

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

KENNETH GREEN,

Claimant,

vs.

ABF FREIGHT SYSTEMS,

Employer,

and

ACE AMERICAN INSURANCE
COMPANY,Insurance Carrier,
Defendants.

File No. 21001044.01

ARBITRATION DECISION

Head Notes: 1108.50, 1402.60, 1703,
2206, 2701, 2907, 3001

STATEMENT OF THE CASE

Kenneth Green, claimant, filed a petition in arbitration seeking workers' compensation benefits from ABF Freight Systems, employer, and ACE American Insurance Company, as defendants. The hearing was held on November 10, 2022. Pursuant to an order from the Iowa Workers' Compensation Commissioner, this case was heard via videoconference using Zoom with all parties and the court reporter appearing remotely.

The parties filed a hearing report at the commencement of the arbitration hearing. On the hearing report, the parties entered into various stipulations. 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.

Kenneth Green and Patricia J. Kelly testified live at the hearing. The evidentiary record also includes joint exhibits 1-9, claimant's exhibits 1-5, and defendants' exhibits A-G. All exhibits were received into the record without objection. The parties also submitted post-hearing briefs. The case was fully submitted to the undersigned on January 5, 2023.

ISSUES

The parties identified the following disputed issues on the hearing report:

1. Claimant's average weekly wage and weekly rate.
2. Whether defendants are entitled to a credit for overpaid temporary total or healing period benefits.
3. Whether claimant is entitled to alternate medical care.
4. Whether claimant is entitled to recover the cost of an independent medical examination pursuant to Iowa Code section 85.39.
5. Assessment of costs.

FINDINGS OF FACT

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

At the time of the hearing the claimant, Kenneth Lee Green (hereinafter "Green"), was 66 years old. (Hearing Transcript, p. 12). He resides in Pleasant Valley, Missouri with his wife. (Id.). He graduated from high school in 1974. (Id.; see Claimant's Post-Hearing Brief, p. 1).

In 2001, Green began working for ABF Freight Systems (hereinafter "ABF"), the defendant employer, as a truck driver. (Tr., p. 13). He testified that he worked for another trucking company, Crouse Cartage, for six years prior to that. (Id. at 14-15). At the time of the hearing, Green was still working for ABF driving a truck. (Id.).

Green works in the Line Haul Division. (Tr., p. 13). He moves freight from one destination to another. (Id.). Each year he is allowed to bid his job or route. (Id. at 14). At the time of the stipulated injury date, he was pulling a set of double trailers from Kansas City, Missouri, to Williams, Iowa. (Id. at 16). In Williams, Green would meet another driver coming from Owatonna, Minnesota. (Id. at 17). He and the other driver would switch trailers. (Id.). This meant Green had to unhook his trailers and then re-attach the new ones. (Id.). He would then drive back to Kansas City, Missouri. (Id.). Green testified he generally drove this route daily. (Id. at 17).

On the date of the injury, October 22, 2019, Green testified he pulled into the meeting spot in Williams, Iowa, the Old Boondocks Truck Stop, sometime in between 12:30 a.m. and 2:00 a.m. (Tr., p. 21). Green testified it was a stormy, rainy night. (Id.). He successfully performed the drop-and-hook, but as he was getting back in the semi, he noticed that the lights were flickering on one of the trailers. (Id. at 22). He climbed back down and fixed them by tightening the electric cord. (Id.). As Green was climbing

back up into the cab of the semi, a gust of wind caught the door and slammed it into the left side of his chest and causing him to fall to the ground. (Id.). There were no witnesses to the incident. (Id. at 22). Green testified he had immediate pain in his left side, foot, and ankle, as well as trouble breathing. (Id.). Ten to fifteen minutes later he also noticed back pain. (Id. at 23). Green called his dispatcher in Kansas City and reported the injury. (Id.). The dispatcher asked if he was physically able to make it back to Kansas City. (Id.). He responded in the affirmative. (Id.). He was then instructed to drive back to Kansas City and fill out an incident report. (Id.).

Green arrived back in Kansas City early in the morning on October 22, 2019. (Tr., p. 23). ABF sent him to Concentra Medical Center for treatment later that day. (JE 4, p. 25). According to the medical records, Green was evaluated by Chau Herring, DNP, for a burning sensation in his feet, as well as pain in his left rib cage, left ankle, legs and back. (Id.). Green told Nurse Herring he was climbing into his truck, when the wind swung the door into his left side, knocking him to the ground. (Id.). Nurse Herring diagnosed him with a rib injury and a contusion of the left ankle. (Id. at 27).

Green followed-up with Nurse Herring on October 24, 2019, for his rib and ankle pain. (JE 4, p. 29). At this appointment he also complained of pain in his lower back and hip weakness. (Id.). He reported increased rib pain with deep breathing and coughing. (Id.). He had not yet returned to work. (Id.). Nurse Herring prescribed Green a muscle relaxant and work restrictions. (Id. at 30-31). Green's next appointment was on October 31, 2019. (Id. at 32). He was still complaining of pain in the top of his buttocks/lower back, as well as his left ribcage area and left ankle and leg. (Id. at 32). He told Nurse Herring he had pain with walking. (Id.). He stated, "Back started to [stiffen] up and is having trouble walking far distance without feeling stiffness and increased pain. He reports pain shooting down to his back thigh worse on the right." (Id.). Nurse Herring added a diagnosis of lumbar strain and referred Green to physical therapy. (Id. at 33). Green attended physical therapy at Concentra on November 4, 2019. (Id. at 37).

Green returned to Nurse Herring on November 11, 2019. (JE 4, p. 38). He reported improvement in his pain complaints, except for in his left heel. (Id.). He reported continued leg weakness, but no numbness or tingling. (Id.). Herring ordered a CT of Green's left ankle. (Id. at 39). This was performed on November 14, 2019. (JE 5, p. 43). It showed a calcaneal spur near the Achilles tendon insertion, but no tears. (Id.). It also showed some cystic areas in the proximal third and fourth metatarsals. (Id.). Green followed up with Nurse Herring on November 20, 2019. (JE 4, p. 40). He reported his rib pain had resolved, the left ankle pain was unchanged, and his back pain increased with walking. (Id.). Nurse Herring referred him to an orthopedic specialist. (Id. at 42).

On December 3, 2019, Green was evaluated by Stanley Bowling, M.D., at Dickson Diveley Midwest Ortho. (JE 6, pp. 45-46). Dr. Bowling diagnosed Green with an avulsion fracture of the left calcaneus and a lumbar strain with possible right sided lumbar sciatica. (Id. at 45). He referred Green to Theodore Koreckij, M.D., a spine

specialist, for the low back condition. (Id.). Dr. Bowling opined that his altered gait and the October 22, 2019 “mechanism of injury” could have caused his low back pain. (Id.). Dr. Bowling did not recommend any additional treatment or prescribe restrictions for Green’s left heel fracture. (Id. at 45-46). Green followed-up with Dr. Bowling for his left heel on December 30, 2019. (Id. at 54). On that date, Dr. Bowling placed him at maximum medical improvement (MMI) for the left heel, released him to full duty work for that condition, and discharged him from treatment. (Id.).

On December 26, 2019, Green saw Dr. Koreckij for his low back complaints. (JE 6, p. 50). He told Dr. Koreckij that since the work injury he had experienced back pain and worsening leg pain, right greater than left. (Id.). Dr. Koreckij diagnosed him with L4-5 spondylolisthesis, as well as back and bilateral leg pain. (Id. at 53). According to the hearing record, in 1989, Green was shot in his low back. (See Tr., pp. 27-28). They were unable to remove the bullet. (Id.). Since then, it has remained lodged in some fatty tissue left of his L-5 vertebrae. (See JE 3, p. 23; JE 6, pp. 45, 52).

The medical records show that Green received treatment for back and flank pain in January 2013 at Liberty Hospital. (JE 9, pp. 84-87). At that time, he was diagnosed with back spasms and pain. (Id. at 87). A CT was ordered. (Id.). A copy of the CT is not in the record. Green returned to Liberty Hospital in March 2013. (Id. at 88). At that time his back pain and spasms had improved. (Id.). There are no other past treatment notes for Green’s back in the hearing record.

Due to his prior history of back injury, Dr. Koreckij was unable to order an MRI. (JE 6, p. 53). Instead, Dr. Koreckij ordered a CT myelogram. (JE 6, p. 53). This was performed on February 7, 2020. (JE 3, p. 23). It showed mild central canal narrowing at L3-4 and L4-5 due to mild disc bulges, near complete loss of myelographic contrast at L5-S1, and severe to moderate right and left neural foraminal stenosis at L4-L5 due to facet arthropathy. (JE 3, p. 24).

On February 12, 2020, Dr. Koreckij reviewed the CT images. (JE 6, p. 56). He changed his diagnosis to L4-5 spondylolisthesis with stenosis and radiculopathy. (Id.). He opined that Green’s lumbar disc disease was pre-existing but the “work injury likely represents an exacerbation” of the disease. (Id.). Dr. Koreckij recommended injections, physical therapy, and temporary work restrictions. (Id.). Green began physical therapy for his low back condition at ARC Physical Therapy on February 20, 2020. (JE 2, p. 4).

On March 18, 2020, Green received bilateral lumbar transforaminal epidural steroid injections at L5 from Femin Santos, M.D. (JE 6, pp. 61-62). The injections did not provide him with any lasting relief. (Id. at 63). Green underwent a second set of injections with Dr. Santos on May 28, 2020. (Id. at 65-66). The second set of injections provided some relief, but Green still experienced back pain, leg heaviness, and leg weakness with prolonged standing and walking. (Id. at 67). Green saw Dr. Koreckij on June 18, 2020. (Id. at 67-70). Green opted to try a trial of full duty work at ABF. (Id. at 68). Dr. Koreckij cautioned that if Green was unsuccessful at work, his next treatment option was a L4-5 laminectomy fusion surgery. (Id.).

In August 2020, Dr. Koreckij extended Green's full duty trial for five or six more weeks. (JE 6, p. 72). Green returned to Dr. Koreckij on November 11, 2020. (Id. at 76). He was still experiencing back pain that radiated to his posterior thighs and calves. (Id.). Green requested a second opinion with a neurosurgeon. (Id. at 77). Dr. Koreckij agreed. (Id.).

Defendants set up a second opinion with John Ciccarelli, M.D., at Premier Spine Care. (JE 1, p. 1-3). That appointment took place on December 17, 2020. (Id. at 1). Dr. Ciccarelli diagnosed him with spinal stenosis, lumbar region with neurogenic claudication at L4-5 and bilateral legs, low back pain, and spondylolisthesis, lumbar region L4-5. (Id. at 3). Dr. Ciccarelli agreed that it was reasonable to proceed with an L4-5 decompression and fusion. (Id.). Dr. Ciccarelli's report states,

I do believe the L4-5 stenosis and spondylolisthesis is most likely the primary contributors to his symptoms. I agree that the radiographic findings were present long before the injury yet he was not symptomatic until the work injury, by history and review of the available records. Based on this information, I would opine that he has suffered a work related symptomatic aggravator of a prior and pre existing underlying condition at L4-5. Again, I generally concur with the advice that Dr. Koreckij has already presented to him from a surgical standpoint perspective and also in explaining or defining causation in this case.

(Id. at 3).

On January 4, 2021, Green returned to Dr. Bowling complaining of feeling a sharp pain over the posterior aspect of his heel. (JE 6, p. 80). Dr. Bowling indicated Green was likely irritating the sural nerve root in his heel, but no damage was being done and there was nothing surgical to do. (Id.). Dr. Bowling again discharged Green from his care for the left heel. (Id. at 78).¹

At the request of defendants, Green attended an independent medical exam (IME) with William Boulden, M.D., on November 30, 2021. (Ex. A, pp. 1-7). Prior to the examination, Dr. Boulden reviewed records from Liberty Hospital, Concentra, Dr. Koreckij, Dr. Bowling, and several medical records related to a prior right knee injury.² (See id. at 1-5). Dr. Boulden diagnosed Green with mechanical back pain and neural claudication symptoms in the thigh. (Id. at 6). Dr. Boulden opined that the work injury did not cause any of his back or leg pathology and "any need for surgery would be

¹ The records show Green sought care from his family provider, Ryan Huyser, M.D., at Liberty Clinic for left Achilles pain on April 5, 2021. (JE 9, p. 101). Dr. Huyser diagnosed him with a strain of the left Achilles tendon, placed him in a cam walker boot, and referred him to orthopedic foot and ankle surgery for further care. (Id. at 103). It is not clear whether he ever saw the orthopedic doctor. On July 1, 2021, Green followed up with Dr. Huyser for his left Achilles pain. (Id. at 108). The cam walker boot was discontinued, and he was returned to work without restrictions. (Id. at 108, 112).

² Dr. Boulden also provided his opinion on surgical options for Green's right knee. (See Ex. A, p. 7). The right knee is not part of this claim, so those are not discussed.

based on pre-existing pathology.” (Id.). Dr. Boulden did not agree with Dr. Koreckij’s surgery recommendation, instead he recommended an exercise program. (Id.).

On March 10, 2022, defendants sent Green a letter denying liability for any further treatment for his right knee and/or low back conditions. (Ex. 1).

At the behest of his attorney, Green underwent a second IME with Sunil Bansal, M.D., on August 31, 2022. (Ex. 2, pp. 2-10). Prior to the evaluation, Dr. Bansal also reviewed Green’s treatment records from Concentra, the CT of his lumbar spine, as well as Dr. Ciccarelli and Dr. Boulden’s IME reports. (Id. at 3-5). Dr. Bansal diagnosed Green with aggravation of lumbar spondylosis and facet arthropathy. (Id. at 8). Dr. Bansal agreed with Dr. Koreckij’s recommendation to proceed with an L4-5 decompression and fusion. (Id.). Dr. Bansal opined that the work incident on October 22, 2019 “lit up” or aggravated his pre-existing spinal condition, causing the need for the recommended spinal surgery. (Id. at 9-10).

Defendants sent Dr. Bansal’s report to Dr. Boulden for review. On September 28, 2022, Dr. Boulden issued a supplemental check-the-box report. (Ex. A, pp. 8-13). In this report Dr. Boulden reiterated his belief that Green’s back condition was pre-existing and was not substantially aggravated by the 2019 work incident. (Id. at 8). Dr. Boulden listed several rationales for his opinion. Those are:

- Green did not have any symptoms in his back until two to three days after the work incident.
- Subsequent radiology testing showed that his low back pathology was pre-existing and was not acutely aggravated by the work incident.
- A Concentra record from November 4, 2019, indicated Green’s low back and rib complaints had resolved.
- Green did not show radicular type symptoms until December 2019 and if the work incident had caused the symptoms they would have appeared earlier.

(Id.). Based upon the above rationale, Dr. Boulden opined that any aggravation to Green’s back from the work incident was temporary and the work incident did not cause any permanent impairment to Green’s back. (Id. at 12).

In September 2022, defendants also requested a records review from Robert Broghammer, M.D. (Ex. B, pp. 14-37). Dr. Broghammer reviewed records from ARC Physical Therapy, Concentra Medical Centers, Liberty Hospital, Dr. Huyser, Dr. Bowling, Dr. Koreckij, Dr. Ciccarelli’s IME report, Dr. Boulden’s IME report, Dr. Bansal’s IME report, the CT scan of his lumbar spine from February 7, 2020, as well as records from a prior knee injury and a prior cervical injury. (Id.). He also reviewed the transcript of Green’s deposition taken on August 3, 2021. (Id. at 33). After reviewing Green’s records, Dr. Broghammer diagnosed Green with a lumbar strain and ongoing mechanical low back pain. (Id. at 34). Dr. Broghammer opined the lumbar strain had resolved and the cause of the mechanical pain was degenerative and pre-existing, and was not causally related to the October 22, 2019 date of injury. (Id.).

At the hearing, Green testified that since June 2020, he has worked full duty for ABF. (Tr., p. 36-38). However, in 2020, ABF canceled his route “quite a bit,” so he rarely worked five full days in a week. (Id.). He recently bid into a new route. (Id. at 33). He still works in the Line Haul Division, but now he drives from Kansas City, Missouri to Towanda, Oklahoma. (Id.). He still must drop and hook trailers, but he does not load or unload freight. (See, e.g., id. at 13). He still experiences pain in the left side of his low back, right above his belt line. (Id. at 25, 34). The pain shoots down his legs, the left more often than the right. (Id. at 34). Green also has occasional weakness in his legs and his back tightens up. (Id.). The symptoms make it hard for him to sit or stand for long periods of time. (Id.). He testified that sometimes he loses feeling in his foot and has trouble distinguishing between the break and the gas pedal. (Id. at 31). Green feels like the symptoms are getting worse and he would like to proceed with the lumbar surgery. (Id. at 30-34). On cross-examination, he admitted that he had a prior injury to his right knee that causes him to limp sometimes. (Id. at 40-41). It also can make it hard to walk, climb stairs, and stand for long periods of time. (Id.).

Patricia Kelly testified on behalf of the defendants at the hearing. (See Tr., pp. 42-46). Ms. Kelly is the Line Haul Division manager at ABF. (Id. at 43). She has worked at ABF for eight years and held the Line Haul Manager position since September 2020. (Id.). Ms. Kelly confirmed that Green is one of the drivers that works for her in the Line Haul Division. (Id. at 43-44). She also confirmed that he continues to work at ABF as a driver without restrictions. (Id. at 44). Ms. Kelly testified that Green has never talked to her about his low back or radicular leg symptoms, but he has mentioned having ongoing difficulties with his knees. (Id. at 44-45). She testified that he generally works three and a half to four days a week. (Id.). Ms. Kelly indicated Green has previously requested time off work for allergy/sinus issues, mother-in-law problems, his wife’s illness, and his knees, but she was unaware of him taking any time off work for his back. (Id. at 45). She also indicated that Green was currently on medical leave from ABF, but the leave was not related to his back or leg symptoms. (Id. at 45-46).

The record contains several different causation opinions for Green’s back and leg symptoms. Of these, I find those of Dr. Koreckij and Dr. Ciccarelli to be the most persuasive. Both are orthopedic surgeons that specialize in spinal surgery. Additionally, they were both authorized and retained by the defendants, and have physically examined Green. According to Dr. Broghammer’s records review, Dr. Koreckij has been treating Green since 2016. (See Ex. B, p. 24). However, none of the prior treatment records listed in Dr. Broghammer’s review were for Green’s low back. (Id. at 24-26). Dr. Koreckij opined that Green had pre-existing lumbar disc disease, but the October 22, 2019, work incident exacerbated the disease. (JE 6, p. 56). This opinion is supported by the records. While Green had a prior injury to that area in 1989 and has a foreign object lodged in the fatty tissue around his spine, he did not seek any treatment for back or radicular leg symptoms from 2013 until after the 2019 date of injury. (See JE 3, p. 23; JE 4, p. 29; JE 6, pp. 45, 52). Green’s condition was asymptomatic until after the work injury. In his supplemental report, Dr. Boulden states that Green’s pre-existing back condition was not substantially aggravated by the work incident because he did not have back symptoms until two to three days after the

incident. (See Ex. A, p. 8-9). That statement is not supported by the medical records. When Green presented to Concentra on the day of the incident, he was already complaining of pain in his back and legs, as well as a burning sensation in his feet. (JE 4, p. 25). When he returned to Concentra two days later, he was still complaining of low back pain, as well as hip weakness. (Id. at 29). The evidence supports Dr. Koreckij's opinion that the October 22, 2019, work incident exacerbated Green's pre-existing back condition. Dr. Koreckij's opinion is adopted by the undersigned. Similarly, Dr. Ciccarelli found Green "suffered a work related symptomatic aggravator of a prior and pre existing underlying condition at L4-5." (JE 1, p. 3). Dr. Ciccarelli's report also notes "he was not symptomatic until the work injury, by history and review of the available records." (Id.). Dr. Ciccarelli's opinion is supported by the medical evidence. It is also adopted. Green's current low back and leg symptoms are causally related to the October 22, 2019, date of injury.

The parties have a rate disagreement. They agree Green was married and entitled to two exemptions at the time of the injury but disagree about his correct average weekly earnings. Green contends his average weekly wage is \$1,364.77 (CI Ex. 5, p. 23). Defendants claim his average weekly wage is \$1,309.01. (Ex. C, p. 38). The difference in the amounts alleged comes down to one week of earnings, which Green contends is non-representative and should be excluded. The week in question is October 5, 2019, through October 11, 2019. (Ex. 5, p. 23). The parties' documents show Green was paid \$667.74 that week. (Id.). This is the only week listed where Green made less than \$1,052.17 in the 13 weeks leading up to the injury. (Id.). At the hearing, Green testified that at the time of the injury he drove the route from Kansas City, MO to Williams, IA five days a week. (Tr., p. 17). The route was 510 miles round trip. (Id.). According to Green, he was paid 61-62 cents per mile, plus delay time pay, and drop and hook time, which was normally around \$13. (Id. at 17-18). Added all together, Green estimated he made around \$330 a day at ABF at the time of the injury. (Id. at 18). Green further testified that he generally worked five days a week, except when a load was cancelled because there was no driver available on the other end or when he requested time off because of his right knee issues. (Id. at 18-19). Green had no explanation for why his pay was short the week of October 5, 2019, through October 11, 2019. (Id. at 19-20).

Patricia Kelly testified that Green works three and a half to four days a week now. (Tr., pp. 44-45). She, however, did not provide any information about Green's schedule, rate of pay, or absences back in 2019. (Id.). Defendants included a payment summary in their exhibits. (Ex. C, pp. 39-40). The summary has columns for the pay period, gross pay, rate, regular hours, and PTO hours. (Id.). It begins the week of October 27, 2018, and ends the week of October 19, 2019. (Id.). Of the 52 weeks shown, only seven weeks show wages below \$1,000, and three of those weeks contain federally recognized holidays. (Id.). Given this, I accept Green's testimony that he generally worked five days a week and adopt his purposed average weekly wage of \$1,364.77, which excludes the week of October 5, 2019, for being non-representative. Given the

parties' other stipulations, Green's weekly rate for the October 22, 2019, date of injury is \$866.33.

Defendants seek a credit for overpayment of temporary total or healing period benefits. At the time of the hearing, the parties stipulated that Green was previously paid temporary total or healing period benefits from October 23, 2019, through December 21, 2019, and again from February 24, 2020, through June 24, 2020, at the rate of \$872.68 per week. (See Hearing Report). According to the parties, this claim was originally filed in Missouri and Green's benefits were paid at a higher rate under Missouri law. (Tr., pp. 5-7). Under Iowa law, Green's weekly rate for the October 22, 2019, date of injury is \$866.33. Defendants overpaid temporary total or healing period benefits in the amount of \$6.35 per week.

CONCLUSIONS OF LAW

The party who would suffer loss if an issue were not established ordinarily has the burden of proving that issue by a preponderance of the evidence. Iowa R. App. P. 6.904(3)(e).

The claimant has the burden of proving by a preponderance of the evidence that the alleged injury 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 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 or incorrect 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 fact. Musselman v. Central Telephone Company, 154 N.W.2d 128 (Iowa 1967); Bodish v. Fischer, Inc., 257 Iowa 516, 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, 526 N.W.2d 845.

Based on the above findings of fact, I conclude that Green's current low back and leg symptoms are causally related to the October 22, 2019, date of injury. Green asserts a claim for alternate medical care. Specifically, he seeks approval for the laminectomy fusion surgery as recommended by Dr. Koreckij and Dr. Ciccarelli. (See JE 6, p.68; JE 1, p. 3). Iowa Code section 85.27(4) provides, in relevant part:

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

Id.

In this case, Green's low back and leg symptoms were caused by the work incident on October 22, 2019. Both Dr. Koreckij and Dr. Ciccarelli opined that he would benefit from spinal surgery. The need for surgery is related to the work injury.

Green has established by a preponderance of the evidence that there is reasonable and necessary treatment that can and should be offered to him. Green has proven he is entitled to alternate care, specifically back surgery as recommended by Dr. Koreckij. Defendants shall designate Dr. Koreckij as the authorized treating physician for Green's work-related back condition and immediately authorize the laminectomy fusion surgery as requested.

The parties have a dispute about Green's correct weekly rate. This disagreement originates from a difference of opinion about Green's correct average weekly earnings. The language of Iowa Code section 85.36(6) states,

The basis of compensation shall be the weekly earnings of the injured employee at the time of the injury. Weekly earnings means gross salary, wages, or earnings of an employee to which such employee would have been entitled had the employee worked the customary hours for the full pay period in which the employee was injured, as regularly required by the employee's employer for the work . . . computed or determined as follows and then rounded to the nearest dollar:

. . .

(6) In the case of an employee who is paid on a daily or hourly basis . . . the weekly earnings shall be computed by dividing by thirteen the earnings . . . the employee earned in the employ of the employer in the last completed period of thirteen consecutive calendar weeks immediately preceding the injury. If the employee was absent from employment for reasons personal to the employee during part of the thirteen calendar weeks preceding the injury, the employee's weekly earnings shall be the amount the employee would have earned had the employee worked when work was available to other employees of the employer in a similar occupation. A week which does not fairly reflect the employee's customary earnings shall be replaced by the closest previous week with earnings that fairly represent the employee's customary earnings.

Id. (emphasis added).

Green contends his average weekly wage is \$1,364.77. (CI Ex. 5, p. 23). Defendants claim his average weekly wage is \$1,309.01. (Ex. C, p. 38). The difference in the amounts alleged comes down to one week of earnings, which Green argues is non-representative and should be excluded. The week in question is October 5, 2019, through October 11, 2019. (Ex. 5, p. 23). The parties' documents show Green was only paid \$667.74 that week. (Id.). This is the only week listed where Green made less than \$1,052.17 in the 13 weeks leading up to the injury. (Id.). At the hearing, Green testified that at the time of the injury he drove the route from Kansas City, MO to Williams, IA. (Tr., p. 17). The route was 510 miles round trip. (Id.). According to Green, he was paid 61-62 cents per mile, plus delay time pay, and drop and hook time, which was normally around \$13. (Id. at 17-18). Added all together, Green estimated he made around \$330 a day at ABF at the time of the injury. (Id. at 18). Green further testified that he generally worked five days a week, except when a load was cancelled because there was no driver available on the other end or when he requested time off for his right knee issues. (Id. at 18-19). Given the lack of competing evidence, I accepted Green's testimony that he generally worked five days a week at that time. Based on the evidence presented, Green's earnings the week of October 5, 2019, through October

11, 2019, were not customary and should be excluded from his rate calculation. Griffin Pipe Products Co. v. Guarino, 663 N.W.2d 862 (Iowa 2003) (stating pertinent question is whether employee customarily worked a full week, if so, any weeks with less are not representative and should be excluded); Weishaar v. Snap-On Tools, 582 N.W.2d 177 (Iowa 1998).

Based on the findings above, Green's average weekly wage is \$1,364.77. Green was married and entitled to two exemptions. (Hearing Report). Green's weekly rate for the October 22, 2019, date of injury is \$866.33.

Defendants seek a credit for overpayment of temporary total or healing period benefits. Iowa Code section 85.34 addresses entitlement to credit for overpaid temporary total and/or healing period benefits. The pertinent portions of that Code section provide:

4. Credits for excess payments. If an employee is paid weekly compensation benefits for temporary total disability under section 85.33, subsection 1, for a healing period under section 85.34, subsection 1, or for temporary partial disability under section 85.33, subsection 2, in excess of that required by this chapter and chapters 85A, 85B, and 86, the excess paid by the employer shall be credited against the liability of the employer for any future weekly benefits due for an injury to that employee, provided that the employer or the employer's representative has acted in good faith in determining and notifying an employee when the temporary total disability, healing period, or temporary partial disability benefits are terminated.

5. Recovery of employee overpayment. If an employee is paid any weekly benefits in excess of that required by this chapter and chapters 85A, 85B, and 86, the excess paid by the employer shall be credited against the liability of the employer for any future weekly benefits due pursuant to subsection 2, for any current or subsequent injury to the same employee.

Iowa Code § 85.34(4), (5) (emphasis added).

Prior to the hearing, Green was paid 25 weeks and 6 days of temporary total or healing period benefits at the rate of \$872.68 per week. (Hearing Report). I found the proper weekly rate to be \$866.33. According to the language in Iowa Code sections 85.34(4) and 85.34(5), defendants are entitled to a credit in the amount of \$113.39, for any future weekly benefits due Green because of the current back injury or for a subsequent injury.

Green requests reimbursement of the IME performed by Dr. Bansal on August 31, 2021. (CI Ex. 2, pp. 11-12; Ex. 4, p. 22). Iowa Code 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 IME. 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).

Regarding the IME, the Iowa Supreme Court provided a literal interpretation of the plain language of Iowa Code section 85.39, stating that section 85.39 only allows the employee to obtain an IME at the employer's expense if dissatisfied with the evaluation arranged by the employer. Des Moines Area Reg'l Transit Auth. v. Young, 867 N.W.2d 839, 847 (Iowa 2015). Under the Young decision, an employee can only obtain an IME at the employer's expense if an evaluation of permanent disability has been made by an employer-retained physician. Iowa Code section 85.39 limits an injured worker to one IME. Larson Mfg. Co., Inc. v. Thorson, 763 N.W.2d 842 (Iowa 2009).

The language of Iowa Code section 85.39(2) states,

If an evaluation of permanent disability has been made by a physician retained by the employer and the employee believes this evaluation to be too low, the employee shall ... be reimbursed by the employer the reasonable fee for a subsequent examination by a physician of the employee's own choiceA determination of the reasonableness of a fee for an examination made pursuant to this subsection, shall be based on the typical fee charged by a medical provider to perform an impairment rating in the local area where the examination is performed.

Id.

In November 2021, Dr. Boulden, an expert retained by defendants, opined that the October 2019 work injury did not cause Green's back condition or the need for the laminectomy fusion surgery recommended by Dr. Koreckii. (Ex. A, pp. 1-7). In Kern v. Fenchel, Doster, and Buck, P,L,C. No. 20-1206, slip op. at 10 (Iowa Court of Appeals)(Sept. 1, 2021), the Court of Appeals stated that an "opinion on lack of causation [is] tantamount to a zero impairment rating," which is reimbursable under Iowa Code section 85.39. See also Kern v. Fenchel, Doster & Buck, File No. 5062419 (Remand March 3, 2022). However, having a causation opinion is not the end of the analysis under the statutory language.

In 2017, subsection (2) was added to Iowa Code section 85.39. While some of the language in the subsection was pre-existing, the legislature added two new requirements for IME reimbursement. The first was to establish compensability of the work injury and the second was to prove the reasonableness of the IME fee. Iowa Code § 85.39(2)(2017). The language addressing fee reasonableness states as follows:

A determination of the reasonableness of a fee for an examination made pursuant to this subsection, shall be based on the typical fee charged by a medical provider to perform an impairment rating in the local area where the examination is conducted.

(Id.)(emphasis added). The inclusion of the phrase “impairment rating” in this sentence suggests that the legislature intended that the right to IME reimbursement hinged upon some finding of permanent impairment caused by the work injury. We do not have that here. In this case, there is no evidence that any physician provided an opinion on Green’s permanent impairment. The facts of this case are not similar to those present in Kern. Dr. Bansal’s exam was not completed for the purpose of providing an impairment rating as contemplated by Iowa Code section 85.39(2). It does not qualify for reimbursement under that code section.

The Supreme Court, in Young noted that in cases where Iowa Code section 85.39 is not triggered to allow for reimbursement of an IME, a claimant can still be reimbursed expenses associated with the preparation of the written report as a cost under rule 876 IAC 4.33. Young at 846-847. Green also seeks an award of the costs outlined in claimant’s exhibit 4. Costs are to be assessed at the discretion of the deputy commissioner hearing the case. See 876 IAC 4.33; Iowa § Code 86.40. Administrative Rule 4.33 provides as follows:

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

876 IAC 4.33.

Green incurred costs for the filing fee for his petition, a copy of his deposition transcript, and Dr. Bansal’s IME report. (CI Ex. 4, p. 22). Green was successful in this action—defendants were ordered to approve the lumbar surgery recommended by Dr. Koreckij. Therefore, I conclude it is reasonable to assess Green’s filing fee pursuant to 876 IAC 4.33(7). Green’s deposition testimony was largely redundant of his hearing testimony. I did not rely upon it in my decision. Additionally, Green did not even submit a copy of the deposition transcript as an exhibit at hearing—it was submitted by the

defendants. Given this, I conclude it would not be appropriate to assess Green's deposition transcript as a cost.

Under the language of 876 IAC 4.33(6), claimants can be awarded the costs of obtaining two medical reports. However, the only taxable costs are the reports themselves, not the underlying examination needed to draft the reports. See Young, 867 N.W.2d at 846-847. Dr. Bansal's bill contains only one line; it is not itemized. (See CI Ex. 2, pp. 11-12). Given this, I cannot decipher, and I am not willing to speculate, on the charges specifically attributed to the drafting of the report. Green has not met his burden to prove he is entitled to an award of costs for Dr. Bansal's report.

ORDER

THEREFORE, IT IS ORDERED:

Defendants shall designate Dr. Koreckij as the authorized treating physician for Green's work-related back condition and immediately authorize the laminectomy fusion surgery as recommended.


Green is entitled to temporary total or healing period benefits from October 23, 2019, through December 21, 2019, and February 24, 2020, through June 24, 2020, at the rate of eight hundred sixty-six and 33/100 (\$866.33) per week. Defendants, however, are entitled to a credit for temporary total or healing period benefits already paid under the Missouri claim.

Defendants are entitled to an additional credit in the amount of one hundred thirteen and 39/100 (\$113.39) for any future benefits due Green for the current back injury or for a subsequent injury.

Defendants shall pay costs of one hundred 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.

Signed and filed this 7th day of June, 2023.


AMANDA R. RUTHERFORD
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Jacob J. Peters (via WCES)

Stephen Spencer (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.