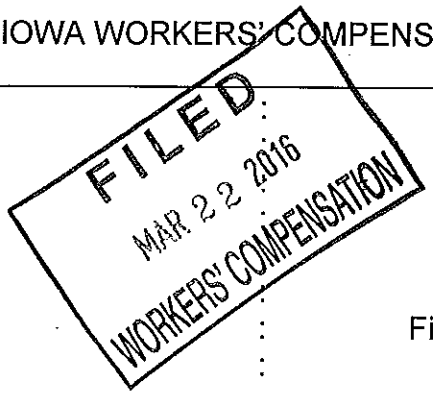
BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER



SAM WANDREY,

Claimant,

vs.

LOBO'S INC.,

Employer,

and

AUTO-OWNERS INSURANCE COMPANY,

Insurance Carrier,
Defendants.

File Nos. 5049279, 5049280

ARBITRATION

DECISION

Head Note Nos.: 1402.30, 1402.40, 1802, 1803,2501, 2502, 2907

STATEMENT OF THE CASE

Sam Wandrey, claimant, filed a petition for arbitration against defendants, Lobo's, Inc. (hereinafter referred to as "Lobo's"), as the employer, and Auto-Owners Insurance, as the insurance carrier. An in-person hearing occurred on December 17, 2015 in Des Moines, Iowa.

At the commencement of hearing, claimant notified the undersigned that he intended to pursue his injury claim under only the alleged April 1, 2014 injury date. Claimant filed a second petition, alleging a May 1, 2014 injury date, only because the insurance carrier had initially used that as the date of injury. Given claimant's statement, the undersigned dismissed File No. 5049280, which involves the May 1, 2014 injury date. No findings, conclusions, or award will be made with respect to File No. 5049280.

Hearing proceeded on File No. 5049279 for the alleged April 1, 2014 injury date. The evidentiary record includes claimant's Exhibits 1 through 11 and defendants' Exhibits A through I. Claimant testified on his own behalf and called his former employee, Vicki Turnquist, to testify. Defendants did not call any witnesses to testify live at hearing.

The evidentiary record closed on December 17, 2015 at the end of the live hearing. However, counsel for the parties requested the opportunity to file post-hearing

briefs. The parties were given until January 13, 2016 to serve their post-hearing briefs, at which time the case was considered fully submitted to the undersigned.

ISSUES

The parties entered into numerous stipulations on the hearing report submitted at the time of hearing. Those stipulations were accepted and no factual or legal issues relative to the parties' stipulations will be made or discussed.

The parties submitted the following disputed issues for resolution:

1. Whether claimant sustained an injury arising out of and in the course of his employment at Lobo's on April 1, 2014.

2. The extent of claimant's entitlement to temporary disability, or healing period, benefits.

3. Whether the April 1, 2014 injury caused permanent disability and, if so, the extent of claimant's entitlement to permanent disability benefits.

4. Claimant's entitlement to payment or reimbursement of past medical expenses contained at Exhibit 9.

5. Whether claimant is entitled to reimbursement of his independent medical evaluation fee pursuant to Iowa Code section 85.39.

6. Whether costs should be assessed against either party.

FINDINGS OF FACTS

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

Sam Wandrey asserts he sustained neck and left shoulder injuries on April 1, 2014 while moving boxes of meat at his place of business, Lobo's. Mr. Wandrey is the sole owner of Lobo's, a bar and restaurant in Schaller, Iowa. He specifically purchased worker's compensation insurance coverage on himself for all work performed at Lobo's.

On April 1, 2014, Mr. Wandrey testified he received a delivery and was moving boxes of meat from a keg cooler into a regular cooler. Given the configuration of the keg cooler, claimant was bent or stooped over attempting to maneuver boxes in the cooler. As he pulled on a box of meat, he testified that he felt immediate pain in his left shoulder.

The mechanism of injury and whether the alleged injury arose out of and in the course of employment are disputed factual issues. Defendants contend that claimant has provided numerous versions of events to various medical professionals and has

failed to prove by a preponderance of the evidence that he sustained an injury on April 1, 2014 that arose out of and in the course of his employment.

Numerous pieces of competing evidence exist on this issue. First, claimant testified about the mechanism of injury. Specifically, claimant testified he was maneuvering boxes around in the keg cooler at the restaurant and was attempting to pull them out to transfer them to a food cooler. (Transcript, pages 27-29) As he pulled on one particular box, he felt a pop in his left shoulder and burning pain like someone stabbed him. (Tr., pp. 25-26) Mr. Wandrey testified that he immediately told one of his employees, Vicki Turnquist, about his left shoulder injury and left to try to get in to see a chiropractor for treatment. (Tr., pp. 28-29)

Mr. Wandrey called his former full-time employee, Vicki Turnquist, to testify. Ms. Turnquist confirmed that she was present at the restaurant on April 1, 2014. Although she did not see the specific moment of injury, Ms. Turnquist confirmed that she saw claimant shortly thereafter and that he appeared to be in pain. (Tr., pp. 101-102) She had never seen claimant exhibit behavior that demonstrated he was experiencing pain in his left shoulder before April 1, 2014. (Tr., p. 102) Ms. Turnquist's testimony corresponds closely with claimant's testimony about the date of injury and corroborates much of claimant's version of events.

Claimant also introduced an independent medical evaluation performed by Sunil Bansal, M.D., on May 15, 2015. Dr. Bansal reviewed claimant's medical history and recorded a subjective history from claimant that includes:

> While at work, he was moving some boxes of meat around in the keg cooler. The keg cooler was only about four feet in height, and he was bent down while pulling and pushing the boxes of meat using his left arm. As he was pulling the meat boxes out of the cooler, he felt a pulling sensation and pain in his left shoulder.

(Ex. 8, p. 6)

Dr. Bansal's recorded history is fairly consistent with claimant's testimony and generally corroborates claimant's testimony. Dr. Bansal opines, "The mechanism of injury, pushing and pulling boxes that weighed 60 to 80 pounds, was a significant contributing factor for Mr. Wandrey's left shoulder rotator cuff tear and need for surgery." (Ex. 8, p. 10)

On the other hand, the defendants identify several pieces of evidence that contradict or at least call claimant's version of the events into question. For instance, claimant initially sought evaluation with a chiropractor. The initial chiropractic note dated April 3, 2014 records a history that states, "Patients [sic] shoulder and upper back has been hurting. Started a few days ago and not really sure on what started it but did lift some boxes." (Ex. 1, p. 2) Claimant's selected chiropractor records only two days after the alleged injury that claimant is not really sure what started his symptoms.

Certainly, this history calls into question the mechanism of injury and the accuracy of claimant's testimony about the cause of his injury.

After chiropractic care failed to resolve his symptoms, claimant sought medical care through a primary care physician's office. On April 24, 2014, Tonya Lankford, ARNP, evaluated claimant. She recorded "has left shoulder pain and hurts to lift above head for 2-3 months." (Ex. 3, p. 1) Nurse Lankford continued in that same record, noting, "left shoulder pain for several months. Difficulty raising left shoulder. Denies recent injury. Thinks dislocated several years ago and went to chiropractor to put back in place." (Ex. 3, p. 1)

Claimant was ultimately referred to an orthopaedic surgeon for evaluation of his left shoulder. Steven J. Meyer, M.D. evaluated claimant on May 7, 2014. Dr. Meyer took a history from claimant and recorded:

> Mr. Wandrey does not recall a specific antecedent injury. He states he has had previous lumbar fusion and ever since then has had occasional upper thoracic back pain but for the past several months his back pain and left shoulder pain have become increasingly problematic.

(Ex. 4, p. 1)

Dr. Meyer referred claimant to another orthopaedic surgeon, Benjamin T. Bissell, M.D., who evaluated claimant initially on October 9, 2014. In his office note for that date, Dr. Bissell recorded:

> This is a very pleasant 56-year-old male who had no prior shoulder pain or problems until he had a specific incident at work at the end of April of 2014. He owns a bar, and he was pulling on a keg and felt a pop in his left shoulder and had sudden onset of left shoulder pain and weakness and has had problems with it ever since.

(Ex. 4, p. 9)

Defendants also obtained a records review and solicited a causation opinion from a board-certified orthopaedic surgeon, Mark B. Kirkland, D.O. Dr. Kirkland opined:

> I cannot state within a reasonable degree of medical certainty whether Mr. Wandrey's left shoulder condition arose out of and in the course of his employment from the alleged April 1, 2014 incident. The history is uncertain in regards to any type of specific injury. Reports of any specific injury on or about April 1, 2014 are vague.

(Ex. A)

My review and interpretation of the medical records suggests that the medical providers understood claimant to have provided at least five different versions of how

his injury occurred. Many of the histories recorded by the medical providers occurred within a few months of claimant's alleged injury. Claimant's memory and recitation of the facts would be assumed to have been better near in time to this injury than it was at the time of trial. Yet, he provided various medical providers different versions of how this injury allegedly occurred.

Claimant's testimony seemed credible enough to be convincing on direct examination. However, he did not have convincing responses or explanations for the various medical histories while being cross-examined. Claimant's testimony, coupled with the medical records, would not be sufficient to convince me that claimant had proven by a preponderance of the evidence that he sustained a left shoulder or upper back injury on April 1, 2014 while working at Lobo's.

However, Ms. Turnquist presented as a reasonable and credible witness. She answered questions directly and convincingly. Certainly, Ms. Turnquist would have some loyalties to claimant, as his friend and as her former employer. However, nothing on cross-examination or in this evidentiary record made me question the accuracy of her testimony or her credibility. Ms. Turnquist corroborated claimant's version of his injury in the sense that she was present when it occurred. Although she did not directly witness the injury, she testified that claimant immediately reported his injury to her, appeared to be in pain, and had to leave the bar and restaurant as a result of the April 1, 2014 injury. I found Ms. Turnquist's testimony credible and convincing.

Although not all the medical records can be completely rectified with each other or with claimant's testimony, most of the medical records refer to an injury at work involving boxes, meat, or kegs. It is possible that the medical providers' interpretations were not precise but were all similar to claimant's story of events. The two medical causation opinions offered are also significant.

Dr. Bansal clearly causally connected the claimant's work injury to his shoulder condition and subsequent need for shoulder surgery. Dr. Bansal confirms that the mechanism of injury now asserted by claimant is consistent with the injury and surgery that resulted.

By contrast, Dr. Kirkland only notes that there is vagueness in the medical history. Indeed, I concur that there is vagueness or confusion in the medical history throughout the records. However, Dr. Kirkland opines that he cannot state within a reasonable degree of medical certainty that claimant's left shoulder condition arose out of and in the course of his employment from the alleged April 1, 2014 incident. Dr. Kirkland does not offer an opinion that the alleged mechanism of injury is inconsistent with the resulting injury or that the injury could not have happened the way claimant testified it did.

Ultimately, I find Ms. Turnquist's testimony corroborates claimant's version of events. In this sense, I find that Ms. Turnquist's testimony is most consistent with Dr. Bansal's opinion. Given the corroboration by Ms. Turnquist and the medical opinion

by Dr. Bansal that the mechanism of injury would be consistent with the injury sustained, I find that Mr. Wandrey did sustain a left shoulder and upper back or neck injury as a result of his work activities on April 1, 2014.

Claimant's upper back or neck condition resolved prior to trial. (Tr., 85) Unfortunately, claimant's left shoulder symptoms did not resolve. Conservative medical treatment failed, and Dr. Bissell took claimant to surgery on October 29, 2014. Dr. Bissell performed a left shoulder biceps tenotomy, labral debridement, and coracoacromial ligament resection. (Ex. 7, p. 1) I find the conservative medical care and Dr. Bissell's surgery to all be related to the April 1, 2014 left shoulder injury.

Following surgery, claimant was placed on restrictions that precluded him from returning to any meaningful work at Lobo's. He remained off work from October 29, 2014 through December 31, 2014. He was continuing to treat for his left shoulder condition and not at maximum medical improvement during this time period. Although claimant was not able to return to work at Lobo's between October 29, 2014 and December 31, 2014, he continued to take his normal salary of $1,000.00 per month. (Tr., p. 71; Ex. 10, p. 25; Ex. 10, p. 47)

The parties stipulated that claimant's gross weekly earnings prior to the April 1, 2014 date of injury were $350.00 and that the applicable weekly worker's compensation rate for this injury is $229.14. Continuing to receive his $1,000.00 monthly draw as wages, claimant received more than $229.14 per week from Lobo's.

Mr. Wandrey was released to full-duty work and released from care by Dr. Bissell on August 24, 2015. (Ex. 4, p. 18; Ex. D, p. 6) Dr. Bansal provided the only opinion in this case regarding claimant's permanent impairment, opining that claimant sustained a five percent (5%) impairment of the whole person as a result of the April 1, 2014 left shoulder injury. Dr. Bansal recommended a 20-pound occasional lifting restriction as well as a 10-pound frequent lifting restriction. He also recommended no lifting over 10 pounds above shoulder level on an occasional basis and no frequent overhead activities with the left arm. (Ex. 8, p. 12)

I accept Dr. Bansal's unrebutted opinion pertaining to permanent impairment. I also accept Dr. Bansal's opinion that claimant achieved maximum medical improvement by March 16, 2015. (Ex. 8, p. 10) However, I find Dr. Bansal's opinions to be difficult to accept with respect to permanent work restrictions. Claimant clearly returned to work at Lobo's after his shoulder surgery. Ms. Turnquist testified that claimant continued to work and perform all job duties but at a slower pace. Claimant was clearly continuing to lift more than 20 pounds and was capable of doing so.

On the other hand, having found Ms. Turnquist's testimony convincing, it is also difficult to accept the full duty release by Dr. Bissell. Claimant clearly had some difficulties after the left shoulder surgery and was not able to perform his work duties at the same level and pace he had previous to this injury. Realistically, it appears as though claimant remained capable of lifting the 60-80 pound boxes of meat,

manipulating heavy kegs of beer, and moving other products required in a bar and restaurant setting. However, claimant had more difficulties with those tasks after the injury and surgery. I find that claimant has proven a permanent injury, permanent impairment and a loss of future earning capacity resulted from the April 1, 2014 left shoulder injury.

Mr. Wandrey was 57 years of age at the time of hearing. He lives in Schaller, Iowa. He is a high school graduate but has no further education or training. Given his age and educational background, it is not likely that Mr. Wandrey will seek retraining or that it would be worth a significant financial incentive to do so. He has experience running a bar and restaurant and physically appears capable of continuing in that pursuit but would likely require additional assistance or support from employees or co-workers.

Claimant's work history includes physical labor on a cattle farm. He worked as a laborer in a popcorn facility, performing clean-up in a meat processing facility, and performing research for a corn processing facility. Mr. Wandrey probably could not physically return to work on the cattle farm or the physical labor involved with the meat processing facility or as a laborer at the popcorn facility. However, claimant was likely precluded from these positions before he opened Lobo's. In fact, claimant started Lobo's because he was unable to continue working the heavier and more physical jobs as a result of a prior low back injury.

Mr. Wandrey appears to be a hard-working and motivated individual. After he struggled to find work following his back injury, he opened Lobo's to create employment for himself. He worked extended hours, up to six or seven days per week, to make a living. He has now closed and sold Lobo's. However, he closed the business due to insurance problems and not as a result of this left shoulder injury. I find that he could continue to operate a bar and/or restaurant and would certainly be qualified to serve as a manager for another similar business.

Considering claimant's age, education, employment history, permanent impairment, limitations following his prior low back surgery and now following his left shoulder surgery, as well as his inability to retrain, his residual abilities, his motivation level, and all other factors of industrial disability defined by the Iowa Supreme Court, I find that Mr. Wandrey has proven by a preponderance of the evidence that the April 1, 2014 left shoulder injury caused him a 25 percent loss of future earning capacity.

Mr. Wandrey also seeks an award of past medical expenses. Claimant's medical expenses and summary are contained at Exhibit 9. I find that the medical expenses contained in Exhibit 9 are causally related to claimant's work injury and that the medical expenses contained in Exhibit 9 are reasonable and necessary for treatment of the work injury.

Finally, claimant seeks an award of his independent medical evaluation fee. In this instance, defendants did not obtain any medical opinion providing a permanent

impairment rating. Claimant sought an evaluation performed by Dr. Bansal on May 15, 2015. Dr. Bansal provided the only impairment rating contained within this evidentiary record.

CONCLUSIONS OF LAW

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 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).

Having found that claimant proved by a preponderance of the evidence that he sustained a left shoulder injury on April 1, 2014 as a result of his work duties at Lobo's, I conclude that claimant has proven entitlement to worker's compensation benefits in some amount.

Claimant asserts a claim for healing period benefits from October 29, 2014 through December 31, 2014. Section 85.34(1) provides that healing period benefits are payable to an injured worker who has suffered permanent partial disability until (1) the worker has returned to work; (2) the worker is medically capable of returning to substantially similar employment; or (3) the worker has achieved maximum medical recovery. The healing period can be considered the period during which there is a reasonable expectation of improvement of the disabling condition. See Armstrong Tire & Rubber Co. v. Kubli, 312N.W.2d 60 (Iowa App. 1981). Healing period benefits can be interrupted or intermittent. Teel v. McCord, 394 N.W.2d 405 (Iowa 1986).

In this situation, claimant did not return to work, was not capable of returning to substantially similar work during the above time frame, and had not reached maximum medical improvement before December 31, 2014. Therefore, claimant remained in a healing period. The question is the extent of benefits to which claimant was entitled.

An employee is entitled to appropriate temporary partial disability benefits during those periods in which the employee is temporarily, partially disabled. An employee is temporarily, partially disabled when the employee is not capable medically of returning to employment substantially similar to the employment in which the employee was engaged at the time of the injury, but is able to perform other work consistent with the employee's disability. Temporary partial benefits are not payable upon termination of temporary disability, healing period, or permanent partial disability simply because the employee is not able to secure work paying weekly earnings equal to the employee's weekly earnings at the time of the injury. Section 85.33(2).

The purpose of temporary disability, or healing period, benefits is "to compensate employees for lost wages until they are able to return to gainful employment when they cannot work due to injuries." 15 Iowa Practice, Workers' Compensation, § 13.1, pp. 137-138 (2014-2015). See also Larson Mfg. Co. v. Thorson, 763 N.W.2d 842, 857 (Iowa 2009).

In this instance, claimant was paid his full and typical salary during the period of time he claims entitlement to temporary disability, or healing period benefits. Having sustained no loss of wages, I conclude that the principles behind awarding either temporary total disability or healing period benefits do not apply.

Defendants contend that claimant is not entitled to temporary total disability benefits but may be entitled to temporary partial disability benefits between October 29, 2014 and December 31, 2014. However, the provisions of Iowa Code section 85.33(2) are not applicable, and temporary partial disability benefits are not appropriate because claimant never returned to light duty work. Instead, as the owner of the business, claimant permitted himself to simply continue taking his standard monthly draw of $1,000.00. In other words, Lobo's continued to pay claimant his salary in lieu of weekly benefits.

Agency rule 876 IAC 8.4 recognizes the employer's right to pay salary in lieu of compensation. Although the employer cannot claim any payments above the weekly rate as a credit against further obligations, the rule permits an employer to pay ongoing salary to an injured worker in lieu of payment of worker's compensation weekly benefits.

The Iowa Workers' Compensation Commissioner has recognized the payment of salary in lieu of benefits as a payment of weekly benefits even if the employer believes it is simply paying a salary. Boyd v. Ankeny Comm. Schools, File No. 1225693 (Appeal June 2003). See also Moffitt v. Super Value, File No. 1059425 (Appeal June 1998). In this case, claimant was owed $229.14 in weekly worker's compensation benefits if he qualified for healing period benefits during his period of absence from work from October 29, 2014 through December 31, 2014. However, he received his typical salary in the amount of $1,000.00 for this period of time.

Having received more than his weekly workers' compensation rate, claimant is not entitled to healing period benefits or temporary partial disability benefits. Gonzalez v. Design Drywall, Inc., File No. 5051821 (Arbitration December 2015). Therefore, I conclude that claimant has failed to prove entitlement to temporary total disability, temporary partial disability, or healing period benefits for the period of time between October 29, 2014 and December 31, 2014. Upon claimant's return to work at Lobo's beginning January 1, 2015, claimant's healing period terminated. Iowa Code section 85.34(1).

The parties have stipulated that if a work related injury is found and that it is found the injury caused permanent disability, that the injury should be compensated industrially pursuant to Iowa Code section 85.34(2)(u). (Hearing Report) This stipulation is legally accurate. When disability is found in the shoulder, a body as a whole situation may exist. Alm v. Morris Barick Cattle Co., 240 Iowa 1174, 38 N.W.2d 161 (1949). In Nazarenus v. Oscar Mayer & Co., II Iowa Industrial Commissioner Report 281 (App. 1982), a torn rotator cuff was found to cause disability to the body as a whole.

Since claimant has an impairment to the body as a whole, an industrial disability has been sustained. Industrial disability was defined in Diederich v. Tri-City R. Co., 219 Iowa 587, 258 N.W. 899 (1935) as follows: "It is therefore plain that the legislature intended the term 'disability' to mean 'industrial disability' or loss of earning capacity and

not a mere 'functional disability' to be computed in the terms of percentages of the total physical and mental ability of a normal man."

Functional impairment is an element to be considered in determining industrial disability which is the reduction of earning capacity, but consideration must also be given to the injured employee's age, education, qualifications, experience, motivation, loss of earnings, severity and situs of the injury, work restrictions, inability to engage in employment for which the employee is fitted and the employer's offer of work or failure to so offer. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963); Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961).

Compensation for permanent partial disability shall begin at the termination of the healing period. Compensation shall be paid in relation to 500 weeks as the disability bears to the body as a whole. Section 85.34.

Having found that claimant proved a 25 percent loss of future earning capacity, I conclude that claimant has established entitlement to 25 percent industrial disability. A 25 percent industrial disability entitles claimant to 125 weeks of permanent partial disability benefits at the stipulated weekly rate of two hundred twenty-nine and 14/100 dollars ($229.14). Iowa Code section 85.34(2)(u). Pursuant to the parties' stipulation, permanent disability benefits shall commence on January 1, 2015. (Hearing Report)

Claimant also seeks an award of past medical expenses contained in claimant's Exhibit 9. 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).

Having found the medical expenses contained in Exhibit 9 to be causally related, as well as medically reasonable and necessary to treat claimant's work injuries, I conclude that defendants are obligated to reimburse, pay, or otherwise satisfy the medical expenses contained in Exhibit 9.

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).

However, "Iowa Code section 85.39 does not expose the employer to liability for reimbursement of the cost of a medical evaluation unless the employer has obtained a rating in the same proceeding with which the claimant disagrees." Kohlhaas v. Hog Slat, Inc., 777 N.W.2d 387, 394 (Iowa 2010). See also Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839, 844 (Iowa 2015). Having found that the defendants did not obtain a permanent impairment rating in this case, I conclude that claimant is not able to establish entitlement to reimbursement for his independent medical evaluation pursuant to Iowa Code section 85.39.

Finally, claimant seeks an assessment of his costs. Costs are assessed at the discretion of the agency. Iowa Code section 85.40. Exercising the agency's discretion and recognizing that claimant has prevailed on the majority of issues, claimant's filing fee of $100.00 shall be assessed pursuant to 876 IAC 4.33(7).

Claimant also seeks assessment of Dr. Bansal's examination and report as a cost in this case. The cost of the examination performed by Dr. Bansal is not a cost that can be ordered, but the cost of Dr. Bansal's report can be assessed as a cost pursuant to Iowa Code section 86.40 and 876 IAC 4.33(6). Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839, 845-846 (Iowa 2015).

Claimant lists Dr. Bansal's entire fee totaling $2,495.00 as being requested as a cost. However, claimant does not provide a breakdown of the fee with respect to what portion of the fee is related to Dr. Bansal's examination as opposed to the cost of drafting the report. Claimant has not provided the necessary information to determine the cost of Dr. Bansal's report, and any fees associated with his examination are not taxable. Id. Therefore, I conclude that Dr. Bansal's fee should not be taxed as a cost in this case.

ORDER

THEREFORE, IT IS ORDERED:

In File No. 5049279:

Defendants shall pay claimant one hundred twenty-five (125) weeks of permanent partial disability benefits commencing on January 1, 2015 at the stipulated weekly rate of two hundred twenty-nine and 14/100 dollars ($229.14).

All accrued benefits shall be paid in lump sum.

Defendants shall pay interest on all accrued weekly benefits pursuant to Iowa Code section 85.30.

Defendants shall pay all medical providers, reimburse claimant, reimburse all third party payers, or otherwise satisfy and hold claimant harmless for any medical expenses contained in Exhibit 9.

Defendants shall reimburse claimant's costs totaling one hundred and 00/100 dollars ($100.00).

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.

In File No. 5049280:

All claims asserted are dismissed and each party shall pay their own costs in this file.

Signed and filed this 22nd day of March, 2016.

WILLIAM H. GRELL
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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WHG/sam

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