BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

HOWARD FLOWERS,

Claimant,

vs.

HY-VEE, INC./PERISHABLE DISTRIBUTORS OF IOWA,

Employer,

and

EMC PROPERTY & CASUALTY COMPANY,

Insurance Carrier,
Defendants.

File No. 5047066

ARBITRATION

DECISION

Head Note Nos.: 1801, 1803, 4000.2

STATEMENT OF THE CASE

This is a proceeding in arbitration. The contested case was initiated when claimant, Howard Flowers, filed his original notice and petition with the Iowa Division of Workers' Compensation. The petition was filed on February 3, 2014. Claimant alleged he sustained a work-related injury on March 30, 2012. (Original notice and petition)

Hy-Vee, Inc./Perishable Distributors of Iowa, (PDI) and its workers' compensation insurance carrier, EMC Property and Casualty Company, filed their answer on February 21, 2014. They admitted the occurrence of the work injury. A first report of injury was filed on April 4, 2012.

The hearing administrator scheduled the case for hearing on May 13, 2015 at 1:00 p.m. The hearing took place in Des Moines, Iowa at the Iowa Division of Workers' Compensation. The undersigned appointed Ms. Janice Doud as the certified shorthand reporter. She is the official custodian of the records and notes.

Claimant testified on his own behalf. Defendants elected not to call any witnesses to testify.

The parties offered exhibits. Claimant offered exhibits marked 1 through 22. Defendants offered exhibits marked A through H. All proffered exhibits were admitted as evidence in the case.

Post-hearing briefs were filed on June 15, 2015. The case was deemed fully submitted on that date.

STIPULATIONS

The parties completed the designated hearing report. The various stipulations are:

1. There was the existence of an employer-employee relationship at the time of the alleged injury.
2. Claimant sustained an injury on March 30, 2012 which arose out of and in the course of his employment;
3. The alleged injury is a cause of temporary disability during a period of recovery;
4. The weekly benefit rate for which benefits should be paid is $409.56 per week;
5. If permanency benefits are awarded, the permanency is an industrial disability and the commencement date is April 22, 2012;
6. Defendants have waived any affirmative defenses; and
7. The parties are able to stipulate to the costs allowed by law.

ISSUES

The issues presented are:

1. Whether the alleged injury is a cause of permanent disability;
2. Whether claimant is entitled to permanent disability benefits, and if so, the extent of those permanent disability benefits;
3. Whether claimant is entitled to alternate medical care; and
4. Whether claimant is entitled to medical benefits pursuant to Iowa Code section 85.27.

FINDINGS OF FACT

This deputy, after listening to the testimony of claimant at hearing, after judging the credibility of claimant, and after reading the evidence, and the post-hearing briefs, makes the following findings of fact and conclusions of law:

The party who would suffer loss if an issue were not established has the burden of proving the issue by a preponderance of the evidence. Iowa R. App. P. 6.14(6).

Claimant is a 27-year-old, married, man who is the father of one minor child, and he has two step-children from a previous marriage. He pays $309.00 per month in child support for his minor child. Claimant resides with his current spouse in Laurel, Iowa, near Marshalltown, Iowa. Laurel is a very small town of only 266 residents. Claimant commutes to his current place of employment from Laurel.

Claimant commenced his employment with Perishable Distributors of Iowa on January 16, 2012. Well before claimant sustained his work injury, claimant had a verbal warning about attendance issues in February of 2012. (Exhibit 14, page 150) He had an unexcused absence on March 16, 2012, and again on March 21, 2012. Claimant was given a warning on March 22, 2012 about excessive absences. (Ex. 14, p. 156) The attendance issues pre-dated claimant's work injury.

Claimant sustained a work-related injury on March 30, 2012 when he was operating a riding pallet jack. He backed into a pole and struck the right side of his lower back and his right buttock against the pole. Claimant fell forward off the pallet jack and landed on his hands and knees.

Claimant reported to the emergency room at Mercy Medical Center for immediate care. (Ex. 3, p. 18) Claimant complained of low back pain and he had a contusion on his back. (Ex. 3) X-rays of the lumbar spine were taken. (Ex. 3, p. 18) The findings of the x-rays showed:

> Findings: AP and lateral views: There are 5 non-rib-bearing lumbar segments. Sagittal alignment is within normal range. Vertebral body height and disc spaces are normal. No acute fractures.

(Ex. 3, p. 18) Claimant was diagnosed with low back contusion and strain. (Ex. 4, p. 19)

Defendants referred claimant to Jon R. Yankey, M.D., for medical treatment on April 2, 2012. Dr. Yankey concurred with the diagnosis given by the emergency room personnel at Mercy Medical Center. Dr. Yankey saw no evidence of a bone injury. The physician recommended the following conservative treatment modalities:

(1) I recommended ice packs intermittently for 10-15 minutes per hour t.i.d. to q.i.d.

(2) I advised that he do gentle stretching and range of motion exercises b.i.d. to t.i.d.

(3) I recommended he continue with ibuprofen 600 mg t.i.d.

(4) He can take over-the-counter Tylenol as needed and directed.

(5) He is given a prescription for tramadol 50 mg, 1 tab q.6h p.r.n., #20, no refills.

(6) I recommended modified work duties. See the patient status report for details.

(7) I asked the patient to return here in 3-4 days for recheck.

(Ex. 4, p. 20)

Claimant returned to Dr. Yankey on April 5, 2012 with reports of continued pain and intermittent tingling in the right leg over the anterior thigh, lateral calf and foot area. (Ex. 4, p. 24) Dr. Yankey opined claimant's diagnosis was "Low back contusion and strain." (Ex. 4, p. 24) Dr. Yankey continued conservative treatment. (Ex. 4, p. 24) Claimant was allowed to perform light-duty work at Perishable Distributors of Iowa.

On April 10, 2012, Dr. Yankey prescribed three sessions of physical therapy per week for two weeks. (Ex. 4, p. 27) Dr. Yankey did not find radicular pain. Claimant was advised to perform back exercises 2 to 3 times per day, take 600 mg of Ibuprofen 3 times per day and to use Tramadol as needed. Dr. Yankey also kept claimant on modified work duties. (Ex. 4, p. 27)

Claimant returned to Dr. Yankey on April 23, 2012. Claimant stated he had been attending physical therapy, and it was helpful. (Ex. 4, p. 29) Claimant also reported he performed his back exercises at home and took his medication as directed. (Ex. 4, p. 29) The authorized treating physician noted in his report of the same date:

> The patient has had slight improvement in his back since his last visit here. His exam here has improved slightly. The physical therapist felt that he had improved there slightly. His diagnosis remains the same. He has no evidence of radiculopathy. I recommended continuing the current conservative treatment. I recommended that he continue with physical therapy three times weekly. I also recommended a TENS unit for home use. I recommended he continue with home exercises. He is given prescriptions for Ibuprofen 600 mg, one tablet t.i.d. with food, #45, no refills; cyclobenzaprine 10 mg, one tablet b.i.d. p.r.n. muscle spasm, # 30, no refills; and tramadol 50 mg, one tablet q.6h. p.r.n. pain, # 30, no refills.

> I recommended that he continue modified work duties. See status report for details. I asked the patient to return here in two weeks for recheck.

(Ex. 4, p. 29)

On the same day, claimant presented to the Des Moines University Clinic for a rash on his arms and chest, low back pain and intermittent paresthesias in both legs. (Ex. 1, pp. 6-7) MRI testing was ordered but defendants did not approve the testing since the medical appointment was unauthorized. Prescription lotion and shampoo were prescribed for the rash. (Ex. 1, p. 7) No one indicated the rash was contagious.

That evening claimant did not want to report to work. He telephoned his supervisor. Claimant reported he had a fungal infection, but he did not have a doctor's excuse to keep claimant off work. Claimant was informed he would receive an adverse point towards his attendance record if he did not appear for work. Claimant had previously experienced problems with tardiness and unexcused absences, as discussed earlier in this decision. In fact, he had already had a 5-day suspension for poor attendance commencing on April 14, 2012. According to the evidence, claimant's last day of work was on April 20, 2012. Claimant did not work on April 23, 2012. He did not appear for work or call into work on April 24, 2012, April 25, 2012, and April 26, 2012. Claimant was terminated on April 27, 2012.

Claimant applied for unemployment insurance benefits through Iowa Workforce Development. Claimant was denied benefits on the basis he had voluntarily quit his position. (Ex. D)

On May 7, 2012, Dr. Yankey examined claimant for the final time. Claimant appeared at 8:00 a.m. for his appointment. He reported the following to the treating doctor:

> Howard Flowers is an employee of Perishable Distributors of Iowa who presents for recheck of his back. The patient reported that his back is unchanged since his last visit here 2 weeks ago. He states that he continues to have pain in his lower back which he rates at 6/10 now. He points to the right lower back as the site of that pain, which is the same area as noted on previous exams. He states that his pain is there most of the time and is worse with back motion. The patient reported that he is having episodes of his back "locking up" on a daily basis now. He notes that the "locking up" occurs when he is reaching forward. He describes the "locking up" as a sudden increase in back pain and is unable to move for 10 to 15 seconds. The patient also reported that he continues to have pain and tingling in his right leg at times. Upon my asking, the patient stated that he had been going to physical therapy 2 to 3 times weekly since his last visit here. He stated that he had not received a TENS unit yet although he states that he expected to receive the TENS unit from

physical therapy soon. He stated that he has continued to take his medications. He has been doing home exercises. The patient did not volunteer information about his current work status.

. . .

At my request, our office nurse called the physical therapy clinic to obtain a progress note. However, she was told by the therapist that the patient had not been to physical therapy since 04/20/2012. They stated that they had tried to contact the patient by phone on multiple occasions without success.

. . .

Based on the patient stating that he had been going to physical therapy 2 to 3 times weekly since his last visit, when the physical therapy clinic reported that he has not attended any session there since 04/20/2012, I feel the patient is noncompliant with my recommended medical treatment for his back condition. Thus, as the patient is noncompliant with my recommended treatment, I advised him that it would be in his best interest for him to seek medical treatment for his back condition elsewhere. He was instructed to contact the employer and that he might possibly need to see his personal physician, if no other appropriate physician was available. His response to my recommendation was "that's fine with me." Consequently, no further appointment was made here at this time. He was discharged from treatment here at this office on 05/07/2012. No further prescriptions or medications will be given here. In addition, physical therapy was stopped. His activity restrictions will need to be determined by the next provider. The employer was informed of my recommendations.

(Ex. 4, p. 31)

On May 25, 2012, claimant returned to Methodist Occupational Medicine. Nicholas O. Bingham, M.D., MS, examined claimant. The physician diagnosed claimant with: "Lumbar strain/contusion, resolved." (Ex. 4, p. 33) Dr. Bingham noted the following in his report for the 25th of May:

The patient was dismissed by Dr. Yankey for noncompliance. He [claimant] returns today with a few complaints. He complains of some morning stiffness but otherwise has no problems. Denies any radicular symptoms or undue pain. He is now working as a security guard which mostly is comprised of watching a wall of camera monitors. When asked why he discontinued therapy, he stated that he had been dismissed from Perishable Distributors of Iowa and he thought that he no longer had the

> right to go. Today, he is really seeking no additional treatment and says that he just wishes to be released.
>
> ...
>
> Released to return to duty without follow up appointment. I did offer the patient the opportunity to ask any questions he might have had. I asked him if there were any signs, symptoms, complaints, or concerns that we had not addressed, and he responded in the negative.

(Ex. 4, p. 33)

Dr. Bingham prepared documentation for claimant to establish claimant was fit for duty with no restrictions. (Ex. 4, p. 34) Claimant left the medical office without signing the patient status report. (Ex. 4, p. 34)

During cross-examination, claimant denied he told Dr. Bingham he had no other symptoms than morning stiffness. Claimant said he would never tell the physician he was improved.

According to Exhibit 5, pages 35 through 39, claimant only attended four physical therapy sessions between April 13, 2012 and April 20, 2012. Claimant testified he quit the physical therapy sessions because he knew more than Dr. Yankey about the exercises he needed to perform. He also testified it was not necessary to continue. Claimant also admitted he delayed in picking up the TENS unit that was made available to him.

Claimant testified he did not return to Dr. Bingham after May 25, 2012. Claimant testified he did not seek other medical care because he did not have personal health insurance. However, on July 5, 2012, counsel for claimant requested medical care for her client. On July 13, 2012, Ms. Rebecca Short, Claims Adjuster I for EMC Risk Services, LLC, notified claimant's counsel the authorized treating physician was:

> Dr. Nicholas Bingham at Iowa Methodist Occupational Medicine
>
> 2515 SW State St
>
> Ankeny, IA 50023
>
> 515-964-6974.

(Ex. 13, pp. 135-136)

Claimant testified he was unaware his attorney had requested medical care on his behalf. However, in claimant's brief, his attorney argued claimant came to her and requested medical care from defendants. It is questionable why claimant did not avail

himself of the care offered by defendants, if in fact, he did need treatment after May 25, 2012.

Fifteen months after his last appointment with Dr. Bingham, claimant sought unauthorized chiropractic care from David Blum, D.C. (Ex. 6, p. 49) Dr. Blum issued a work excuse for August 12, 2013 through August 14, 2013 on the basis claimant suffered severe low back pain. (Ex. 6, p. 49) At the time, claimant was working for NPI. He testified he did not think his workers' compensation insurance would pay for treatment. Again, claimant's testimony is in direct conflict with the correspondence between claimant's counsel and the claims adjuster about the authorized treating physician.

Counsel for claimant sent her client to Sunil Bansal, M.D., M.P. H., for an independent medical evaluation. The examination occurred on August 30, 2013. Dr. Bansal related the fall on March 30, 2012 to claimant's low back condition. (Ex. 7, p. 58) Dr. Bansal imposed **provisional restrictions** of:

> I would place a restriction of no lifting greater than 30 pounds occasionally, 10 pounds frequently. Doing more causes him considerable pain and would place additional stress on the lumbar spine.
>
> No frequent bending, squatting, climbing, twisting, pushing or pulling to avoid further damage to the back and keep pain levels in check. These activities cause him undue discomfort.
>
> Sit/Stand/Walk as tolerated. Being in any one position for too long causes him discomfort. Specifically, avoid sitting for more than 45 minutes, no standing for more than 120 minutes, and no walking more than 60 minutes at a time.
>
> Avoid multiple steps/stairs as that causes discomfort.

(Ex. 7, pp. 59-60)

Defendants desired an independent medical examination of their own. They selected Robert D. Rondinelli, M.D., Ph.D., at UnityPoint Physical Medicine and Rehabilitation Clinic. (Ex. 8, p. 77) Dr. Rondinelli found:

> He is now complaining of morning stiffness, centralized pain in his lower back, and some centralized radicular complaints into the right lower extremity. He has no objective findings to suggest radiculopathy based upon my physical examination; however, the nature of his complaints and duration of same in relation to his work-related trauma deserves further workup in my opinion.

(Ex. 8, p. 79) Dr. Rondinelli recommended MRI testing, and a triple-phase bone scan. (Ex. 8, p. 79)

On March 24, 2014, James J. Choi, M.D., interpreted the MRI of claimant's lumbar spine. The radiologist opined:

> IMPRESSION: AT L4-5 the degenerative disc bulge and facet changes contribute to mild to moderate central canal and mild bilateral foraminal narrowing. There is a superimposed central disc protrusion slightly exaggerated towards the right abutting the traversing L5 nerves.

(Ex. 8, p. 84)

Marvin D. Walker, D.O., reviewed the anterior and posterior whole body bone scan. (Ex. 8, pp. 85-86) The scan was negative. (Ex. 8, p. 86)

Claimant returned to Dr. Rondinelli on March 24, 2014. The physician ordered EMG studies. Anandeep Kumar, M.D., conducted the exam on June 9, 2014. Dr. Kumar interpreted the results as:

> **Electrodiagnostic Impressions:**
>
> 1) Abnormal electrodiagnostic study.
>
> 2) NCS and NEE studies above show no evidence of lumbar plexopathy, peripheral polyneuropathy, myopathy, no peripheral nerve entrapment, no sciatic neuropathy, nor any motor-neuronopathy.
>
> 3) Electrodiagnostic needle exam findings of Lumbar myotomes do show chronic nerve root irritation changes suggestive of L 5, S1 lumbar radiculopathy.

(Ex. 8, p.92) Dr. Rondinelli referred claimant to a pain specialist or an orthopedist. (Ex. 8, p. 94)

Defendants sent claimant to Lynn M. Nelson, M.D., for an independent medical examination. Dr. Nelson examined claimant on October 14, 2014. Dr. Nelson diagnosed claimant with:

> **IMPRESSION:**
>
> 1. Low back pain.
>
> 2. Mild L4-5 spinal stenosis.

(Ex. A, p. 3)

Dr. Nelson indicated in his note for October 14th the conversation he held with claimant. The orthopedic surgeon explained:

I discussed at length with the patient that his scan demonstrates mild appearing L4-5 spinal stenosis with a small central to right sided L4-5 disk protrusion. I explained that I would not expect it needs surgical treatment. In patients with ongoing persistent pain complaints, however, a lumbar ESI trial is reasonable. The patient was under the understanding that he was presenting for today's appointment for a lumbar ESI. I reviewed that he is being seen today for an independent medical examination and that I was not the treating physician.

Given that the patient reported quite minimal symptoms and requested a full release in May 2012 and my understanding that he did not seek additional medical care until about 15 months later, I cannot, with a reasonable degree of medical certainty, attribute his ongoing complaints to his work injury on or about 3/30/12. Furthermore, with a reasonable degree of medical certainty, my additional opinions are as follows:

1. The patient attained MMI on 5/25/12.

2. Utilizing The AMA Guidelines to the Evaluation of Permanent Partial Impairment, Fifth Edition, a permanent partial impairment rating of zero percent is indicated as his complaints and findings are most consistent with a DRE Lumbar Category I Impairment (Table 15-3, page 384).

(Ex. A, p. 3)

On January 30, 2015, Dr. Bansal reviewed additional medical records, examined claimant once again, and authored a subsequent report. (Ex. 7, p. 63) Dr. Bansal diagnosed claimant with "L4-5 and L5-S1 disc bulge with L5 radiculopathy." (Ex. 7, p. 67)

Dr. Bansal opined, "The EMG did substantiate Mr. Flowers' subjective reporting of back pain with radiculopathy, as it showed L5-S1 radiculopathy." (Ex. 7, p. 68) Dr. Bansal rated claimant as having a 10 percent permanent partial impairment based on the AMA Guides to the Evaluation of Permanent Impairment, 5th Edition, Table 15-3. (Ex. 7, p. 69) Dr. Bansal wanted to impose the following work restrictions: No lifting greater than 40 pounds occasionally from waist level; no lifting greater than 30 pounds from the floor; no lifting more than 20 pounds on a frequent basis; and no frequent bending, climbing or twisting. (Ex. 7, p. 69) However, claimant felt the imposition of work restrictions would affect his current employment status. (Ex. 7, p. 69) As a consequence, Dr. Bansal did not feel permanent restrictions would be necessary. (Ex. 7, p. 69)

The most recent medical care claimant received followed a work accident that occurred on February 5, 2015. Claimant was employed at Doll Distributing as a truck driver and beer delivery person. (Ex. 9, p. 95) Claimant injured his low back when he

hopped up onto the lift gate of the truck he was driving. He experienced pain in his right lower back and numbness and tingling into the right leg. (Ex. 9, pp. 95, 98)

X-rays were taken. John Tentinger, M.D., read the results as:

> Mild disc space narrowing L4 and L5, most marked at the L4 interspace.
>
> Lumbar spine is otherwise normal.

(Ex. 9, p. 96)

Claimant reported on his medical form. "I have had back pain for a while, but today it feels like I threw my back out." (Ex. 9, p. 99)

Mary A. Shook, M.D., diagnosed claimant with a "Lumbar Sprain." (Ex. 9, p. 100) The physician returned claimant to work with no lifting greater than 20 pounds. (Ex. 9, p. 100) Physical therapy was also prescribed as well as drug therapy. (Ex. 9, p. 101)

Claimant testified he did not attend physical therapy sessions, as he did not need therapy. He stated he just took medication for one week.

Following the injury on February 5, 2015, Dr. Bansal opined the incident was nothing more than a temporary aggravation of a pre-existing condition. Dr. Bansal had no other recommendations regarding claimant's condition or treatment. (Ex. 7, p. 72)

RATIONALE AND 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 question of causal connection is essentially within the domain of expert testimony. The expert medical evidence must be considered with all other evidence introduced bearing on the causal connection between the injury and the disability. Supportive lay testimony may be used to buttress the expert testimony and, therefore, is also relevant and material to the causation question. The weight to be given to an expert opinion is determined by the finder of fact and may be affected by the accuracy of the facts the expert relied upon as well as other surrounding circumstances. The expert opinion may be accepted or rejected, in whole or in part. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); IBP, Inc. v. Harpole, 621 N.W.2d 410 (Iowa 2001); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995). Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417 (Iowa 1994). Unrebutted expert medical testimony cannot be summarily rejected. Poula v. Siouxland Wall & Ceiling, Inc., 516 N.W.2d 910 (Iowa App. 1994).

When an expert's opinion is based upon an incomplete history it is not necessarily binding on the commissioner or the court. It is then to be weighed, together with other facts and circumstances, the ultimate conclusion being for the finder of the facts. Musselman v. Central Telephone Company, 154 N.W.2d 128, 133 (Iowa 1967); Bodish v. Fischer, Inc., 257 Iowa 521, 522, 133 N.W.2d 867 (1965).

The commissioner as trier of fact has the duty to determine the credibility of the witnesses and to weigh the evidence. Together with the other disclosed facts and circumstances, and then to accept or reject the opinion. Dunlavey v. Economy Fire and Casualty Co., 526 N.W.2d 845 (Iowa 1995).

It is the determination of the undersigned deputy workers' compensation commissioner; claimant did not sustain a permanent partial disability as a result of his stipulated work injury on March 30, 2012. Defendants admitted claimant sustained a temporary disability.

The medical evidence established claimant's injury was diagnosed as a low back contusion and strain. Claimant engaged in some conservative treatment modalities. He told Dr. Yankey, the authorized treating physician, his physical therapy was helping his condition when he was not even attending physical therapy. Claimant testified during his arbitration hearing, he knew what exercises he should be performing and it was not necessary to continue with a formalized therapy program. Because claimant was non-compliant with Dr. Yankey's treatment recommendations, the authorized treating physician refused to treat claimant.

As a consequence, defendants authorized Dr. Bingham to treat claimant. Dr. Bingham examined claimant on May 25, 2012. Claimant told the physician he did not attend therapy because he had been terminated, and he did not think he had the

ability to attend physical therapy. Claimant told Dr. Bingham his only problem was morning stiffness, and he asked to be released from the doctor's care.

During cross-examination, claimant testified he never would have told Dr. Bingham his condition had resolved. However, claimant's actions speak louder than his words in this case. Claimant did not seek medical treatment for the next 15 months even though his attorney had received confirmation from defendants. They authorized Dr. Bingham as the treating physician. At his hearing, claimant testified he did not know Dr. Bingham was authorized to treat him. However, counsel for claimant had requested treatment in July 2012. If claimant truly needed treatment, Dr. Bingham was available to provide care.

The only care claimant sought after the 15-month gap was a short period of chiropractic care with Dr. Blum. The care was not authorized by defendants. Claimant selected the chiropractor on his own. He did not request alternate care from defendants prior to treating with Dr. Blum.

Next, claimant had an appointment with an independent medical examiner. Dr. Bansal was not a treating physician. Claimant's counsel directed claimant to Dr. Bansal.

Subsequent to the opinions rendered by Dr. Bansal, defendants sent claimant to Dr. Rondinelli for an independent medical evaluation and to Dr. Nelson for an evaluation by an orthopedic surgeon. Neither evaluating physician related claimant's condition to his work injury on March 30, 2012. The medical testing suggested spinal stenosis and lumbar pain. No one indicated surgery was a viable alternative for claimant to select. Dr. Nelson rated claimant as having a zero percent permanent impairment rating.

Dr. Bansal, after his second IME, determined claimant had a 10 percent permanent impairment rating. The evaluating physician was under the mistaken impression claimant had back pain which radiated down to his right calf and into his foot. The evidence established claimant had low back pain which radiated into the right knee on occasion. The pain did not travel down the right leg and into the foot. (Ex. 7, p. 65) Dr. Bansal did not impose work restrictions. Claimant did not want restricted work duty. He did not want the restrictions to affect his employment as a truck driver and delivery person. Dr. Bansal's opinions lack a sufficient basis to support an award of permanent disability.

Additionally, there are the activities of claimant. For more than one year, claimant has successfully worked as a truck driver delivering kegs and cases of beer. He works without any work restrictions. He stated he passed the pre-employment physical.

Several of claimant's current duties are in the heavy category of labor. They include:

Frequently lift, push, or move product that weighs 1-50 pounds, up to 165 pound kegs of beer; daily lifting of 20,000 to 40,000 or more pounds of product.

Frequently reach up to 72" to stack and unstack pallets and hand carts.

Constantly bend and twist while loading and unloading product, stocking coolers and shelves, and rotating backroom stock at customer locations.

(Ex. G, p. 67)

Claimant admitted the job he holds as a truck driver is more strenuous than the job he held at Perishable Distributors of Iowa. Claimant described the job as physically demanding. Claimant is able to perform his duties to the satisfaction of his current employer after three and one-half years following his work injury. Claimant has no permanent disability.

Claimant is requesting the cost of two independent medical examinations pursuant to Iowa Code section 85.39.

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 entitled to the cost of one independent medical examination with Dr. Bansal. Claimant's IME was to occur following an assessment of permanent disability by defendants' physician. It was not until Dr. Nelson saw claimant in October of 2014 that defendants obtained a zero percent impairment rating. Consequently, the cost of Dr. Bansal's second IME is to be paid by defendants.

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).

Defendants are not liable for the costs of any unauthorized medical treatment. Claimant had notice defendants had authorized Dr. Bingham to treat claimant. Counsel for claimant had specifically addressed the issue with the claims adjuster in July 2012. Claimant did not abide by defendants' authorization.

ORDER

THEREFORE, IT IS ORDERED:

Claimant shall take nothing additional from these proceedings.

Each party shall pay her/its/their own costs to litigate the claim.

Defendants shall pay for the cost of Dr. Bansal's second independent medical evaluation and report.

Defendants shall file all reports as required by this division.

Signed and filed this 24th day of November, 2015.

Michelle A. McGovern

MICHELLE A. MCGOVERN
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

Copies To:

Jean Mauss
Attorney at Law
6611 University Ave., Ste. 200
Des Moines, IA 50324-1655
jmauss@smalaw.net

Valerie A. Landis
Attorney at Law
2700 Grand Ave., Ste. 111
Des Moines, IA 50312
vlandis@hhlawpc.com

MAM/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.