various positions, I find his testimony in this respect credible and find that he likely could not return to the various prior positions he held with IAC. Therefore, I find that claimant has proven he sustained permanent disability and a loss of future earning capacity as a result of the December 8, 2013 left shoulder injury at work.

The parties stipulate that claimant sustained a prior right shoulder injury in April 1997 and that he received a 40 percent industrial disability award for that injury. (Hearing Report) The parties further stipulate that the defendants are entitled to a 40 percent, or 200 week, credit for the prior payment of benefits for the left shoulder injury. (Hearing Report)

Considering Mr. Bahmler's age, educational background, employment history, the situs and severity of his left shoulder injury, his motivation to work, his need for some work restrictions, his prior medical history, limitations, and industrial disability, as well as all other factors of industrial disability outlined by the Iowa Supreme Court, I find that Mr. Bahmler proved he sustained a 55 percent loss of future earning capacity as a result of his left shoulder injury at work on December 8, 2013.

Mr. Bahmler also asserts he sustained an injury to his low back on October 7, 2016. Specifically, claimant asserts a cumulative injury claim for his low back. Mr. Bahmler has a long history of low back pain and symptoms. He required surgical intervention on his low back in December 2014 and again in January 2015 after he developed a post-surgical hematoma. (Claimant's testimony)

Claimant asserts that his low back condition continued to worsen as he worked for IAC and that he developed a cumulative back injury that manifested on October 7, 2016. Mr. Bahmler conceded that he experienced low back pain for approximately 20

years and that he had prior surgery on his low back. He testified that the prior surgeries helped his back symptoms "a little bit." However, Mr. Bahmler testified that his symptoms gradually worsened back to pre-surgical levels over time.

Mr. Bahmler testified that he was able to return to work after the left shoulder surgery from January 2015 until October 7, 2016. He testified that his low back symptoms worsened during this period. He also testified that his quality of life is not good right now as a result of his low back injury and symptoms. Mr. Bahmler testified that his symptoms got to the point where he simply could not take it anymore and he quit work. He described difficulties with sleep and constant pain leading up to his retirement on October 7, 2016.

Mr. Bahmler sought medical care for his low back on October 21, 2016 with his personal physician, Thomas A. Novak, M.D. On that date, Dr. Novak noted chronic lower back pain, as well as radicular pain into claimant's leg. (Joint Ex. 4, p. 5) Dr. Novak also noted that claimant's medications were not providing lasting relief of claimant's symptoms and that facet injections and epidurals were also not providing lasting relief of claimant's back pain. Dr. Novak noted that Mr. Bahmler had limited capacity for bending, twisting and lifting and indicated that claimant would initiate a disability application. (Joint Ex. 4, pp. 5-9)

Also on October 21, 2016, Dr. Novak issued correspondence indicating that Mr. Bahmler qualifies for a handicapped parking permit. (Joint Ex. 4, p. 10) Dr. Novak also provided claimant a medical work release from October 7, 2016 through November 7, 2018. (Joint Ex. 4, p. 11)

On October 21, 2016, Mr. Bahmler also sought care for his back at the pain clinic at the University of Iowa Hospitals and Clinics. Shuchita Garg, M.D., noted on that date that claimant's pain started in 1997, was ongoing, and was the result of work standing on concrete, moving and twisting. (Joint Ex. 7, p. 25)

Mr. Bahmler continued to treat with Dr. Novak. On December 15, 2016, Dr. Novak indicated that claimant only had limited, or brief, relief of symptoms after his last round of injections for his back. Dr. Novak noted that claimant had difficulties with sleep and that he had to lie down throughout the day as a result of his back symptoms. (Joint Ex. 4, p. 16) Dr. Novak concluded that claimant was "[u]nable to continue working, has failed all treatments through pain clinic." (Joint Ex. 4, p. 19)

Claimant returned for evaluation by Dr. Novak on January 27, 2017. Dr. Novak noted that claimant experienced buttock pain radiating down the posterior legs. Claimant also had gait abnormality and leg weakness. Dr. Novak noted that pain was "significantly effecting [sic] quality of life" for Mr. Bahmler. (Joint Ex. 4, p. 21) Dr. Novak noted that claimant was "disabled and unable to work due to his medical condition." (Joint Ex. 4, p. 25) Dr. Novak declared that claimant's "disability is permanent." (Joint Ex. 4, p. 25)

In spite of ongoing conservative care, claimant's symptoms persisted. On May 10, 2017, Dr. Novak responded to a disability questionnaire and noted that claimant's condition is permanent. Dr. Novak indicated that claimant should never bend at the waist, kneel, crouch, climb, or balance and only occasionally drive. Dr. Novak also imposed a two-pound occasional lifting restriction. (Joint Ex. 4, p. 37)

Defendants arranged for an independent medical evaluation of claimant, performed by Joseph J. Chen, M.D., on April 7, 2017. (Joint Ex. 7, pp. 33-37) Defendants asked Dr. Chen to address the issue of causation for claimant's ongoing low back symptoms. Dr. Chen opined, "I am unable to attribute Mr. Bahmler's current condition and symptoms causally to his vocational duties at IAC as he did not reported [sic] a specific traumatic event that led to a plausible mechanism of injury." (Joint Ex. 7, p. 37)

In response to an inquiry from claimant's attorney, Dr. Novak opined that claimant's work activities at IAC aggravated his preexisting chronic low back problems. (Joint Ex. 4, p. 48) Dr. Novak also opined that claimant's work at IAC constituted a substantial contributing factor in bringing about the degree of pain claimant experienced and ultimately resulted in claimant's inability to work. (Joint Ex. 4, p. 49)

As noted previously in this decision, Mr. Bahmler also obtained an independent medical evaluation, performed by Sunil Bansal, M.D., on August 17, 2018. With respect to the low back, Dr. Bansal opined that claimant has sacroiliitis. Dr. Bansal further opined that claimant's work activities at IAC were a substantial contributing factor in claimant's increasing symptoms and ultimate inability to work. (Claimant's Ex. 1, p. 26) Dr. Bansal assigned a three percent permanent impairment of the whole person as a result of Mr. Bahmler's low back condition and opined that claimant cannot lift over 40 pounds occasionally and cannot frequently bend or twist as a result of his low back injury. (Joint Ex. 1, p. 27)

Defense counsel sought a review and response to Dr. Novak's opinions from Dr. Chen. In correspondence dated January 22, 2019, Dr. Chen opined that a "more plausible explanation for Mr. Bahmler's increase in pain around 2016 is that by then several months had elapsed since he had undergone a radiofrequency ablation procedure as a part of his UIHC Pain Clinic treatment. This radiofrequency ablation procedure is only expected to provide a temporary decrease nerve fiber or pain transmission as the ablated nerves eventually regrow and can lead to the return or worsening of pain." (Defendants' Ex. A, p. 6) Therefore, Dr. Chen stood by his opinion that claimant's low back condition is not causally related to his work. (Defendants' Ex. A, p. 6)

Defendants also sought comment on the cause of Mr. Bahmler's current low back condition from a previous treating surgeon, Benjamin D. MacLennan, M.D. In a report dated April 10, 2019, Dr. MacLennan noted that he had last evaluated claimant on June 22, 2015 and that claimant had a 20-year history of chronic low back pain at that time. (Defendants' Ex. B, p. 10) Dr. MacLennan confirmed that claimant did not

report any specific injuries to him related to work but did not offer an opinion whether claimant's current condition may or may not be related to an aggravation resulting from work since he last evaluated claimant in June 2015. I do not find Dr. MacLennan's opinions terribly helpful in assessing causation, other than to note the 20-year history of chronic low back pain.

Dr. Bansal also had the opportunity to review the November 15, 2017 medical opinion of Dr. Novak and the supplemental report of Dr. Chen dated January 22, 2019. In response, Dr. Bansal concurred with Dr. Chen that claimant had long-standing pre-existing lumbar spine pathology. However, Dr. Bansal opines that claimant developed sacroiliitis, a condition never previously diagnosed prior to October 2016. Dr. Bansal opines that this diagnosis "is directly related to the wear and tear from his job and further aggravated by his work standing on concrete throughout the day. This is a completely distinct and separate pathological entity from lumbar spine degenerative spine disease." (Claimant's Ex. 1, p. 31) Dr. Bansal points out in his supplemental report that claimant's pain physician specifically directed treatment with an injection into the sacroiliac joint on October 21, 2016. (Joint Ex. 1, p. 31)

Considering and weighing each of the causation medical opinions, I find the causation opinion offered by Dr. Chen to be strained. His initial report ruled out causation because there was not a traumatic incident at work. Of course, that is not the legal standard to be applied to a causation issue in a worker's compensation case. In his supplemental report, Dr. Chen bolsters his causation opinion and offers some cogent explanations for why claimant's pain may have returned. However, claimant credibly testified that his pain increased during the latter part of his work for IAC. Certainly, claimant's pain may have been returning after an ablation procedure. However, claimant reported that his symptoms were actually heightened back to pre-surgical levels by October 2016.

Instead, I find the unsolicited medical opinion of Dr. Garg indicating that claimant's ongoing work duties caused his increase in symptoms and worsening of his condition. Dr. Bansal's causation opinions clearly dovetail with this opinion and bolster its credibility. Similarly, Dr. Novak's opinions bolster the opinions that claimant's ongoing work was a substantial contributing factor in the development or material worsening of claimant's low back condition. I find these medical opinions to be most persuasive in this evidentiary record and find that claimant has proven that the cumulative effects of his work activities at IAC leading up to October 7, 2016 were a substantial contributing cause of his current symptoms and condition. I specifically find that claimant proved a material aggravation of his underlying low back condition as a result of his work activities at IAC manifesting in a cumulative trauma injury on October 7, 2016.

Claimant testified that Dr. Novak indicated his pain was medically uncontrollable and that Dr. Novak recommended claimant quit his employment. Dr. Novak's medical records support this conclusion. Dr. Chen recommended increased activity, while Dr. Bansal offered restrictions that permit greater activity than those offered by Dr. Novak. I

find that Dr. Novak has offered treatment for claimant over an extended period of time and has the best understanding of claimant's condition. I specifically accept the medical restrictions offered by Dr. Novak for claimant's low back condition as credible and accurate. (Joint Ex. 4, p. 37)

Mr. Bahmler candidly conceded that he has not looked for work since October 7, 2016 and that he is not intending to look for work. He applied for and received an award of Social Security disability benefits. Mr. Bahmler testified that he does not believe he can return to work with his low back symptoms and that he barely is able to function to perform his daily activities at home. Again, he described a very poor quality of life in his current condition. Nevertheless, claimant is a long-time employee and appears to have been a motivated worker prior to the low back difficulties worsening in October 2016.

With the significant restrictions offered by Dr. Novak, including a two-pound occasional lifting restriction and prohibitions against bending, kneeling, crouching, or climbing, coupled with the limitations claimant has from his left shoulder injury, I find that the medical restrictions essentially preclude future employment for Mr. Bahmler. Considering claimant's age, the situs and severity of his injury, the permanent restrictions imposed by Dr. Novak, claimant's educational and employment background, his motivation levels, and the specific opinion of Dr. Novak that claimant cannot work, along with all other factors of industrial disability outlined by the Iowa Supreme Court; I find that Mr. Bahmler has proven that his low back injury of October 7, 2016 caused permanent and total disability.

CONCLUSIONS OF LAW

The initial disputed issue in File No. 5064091 is the extent of claimant's entitlement to permanent disability benefits. The parties stipulate that Mr. Bahmler sustained a prior 40 percent industrial disability as a result of a pre-existing, work-related injury to his left shoulder. The parties also stipulate that defendants are entitled to a credit for that prior 40 percent industrial disability payment.

Having considered the relevant industrial disability factors outlined by the Iowa Supreme Court, I found that claimant proved Mr. Bahmler sustained a 55 percent loss of future earning capacity as a result of the December 8, 2013 left shoulder injury. This is equivalent to a 55 percent industrial disability and entitles claimant to an award of 275 weeks of permanent partial disability benefits. Iowa Code section 85.35(2)(u). Pursuant to the stipulation of the parties, defendants are entitled to a 40 percent credit against this award, or a credit equal to 200 weeks. (Hearing Report)

In File No. 5064092, the initial disputed issue is whether claimant sustained a low back injury arising out of and in the course of his employment on October 7, 2016.

The claimant has the burden of proving by a preponderance of the evidence that the alleged injury actually occurred and that it both arose out of and in the course of the

employment. Quaker Oats Co. v. Ciha, 552 N.W.2d 143 (Iowa 1996); Miedema v. Dial Corp., 551 N.W.2d 309 (Iowa 1996). The words "arising out of" referred to the cause or source of the injury. The words "in the course of" refer to the time, place, and circumstances of the injury. 2800 Corp. v. Fernandez, 528 N.W.2d 124 (Iowa 1995). An injury arises out of the employment when a causal relationship exists between the injury and the employment. Miedema, 551 N.W.2d 309. The injury must be a rational consequence of a hazard connected with the employment and not merely incidental to the employment. Koehler Electric v. Wills, 608 N.W.2d 1 (Iowa 2000); Miedema, 551 N.W.2d 309. An injury occurs "in the course of" employment when it happens within a period of employment at a place where the employee reasonably may be when performing employment duties and while the employee is fulfilling those duties or doing an activity incidental to them. Ciha, 552 N.W.2d 143.

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

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

When the injury develops gradually over time, the cumulative injury rule applies. The date of injury for cumulative injury purposes is the date on which the disability manifests. Manifestation is best characterized as that date on which both the fact of injury and the causal relationship of the injury to the claimant's employment would be plainly apparent to a reasonable person. The date of manifestation inherently is a fact based determination. The fact-finder is entitled to substantial latitude in making this determination and may consider a variety of factors, none of which is necessarily dispositive in establishing a manifestation date. Among others, the factors may include missing work when the condition prevents performing the job, or receiving significant medical care for the condition. For time limitation purposes, the discovery rule then becomes pertinent so the statute of limitations does not begin to run until the employee,

as a reasonable person, knows or should know, that the cumulative injury condition is serious enough to have a permanent, adverse impact on his or her employment. Herrera v. IBP, Inc., 633 N.W.2d 284 (Iowa 2001); Oscar Mayer Foods Corp. v. Tasler, 483 N.W.2d 824 (Iowa 1992); McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985).

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).

Having found the medical causation opinions of Dr. Garg, Dr. Bansal and Dr. Novak most convincing, I found that Mr. Bahmler proved he sustained a material aggravation of his low back condition as a result of his work activities at IAC. I also found that claimant proved those work duties caused a cumulative trauma that manifested on October 7, 2016. Therefore, I conclude that Mr. Bahmler has proved his low back injury arose out of and in the course of his employment with IAC and is entitled to an award of benefits.

The next disputed issue in File No. 5064092 is the extent of claimant's entitlement to permanent disability benefits. Mr. Bahmler asserts that he is permanently and totally disabled as a result of the October 7, 2016 low back injury. Total disability does not mean a state of absolute helplessness. Permanent total disability occurs where the injury wholly disables the employee from performing work that the employee's experience, training, education, intelligence, and physical capacities would otherwise permit the employee to perform. See McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Diederich v. Tri-City R. Co., 219 Iowa 587, 258 N.W. 899 (1935).

A finding that claimant could perform some work despite claimant's physical and educational limitations does not foreclose a finding of permanent total disability, however. See Chamberlin v. Ralston Purina, File No. 661698 (App. October 1987); Eastman v. Westway Trading Corp., II Iowa Industrial Commissioner Report 134 (App. May 1982).

Having considered the relevant industrial disability factors outlined by the Iowa Supreme Court, I found the medical restrictions offered by Dr. Novak most convincing. Therefore, I found that Mr. Bahmler proved he is permanently and totally disabled as a result of the October 7, 2016 work injury. I conclude that claimant is entitled to an award of permanent total disability benefits pursuant to Iowa Code section 85.34(3).

Defendants assert entitlement to apportionment pursuant to Iowa Code section 85.34(7). On the hearing report, claimant stipulated to defendants' entitlement to

apportionment. Therefore, the issue of apportionment will not be addressed in this decision.

Mr. Bahmler also asserts that he is entitled to payment, reimbursement, or satisfaction of past medical expenses contained at Claimant's Exhibit 5 pursuant to Iowa Code section 85.27. Defendants challenge the reasonableness, necessity, and causal connection of the 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).

Evidence in administrative proceedings is governed by section 17A.14. The agency's experience, technical competence, and specialized knowledge may be utilized in the evaluation of evidence. The rules of evidence followed in the courts are not controlling. Findings are to be based upon the kind of evidence on which reasonably prudent persons customarily rely in the conduct of serious affairs. Health care is a serious affair.

Prudent persons customarily rely upon their physician's recommendation for medical care without expressly asking the physician if that care is reasonable. Proof of reasonableness and necessity of the treatment can be based on the injured person's testimony. Sister M. Benedict v. St. Mary's Corp., 255 Iowa 847, 124 N.W.2d 548 (1963).

It is said that "actions speak louder than words." When a licensed physician prescribes and actually provides a course of treatment, doing so manifests the physician's opinion that the treatment being provided is reasonable. A physician practices medicine under standards of professional competence and ethics. Knowingly providing unreasonable care would likely violate those standards. Actually providing care is a nonverbal manifestation that the physician considers the care actually provided to be reasonable. A verbal expression of that professional opinion is not legally mandated in a workers' compensation proceeding to support a finding that the care provided was reasonable. The success, or lack thereof, of the care provided is evidence that can be considered when deciding the issue of reasonableness of the care. A treating physician's conduct in actually providing care is a manifestation of the physician's opinion that the care provided is reasonable and creates an inference that can support a finding of reasonableness. Jones v. United Gypsum, File 1254118 (App. May 2002); Kleinman v. BMS Contract Services, Ltd., File No. 1019099 (App. September 1995); McClellon v. Iowa Southern Utilities, File No. 894090 (App. January

1992). This inference also applies to the reasonableness of the fees actually charged for that treatment.

Having found that the contested medical expenses identified at Claimant's Exhibit 5 are causally related to the low back work injury of October 7, 2016, I conclude that claimant is entitled to payment, reimbursement, or satisfaction of those medical expenses. Iowa Code section 85.27.

Claimant seeks reimbursement of his independent medical evaluation fees in both contested cases.

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).

Claimant's rights under Iowa Code section 85.39 require fulfillment of the statutory requirements. The employer is not responsible for payment of fees incurred outside the statutory process. Young, 867 N.W.2d at 844.

Iowa Code section 85.39(2) provides that, if the employer has obtained an evaluation of permanent disability from a physician of its choosing, the employer must reimburse claimant for a subsequent examination by a physician of the employee's choosing. In this instance, defendants obtained an independent medical evaluation with Dr. Chen on April 7, 2017. However, Dr. Chen did not offer any opinions about permanent impairment. I conclude that claimant failed to establish the prerequisites of Iowa Code section 85.39 to obtain reimbursement of Dr. Bansal's evaluation in File No. 5064092.

However, in File No. 5064091, defendants obtained a permanent impairment rating from Dr. Pilcher on August 11, 2014. Dr. Bansal did not evaluate claimant until August 2018. Claimant has established entitlement to reimbursement of Dr. Bansal's evaluation in File No. 5064091. Therefore, I conclude that defendants should be ordered to reimburse Dr. Bansal's independent medical evaluation fees ($3,462.00) in File No. 5064091. Iowa Code section 85.39.

Finally, claimant seeks assessment of his costs in both files. Costs are assessed at the discretion of the agency. Iowa Code section 86.40. Claimant has prevailed in both files. Therefore, I conclude it is appropriate to assess claimant's costs in some amount.

Attached to the hearing report, claimant sought assessment of his filing fee ($100.00) and service fee ($13.76). Both of these costs are reasonable and permitted costs. 876 IAC 4.33(3), (7).

Mr. Bahmler also seeks assessment of a supplemental report fee from Dr. Bansal in the amount of $268.00. The supplemental report was obtained by claimant directly in response to a supplemental report authored by Dr. Chen and specifically addressed causation issues pertaining to the low back claim. Ultimately, I accepted and relied upon the opinions of Dr. Bansal, among other medical experts. This is a permissible cost pursuant to 876 IAC 4.33(6). I conclude defendants should be ordered to reimburse the cost of Dr. Bansal's supplemental report in the amount of $268.00 in File No. 5064092.

ORDER

THEREFORE, IT IS ORDERED:

In File No. 5064091:

Defendants shall pay claimant two hundred seventy-five (275) weeks of permanent partial disability benefits commencing on June 21, 2014.

All weekly benefits shall be payable at the rate of four hundred ninety-seven and 09/100 dollars ($497.09) per week.

Defendants shall be entitled to an apportionment credit of two hundred (200) weeks of permanent disability benefits pursuant to the parties' stipulation noted in the hearing report and at the hearing.

Defendants shall also be entitled to a credit for fifty (50) weeks of additional permanent disability benefits paid to claimant prior to hearing, as stipulated to by the parties on the hearing report.

Defendants shall reimburse claimant's independent medical evaluation fee with Dr. Bansal in the amount of three thousand four hundred sixty-two and 00/100 dollars ($3,462.00).

In File No. 5064092:

Defendants shall pay claimant permanent total disability benefits commencing on October 7, 2016.

Weekly benefits shall be paid at the stipulated weekly rate of seven hundred three and 00/100 dollars ($703.00) per week.

Defendants shall be entitled to apportionment pursuant to Iowa Code section 85.34(7) pursuant to the stipulation of the parties in the hearing report.

Defendants shall pay directly to the medical provider, reimburse claimant for any out-of-pocket expenses, and hold claimant harmless for all medical expenses contained in Claimant's Exhibit 5.

In both files:

Defendants shall reimburse claimant's costs totaling three hundred eighty-one and 76/100 dollars ($381.76).

Defendants shall file subsequent reports of injury (SROI) as required by this agency pursuant to rules 876 IAC 3.1(2) and 876 IAC 11.7.

Signed and filed this 14th day of August, 2019.

WILLIAM H. GRELL
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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WHG/sam

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