BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JAVIER CALDERON,	:	
Claimant,	: FILED	File Nos. 5051782, 5056141
vs.	: FEB 23 2017	ARBITRATION
TYSON FRESH MEATS, INC.,	: WORKERS COMPENSATION	DECISION
Employer, Self-Insured, Defendant.	:	Head Note Nos.: 1108.50, 1402.10, 1405.60, 1803, 2602

STATEMENT OF THE CASE

Javier Calderon, claimant, filed a petition in arbitration seeking workers' compensation benefits from Tyson Fresh Meats, Inc. (hereinafter "Tyson"), self-insured employer. Hearing was held on November 2, 2016, in Des Moines, Iowa.

Javier Calderon and Terry Carmichael testified live at trial. The record was left open for defendant to take the evidentiary deposition of Daniel Leake; the transcript of that deposition is contained in the record as volume II of the hearing transcript. The evidentiary record also includes claimant's exhibits 1-19 and defendant's exhibits A-M.

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.

The parties requested the opportunity for post-hearing briefs, which were submitted on December 23, 2016.

ISSUES

File No. 5051782 (Date of Injury: March 27, 2014)

The parties submitted the following issues for resolution:

1. Whether claimant sustained an injury on or about March 27, 2014, which arose out of and in the course of employment?

2. Whether the alleged injury was the cause of permanent disability? If so, the extent of industrial disability claimant is entitled to receive.

3. Whether claimant is entitled to past medical benefits?

4. Whether claimant is entitled to reimbursement pursuant to Iowa Code section 85.39 for an independent medical evaluation (IME)?

5. Assessment of costs.

File No. 5056141 (Date of Injury: October 12, 2015)

The parties submitted the following issues for resolution:

1. The extent of industrial disability claimant is entitled to as a result of the stipulated October 12, 2015 work injury.

2. Whether claimant is entitled to past medical benefits?

3. Whether claimant is entitled to reimbursement pursuant to Iowa Code section 85.39 for an IME?

4. Assessment of costs.

FINDINGS OF FACT

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

Claimant, Javier Calderon, has filed two petitions against defendant employer, Tyson, for alleged injuries he contends arose out of and in the course of his employment. The petition in file number 5051782 alleges cumulative injury to claimant's back with an injury date of March 27 or 28, 2014. Defendant denies that the back claim arose out of and in the course of his employment. Claimant's petition in file number 5056141 alleges an October 12, 2015 cumulative injury to his neck. Defendant admits claimant sustained a temporary aggravation to his neck, but denies all other allegations.

At the time of hearing claimant was in his late 40s. Javier was still actively employed at Tyson's pork production facility in Perry, Iowa. He was performing the job of removing spinal cord or "spinal cord vacuum." This is the same job he was performing at the time of the injuries in question. (Ex. M, pp. 12, 16)

Javier was born and raised in El Salvador, but has lived in the United States for over 20 years. He has worked at the Tyson processing plant in Perry for over 20 years. Javier has no formal education. He speaks Spanish. He is able to read and write a very little bit of Spanish at a slow pace. He cannot read or write English. Javier has

worked numerous jobs at Tyson. He had been performing the spinal cord vacuum job for approximately six months prior to the alleged September 2014 date of injury. The prior jobs he performed at Tyson were more physically demanding than the spinal cord vacuum job. (Testimony)

The spinal cord vacuum job requires the worker to stand on a platform while hog carcasses pass by on an overhead conveyor. In this job, Javier placed the nozzle of the vacuum wand against the back of the carcass to vacuum the spine. The carcass was in front of him at head-level. Javier would grab the vacuum at head height with his right hand and move it downward towards his knee. He would hold the one hog with his right arm then hold the next hog with his left arm. Javier testified that this involved repeatedly twisting his body. Javier is approximately 5'2" tall. He testified that he would use the vacuum on approximately 2,500 to 2,700 hogs per day. He would perform this task all day long. He said performing this job required him to use his back with some force. According to Javier, sometimes the suction in the vacuum was not as strong due to a filter not being cleaned. Consequently, Javier testified that he would have to bend and use more force while twisting repeatedly. The vacuum had a spike at the end but when that became dull it would not pass through the hog carcass as easily. (Testimony; Exhibit M)

Javier testified that his back pain began on March 27, 2014 due to the repetitive work he was performing. A statement of injury form was completed regarding Javier. The statement indicates his pain began while he was performing his job on the kill floor. He was performing his job as usual but the tip of the vacuum was dull so he had to push down with force, which caused pain in his right shoulder to his lower back and right wrist. (Ex. 1; Testimony)

Javier testified that initially his pain level was low but it began to increase. He reported the pain to his supervisor who brought him to the company nurse. He was given creams and pills for 2 to 3 weeks; then Tyson referred him to Dr. Miller. (Testimony; Ex. 1 and M)

Javier first saw Dr. Miller on April 10, 2014. He reported pain in his right middle finger, neck, and low back with radiation up to his mid back with some pain in his neck. Dr. Miller told him that he must have pulled or torn something. He prescribed pills, ordered x-rays, and physical therapy. He also placed restrictions on his activities. Tyson placed Javier in light duty jobs such as sitting and looking at contamination or grabbing hair so others could cut the hair. He did not have to push, pull or bend in the light duty jobs. Claimant testified that he treated with Dr. Miller for approximately two months and had restrictions on his activities the entire time. The treatment consisted primarily of physical therapy and prescription medications. Javier thought that this helped a little, but what he felt helped him the most was being on light duty work. (Ex. 2, pp. 82-88; Testimony)

In April, claimant went to see David Huante, M.D. at Mercy Family Clinic in Perry for labyrinthitis. Javier reported that when he would turn side to side he would become

dizzy. This lasted approximately three days and then his labyrinthitis improved. (Testimony; Ex. B)

Javier continued to treat with Dr. Miller who ordered an MRI in May 2014. The impression on the radiology report was that there was trivial mild chronic degenerative disc bulging at L5-S1, but no frank disc herniation, lumbar spinal stenosis, or lumbar nerve root impingement. (Ex. 4, p. 104) Claimant testified that Dr. Miller informed him that he had arthritis in his back which was not related to his work. Javier continued to treat with Dr. Miller from April to June. On June 12, 2014, Dr. Miller released him to return to his regular job, full duty. (Ex. 2, pp. 90-98; Testimony)

Javier returned to work at Tyson performing his regular job. He worked with pain and has advised Tyson of his pain. Since March 2014 Javier's pain is different than the pain he experienced in 2011; his pain does not go away and is greater than in 2011. (Testimony)

Javier testified that in June of 2014 he requested that Tyson allow him to see another doctor. Tyson sent him to David E. Hatfield, M.D. on September 19, 2014. Dr. Hatfield is a spine surgeon at Des Moines Orthopedic Surgeons. Javier reported pain in his neck, back, left leg, and buttock that started at work on March 27, 2014. Dr. Hatfield examined the patient and reviewed the films provided to him. Dr. Hatfield did not have anything to offer Javier from a surgical standpoint. (Ex. 5, pp. 106-08; Testimony)

Next, Tyson sent Javier back to Dr. Miller in October 2014. Javier reported that he was still having low back pain that went into the top and front of both hip areas. His left hip was worse than his right hip. Dr. Miller did not feel that his chronic back pain was work-related; rather, the pain was due to the mild degenerative changes in his lumbar spine. Dr. Miller had nothing to offer the claimant. Javier simply needed to go back to work. He did return to work with pain; he took Tylenol to try and control the pain. (Testimony; Ex. 2, pp. 99-100)

On November 28, 2014, claimant saw Sunil Bansal, M.D. for an IME at his attorney's request. Dr. Bansal opined that Javier incurred a self-limited cervical neck strain due to his work at Tyson. He further stated that he developed chronic lumbar myofascial pain from his work at Tyson. Dr. Bansal noted that Javier's work required repetitive truncal twisting. Dr. Bansal felt that he had no ratable impairment for his neck. With regard to Javier's back, he assigned 3 percent whole person impairment. He assigned the following permanent restrictions: no lifting greater than 50 pounds and to avoid repetitive truncal twisting. (Ex. 6, pp. 109-116)

On March 13, 2015, Kurt Smith, D.O. signed a check the box letter authored by the defendant. He indicated that he had observed and performed the job of Remove Spinal Cord at the Perry facility. Based on his review and performance of the job, Dr. Smith felt that there were no lumbar and/or cervical stressors present in the job with the correct standing platform height. Dr. Smith concurred with Dr. Miller that Javier's

chronic back pain was not work related but instead was due to the mild degenerative changes in his lumbar spine. (Ex. E, p. 59)

Claimant filed a second petition in this matter alleging injury to his neck on October 12, 2015. Javier testified that on October 12, 2015, he injured his neck and shoulders performing the same vacuuming job. He believes the injury was caused by lifting his shoulders up and twisting repetitively. Additionally, Javier testified that sometimes the vacuum's air was not good and he had to use more force. (Testimony)

Javier reported his injury to Tyson. He was seen at their nurses' station. He was prescribed medications for two or three weeks. Tyson then sent Javier to see Dr. Smith at Iowa Ortho; this was in November 2015. Dr. Smith's assessment was cervical myofascial strain and acute thoracic myofascial strain. Javier treated with Dr. Smith for approximately one month. Tyson placed Javier on a light duty job. Claimant testified that he last saw Dr. Smith on December 7, 2015. At that appointment, Dr. Smith informed Javier there was nothing wrong with him and he could go back to work. Javier requested that an MRI of his neck be performed but Dr. Smith said that another MRI was not medically indicated. Dr. Smith noted that Javier became very animated and demonstrated normal movements of the neck and arms with no evidence of the pain symptoms Javier had described. Dr. Smith discharged Javier from his care. (Testimony; Ex. 7, pp. 141-163)

Tyson returned Javier to his regular job. Although he was in pain, and felt it was very difficult to perform his job, he did perform it. Javier continued to take Tylenol for his pain. (Testimony)

On January 4, 2016, Dr. Smith indicated that Javier had not sustained any permanent partial impairment. (Ex. E, p. 60)

At his attorney's request, Javier saw Dr. Bansal again in January 2016; this time for evaluation of his shoulders and neck. Dr. Bansal diagnosed Javier with cervical myofascial strain. He also opined that the shoulder pain was referred pain from the neck. Dr. Bansal agreed with Dr. Smith that Javier had reached MMI as of December 7, 2015. Dr. Bansal felt that Javier's neck and bilateral shoulder complaints fit a pattern known as overuse syndrome. Dr. Bansal assigned 5 percent whole person impairment for Javier's neck. He placed the following restrictions on him: avoid work or activities that require repeated neck motion or that place his neck in a posturally flexed position for any appreciable duration of time (greater than 15 minutes). No lifting greater than 50 pounds occasionally or 25 pounds frequently. No frequent pushing or pulling with either arm. (Ex. 6, pp. 118-129)

On February 23, 2016, Javier saw Dr. Angel with complaints of left arm radiculopathy. He was not sent to Dr. Angel by Tyson; rather, Javier sought this treatment on his own. The clinical note states that Javier was at work and was found to have hypertension and was released for the day. However, by the time he was seen at

Dr. Angel's office his blood pressure was normal. Dr. Angel prescribed some medications for Javier. (Ex. 9, p. 166; Testimony)

Javier took a personal leave of absence from work beginning in February of 2016. (Ex. M, pp. 25-26; Testimony) From February to July of 2016, Javier lived with family in St. Joseph, Missouri. While in Missouri, Javier sought treatment on his own. He was seen at Mosaic Life Care on March 15, 2016, as a new patient wanting to establish care. He reported chronic back pain was the reason he was being prescribed medication from an Iowa doctor. Javier returned to the clinic on April 28, 2016, and reported that his back pain was getting worse; he had not been working at Tyson since February. The pain was constant and at a 7. He was referred to the pain clinic for his low back pain. By July of 2016, Javier was reporting neck pain and low back pain. Additional MRIs were performed. Javier received three injections; one in his upper back, one in his shoulder, and one in his low back or hip area. In July, Dr. Rivas released claimant to return to work with no restrictions. (Ex. 10; Ex. F)

On September 26, 2016, Joshua D. Kimelman, D.O. conducted an independent medical examination; at the request of the defendant. Based on multiple trigger points, morning stiffness, and failure to improve with physical therapy and various previous treatment modalities, Dr. Kimelman believed that Javier had fibromyalgia. He felt Javier also demonstrated multiple incongruency signs, give-out weakness in his legs when he was able to toe stand and heel walk as well as palpatory inconsistencies. Dr. Kimelman opined that Javier's back, neck, and posterior shoulder complaints were all secondary to fibromyalgia. Dr. Kimelman stated that the diagnosis of fibromyalgia was not secondary to either trauma or repetitive stress. Additionally, he opined that Javier did not sustain any permanent impairment, nor require any restrictions due to his work at Tyson. (Ex. E)

On September 29, 2016, after Dr. Bansal had an opportunity to review additional records, he issued a report to claimant's counsel. Although Dr. Bansal had previously indicated that Javier did not have any shoulder injury, he now assigned permanent impairment for Javier's bilateral shoulder tendonitis. He also opined that Javier's continued work above 90 degrees of shoulder flexion removing "tripe" from spines of carcasses was a significant contributing factor to his bilateral rotator cuff tendinopathy. He assigned 5 percent impairment of the body as a whole for the neck, 3 percent impairment of the body as a whole for the back, 4 percent of the body as a whole for the right shoulder and 2 percent of the body as a whole for the left shoulder. He assigned permanent restrictions as set forth in his report. (Ex. 6, pp. 130A-130K)

On September 30, 2016, John Kuhnlein, D.O. issued a report to defendant based upon his records review. Dr. Kuhnlein diagnosed Javier with chronic myofascial neck pain. He noted that, other than Dr. Bansal's reports, there was no evidence of any radicular findings by any other physician who had seen Javier. He also diagnosed chronic myofascial lumbar pain. Dr. Kuhnlein stated that there was no repetitive truncal twisting in Javier's job. He noted that Javier did not work on every hog and that the job required a simple up-and-down motion of the right arm. Dr. Kuhnlein opined that there

were not any significant cervical and/or lumbar stressors in the job. Dr. Kuhnlein was not able to state within a reasonable degree of medical certainty that Javier sustained any injury to his back or neck on March 28, 2014 or his neck on October 25, 2015 as a result of his work duties at Tyson. (Ex. G)

On October 6, 2016, Dr. Bansal reviewed additional records, including the reports of Dr. Kimelman and Dr. Kuhnlein, and issued another report to claimant's counsel. In this report, Dr. Bansal stood by his prior opinions. (Ex. 6, pp. 130N-130P)

On December 1, 2016, the defendant took the deposition of Daniel Leake for perpetuation purposes as an extension of the arbitration hearing. Daniel has been employed by Tyson as a kill floor supervisor at the Perry plant for approximately four years. During that time he has been Javier's supervisor. Daniel testified that Javier had complained to him on many occasions about the vacuum wand. When this happened Tyson would investigate the wand, inform maintenance, and if there was an issue the wand would be taken out of service until it was fixed or it would simply be replaced on the spot. Daniel explained that there are three workers performing this job at the same time and that there is an extra wand there in case it is needed. The workers are instructed that if a piece of equipment is defective then they are to stop using it; they may use the extra wand until theirs is repaired or replaced. Daniel also recalls Javier complained about the vacuum power not being strong enough. He testified that if this occurred then all three spinal vacuum wands would be out of service and no one would be using them. Maintenance would have to fix the issue so that the work process could then resume. According to Daniel, there would not be a time when Javier would be required to continue performing his job with faulty equipment. Daniel testified that three workers remove a total of 8,250 spinal cords per day. Daniel testified that in 2014 Javier would not have had to reach at all to perform his job. Claimant avers that this testimony is not consistent with the job description contained in Exhibit 13, page 268. Daniel agreed that there is an upward and downward motion but denied that any reaching was required. He explained that he does not feel reaching is required because the worker's arm does not need to fully extend away from his body. Daniel further testified that repetitive twisting is not required by the worker because the hog is directly in front of the worker. (Testimony)

In response to Daniel's testimony, claimant offered his own rebuttal testimony. Javier testified that he does twist his body to perform the job. Javier also testified that sometimes he would report that the nozzles were not working properly and maintenance would not come for one to two hours and Javier was expected to continue working during this time. Javier testified that he could not use the "extra" wand because all four nozzles were not working properly. (Testimony)

Under job/task steps Tyson's Job Safety Analysis states: "Insert the vacuum tool into the top area of the spinal cord channel. Pull the wand downward allowing the vacuum to pull the spinal cord from the channel." (Ex. 14, p. 277) Under the safety column the Analysis also states: "If the vaccum [*sic*] is not working correctly it will make the job much harder. Immediately notify your supervisor of the mechanical problems."

(Id.) At hearing, Terry Carmichael agreed that there could be a period of time before maintenance at the plant corrected the problem and thus, workers would have times when they performed their job without the vacuum working properly. (Testimony)

The first issue that must be addressed is whether Javier sustained a work related injury to his back on March 27, 2014. There are several medical experts who have rendered their opinions regarding causation in this matter. Of these medical experts the only one to indicate that Javier's back complaints are related to his work at Tyson is Dr. Bansal, claimant's own IME doctor. His opinion was based largely on his understanding that the work required repetitive truncal twisting. However, both Dr. Smith and Daniel have stated that they have performed this job and it does not require repetitive twisting. The hog carcass is directly in front of the worker and the worker simply performs an upward and downward motion with the upper extremity. I find Dr. Smith's opinion to be persuasive because he has first-hand knowledge about how the job is performed. Dr. Smith has indicated that Javier's symptoms are due to degenerative conditions, not due to his work at Tyson. While Dr. Kimelman indicated a diagnosis of fibromyalgia is appropriate, he too does not believe that Javier's condition is work-related. Additionally, Dr. Kuhnlein agreed with Dr. Smith's opinions regarding causation. I find that the preponderance of the expert medical evidence simply does not support claimant's contention that he sustained a compensable injury to his back on or about March 27, 2014. Claimant has failed to carry his burden of proof to demonstrate by a preponderance of the evidence that he sustained a back injury on or about March 27, 2014, which arose out of and in the course of his employment at Tyson.

Next, claimant is seeking reimbursement for the IME performed by Dr. Bansal on November 21, 2014. Claimant is seeking reimbursement under Iowa Code section 85.39. The commissioner has previously held that a zero impairment rating constitutes an evaluation of permanent disability such as to trigger entitlement. In this case, the defendant had obtained at least one opinion denying causation in this matter. Thus, I find that an evaluation of permanent disability had been made by a physician retained by the employer and that the claimant believed the evaluation was too low. Thus, defendant shall reimburse claimant in the amount of $2,495.00.

With regard to file number 5051782 (Date of Injury: March 27, 2014) I find that claimant was not successful in his claim. Because he was not successful, I find that it is not appropriate to assess costs against the defendant. Each party shall bear their own costs.

Because claimant has failed to carry his burden of proof to show that he sustained an injury to his back arising out of and in the course of his employment on or about March 27, 2014, all other issues regarding that claim are moot.

We now turn to the October 12, 2015, date of injury. Defendant admits that claimant sustained an injury arising out of and in the course of his employment. However, defendant denies that the injury was the cause of any temporary or permanent disability.

There are numerous medical experts who have offered their opinions regarding causation. Again, I find the opinions of Dr. Smith to carry the greatest weight. He assessed Javier with cervical myofascial strain and acute thoracic myofascial strain. He released him to return to full duty work. Likewise, the doctor that Javier selected and treated with in Missouri, Dr. Rivas-Gotz, also released Javier to return to work with no restrictions. Dr. Kuhnlein and Dr. Kimelman have both indicated that the October 12, 2015, work injury did not cause any permanent disability, nor did it cause the need for any permanent restrictions. Dr. Bansal is the only physician to assign permanent impairment as a result of the October 12, 2015. Dr. Bansal was also the only doctor to find any radicular findings when examining Javier. I find that the preponderance of the evidence does not support Javier's claim that he sustained permanent disability as a result of the stipulated October 12, 2105, work injury. Further, based on the opinions of Dr. Smith, I find that Javier reached maximum medical improvement on December 7, 2015.

The next issue to address is whether defendant is responsible for the past medical expenses set forth in Exhibit 17. At the time of the hearing Tyson agreed to pay any authorized and unpaid medical bills; therefore, those bills are no longer at issue.

Tyson provided authorized medical care for Javier up until Dr. Smith placed him at maximum medical improvement on December 7, 2015. After Dr. Smith released Javier from his care, Javier chose to seek treatment on his own with medical providers that he selected. If claimant was dissatisfied with the medical care Tyson was offering he could have expressed his dissatisfaction to the employer and filed a petition for alternate medical care. Instead, clamant chose to simply seek treatment on his own with providers of his choosing. Claimant offers no specific evidence to establish that the care he obtained on his own resulted in a more beneficial medical outcome than could have been achieved through the authorized providers. Also, I find that the claimant has failed to carry his burden to show that the unauthorized treatment was reasonable and necessary because of the injury. I find that the expenses claimant seeks to recover in Exhibit 17 related to agency file number 5056141 were for unauthorized treatment and are not defendant's responsibility.

Next, claimant is seeking reimbursement under Iowa Code section 85.39 for the IME performed by Dr. Bansal on January 22, 2016. (Ex. 18, pp. 313-14) I find that an evaluation of permanent disability had been made by a physician retained by the employer and that the claimant believed the evaluation was too low. Thus, defendant shall reimburse claimant in the amount of $2,350.00. However, claimant is only entitled to reimbursement for one IME per date of injury. Therefore, the defendant is not responsible for reimbursement of the remainder of the charges from Dr. Bansal.

Finally, because claimant was generally not successful with regard to the October 12, 2015, date of injury I find it is not appropriate to assess costs against the defendant. Each party shall bear their own costs in this matter.

CONCLUSIONS OF LAW

The party who would suffer loss if an issue were not established ordinarily has the burden of proving that issue by a preponderance of the evidence. Iowa Rule of Appellate Procedure 6.14(6)(e).

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).

A personal injury contemplated by the workers' compensation law means an injury, the impairment of health or a disease resulting from an injury which comes about, not through the natural building up and tearing down of the human body, but because of

trauma. The injury must be something that acts extraneously to the natural processes of nature and thereby impairs the health, interrupts or otherwise destroys or damages a part or all of the body. Although many injuries have a traumatic onset, there is no requirement for a special incident or an unusual occurrence. Injuries which result from cumulative trauma are compensable. Increased disability from a prior injury, even if brought about by further work, does not constitute a new injury, however. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); Ellingson v. Fleetguard, Inc., 599 N.W.2d 440 (Iowa 1999); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995); McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985).

First, we turn to claimant's alleged back injury. Based on the above findings of fact, I conclude that claimant has failed to prove by a preponderance of the evidence that he sustained an injury to his back on or about March 27 or March 28, 2014, which arose out of and in the course of his employment with Tyson.

The issues of IME reimbursement and assessment of costs will be addressed below. Because I concluded that claimant failed to prove he sustained a compensable injury on or about March 27 or March 28, 2014 all other issues in agency file number 5051782 are rendered moot.

Next, we turn to the stipulated October 12, 2015 injury. Claimant is seeking permanent disability benefits. Based on the above findings of fact, I concluded that claimant failed to carry his burden of proof to demonstrate that he sustained any permanent disability as a result of the October 12, 2015 injury.

Claimant is also seeking payment of past 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).

Under Iowa Code section 85.27, the employer has the right to choose medical care as long as it is offered promptly and reasonably suited to treat the injury without undue inconvenience to the employee. An employer is not responsible for the costs of medical care not authorized by section 85.27. A claimant can seek payment of unauthorized medical care by a preponderance of the evidence that care was reasonable and beneficial. Bell Bros. Heating v. Gwinn, 779 N.W.2d 193, 206 (Iowa 2010). To be beneficial, the medical care must provide a more favorable medical outcome than would likely have been achieved by the care authorized by the employer. Id. at 206. The claimant has a significant burden to prove the care was reasonable and beneficial. Id. at 206.

Based on the above findings of fact, I conclude that claimant failed to establish that the care he obtained on his own resulted in a more beneficial medical outcome than could have been achieved through the authorized providers if he had expressed dissatisfaction of his care to the defendant. I further conclude that the claimant has failed to carry his burden to show that the unauthorized treatment was reasonable and necessary because of the injury. I also conclude that the claimant has failed to show that the medical care he received had a more favorable outcome than he would likely have achieved by the authorized provider. Therefore, defendant is not responsible for the expenses incurred as a result of the unauthorized care.

We now turn to claimant's request for reimbursement for the IMEs in each file. Iowa Code section 85.39 permits an employee to obtain an examination by a physician of the employee's choice when an employer-retained physician has previously evaluated a permanent disability and the result is too low in the employee's opinion.

> If an evaluation of permanent disability has been made by a physician retained by the employer and the employee believes this evaluation to be too low, the employee shall, upon application to the commissioner and upon delivery of a copy of the application to the employer and its insurance carrier, be reimbursed by the employer the reasonable fee for a subsequent examination by a physician of the employee's own choice, and reasonably necessary transportation expenses incurred for the examination. The physician chosen by the employee has the right to confer with and obtain from the employer-retained physician sufficient history of the injury to make a proper examination.

(Iowa Code section 85.39)

There are triggering events that must take place before an employee is entitled to an IME. First, there must be an evaluation by an employer-retained physician. Second, the evaluation must be of a "permanent disability." Third, the evaluation must be deemed too low.

The defendants first argue that because they have denied compensability, there is no obligation to pay for an evaluation by a physician of claimant's choosing. While no case law was put forward by the defendant, one presumes that they rely upon McSpadden v. Big Ben Coal Co., 288 N.W.2d 181, 194 (Iowa 1980). However, subsequent case law has refined that position. According to Dodd v. Fleetguard, Inc., 759 N.W.2d 133 (Iowa App. 2008), an employee's right to an 85.39 examination does not require an admission of responsibility by the employer.

The Dodd Court held that an employer could be held liable for an examination when the injury did not arise out of or in the course of employment. Dodd at 140. The court cited with approval the following language from IBP, Inc. v. Harker, 633 N.W.2d 322 (Iowa 2001). The Iowa Supreme Court interpreted section 85.39 as follows:

> We conclude that when the statute is considered in its entirety, it is apparent that the legislature intended to balance the competing interests of the employee and employer with respect to the *choice* of doctor. We think, therefore, that the legislature meant to allow the employee to obtain a disability rating from a physician of his "own choice" when the physician *chosen by* the employer gives a disability evaluation unsatisfactory to the employee. Accordingly, the industrial commissioner and the district court erred in interpreting the language "retained by the employer" to mean "paid by the employer."

Id. at 327 (Emphases in original).

The appellate court followed this line of reasoning in City of Davenport v. Newcomb, 820 N.W.2d 882 (Iowa App). In Newcomb the employer appealed the denial of an examination under Iowa Code section 85.39. This agency had ruled that as the employer had denied liability for the claim the employee was not entitled to a section 85.39 IME. The Newcomb court reversed on this issue stating:

> Our supreme court has held that *reimbursement* for a medical examination under Iowa Code section 85.39 cannot be ordered until liability for an injury has been established. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181, 194 (Iowa 1980). In addition, the court has held an employer's "right to control treatment . . . is lost if the employer disputes liability." Winnebago Indus., Inc. v. Haverly, 727 N.W.2d 567, 575 (Iowa 2006). Although an admission of liability affects the employer's right to control treatment and an employee's ability to receive compensation for an employee-requested IME, we do not find a denial liability wholly precludes an IME under Iowa Code section 85.39. In fact, if the purpose of the IME is to assist in determining causation, an admission of liability should not be a prerequisite to such an examination. See Daugherty v. Scandia Coal Co., 206 Iowa 120, 124, 219 N.W. 65, 67 (1928) (recognizing the purpose of what is now Iowa Code section 85.39 is "doubtless for the purpose of enabling the employer to ascertain the extent and character of the injury").

Newcomb, at 892-893 (Emphasis in original).

In Newcomb, the court was concerned that the employer would not be able to obtain medical evidence to determine causation. The court recognized that one of the purposes of an IME is to determine causation. In Dodd, the court was concerned about the claimant being able to obtain medical evidence. The employer has directed care in this case. The quid pro quo for directing care is that the claimant is entitled to a section 85.39 IME, provided the employer has retained a physician who has made an evaluation of permanent disability that is believed to be too low by the claimant. The commissioner has previously held that a zero impairment rating constitutes an evaluation of permanent disability such as to trigger entitlement. Holton-Martin v. Savery Hotel, File No. 1040787 (App., March 9, 1994).

Thus, defendant shall reimburse claimant for the two IMEs as set forth above.

Costs are to be assessed at the discretion of the deputy worker's compensation commissioner hearing the case. As previously noted, I concluded that each party shall bear their own costs in these matters.

ORDER

THEREFORE, IT IS ORDERED:

File No. 5051782 (Date of Injury: March 27, 2014)

Claimant shall take no weekly benefits from these proceedings.

Defendant shall reimburse claimant for Dr. Bansal's independent medical evaluation fee in the amount of two thousand four hundred ninety-five and no/100 dollars ($2,495.00)

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.

File No. 5056141 (Date of Injury: October 12, 2015)

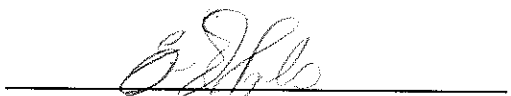
Claimant shall take no weekly benefits from these proceedings.

Defendant shall reimburse claimant for Dr. Bansal's independent medical evaluation fee in the amount of two thousand three hundred fifty and no/100 dollars ($2,350.00)

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 23rd day of February, 2017.



ERIN Q. PALS
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

Copies To:

James C. Byrne
Attorney at Law
1441 – 29th St., Ste. 111
West Des Moines, IA 50266-1309
jbyrne@nbolawfirm.com

Coreen K. Sweeney
Joseph A. Quinn
Attorneys at Law
700 Walnut St., Ste. 1600
Des Moines, IA 50309-3800
cksweeney@nyemaster.com
jquinn@nyemaster.com

EQP/srs

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.