BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JUAN MORALES,

Claimant,

vs.

TYSON FRESH MEATS, INC.,

Employer,
Self-Insured,
Defendant.

File Nos. 5048183; 5049255

ARBITRATION

DECISION

Head Note Nos.: 1402.20, 1108

STATEMENT OF THE CASE

The claimant, Juan Morales, filed two petitions for arbitration and seeks workers' compensation benefits from Tyson Fresh Meats, Inc., a self-insured employer. The claimant was represented by Tom Drew. The defendant was represented by James Drury, II.

The matter came on for hearing on January 20, 2015, before deputy workers' compensation commissioner Joe Walsh in Sioux City, Iowa. The record in the case consists of claimant's exhibits 1 through 9 and defense exhibits A through J. The claimant provided sworn testimony at hearing as did Dennis Gierstorf, claimant's supervisor and Pam Fiedler, Tyson nurse manager. Frank Gonzalez was approved and served as the Spanish language interpreter. Marcia Mahon was appointed the official reporter and custodian of the notes of the proceeding. The matter was fully submitted on February 6, 2015 after helpful briefing by the parties.

ISSUES

The parties submitted the following issues for determination.

For File No. 5049255 (Date of Injury: July 25, 2013):

1. Whether the claimant sustained an injury which arose out of and in the course of employment on July 25, 2013.

2. If an injury was sustained, whether the claimant's disability is causally connected to the work injury.

3. The nature and extent of any disability, if proven.

4. Medical payments are alleged and disputed as outlined in claimant's exhibit 8.

5. The defendant has raised the affirmative defense of notice. The issue is whether the defendant has proven a notice defense.

6. All elements comprising the rate of compensation are disputed.

7. IME and costs are disputed.

For File No. 5048183 (Date of Injury: September 25, 2013):

1. Whether the claimant sustained a cumulative injury which arose out of and in the course of employment and manifested on or about September 25, 2013.

2. If an injury was sustained, whether the claimant's disability is causally connected to the work injury.

3. The nature and extent of any disability, if proven.

4. Medical payments are alleged and disputed as outlined in claimant's exhibit 8.

5. All elements comprising the rate of compensation are disputed.

6. IME and costs are disputed.

STIPULATIONS BOTH FILES

Through the hearing report, the parties stipulated to the following:

1. The parties had an employer-employee relationship.

2. Temporary disability/healing period benefits are not in dispute.

3. The commencement date for any permanent disability benefits is stipulated for each injury.

4. Defendant claims no credit.

5. All affirmative defenses have been waived, other than the notice defense on File No. 5049255.

FINDINGS OF FACT

Juan Carlos Morales resides in Denison, Iowa. He was married at the time of his alleged injuries. He has 3 children. He is 43 years old as of the date of hearing and is diagnosed with diabetes. He completed high school and one semester at university. Juan attained a GED in 2003. His English skills are below average although he is able

to work at Tyson without an interpreter. He is able to carry on conversational English. He communicates with co-workers in both English and Spanish. He is left-handed.

Juan worked as a mechanic in Mexico. He worked at a factory in Los Angeles making furniture after he came to the United States in 1996. He later worked for a company cleaning and maintaining the parks. He eventually moved to Iowa in approximately 2000. He worked for a company in Denison called Custom Ribs. Juan packaged hams and ribs that were already cooked. In 2001, claimant started working at Tyson Fresh Meats. All of his past jobs were physical, manual labor jobs which required the use of his arms and shoulders. He was generally healthy before starting to work for the employer in 2001.

Tyson Fresh Meats, then known as IBP, Inc., hired claimant to wash stomachs. Shortly thereafter, he switched jobs to "loadbacker." Juan suffered injuries to both of his hands and elbows, which ultimately required surgeries. After the surgeries, he was unable to continue working on the line due to restrictions. He could not use air knives, knives and hooks, in addition to a lifting restriction. Tyson accepted the injury and paid claimant's bills. Juan moved into the yard in approximately 2005 or 2006 which was easier on his arms due to less repetitive motion. His position is titled "yard man." He receives, unloads, weighs, and places the cattle in a corral. To move the cattle, he must outstretch his arms and hold gates closed. He also frequently used a heavy hose to spray out the corrals.

Juan estimated that he spends half his time at work with his arms outstretched. He testified his arms are often at or above shoulder height and he is often applying force to push back livestock on the other side of the gate. This estimate was disputed by his supervisor, Dennis Gierstorf, who also testified under oath at hearing that a much smaller amount of his time was spent opening and closing the higher gates.

Juan began reporting symptoms in his left shoulder to the Tyson medical department in January 2013. (Employer's Exhibit A, page 5) The following history was documented on his first visit on January 30, 2013. "He also says that his [l]eft shoulder is sore and has been for at least a year. When asked what part of his job causes his pain, TM [team member] says he really doesn't know but then goes on to list the job duties of holding and maneuvering a 2 inch power hose, and pushing/pulling on gates." (Emp. Ex. A, p. 5) He followed up fairly regularly after January 30, 2013, for the next few months. (Emp. Ex. A, pp. 1-5) Each time, he alleged left shoulder pain, which he attributed to his work activities. The plant nurse manager, Pam Fiedler, testified credibly that the section of the medical notes indicating whether the condition is work-related is not a medical opinion, but rather merely indicates whether the worker was alleging the condition is caused by work.

Juan did not report to the medical department between March and July 2013, according to the documentation. (Emp. Ex. A, pp. 2-3) Juan testified at hearing that he slipped and fell at work on July 25, 2013. He testified that he reported this to his

supervisor, Dennis Gierstorf, who denied the same. Ms. Fiedler testified that if the claimant had been referred to the medical department, the visit would have been documented.

On August 14, 2013, the Tyson medical department documented that Juan was complaining of pain in his left shoulder from his work activities. Again, the primary sources of pain were using the pressure hose and opening and closing the gates. (Emp. Ex. A, p. 3) His range of movement was limited in his left shoulder at this time. Juan was provided with medications and his shoulder was iced, followed by a hot pack, which improved some of his range of motion. (Emp. Ex. A, p. 3) He returned a few days later with continued symptoms. (Emp. Ex. A, p. 3) An injury was officially reported on September 25, 2013, and he restated the mechanism of injury at that time. (Emp. Ex. A, pp. 1-2) An appointment was arranged for him with Miller Orthopedics where he saw Huy Trinh, M.D. (Claimant's Ex. 5, pp. 46-47)

On September 27, 2013, Dr. Trinh took x-rays and evaluated Juan. He diagnosed chronic rotator cuff syndrome with glenohumeral osteoarthritis of the left shoulder. (Cl. Ex. 5, p. 46) He ordered an MRI with arthrogram and asked to see Juan back. (Cl. Ex. 5, p. 47) An MRI was performed on October 1, 2013. (Cl. Ex. 3, p. 39) He followed up with Dr. Trinh on October 4, 2013, who modified his diagnosis with the new reports. He diagnosed impingement syndrome of the left shoulder and acromion type 3. (Cl. Ex. 5, p. 45) He gave Juan a "subacromial injection" for pain with "immediate good relief" and stated if "his symptoms return then we will consider an arthroscopy acromioplasty of his left shoulder as the next step." (Cl. Ex. 5, p. 45) On October 28, 2013, Dr. Trinh saw Juan again and recommended surgery. (Emp. Ex. B, p. 1) He also provided an expert opinion that "this is probably not considered as work related because of the shape of his acromion." (Emp. Ex. B, p. 1)

Tyson sent the claimant for an evaluation with Dean Wampler M.D., in November 2013. (Emp. Ex. C, pp. 1-4) Dr. Wampler performed a review of the records, evaluated Juan and reviewed his medical history, in addition to reviewing the job description. (Emp. Ex. C, p. 1) He opined, "I cannot identify a work related condition for Mr. Morales. He has not sustained acute or cumulative trauma injury." (Emp. Ex. C, p. 3) When responding to a specific question about whether Juan's work activities aggravated his condition, Dr. Wampler provided the following response:

> Mr. Morales has substantial left shoulder problems that combine a swollen, arthritic AC joint, glenohumeral joint arthritis, and outlet stenosis to create chronic pinching or impingement of the rotator cuff tendons and superior labrum. This condition results from his anatomical variation of a hooked acromion and the AC joint arthritis.
>
> Mr. Morales' earliest symptoms were nighttime awakening, which is obviously unrelated to work. Activities of daily living that promote this condition are reaching and rotating the shoulder *above chest high*. I

> asked Mr. Morales specifically if he has any work performed overhead or over shoulder high. He reported everything he does is at chest high or below. He does not do any shoulder rotation and does not do any lifting of significance except with a hose with water in it. Opening and closing gates is done with his shoulders below chest high. I could not identify any work activities that create risk of AC joint arthritis or impingement.

(Emp. Ex. C, pp. 3-4) He recommended the surgery. Tyson officially denied the claim on December 17, 2013, in a letter which clearly spelled out valid reasons for denying a work injury claim in the State of Iowa. (Cl. Ex. 4, p. 43)

Juan subsequently sought treatment on his own using his private insurance through Tyson. Todd Woollen, M.D., is Juan's primary physician. He referred Juan to Thomas Dulaney, M.D., at Des Moines Orthopaedic Surgeons. Dr. Dulaney took over the treatment on January 27, 2014. (Cl. Ex. 2, p. 33) Dr. Dulaney diagnosed adhesive capsulitis. "I discussed with Juan this definitely seems to be a frozen shoulder clinically." (Cl. Ex. 2, p. 33) He prescribed aggressive stretching in a structured physical therapy program. In February, his condition had worsened and Dr. Dulaney recommended he undergo "manipulation under anesthesia" which was performed on February 25, 2014. (Cl. Ex. 2, pp. 28, 31) The procedure initially worked, but the problem began to recur in April 2014. (Cl. Ex. 2, p. 24)

In September 2014, Dr. Dulaney provided medical opinions to the employer's attorney that his left shoulder conditions (adhesive capsulitis and arthritis) were not work-related or work-aggravated. (Emp. Ex. E, p. 2) On October 2, 2014, Juan was evaluated by Jacqueline Stoken, M.D. (Cl. Ex. 1) Dr. Stoken performed a thorough evaluation and review of the medical file. (Cl. Ex. 1, pp. 2-6) She stated the following under impression: "1. Status post work injury on or about September of 2013 with left shoulder chronic bursitis and left frozen shoulder." (Cl. Ex. 1, p. 7) It is not entirely clear whether she related the conditions to the fall or the repetitive work activities. She clearly had a history of the July 2013 fall. (Cl. Ex. 1, p. 1) There is very little in her report describing his repetitive work activities other than her review of the medical records of the treatment providers. In any event, she opined that there is a causal connection between Juan's conditions and a work injury in September of 2013. (Cl. Ex. 1, p. 7) She assigned an impairment rating of ten percent of the whole person and recommended medium duty work. (Cl. Ex. 1, p. 7)

At the time of hearing, Juan still suffered from symptoms in his left shoulder. In particular, his symptoms cause difficulty in reaching overhead or across his body.

CONCLUSIONS OF LAW

The first question submitted is whether the claimant suffered injuries on July 25, 2013 and/or September 25, 2013. The claimant alleges he suffered an incident of injury on July 25, 2013, when he slipped and fell in his work area. He also alleges he suffered

a cumulative injury which manifested on September 25, 2013, which was the date his left shoulder symptoms became severe and significant such that he sought out treatment.

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 Elec. 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.

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). An occupational disease covered by chapter 85A is specifically excluded from the definition of personal injury. Iowa Code section 85.61(4)(b); Iowa Code section 85A.8; Iowa Code section 85A.14.

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).

The defendant denied both injury dates set forth in the petitions. After weighing all of the evidence in the record, I find by a preponderance of evidence that the claimant suffered a fall at work on July 25, 2013, which arose out of and in the course of his employment. I further find that claimant suffered a cumulative injury for the employer which manifested on or about September 25, 2013.

It is the duty of the workers' compensation commissioner to determine the credibility of testimony. Second Injury Fund of Iowa v. Braden, 459 N.W.2d 467, 471 (Iowa 1990). In every case, the deputy workers' compensation commissioner is required to determine the credibility of the witnesses and to evaluate the weight to be given to the testimony presented.

With respect to the July 25, 2013, injury, I find it more likely than not that Juan fell at work on that date. I generally find him to be credible. Juan's supervisor denied that Juan ever told him about it and the employer never documented the fall anywhere in any of its medical notes. (Emp. Ex. A) Tyson's nurse manager testified about the strict manner in which Tyson maintains its nursing notes. If Juan had reported a fall to the employer, it should have been recorded. I find that these factors strongly suggest that the fall was not terribly serious; however, based upon the record before me, I believe the fall did happen. As I will discuss later, there is very little evidence in the record which establishes causal connection between this fall and the claimant's ongoing left shoulder conditions. Juan had a long history of left shoulder pain prior to the fall and he attributed his problems more to his cumulative work activities rather than the fall. (Emp. Ex. G) The insignificant nature of the fall in relation to his left shoulder pain is the most likely explanation for why it was undocumented.

With respect to the September 25, 2013, injury, I find that Juan was experiencing significant pain on that date which caused him to seek medical treatment in the Tyson medical department. I find that a cumulative trauma injury manifested on that date. I find the Tyson medical department notes to be highly valuable. Between January 30, 2013 and September 25, 2013, Juan visited the medical department seven times. (Emp. Ex. A, pp. 2-5) Each time he complained of left shoulder pain which he deemed to be work-related. He consistently described using the pressure hose and maneuvering the gates as the cause and onset of the pain. September 25, 2013, is the first date that Juan was referred to a shoulder specialist and placed on medical restrictions, due to symptoms of pain and disability in the left shoulder.

The next issue is causal connection for each injury.

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).

Juan has arthritis in his shoulder, also described by experts as bursitis. He also developed left shoulder adhesive capsulitis. The real question in this case is whether either or both of his work injuries substantially contributed to or materially aggravated those conditions. The injured worker bears the burden to prove medical causation through expert testimony.

For the reasons already alluded to above, I am unconvinced that the July fall at work bears any reasonable causal connection to the ongoing disability in his left shoulder. Specifically, while Juan fell at work and this likely caused some temporary pain in his shoulder and arm, there is little supporting documentation in the file to link the July fall to his left shoulder arthritis or adhesive capsulitis to the fall. Juan did not seem to mention any fall in any of the medical notes. On August 14, 2013, Juan made his first visit to the medical department after his fall. He attributed his shoulder pain to pulling the hose out to wash the pens and opening and closing the gates. (Emp. Ex. A, p. 3) There is no mention of a fall. All of the contemporaneous treatment notes are the same in that no fall is mentioned. In his own sworn interrogatory answer, Juan did not even mention his fall at work as a cause of his disability. His July fall at work was, at most, a temporary aggravation of his shoulder pain.

The reality is, Juan had started to notice left shoulder pain in 2012. (Emp. Ex. A, p. 5) The symptoms gradually became worse over time until he began seeking medical attention from the Tyson medical department in 2013. His work activities clearly aggravated his symptoms. It is the claimant's burden to prove that his work injury

substantially contributed to, materially aggravated or "lit up" his conditions through expert opinions. A treating physician's opinions are not to be given more weight than a physician who examines the claimant in anticipation of litigation as a matter of law. Gilleland v. Armstrong Rubber Co., 524 N.W.2d 404, 408 (Iowa 1994); Rockwell Graphic Systems, Inc. v. Prince, 366 N.W.2d 187, 192 (Iowa 1985). The weight given depends upon a review of all of the circumstances when considering the record as a whole.

In this case there are four different expert opinions. In general, Dr. Trinh, Dr. Wampler and Dr. Dulaney have provided adverse opinions. The only favorable opinion in the record is the opinion of Dr. Stoken. When viewing this entire record as a whole, I find that Juan has failed to meet his burden of proof linking his impairments with his work activities. The greater weight of evidence suggests that his work activities cause his symptoms to flare up from time to time, but have not substantially contributed to, materially aggravated, or "lighted up" his underlying conditions. The medical evidence is simply not strong enough.

I note that this is a very close case. On the one hand, I have already found that Juan's work activities resulted in an "injury" as defined by Iowa law. This is enough to entitle an injured worker to medical payments and temporary disability benefits. I believe that Juan has pain and symptoms in his left shoulder when he performs certain work activities. It even makes sense to me that the type of work activities could possibly materially aggravate Juan's arthritis or lead to a frozen shoulder. The medical experts, however, do not convincingly support this.

Dr. Trinh treated Juan. Without any apparent prompting he specifically told Juan his condition, which he diagnosed as impingement syndrome, acromion type III "Is probably not considered as work related because of the shape of his acromion." (Emp. Ex. B, p. 1) This particular statement is not given overwhelming weight because it is unclear what precise standard Dr. Trinh was using. He never did address the specific question of whether Juan's work activities contributed to, materially aggravated or lighted up the condition. Nevertheless, this unsolicited opinion is not helpful at all to Juan, who bears the burden of proof.

The employer arranged a medical evaluation with Dr. Wampler, who answered specific questions. Dr. Wampler did not treat Juan, but he did evaluate him and review his records. He described Juan's condition in the most detail of all of the experts.

> Mr. Morales has substantial left shoulder problems that combine a swollen, arthritic AC joint, glenohumeral joint arthritis, and outlet stenosis to create chronic pinching or impingement of the rotator cuff tendons and superior labrum. This condition results from his anatomical variation of a hooked acromion and the AC joint arthritis.

(Emp. Ex. C, p. 3) He then listed specific, detailed reasons he did not believe that

Juan's work activities significantly contributed to or materially aggravated or lit up the described conditions. Some of these explanations do not make sense to me. He stated that Juan opens and closes gates with his shoulders below chest high. Juan testified, under oath, that he is required to open and close many of the gates at chest height. In spite of the flaws in the opinion, it certainly does not, in any way, assist Juan in meeting his burden of proof.

Neither Dr. Wampler nor Dr. Trinh had diagnosed the adhesive capsulitis or addressed such diagnosis in their opinions. Their causation opinions were solely related to the conditions of arthritis/impingement syndrome problems. Both Dr. Wampler and Dr. Trinh were selected by the employer.

Of all the adverse medical opinions, the opinion of Dr. Dulaney is the most troubling. Juan was referred to Dr. Dulaney by his primary physician. Tyson had nothing to do with his selection. He provided treatment for Juan. He opined that Juan's diagnoses were left shoulder arthritis and adhesive capsulitis. He checked the box that he could not "state within a reasonable degree of medical certainty that Mr. Morales' work activities at Tyson aggravated, accelerated, worsened, or 'lighted up' his left shoulder arthritis and adhesive capsulitis." (Emp. Ex. E, p. 2) The only real flaw in this report is that it is a check box report rather than Dr. Dulaney's own words. Consequently, it is not explained in great detail or in his own words. It is, however, a clear, expert medical opinion which refutes medical causation.

Juan relies upon Dr. Stoken. Dr. Stoken diagnosed left shoulder chronic bursitis and adhesive capsulitis. Dr. Stoken provided a summary opinion that these conditions developed following a work injury. She did not provide any detailed analysis as to how Juan's work activities caused, substantially contributed to, materially aggravated, or lighted up those conditions. In truth, I find her expert opinion somewhat confusing. For example, when discussing the history of the injury, she references his fall at work. (Cl. Ex. 1, p. 1) When specifically addressing the primary question of medical causation, however, she references a September of 2013 injury, without referencing whether it was the fall or a cumulative trauma injury. She provides no analysis of how Juan's work activities may have specifically contributed to the onset of his condition. When analyzed in comparison to the three adverse expert opinions of Dr. Trinh, Dr. Wampler and Dr. Dulaney, the opinion is not strong enough to carry the claimant's burden.

For these reasons, Juan has failed to establish medical causation with regard to either injury date. He has proven a temporary aggravation of his condition. He is not entitled to industrial disability benefits.

Because I have found medical causation has not been established, there is no need to address the notice issue (for the July 2013, injury), the rate issues (both files), medical payments (both files) or the nature and extent of disability (both files). I do note that since I have found that Juan suffered an injury as defined by Iowa law, he could be entitled to treatment for the temporary aggravation. For the same reasons as I denied

medical causation for permanency, however, I deny the medical bills outlined in claimant's exhibit 8. Most of the bills are set forth are for treatment of the adhesive capsulitis. The claimant has failed to establish that the bills are causally connected to the work injury.

Therefore, the next and final issue is the claimant's independent medical evaluation (IME).

Section 85.39 permits an employee to be reimbursed for subsequent examination by a physician of the employee's choice where an employer-retained physician has previously evaluated "permanent disability" and the employee believes that the initial evaluation is too low. The section also permits reimbursement for reasonably necessary transportation expenses incurred and for any wage loss occasioned by the employee attending the subsequent examination.

Defendant is 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).

In this case, the claimant did suffer an injury to his left shoulder which arose out of and in the course of employment. The defendant initially directed Juan's medical care and then referred him for an evaluation with Dr. Wampler. Dr. Wampler opined that the claimant had no disability resulting from the work injuries. Under section 85.39, claimant is entitled to a second opinion. I find that Dr. Stoken's fees charged were fair and reasonable. (Cl. Ex. 9, pp. 73-75)

ORDER

THEREFORE IT IS ORDERED

With regard to File No. 5049255:

The claimant shall take nothing.

The filing fee is assessed to the claimant.

With regard to File No. 5048183:

The claimant shall take nothing.

The defendant shall reimburse claimant for the IME of Dr. Stoken as set forth in claimant's Exhibit 9, pages 73 to 75.

The defendant shall pay the filing fee.

Signed and filed this 13th day of March, 2015.

JOSEPH L. WALSH
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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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.