BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JERIMY ALMESTICA, Claimant, vs. ABSOLUTE CONCRETE CONSTRUCTION, INC., Employer, and THE CINCINNATI INSURANCE COMPANIES, Insurance Carrier, Defendants.	:	File No. 5062297 ARBITRATION DECISION Head Note Nos.: 1803, 2500

FILED
JAN 17 2018
WORKERS' COMPENSATION

STATEMENT OF THE CASE

Jerimy Almestica, claimant, filed a petition in arbitration seeking workers' compensation benefits from defendant employer, Absolute Concrete Construction, Inc. and Cincinnati Insurance Companies. The arbitration hearing was held on August 30, 2017. The parties submitted post-hearing briefs on October 9, 2017, and the matter was considered fully submitted on that date.

The evidentiary record includes: Joint Medical Exhibits JE1 through JE6, Claimant's Exhibit 1 and Defendants' Exhibits A through H.

Claimant and Corey Purvis, Vice President of Operations at Absolute Concrete Construction, provided testimony at hearing.

The parties filed a hearing report at the commencement of the arbitration hearing. On the hearing report, the parties entered into various stipulations. All of those stipulations were accepted and are hereby incorporated into this arbitration decision and no factual or legal issues relative to the parties' stipulations will be raised or discussed in this decision. The parties are now bound by their stipulations.

ISSUES

The parties submitted the following disputed issues for resolution:

1. The extent of Permanent Partial Disability, if any.
2. Entitlement to payment of medical expenses.
3. Entitlement to IME reimbursement, Iowa Code section 85.39.
4. Entitlement to alternate medical care, Iowa Code section 85.27.
5. Costs.

FINDINGS OF FACT

After a review of the evidence presented, I find as follows:

Claimant was 39 years old at the time of the hearing. (Transcript page 11)

EDUCATION

Claimant graduated from Ames High School in 1997. (Ex. F, p. 11) He was an average student. (Tr. p. 13) He attended Des Moines Area Community College from 1997 to 1999. He obtained certifications in automotive air-conditioning and brakes, but did not obtain a degree. (Exhibit F, p. 11; Tr. p. 36) He has also been previously trained and certified concerning working in confined spaces. (Id.)

WORK HISTORY

Claimant's work experience includes working as: an automotive technician; a laborer on an underground boring crew; an underground pipe layer; a landscaper; a heavy equipment operator; and concrete work, among other labor positions. (Ex. F, pp. 12 - 13; Tr. pp, 25 – 32) Claimant testified that he did not think he could perform these jobs any longer since his work injury, or that significant portions of these jobs would be difficult, such as reaching overhead, bending, lifting, handling significant weight, pulling, and bouncing around in heavy equipment. (Tr. pp. 25-32) Claimant's wages have largely been in the neighborhood of $10.00 to $15.00 per hour. (Ex. F, pp. 12-13) While working for Eriksen Construction from 2014 to 2015, claimant earned between $28.00 to $42.00 per hour, but quit that job due to differences with the foreman. (Ex. F, p. 13; Tr. p. 40)

Claimant testified that he left the automotive repair industry and does not plan to return due to his allergic reaction to latex gloves and exposure to grease and oil. (Tr. pp. 37-38)

Claimant worked as a laborer for the defendant employer Absolute Concrete Construction from approximately June, 2015 until September, 2015. (Ex. F, p. 13; Tr. p. 14) Part of his job involved operating a concrete buggy, which is a motorized machine with a bucket at the front and a platform at the rear for the operator to stand on and ride. The machine is used to transport concrete to the location where it is poured. (Tr. p. 15) Claimant earned $15.00 per hour. (Tr. p. 17).

After the work injury on August 13, 2015, claimant was placed on light duty work cleaning the shop and doing inventory until he was released to return to regular duty. (Tr. p. 41) However, upon his release to regular duty, he was informed that his position had been filled and he was terminated on September 15, 2015. (Tr. pp. 41-42, 64; Ex. H, p. 22) Mr. Cory Purvis, Vice president of Operations at Absolute Concrete, stated that it would be difficult for claimant to work as a laborer for Absolute Concrete with a work restriction placing him in the medium work category. (Tr. pp. 67-68)

After claimant's termination from the defendant employer, he obtained employment at Keller Excavating in September, 2015 and remained employed there until February, 2016. (Ex. F, p. 13; Tr. p. 45)

CURRENT EMPLOYMENT

At the time of the hearing, claimant worked full-time at Casey's General Store in Slater, Iowa, making donuts and breakfast foods. (Tr. pp. 32-33; Ex. F, p. 13) Claimant earns about $10.00 per hour. (Tr. p. 34) He had no plans to look for a different job. (Tr. p. 34) He is concerned about whether he can physically return to the physically demanding type of work that he has done before, which provided higher wages. (Id.)

PRIOR MEDICAL CONDITION

Claimant did not report any low back injuries prior to the work injury in his answers to interrogatories. (Ex. F, p. 15) However, he had, on at least two occasions, dealt with sciatica symptoms that prompted a visit to the emergency room. (Tr. p. 56)

THE INJURY

The parties stipulated that claimant sustained an injury that arose out of and in the course of his employment on August 13, 2015. (Hearing Report, p. 1) On that day the company was pouring a concrete parking lot and several employees were operating concrete buggies, including claimant. The person directing the buggies where to dump the concrete indicated for claimant to stop, which he did, and the person operating the buggy behind claimant ran into him. (Tr. p. 18) Claimant was standing on the rear platform of the buggy and was pinned between the two machines until the other operator backed up. He had immediate pain. (Id.)

POST-INJURY MEDICAL TREATMENT

On August 13, 2015, claimant was seen by Whitney Ceretti, PA-C, at Methodist Occupational Health and Wellness. (Ex. JE1, p. 1) His injury was described as a low back contusion. He was given a Toradol injection for pain, prescribed Flexeril and tramadol and told to ice regularly and take 600 mg of ibuprofen four times per day. (Id.) Claimant was placed on work restrictions of no lifting over 10 pounds. (Ex. JE1, p 4) It was noted that there was "no evidence of radiculopathy or bone injury" at that time. (Ex. JE1, p. 1) However, claimant testified that as time went on, he developed pain radiating down his right leg. (Tr. p. 19)

On August 17, 2015, claimant was seen by Von Miller, PA-C at Methodist Occupational Health and Wellness. (Ex. JE1, p. 5) Claimant reported that he had not had any improvement and that he was having pain in his right buttock and into his right upper leg. (Id.) He was prescribed new medication and two weeks of physical therapy. (Id.)

Claimant continued to receive treatment with Methodist Occupational Health and Wellness, noting improvement in his condition and improvement with physical therapy. (Ex. JE1, p. 7) On September 3, 2015, claimant reported feeling 60 percent better, but with stiffness in his back and leg. (Id.)

On September 10, 2015, claimant denied having any pain in his low back, radiating pain or paresthesia and described his pain as 0/10. (Ex. JE1, p. 9) It is recorded that claimant "met all of his short-term and long-term goals" in physical therapy and had "no deficits in strength or range of motion." (Id.) Claimant was discharged from care and released to return to full-duty work. (Id.) He was also encouraged to continue with home exercises "to prevent future and further injury of his low back." (Id.)

Claimant testified at hearing that when he was released on September 10, 2015, his symptoms were just "slight tightness in my back," but that his back complaints had not resolved entirely. (Tr. p. 43) However, after being presented with the medical record described above indicating that he had no pain, he stated, "that must have been a good day for me." (Tr. p. 44) He then agreed that on September 10, 2015, he felt he was ready to return to work without restrictions and did not dispute the accuracy of the description in the record that he had no pain or deficits in strength or range of motion. (Tr. pp. 44-45)

As stated above, claimant was terminated from his employment with Absolute Concrete in mid-September, 2015. (Tr. pp. 41-42) He began working at Keller Excavating in late September, 2015. (Tr. p. 45) Claimant stated in his deposition that he did not discuss any need for restrictions or back pain with Keller Excavating when he was hired. However, at hearing, claimant indicated that he was confused when answering the prior question, and that he did, in fact, have a conversation with the new employer about his back pain. (Tr. p. 46) I note that claimant worked for over two

months without restrictions at Keller Excavating. (Tr. p. 49) Claimant testified that while working at Keller Excavating, his "back flared up again." (Tr. p. 47)

On October 29, 2015, Jacqueline Stoken, D.O. issued a report to claimant's counsel following an independent medical evaluation on October 26, 2015, about one month after he started work at Keller Excavating. (Ex. 1, p. 1) At that time, claimant reported his average pain in his back as 4/10 and his right leg as 3/10. (Ex. 1, p. 3) Dr. Stoken assigned permanent impairment to the whole person of 5 to 8 percent based on placement in the Lumbar DRE Category II in the American Medical Association Guides to the Evaluation of Permanent Impairment, Fifth Edition. Dr. Stoken also assigned work restrictions that would place claimant in the medium work category. (Ex. 1, p. 5) I find that Dr. Stoken's medical record review from Methodist Occupational Health and Wellness does not extend beyond September 3, 2015, which ends with claimant reporting that he was just 60 percent better. (Ex. 1, p. 2) Dr. Stoken did not review the record of September 10, 2015, in which claimant reported that he had no pain and was returned to work without restrictions. Therefore, Dr. Stoken's opinion is based on an incomplete history.

On December 7, 2015, claimant returned to Methodist Occupational Health and Wellness complaining of low back pain. He stated that the "tingling in his leg went away, but his back pain never went away." (Ex. JE1, p. 11) He was prescribed physical therapy and medication. (Id.) He was placed on restrictions of sitting, standing and walking as tolerated. His back pain was noted to be "4 months old at this time." (Id.) The Patient Status Report indicates that the condition is work related and the employer is listed as Absolute Concrete. (Ex. JE1, p. 12)

Claimant had additional visits to Methodist Occupational Health and Wellness and he was prescribed physical therapy. (Ex. JE1, pp. 13, 15)

By January 25, 2016, the physical therapist noted that claimant was "[d]oing well" and he had "[n]o pain in low back or hips" and was without symptoms for the prior one to two weeks. (Ex. JE2, p. 34) Claimant agreed at hearing that this was an accurate assessment. (Tr. p. 50)

On January 27, 2016, it is noted that claimant had met his physical therapy goals and made "very good progress." (Ex. JE2, p. 35) He was instructed to "stay diligent with flexibility and core strength/endurance to control symptoms long term." (Id.)

On February 5, 2016, claimant reported that "he is not having any pain, numbness, or tingling," stating that "he is completely resolved at this time, not having any issues with his back." (Ex. JE1, p. 15) He was released by Von Miller, PA-C to return to full duty and discharged from care. (Id.)

Claimant agreed that his condition on January 27, 2015 and February 5, 2016 were accurately recorded in the medical records and he stated that his "back was obviously feeling fine" when he saw the medical provider on those days. (Tr. p. 51)

The following questions and answers are significant concerning the February 5, 2016 visit with Von Miller, PA-C:

> Q. Exhibit 1, page 15, it's an exam note from Von Miller, and he says, 'Says he's not having any pain, numbness, or tingling.' Did you tell Von Miller that?
>
> A. Yes.
>
> Q. The note goes on to state, 'He says he is completely resolved at this time, not having any issues with his back.' Did you tell Von Miller that?
>
> A. Yes, sir.

(Tr. p. 51) Although on January 27, 2016 the physical therapist encouraged claimant to engage in continued flexibility and core strength exercises, I note that unlike the prior release to return to work without restrictions on September 10, 2015, on February 5, 2016, there is no recommendation for continued home exercises. (Ex. JE1, pp. 9, 15)

On February 16, 2016, claimant presented at an emergency department for complaint of low back pain and reported a history of chronic back pain, stating that "[h]e just returned to work, and this morning, was helping pick up a railroad tie with a partner at work, when he developed worsening of his low back pain." (Ex. JE3, p. 37) His pain was in his mid-low back and radiated into his buttocks, but not any further. (Id.) It is noted that he "appears to be having exacerbation of his chronic pain." (Id.)

Claimant returned to Methodist Occupational Health and Wellness on February 19, 2016. (Ex. JE1, p. 17) At that time claimant stated that in his new job, he "had bent down to push a railroad tie and felt a pop in his back and developed back pain again." (Id.) Claimant reported being in pain with "radiation down his right leg just to the knee but not below the knee." (Id.) Claimant seemed to relate his condition to his August 13, 2015 incident, however, Mr. Miller openly questioned how this specific and new episode could be related to the August, 2015 work injury, particularly when claimant had previously reported no pain and no symptoms and was released from care. (Id.) An MRI of the lumbar spine was requested. (Id.) Claimant was placed on light duty and subsequently left employment at Keller Excavating. (Tr. pp. 52-53)

At hearing claimant testified that he did not believe his work at Keller caused any increase in his pain. (Tr. p. 57) This is contrary to the medical records, which clearly indicate a specific episode at Keller Excavating resulting in a "pop" in his back and immediate onset of symptoms.

The MRI requested by Mr. Miller was obtained on February 25, 2016, and indicated: "[m]ild degenerative changes at L4-5 and L3-L4 with disc bulging lateralizing to the right laterally at both levels with right posterior lateral annular tearing." (Ex. JE4, p. 38)

On February 29, 2016, claimant was referred by Mr. Miller to an orthopedic physician "for his L3-4 disk tear." (Ex. JE1, p. 19) He was also placed on restrictions of no lifting, pushing or pulling in excess of 10 pounds. (Ex. JE1, p. 20)

On March 7, 2016, claimant was seen by Todd Harbach, M.D. of Iowa Ortho. (Ex. JE5, p. 39) Claimant reported right buttock pain and right leg pain, stopping at the knee, with 90 percent attributed to the leg and 10 percent to the back. Claimant advised of the buggy incident in August 2015. However, it does not appear that Dr. Harbach was advised of claimant's prior release to return to work without restrictions and the railroad tie incident at Keller Excavating. Dr. Harbach stated that claimant's "original injury was August 2015," and that he had intraforaminal disk herniations at level L3-4 and to a lesser extent, L4-5. (Ex. JE5, p. 40) The herniations were described as "very small and actually at L4-L5 is mostly an annular tear." (Id.) Although surgery was possible, there would be "guarded expectations as to a good result." (Id.) Claimant was continued on a 10 pound lifting restriction, and he was to avoid repetitive bending, climbing, twisting, pulling, pushing and stooping. It was recommended that he receive epidural steroid injections. (Ex. JE5, p. 41) Claimant was to return in four weeks for follow-up. (Ex. JE 5, p. 40) It is not clear whether there was a follow-up visit or whether the injections were accomplished.

At the hearing claimant testified that he was unsure if he advised Dr. Harbach of the railroad tie incident at Keller Excavating. (Tr. p. 53) In fact, Dr. Harbach had not been advised of these matters as confirmed on April 28, 2016, when Dr. Harbach responded to a letter from the workers' compensation insurance carrier and indicated that he was previously unaware of claimant's return to regular duty with complete resolution of his symptoms and the subsequent railroad tie incident. (Ex. A, p. 1) Dr. Harbach stated that the railroad tie incident:

> certainly seems like a much more reasonable cause of his current symptomology, which is back and leg pain with some intraforaminal disk herniations. I would think it would be much less likely, if not completely unlikely for the patient to end up with an intraforaminal disk herniations and back and leg pain from being struck in the back by a cement buggy. This type of picture is usually seen clinically after a lifting incident.
>
> Therefore, provided that the information that you have given me is, in fact, factual, I would agree that his injury at Absolute Concrete Construction back in August 13, 2015, has nothing to do with his current symptomology or problems.

(Id.) I note that there is no reason to doubt the factual validity of the railroad tie incident as described in the evidence presented.

On October 10, 2016, Von Miller, PA-C of Iowa Methodist Occupational Health & Wellness, responded to a letter from defense counsel indicating his opinions that: (1) he cannot state within a reasonable degree of medical certainty whether claimant's

symptoms that caused him to seek medical care after the railroad tie incident were causally related to the original August 13, 2015 concrete buggy incident or the railroad tie lifting incident; (2) however, claimant's current complaints and need for treatment are attributed to the railroad tie incident of February 16, 2016; (3) an annular tear is more consistent with the railroad tie lifting incident than the concrete buggy incident; (4) claimant sustained no functional impairment from the August 13, 2015 concrete buggy incident; (5) concerning the August 13, 2015 incident, claimant is released to full-duty and does not require restrictions; and, (6) no additional medical care is needed for the August 13, 2015 injury. (Ex. B, pp. 5-6)

On January 26, 2017, Dr. Harbach responded to a letter from defense counsel indicating his opinions that: (1) the August 13, 2015 work incident was not a substantial contributing factor in claimant's return for treatment in December, 2015; (2) claimant's current complaints and treatment related thereto are causally related to the February 16, 2016, railroad tie incident; (3) the disk herniations and resulting symptoms are more consistent with lifting the railroad tie than being struck by a concrete buggy; (4) the August 13, 2015 incident did not result in any permanent impairment; (5) no restrictions are needed concerning the August 13, 2015 incident. (Ex. A, pp. 2-3)

On March 15, 2017, claimant went to the Story County Medical Center and was seen by Shane Higgins, PA-C. He was trying to get "referred back to Iowa Ortho for a steroid injection." (Ex. JE6, p. 42) I note this is about one year after it was recommended by Dr. Harbach. (Ex. JE5, p. 41) Claimant testified that he had no medical appointments for his back between March 2016 and March 2017 due to his lack of insurance. (Tr. p. 55) However, he also agreed that he obtained health insurance in October 2016. (Id.)

At the March 15, 2017 appointment with Mr. Higgins the plan was to "get a new MRI set up and start a referral for Iowa Ortho." (Ex. JE6, p. 45) The MRI was obtained on March 28, 2017 and showed an L4-5 right foraminal annular tear and mild broad-based right eccentric disc osteophyte contacting the exiting right L4 nerve root, producing mild/moderate right neural foraminal stenosis; mild narrowing and mild encroachment on the traversing L5 nerve root; and, L3-4 mild broad based posterior disc bulge and stenosis with degenerative findings but not displacing the bilateral L3 nerve roots. (Exhibit JE6, p. 47)

On March 28, 2017, claimant was seen again by Mr. Higgins, PA-C at Story County Medical Center, who stated that the MRI revealed "lumber [sic] disk disease with herniation and right nerve abuttment [sic]." (Ex. JE6, p. 48) He was referred for a possible epidural and/or SI joint injection.

On April 5, 2017, it was noted by Mr. Higgins that although he believed that chronic back pain and SI joint pain could be the cause of the radiation, the location of claimant's pain would, according to dermatomal patterns, originate from disks that did not show any nerve impingement. (Ex. JE6, p. 54)

On April 12, 2017, claimant stated that "he has a 1-1/2 year history of back pain and pain down his right leg", which he rated as 7-8/10 and advised that it has gotten significantly worse in the past few months. (Ex. JE6, p. 55) An epidural steroid injection (ESI) was recommended. (Ex. JE6, p. 56)

On May 3, 2017, claimant was seen again by Mr. Higgins and stated that "he is feeling good and his back is improving," and that claimant was to have an ESI following this appointment. (Ex. JE6, pp. 57, 60)

On May 17, 2017, claimant reported "at least 50% relief" following the ESI and that he is "no longer having any radicular symptoms." (Ex. JE6, p. 62) It is noted that claimant was relatively satisfied with the ESI results, but has noted "that the pain has been worse with wrestling with his children and doing significant lifting at home." (Ex. 6, p. 62) His medication was refilled and a physical therapy prescription given to claimant. (Ex. JE6, p. 63)

He was seen for physical therapy and was found to have "improved faster than anticipated." (Ex. JE6, p. 70) On June 15, 2017, he was discharged with the expectation that he would continue to have gradual progress towards "100% functional" status. (Id.)

On July 27, 2017, Dr. Stoken, without any additional examination of claimant, authored a letter to claimant's counsel indicating that she had reviewed additional records from Story County Hospital, including the MRI of March 22, 2017 and she amended her prior opinion to increase the impairment rating to 10 to 13 percent to the whole person based on placement in the Lumbar DRE Category III in the AMA Guides. (Ex. 1, p. 16) However, Dr. Stoken still did not indicate that she was aware of the records from Methodist Occupational Health and Wellness dated September 10, 2015, in which claimant reported no pain and was returned to work without restrictions. (Ex. JE1, p. 9) She also did not indicate that she was aware of the Methodist Occupational Health and Wellness record from February 5, 2016, in which claimant reported again that he was having no pain and was released to return to work with no restrictions and his back issues were described as "resolved." (Ex. JE1, p. 15) Neither does Dr. Stoken discuss the Methodist Occupational Health and Wellness record from February 19, 2016, when claimant discussed moving a railroad tie at his new employer and feeling a pop in his back. (Ex. JE1, p. 17) Again, Dr. Stoken's opinion is based on an incomplete history.

Considering the expert opinions in this case, I find that Dr. Stoken's initial and subsequent opinions were based on an incomplete history. I find that Dr. Harbach's opinions of April 28, 2016, and January 26, 2017, were made based upon his examinations of claimant and claimant's medical history including his report of a complete resolution of his symptoms and his release to return to work without restrictions on February 5, 2016, along with information concerning the subsequent railroad tie incident and the pop in his back. I find that Dr. Harbach's opinions are the most well informed and I accept his opinion that claimant's current condition and need

for treatment is not related to his injury on August 13, 2015 at Absolute Concrete. I find that Dr. Harbach's opinion is supported by the October 10, 2016 opinion of Von Miller, PA-C.

OTHER FINDINGS

Claimant testified at hearing that he had ongoing back pain, although he was uncertain of the cause. (Tr. p. 57) He also stated that on the day of the hearing he had trouble bending and twisting including bending over to tie his shoes. However, he described this as a bad day, stating that on a normal day, he apparently can bend down to tie his shoes. (Tr. p. 23) In addition, he stated that he has problems with lifting, reaching overhead, reaching out and walking long distances. (Tr. pp. 23-25)

I find that on June 29, 2016, defendants communicated to claimant's counsel their findings from Dr. Harbach concerning his opinion that claimant's current condition was no longer related to the original work injury of August 13, 2015. (Ex. C, p. 7) On October 28, 2016, defense counsel in a letter to claimant's counsel, referred to the June 29, 2016 letter in support of their denial of further medical care. (Ex. D, p. 8)

Concerning prior medical expenses, I find, based on Dr. Harbach's medical opinion, that claimant's entitlement to medical benefits stopped upon his release to return to work on February 5, 2016, when claimant reported that he was "not having any pain, numbness, or tingling," and that he was "completely resolved." (Ex. JE1, p. 15) I find that the medical expenses incurred thereafter, based upon Dr. Harbach's medical opinion, are not related to the August 13, 2015 work injury with the defendant employer.

I find that Dr. Stoken's IME was conducted on October 26, 2015. (Ex. 1, p. 1) Prior to that time claimant had received treatment from Ms. Ceretti and Mr. Miller, both of whom are physician's assistants at Methodist Occupational Health and Wellness. (Ex. JE1, pp. 1, 5) Dr. Harbach did not render an opinion concerning permanency related to the August 13, 2015 work injury until April 28, 2016. I find that there was no physician retained by the employer that conducted an evaluation of claimant's permanent disability prior to Dr. Stokens' IME on October 26, 2015. I find that claimant has therefore failed to carry his burden of proof that he is entitled to reimbursement for the IME of Dr. Stoken on October 26, 2015 (report issued October 29, 2015).

Having accepted Dr. Harbach's opinion above that claimant's ongoing medical care is not related to the August 13, 2015 work injury, I find that defendants have not unreasonably denied ongoing medical care and that claimant has failed to carry his burden of proof that he is entitled to ongoing alternate medical care.

CONCLUSIONS OF LAW

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

The first issue for determination is the extent of permanent partial disability, if any. The fighting issue is whether the August 13, 2015 work injury is the cause of permanent impairment and claimant's current condition.

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 an expert opinion is based upon an incomplete history, the opinion is not necessarily binding upon the commissioner. 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 & Casualty Co., 526 N.W.2d 845 (Iowa 1995).

Claimant argues that this case is similar to the Iowa Court of Appeals decision in Carl A. Nelson & Co. v. Sloan, 873 N.W.2d 552 (Iowa Ct. App. 2015) In that case claimant had been on light duty for an extended period of time, working only 4 hours per day, when he had been accustom to a wage based on 8 to 12 hours per day. Sloan testified plainly that his symptoms never resolved and he was only returned to full duty work because he specifically asked to be returned to work due to being financially strapped. This was corroborated by Sloan's spouse. The Commissioner found, and the Court of Appeals affirmed, that there "was 'simply no reasonable basis to disbelieve claimant's uncontroverted, sworn testimony that he was still suffering from back and leg pain (radiculopathy) when he was released' back to work." Carl A. Nelson & Co. v. Sloan, 873 N.W.2d 552 at 7. In the case at bar, there was no indication that claimant asked the physician's assistant to return him to work despite continued symptoms. In fact, claimant testified that he agreed that upon his release to return to work, his symptoms had resolved and he had no pain, numbness or tingling and that he was not

having any issues with his back. (Tr. p. 51) Unlike Sloan there is a clear and distinguishable cessation of symptoms as of February 5, 2016. The treating medical provider stated that "he is completely resolved at this time, not having any issues with his back." (Ex. JE1, p. 15) In addition, and unlike Sloan, claimant agreed at hearing that this was accurate, stating that he told Mr. Miller he had no symptoms on February 5, 2016. (Tr. p. 51) He was without any complaint. (Ex. JE1, p. 15) Therefore, I find the Sloan case distinguishable from the case at bar.

I conclude that claimant has failed to carry his burden of proof that he sustained any permanent partial disability regarding the August 13, 2015 incident.

The second issue is payment of 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).

Returning to the expert opinions, the only fully informed expert opinion as discussed above, came from Dr. Harbach, who determined that the "injury at Absolute Concrete Construction back in August 13, 2015, has nothing to do with his current symptomology or problems." (Ex. A, p. 1) Dr. Harbach's opinion is supported by the opinion of Von Miller, PA-C, who said that claimant's "current back complaints and any resultant need for treatment" is attributable "to the February 16, 2016 incident involving lifting a railroad tie," and that "[n]o further medical treatment is necessary for the August 13, 2015 incident." (Ex. B, pp. 5-6) This is contrasted with Dr. Stoken's opinion, which is based on an incomplete medical record and is rejected.

I have found above based upon Dr. Harbach's medical opinion and the supportive opinion of Von Miller, PA-C, that claimant's medical treatment was no longer related to his August 13, 2015 work injury after his release to return to work without restrictions on February 5, 2016. I therefore conclude that defendants are not obligated to pay or reimburse medical expenses after that date. The medical expenses sought in this case by claimant appear to all be after that date. Therefore, I conclude that claimant has failed to carry his burden of proof concerning entitlement to the medical expenses he seeks.

The next issue is entitlement to reimbursement for claimant's IME with Dr. Stoken on October 26, 2015. Her report was issued on October 29, 2015.

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).

I have found above that Dr. Stoken's IME was conducted on October 26, 2015 (report issued October 29, 2015). (Ex. 1, p. 1) Iowa Code section 85.39 requires that there must first be "an evaluation of permanent disability . . . made by a physician retained by the employer," which the employee believes is too low, before the claimant is entitled to an IME under this section. In this case, I have found above that prior to Dr. Stoken's IME, no physician had been retained by the employer who conducted an evaluation of permanent disability as a result of the August 13, 2015 work injury. Therefore, under Iowa Code section 85.39, claimant is not entitled to reimbursement.

The next issue is entitlement to alternate medical care, under Iowa Code section 85.27.

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

> [T]he employer is obliged to furnish reasonable services and supplies to treat an injured employee, and has the right to choose the care. . . . The treatment must be offered promptly and be reasonably suited to treat the injury without undue inconvenience to the employee. If the employee has reason to be dissatisfied with the care offered, the employee should communicate the basis of such dissatisfaction to the employer, in writing if requested, following which the employer and the employee may agree to alternate care reasonably suited to treat the injury. If the employer and employee cannot agree on such alternate care, the commissioner may, upon application and reasonable proofs of the necessity therefor, allow and order other care.

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

Harned v. Farmland Foods, Inc., 331 N.W.2d 98 (Iowa 1983). In Pirelli-Armstrong Tire Co., 562 N.W.2d at 433, the court approvingly quoted Bowles v. Los Lunas Schools, 109 N.M. 100, 781 P.2d 1178 (App. 1989):

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

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

In the case at bar, I have found based on the opinions of Dr. Harbach and Von Miller, PA-C, that any need for ongoing medical care is not related to the August 13, 2015 work injury. I therefore conclude that defendants have not unreasonably denied medical care and that claimant has failed to carry his burden of proof that he is entitled to ongoing medical care under Iowa Code section 85.27.

The final issue is costs. Assessment of costs is a discretionary function of this agency. Iowa Code section 86.40. Costs allowable under commissioner rule are as follows:

> Costs taxed by the workers' compensation commissioner or a deputy commissioner shall be (1) attendance of a certified shorthand reporter or presence of mechanical means at hearings and evidential depositions, (2) transcription costs when appropriate, (3) costs of service of the original notice and subpoenas, (4) witness fees and expenses as provided by Iowa Code sections 622.69 and 622.72, (5) the costs of doctors' and practitioners' deposition testimony, provided that said costs do not exceed the amounts do not exceed the amounts provided by Iowa Code sections 622.69 and 622.72, (6) the reasonable costs of obtaining no more than two doctors' or practitioners' reports, (7) filing fees when appropriate, (8) costs of persons reviewing health service disputes.

876 IAC 4.33.

Iowa Code section 622.69, referenced above provides for witness fees of ten dollars for each full day's attendance, five dollars for a half day's attendance, plus mileage for witnesses at trial.

Iowa Code section 622.72, referenced above, states that expert witnesses called to testify at trial shall receive additional compensation in an amount to be fixed by the court, not to exceed $150.00.

Claimant has not been successful in this claim and I therefore exercise my discretion and do not assess costs.

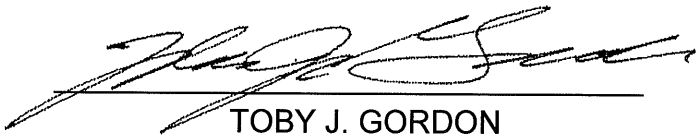
ORDER

THEREFORE, IT IS ORDERED:

Claimant shall take nothing.

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 17th day of January, 2018.



TOBY J. GORDON
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

Copies to:

Nathaniel R. Boulton
Attorney at Law
100 Court Ave., Ste. 425
Des Moines, IA 50309
nboulton@hedberglaw.com

Matthew R. Phillips
Attorney at Law
801 Grand Ave., Ste. 3700
Des Moines, IA 50309-8004
Phillips.matthew@bradshawlaw.com

TJG/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.