BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

PHILLIP ISBELL, Claimant, vs. DEE ZEE, INC., Employer, and WEST BEND MUTUAL INS. CO., Insurance Carrier, Defendants.	:	File No. 1619855.02 ARBITRATION DECISION Head Notes: 1402.30, 1403.1, 1803, 2502

STATEMENT OF THE CASE

Claimant, Phillip Isbell, filed a petition in arbitration seeking workers' compensation benefits from Dee Zee, Inc., employer, and West Bend Mutual Insurance Company, insurer, both as defendants. This matter was heard on February 3, 2021, with a final submission date of March 5, 2021.

The record in this case consists of Joint Exhibits 1-7, Claimant's Exhibits 1-23, Defendants' Exhibits A-L, and the testimony of claimant, Sarah Tew, and Richard Keeney.

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

1. Whether claimant sustained a back injury on July 19, 2016, that arose out of and in the course of employment.

2. The extent of claimant's entitlement to temporary benefits.

3. The extent of claimant's entitlement to permanent partial disability benefits.

4. Credit.

5. Costs.

FINDINGS OF FACT

Claimant was 61 years old at the time of hearing. Claimant has a GED. Claimant did maintenance work at a hotel. He worked for a pest control service. (Defendants' Exhibit A; Deposition pp. 9-12)

Claimant began with Dee Zee in January 2015. Claimant worked as an order fulfillment processor. Claimant testified the job required driving a forklift and pulling orders. He testified the job required him to lift between 10 to 100 pounds. Claimant said he would pull an order, put it on the forklift and move the order to an area to be loaded onto a truck. (Testimony pp. 19-21; Ex. G, pp. 46-47)

Claimant's prior medical history is relevant. In July 2012 claimant was treated for lower back pain. Claimant was assessed as having chronic pain syndrome and prescribed oxycodone. (Joint Exhibit 3, pp. 78-80)

In August 2012 claimant was seen at Broadlawns Emergency Room for lower back pain. Claimant had lower back pain for four days radiating into the buttocks. Claimant was assessed as having sciatica. (JE 4, pp. 105-106)

Claimant treated in September 2012 for lower back pain, rated at a level of 8 where 10 is excruciating pain. (JE 3, p. 81) In September 2012 claimant returned to Broadlawns Emergency Room complaining of lower back pain at a pain level of 9. Claimant indicated he had chronic back pain for years. (JE 4, p. 107)

Claimant treated twice in December 2012 for lower back pain. He was assessed as having a positive herniated disc at that time. (JE 3, pp. 87, 92)

In February 2013 claimant was seen at Broadlawns for lower back pain radiating into his buttocks and lower extremity. (JE 4, p. 109)

In May 2013 claimant was seen for chronic lower back pain that occasionally radiated into the hips and buttocks. (JE 4, p. 113)

In October 2013 claimant treated for lower back pain and hip pain. Claimant was assessed as having chronic lower back pain. (JE 3, p. 97)

On July 19, 2016, claimant was strapping on a parts order. Another employee, driving a forklift, did not see claimant and accidentally hit claimant. The forklift hit the claimant's right leg and ankle. The top of the pallet struck the claimant's hip. Claimant fell to the ground and parts fell on him. (TR pp. 12-13) Claimant was taken to an emergency room by an ambulance.

On the same date, claimant was seen at UnityPoint Emergency Room. X-rays showed he had a complex trimalleolar fracture dislocation. Claimant also had a multiplanar fracture of the distal fibula and a butterfly fracture fragment. The

dislocations were reduced under sedation. Claimant was put in a splint. (JE 2, pp. 38-44)

Claimant saw Mark Isaacson, D.O., at DMOS on July 26, 2016. He reviewed the x-rays and diagnosed a bimalleolar fracture dislocation but did not see a posterior malleolar fracture. Surgery was discussed and chosen as a treatment option. (JE 1, pp. 1-3)

On July 29, 2016, claimant underwent open reduction and internal fixation of the right bimalleolar ankle fracture. Surgery was performed by Dr. Isaacson. (JE 1, p. 4)

Claimant returned in follow-up with Dr. Isaacson on October 6, 2016. Claimant had good passive range of motion. He was to continue physical therapy. (JE 1, pp. 8-9)

On October 18, 2016, claimant returned to Dr. Isaacson. Claimant had good range of motion in the ankle. Dr. Isaacson believed claimant's fracture was healed. Claimant was returned to work with no restrictions on October 31, 2016. (JE 1, p. 10)

In a December 29, 2016 report, Dr. Isaacson found claimant had a 15 percent permanent impairment to the lower extremity using section 17.2J and table 17-33 of the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition. He opined claimant could return to work at his job at Dee Zee with no restrictions. (Ex. C, pp. 27-28)

Claimant returned to Dr. Isaacson on December 30, 2016. Claimant had pain in the ankle. An x-ray showed concern regarding a nonunion of the distal fibula fracture. (JE 1, pp. 13-14)

On January 5, 2017, claimant had a CT scan of the right ankle. It showed a healed medial and posterior malleolus fracture. The anterior aspect had no bony healing or bridging. (JE 6, p. 157)

Claimant saw Dr. Isaacson on January 12, 2017. The CT scan indicated the anterior aspect had no bony healing or bridging. Claimant was assessed as having a delayed union of the anterior cortex distal fibula fracture. Claimant was told to quit smoking. He was told to try a bone stimulator for 2-3 months. Claimant was given work restrictions. (JE 1, pp. 15-16)

Claimant returned to Dr. Isaacson on April 20, 2017. Claimant had continued pain around the ankle. Claimant continued to smoke. Dr. Isaacson believed this was the problem with delayed bone healing. A fracture line could still be seen on x-rays in an AP view. Claimant was told to use the bone stimulator for another 3 months. Claimant was again told to quit smoking. Claimant was given a note for physical therapy to help with his gait as he had developed some back pain. (JE 1, pp. 19-20)

Claimant saw Marni Loftus, D.O., on April 25, 2017, for a cough. Claimant had an alcohol odor on him. Dr. Loftus had concerns with chronic alcohol use. The records did not indicate claimant had any back pain. (JE 2, p. 47)

Claimant returned to Dr. Loftus on April 27, 2017. Claimant was stumbling and had obvious intoxication. Dr. Loftus told claimant his chronic alcohol use was the cause of his problems. Claimant was treated with depression and anxiety medications. (JE 2, p. 49)

Claimant returned to Dr. Loftus on May 30, 2017, for follow-up of two emergency room visits. One of the two emergency room visits was for loss of consciousness after drinking. (JE 2, p. 50)

Claimant saw Dr. Isaacson on June 13, 2017. Claimant was found to be at maximum medical improvement (MMI). He was returned to work with no restrictions. (JE 1, p. 22)

In an August 1, 2017 note, Dr. Isaacson indicated claimant had a 15 percent permanent impairment to the lower extremity. (Ex. C, p. 29)

On August 17, 2017, claimant was evaluated by Wendy Street, ARNP, for evaluation of lower back pain radiating to the right hip. It began two weeks prior. Claimant indicated no prior history of back problems. Claimant was assessed as having right-sided back pain. He was treated with medications. (JE 2, pp. 52-55)

Claimant testified he began experiencing back pain when he began weightbearing on his right ankle. (TR p. 19) He testified he never had long-term back problems prior to his ankle fracture. (TR p. 49)

Claimant saw Kathleen Rousseau, ARNP, on August 22, 2017, for complaints of back pain. Claimant noted symptoms three weeks prior. Claimant's back pain was not related to an injury. Claimant was prescribed medication and physical therapy. (JE 2, pp. 56-57)

Claimant returned to Dr. Loftus on November 28, 2017, for chronic back pain. Claimant had pain in the right ankle. Dr. Loftus did not believe claimant's back pain was related to the July 2016 ankle injury due to a one-year lapse in time between the ankle injury and reports of back pain. Claimant was assessed as having chronic lower back pain with radiculopathy. (JE 2, pp. 63-64)

Claimant had a CT scan of the lumbar spine on December 14, 2017. It showed disc bulges at L3-4 and L4-5, suggesting spinal canal stenosis. (JE 6, p. 159)

Claimant was evaluated on January 4, 2018, by Joseph Sherrill, M.D. Claimant was assessed as having lumbar radiculopathy. A lumbar myelogram was recommended. (JE 5, pp. 140-142)

On February 13, 2018, claimant was evaluated by Dr. Sherrill. Claimant was offered a nerve block. Claimant had no insurance and could not have the procedure. (JE 5, p. 145)

Claimant was evaluated by Molly Anderson, PA-C, on March 27, 2018. Claimant indicated chronic ankle pain. Claimant was told to use ice, elevation and compression on the ankle. (JE 2, pp. 68-73)

Claimant returned to Dr. Isaacson on March 29, 2018. A culture was performed for an infection, which was negative. (JE 1, pp. 25-27)

On May 18, 2018, claimant was evaluated by Susan Latcham, ARNP, for a psychiatric evaluation. Claimant had been inpatient at a unit for approximately 1-1/2 weeks after a suicide attempt. Claimant indicated depression started when he was injured at work in 2006, his wife left him, and he lost his home and job. Claimant was assessed as having a major depressive disorder and alcohol disorder. (JE 4, pp. 121-124)

Claimant returned to Dr. Sherrill on May 22, 2018, to discuss surgery for lower back pain. Surgery was chosen as a treatment option. (JE 5, pp. 146-148)

Claimant was seen Heidi Nettrour, LISW, on June 11, 2018. Claimant indicated he had an OWI in April 2018. He indicated stressors included his wife leaving him, a friend shot to death and an ankle injury. (JE 4, pp. 126-131)

In a June 28, 2018, letter written by claimant's counsel, Dr. Loftus indicated claimant's L3-4 herniated disc was not caused, or accelerated as a sequela, to the July 19, 2016, leg fracture. (Ex. D, p. 38)

Claimant saw Dr. Loftus on June 28, 2018. Dr. Loftus indicated she first saw claimant in April 2017, and at that time claimant made no mention of back pain. It was not until a year after the July 2016 ankle fracture that claimant was seen for back pain. Given the lapse in time between the fracture and the first treatment for back pain, Dr. Loftus did not believe the ankle fracture caused claimant's back pain. (JE 2, p. 75)

On August 13, 2018, claimant underwent back surgery consisting of a laminectomy at the L3 through L5 areas and a discectomy at L3-4. (JE 5, p. 149)

In a September 6, 2018, report, Robert Broghammer, M.D., gave his opinions of claimant's condition following an IME. Claimant complained of shooting pain in the back and hips and down both legs, right greater than left. Claimant indicated "issues" with his ankle. (Ex. B, p. 18)

Dr. Broghammer indicated claimant was at MMI for his right ankle on June 13, 2017. He opined that claimant had a 9 percent permanent impairment to the lower extremity. (Ex. B, pp. 20-21)

Dr. Broghammer opined that claimant's back pain was not related to his ankle fracture. This was because claimant's back pain symptoms did not begin until over a year after the ankle fracture. (Ex. B, p. 22)

Claimant was evaluated postoperatively by Dr. Sherrill on September 18, 2018. Claimant had bilateral hip pain, occasional right leg pain. Records indicate claimant's symptoms were improving. (JE 5, pp. 153-154)

Claimant was seen by Dr. Isaacson on October 2, 2018, for right calf pain. Claimant was treated with medication. (JE 1, pp. 30-31)

Claimant returned in follow-up with Dr. Sherrill on October 30, 2018. Dr. Sherill did not believe that claimant's right calf pain was related to his low back issues. (JE 5, pp. 155-156)

Claimant returned to Dr. Isaacson on January 3, 2019. X-rays showed good alignment with ankle hardware. Removal of the ankle hardware was discussed. (JE 1, pp. 32-33)

On January 3, 2019, claimant was discharged from physical therapy as claimant cancelled seven visits, including the last three physical therapy sessions. (JE 7, p. 164)

In a February 1, 2019, letter written by defense counsel, Dr. Isaacson indicated he was unable to say, within a reasonable degree of medical certainty, that there was any causal relationship between claimant's ankle injury and claimant's lower back condition. He also indicated he would not expect claimant's ankle injury to play a material role in causing the need for claimant's back surgery. (Ex. C, pp. 30-31)

In an April 23, 2020 report, Robin Sassman, M.D., gave her opinion of claimant's condition following an IME. Claimant complained of continued ankle pain. Claimant indicated he was retired. (Claimant's Exhibit 2, p. 13) Dr. Sassman found claimant at MMI as of January 3, 2019. She found claimant had a 21 percent permanent impairment to the right lower extremity. (Ex. 2, pp. 16-18)

In a second IME report dated April 23, 2020, Dr. Sassman gave her opinions of claimant's back condition following an evaluation. Claimant indicated his back was better since surgery. (Ex. 11, pp. 39-48) Claimant indicated he had no lumbar radicular symptoms prior to the ankle injury. He indicated he had prior lower back "aches." Dr. Sassman believed claimant's disc herniation occurred when claimant hit his right hip and fell to the ground at the time of the ankle injury. She opined that claimant's back condition became more symptomatic when he began to bear weight. (Ex. 11, pp. 50-51)

Dr. Sassman found claimant at MMI for his back as of August 13, 2019. She opined claimant had a 23 percent permanent impairment of the body as a whole for his back condition. She limited claimant to occasional lifting, pulling or carrying up to 20 pounds. (Ex. 11, pp. 51-52)

On December 18, 2020, claimant returned to DMOS and was seen by Paul Butler, M.D. Surgery was discussed for removal of hardware. (JE 1, pp. 36-37) Claimant testified at hearing that on January 18, 2021, he had surgery to remove the hardware from his ankle. (TR p. 16)

Claimant testified he worked at Dee Zee up until November 30, 2017. He said he was terminated on January 8, 2018. Claimant was terminated because his FMLA had run out. (TR pp. 10-11)

Claimant testified he believed he was permanently disabled. (TR p. 39)

Sarah Tew testified she is an HR specialist for Dee Zee. In that capacity, she is familiar with claimant and his workers' compensation claim. Ms. Tew testified that claimant never asked Dee Zee for treatment for his lower back pain. (TR pp. 59, 64)

CONCLUSION OF LAW

The first issue to be determined is whether claimant sustained a back injury that arose out of and in the course of employment on July 19, 2016.

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 R. App. P. 6.904(3).

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" refer 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.

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).

An employer may be liable for a sequela of an original work injury if the employee sustained a compensable injury and later sustained further disability that is a proximate result of the original injury. Mallory v. Mercy Medical Center, File No. 5029834 (Appeal February 15, 2012).

The Iowa Supreme Court noted "where an accident occurs to an employee in the usual course of his employment, the employer is liable for all consequences that naturally and proximately flow from the accident." Oldham v. Scofield & Welch, 266 N.W. 480, 482 (1936). The Court explained:

> If an employee suffers a compensable injury and thereafter suffers further disability which is the proximate result of the original injury, such further disability is compensable. Where an employee suffers a compensable injury and thereafter returns to work and, as a result thereof, his first injury is aggravated and accelerated so that he is greater disabled than before, the entire disability may be compensated for." Id. at 481.

A sequela can be an after effect or secondary effect of an injury. Lewis v. Dee Zee Manufacturing, File No. 797154, (Arb. September 11, 1989). A sequela can take the form of a secondary effect on the claimant's body stemming from the original injury. For example, where a leg injury causing shortening of the leg in turn alters the claimant's gait, causing mechanical back pain, the back condition can be found to be a sequela of the leg injury. Fridlington v. 3M, File No. 788758, (Arb. November 15, 1991).

A sequela can also take the form of a later injury that is caused by the original injury. For example, where a leg injury leads to the claimant's knee giving out in a grocery store, the resulting fall is compensable as a sequela of the leg injury. Taylor v. Oscar Mayer & Co., 3 Iowa Ind. Comm. Rep. 257, 258 (1982).

Defendants accept liability for claimant's ankle injury but deny liability for claimant's back condition. Claimant contends his back condition arose out of and in the course of employment from his July 19, 2016, ankle injury.

Claimant testified he never had long-term back problems prior to the July 19, 2016, date of injury. (TR p. 49) As noted in the Findings of Fact, medical records show claimant indicated in September 2012 he had been treated for chronic back pain for years. In July of 2012 claimant was taking narcotic pain medication for back pain. Between July 2012 and October 2013 claimant treated approximately eight different times for chronic lower back pain. (JE 3, pp. 78-79, 82-83, 84-86, 87-89, 90-92, 95-97; JE 4, pp. 105-116)

Claimant testified he began having back pain when he began bearing weight following his ankle fracture. (TR p. 19) On June 13, 2017, claimant was returned to work with no restrictions. (JE 1, p. 22) Obviously, prior to that date, claimant was weightbearing on his right leg. Claimant did not indicate significant back pain until August 2017, or approximately 2 months after his full return to work. (JE 2, pp. 52-55)

Claimant told Dr. Sassman he did not have radicular symptoms prior to the July 19, 2016 date of injury. (Ex. 11, p. 50) Medical records indicate claimant had radicular symptoms from back pain in August 2012, February 2013, May 2013, and October 2013. (JE 4, pp. 105, 109, 113; JE 3, p. 97)

Four experts have opined regarding the cause of claimant's lower back pain. Dr. Loftus is claimant's personal physician. Dr. Loftus indicated, on at least two occasions, that claimant's lower back condition was not caused by the June of 2016 ankle fracture. (Ex. D, p. 38; JE 2, p. 75)

Dr. Isaacson treated claimant for an extended period of time for his ankle fracture. Dr. Isaacson indicated claimant's ankle fracture did not play a material role in causing his lower back condition. (Ex. C, p. 30)

Dr. Broghammer evaluated claimant once for an IME. Dr. Broghammer opined that claimant's lower back condition was unrelated to his July 2016 ankle fracture. (Ex. B, pp. 22-23)

Only Dr. Sassman opined that claimant's July 2016 ankle fracture caused or materially aggravated claimant's low back condition. (Ex. 11, pp. 50-51) Dr. Sassman's opinion regarding causation of claimant's lower back pain is problematic for several reasons.

First, it does not appear that Dr. Sassman was aware or was able to review any of claimant's medical records from 2012 and 2013 regarding claimant's chronic lower back condition. (Ex. 11, p. 40)

Second, as noted, claimant told Dr. Sassman he had an occasional lower back "ache" prior to the July of 2016 work accident and never had any radicular symptoms prior to his ankle injury. (Ex. 11, p. 40) As noted, claimant has a history of long-term chronic back pain in 2012 and 2013. Claimant also had radicular symptoms in 2012 and 2013. (JE 3, pp. 78-79, 82-83, 84-86, 87-89, 90-92, 95-97; JE 4, pp. 105-116)

Dr. Sassman opined that claimant's lumbar disc herniation probably occurred when claimant fell on July 19, 2016. (Ex. 11, p. 51) As noted, diagnostic records indicate claimant had a lumbar disc herniation in December 2012. (JE 3, pp. 87, 92)

The records indicate Dr. Sassman was unaware of claimant's long-term, prior chronic back pain. The only history Dr. Sassman has of claimant's back condition prior to the July of 2016 work injury, is claimant's inaccurate history. Based on this, it is found that the opinions of Dr. Sassman regarding causation of claimant's back condition are found not convincing.

Claimant had a chronic, long-term back condition dating back at least to 2012. Claimant's testimony regarding his prior back condition is inaccurate. Drs. Loftus, Isaacson and Broghammer all opine that claimant's ankle fracture did not cause his lower back condition. The opinions of Dr. Sassman regarding causation of claimant's

lower back condition are found not convincing. Given this record, claimant has failed to carry his burden of proof he sustained a lower back condition that arose out of and in the course of employment on July 19, 2016.

Claimant contends he was also due a running award of temporary benefits due to his back condition. As claimant failed to carry his burden of proof that his back condition arose out of and in the course of employment on July 19, 2016, claimant has also failed to carry his burden of proof he is a due a running award of temporary benefits due to his back condition.

As claimant failed to carry his burden of proof he sustained a back condition that arose out of and in the course of employment on July 19, 2016, the issues regarding extent of permanent partial disability benefits due to the back condition and credit are moot.

Claimant also contends that he sustained a mental injury as a result of his July 19, 2016, ankle fracture. As detailed above, the question of causal connection is essentially within the domain of expert testimony. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); IBP, Inc. v. Harpole, 621 N.W.2d 410 (Iowa 2001). No expert has opined that claimant's ankle fracture caused his depression or his mental injury. No expert has opined that claimant has a permanent impairment from his mental health condition. Given this record, claimant has failed to carry his burden of proof that he sustained a mental injury that arose out of and in the course of employment from the July 19, 2016, date of injury.

The next issue to be determined is the extent of claimant's entitlement to permanent partial disability benefits due to the July 19, 2016, ankle fracture.

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).

Two experts have opined regarding the extent of claimant's permanent impairment due to his ankle fracture. Dr. Sassman evaluated claimant once for an IME. She found that claimant had a 21 percent permanent impairment to the lower extremity. (Ex. 4, p. 17)

Dr. Isaacson treated claimant for approximately 2-1/2 years. Dr. Isaacson performed surgery on claimant. Dr. Isaacson opined that claimant had a 15 percent permanent impairment to the lower extremity. (Ex. C, p. 29)

I am able to follow and understand Dr. Isaacson's use of the table and how he arrived at his evaluation for permanent impairment. Dr. Sassman found that claimant had permanent impairment due, in part, to neurological deficit. (Ex. 4, pp. 16-17) There is no indication in the treatment notes from Dr. Isaacson that once claimant reached MMI he had a neurological deficit. (JE 1, pp. 19, 21, 23, 26) It is true that the opinions of treating doctors are not to be given greater weight solely because they are treating doctors. Gilleland v. Armstrong Rubber Co., 524 N.W.2d 404, 408 (Iowa 1994). As a practical matter, Dr. Isaacson is much more familiar with claimant's history and medical presentation than is Dr. Sassman.

I am able to follow Dr. Isaacson's rationale for permanent impairment. Medical records indicate claimant had no neurological deficits. Dr. Isaacson has far greater experience with claimant's history and medical presentation. Based on these factors, and the others as detailed above, it is found that the permanent impairment rating issued by Dr. Isaacson is more convincing than that of Dr. Sassman. Claimant is due 33 weeks of permanent partial disability benefits (220 weeks x 15 percent).

The final issue to be determined is costs.

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

Defendants are responsible only for reasonable fees associated with claimant's independent medical examination. Claimant has the burden of proving the reasonableness of the expenses incurred for the examination. See Schintgen v. Economy Fire & Casualty Co., File No. 855298 (App. April 26, 1991). Claimant need not ultimately prove the injury arose out of and in the course of employment to qualify for reimbursement under section 85.39. See Dodd v. Fleetguard, Inc., 759 N.W.2d 133, 140 (Iowa App. 2008).

Claimant is only due reimbursement for one IME. Larson Manufacturing Co. Inc. v. Thorson, 763 N.W.2d 842, 861 (Iowa 2009).

Claimant was reimbursed for Dr. Broghammer's IME regarding the left ankle. He also seeks reimbursement for the IME for the back. Because, under Larson, claimant is entitled to only reimbursement for one IME, claimant is not entitled to be reimbursed for Dr. Sassman's IME regarding the back.

ORDER

THEREFORE, IT IS ORDERED:

That defendants shall pay claimant thirty-three (33) weeks of permanent partial disability benefits at the rate of three hundred thirty-nine and 24/100 dollars ($339.24) per week commencing on April 29, 2017.

Defendants shall pay accrued weekly benefits in a lump sum together with interest at the rate of ten percent for all weekly benefits payable and not paid when due which accrued before July 1, 2017, and all interest on past due weekly compensation benefits accruing on or after July 1, 2017, shall be payable at an annual rate equal to the one-year treasury constant maturity published by the federal reserve in the most recent H15 report settled as of the date of injury, plus two percent. See Gamble v. AG Leader Technology File No. 5054686 (App. Apr. 24, 2018)

That defendants shall be given credit for benefits previously paid.

That defendants shall pay costs associated with the filing fee and service.

That defendants are not liable for costs associated with the second IME from Dr. Sassman regarding claimant's back.

That defendants shall file subsequent reports of injury as required by this agency under Rule 876 IAC 3.1(2).

Signed and filed this 26th day of August, 2021.

JAMES F. CHRISTENSON
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Marlon Mormann (via WCES)

Charles Blades (via WCES)

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 filed via Workers' Compensation Electronic System (WCES) unless the filing party has been granted permission by the Division of Workers' Compensation to file documents in paper form. If such permission has been granted, the notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 150 Des Moines Street, Des Moines, Iowa 50309-1836. The notice of appeal must be received by the Division of Workers' Compensation 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 legal holiday.