BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JUAN GONZALEZ, Claimant, vs. MASTERSON PERSONNEL, INC., d/b/a MASTERSON STAFFING SOLUTIONS, Employer, and STATE NATIONAL INS. CO., INC., Insurance Carrier, Defendants.	File No. 22700587.01 ARBITRATION DECISION Head Note: 1100

STATEMENT OF THE CASE

The claimant, Juan Gonzalez, filed a petition for arbitration seeking workers' compensation benefits from employer Masterson Personnel, Inc., d/b/a Masterson Staffing Solutions ("Masterson") and their insurer State National Insurance Company, Inc. Dustin Mueller appeared on behalf of the claimant. Benjamin Erickson appeared on behalf of the defendants. Kelley Goodwater, a corporate representative from Masterson, was also present.

The matter came on for hearing on August 2, 2023, before Deputy Workers' Compensation Commissioner Andrew M. Phillips. Pursuant to an order of the Iowa Workers' Compensation Commissioner, the hearing occurred electronically via Zoom. The hearing proceeded without significant difficulty.

The record in this case consists of Claimant's Exhibits 1-5, and Defendants' Exhibits A-E. All of the exhibits were received into evidence without objection.

The claimant testified on his own behalf via interpreter Susan Wedeking. Keriann Hansen was appointed the official reporter and custodian of the notes of the proceeding. The evidentiary record closed at the end of the hearing, and the matter was fully submitted on September 15, 2023, after the briefing by the parties.

STIPULATIONS

Through the hearing report, as reviewed at the commencement of the hearing, the parties stipulated and/or established the following:

1. There was an employer-employee relationship at the time of the alleged injury.

2. That, at the time of the work injury, the claimant's gross earnings were four hundred seventy-one and 00/100 dollars ($471.00) per week, that the claimant was married, and entitled to two exemptions. The resulting stipulated weekly compensation rate was three hundred twenty-three and 98/100 dollars ($323.98).

3. That the costs listed in Claimant's Exhibit 1 have been paid.

Entitlement to temporary disability and/or healing period benefits was no longer in dispute. Entitlement to permanent partial disability benefits was no longer in dispute. Credits against any award were no longer in dispute. The defendants waived their affirmative defenses.

The parties are now bound by their stipulations.

ISSUES

The parties submitted the following issues for determination:

1. Whether the claimant sustained an injury which arose out of, and in the course of employment, on June 18, 2020.

2. Whether the alleged injury is a cause of temporary disability during a period of recovery.

3. Whether the alleged injury is a cause of permanent disability.

4. Whether the claimant is entitled to alternate care, specifically authorization of an anterior fusion at C5-6, pursuant to Iowa Code section 85.27.

5. Whether the claimant is entitled to a specific taxation of costs, and the amount of those costs.

FINDINGS OF FACT

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

Juan Gonzalez, was 60 years old at the time of the hearing. (Testimony). He is originally from Cuba, and immigrated to the United States of America in 2005 as a

political refugee. (Testimony). He is no longer married, and has two non-dependent children in Cuba. (Testimony). He attended school through the twelfth grade in Cuba, and obtained an electrician certificate there. (Testimony).

Starting in December of 2019, the claimant worked in production for a staffing company known as Masterson. (Testimony). He was placed at a plant operated by a company known as Lund. (Testimony). He put caps and labels on glass tubes and plastic jars. (Testimony). He earned about ten and 00/100 dollars ($10.00) per hour. (Testimony). Sometime in June of 2020, he began employment with Lund Food Holdings. (Defendants' Exhibit D:30). According to statements made to Dr. Kuhnlein in an IME, Mr. Gonzalez began working for Lund on June 22, 2020. (DE B).

On June 18, 2020, the claimant testified that he was using a pallet jack to move a pallet. (Testimony). As he left a cooler, he slipped on a wet floor, fell back, and tried to catch himself with his right arm. (Testimony). However, he failed to catch himself, and fell. (Testimony). He testified that his main manager was present when he fell, and took no action. (Testimony).

Mr. Gonzalez felt no immediate symptoms following his fall. (Testimony). This is consistent with his deposition testimony wherein he was asked:

> Q: Did you tell the doctors…that you injured your neck and back in that fall?
>
> A: No…
>
> Q: Did you injure yourself at all in that June 18, 2020 fall?
>
> A: I fell to the floor and I got up without pain or anything.

(DE E:39). He did not miss any work as a result of this alleged incident. (Testimony). He continued to perform his job for one week before he was put into a meat room and a pie room to perform work. (Testimony). He felt that the work in this room was heavier and required more effort. (Testimony). In the meat room and pie room, the claimant had to take ten-pound bags of chicken and place them into a tumbler with condiments. (Testimony). They would then be placed into plastic tubs weighing upwards of 75 pounds. (Testimony). Mr. Gonzalez would then lift these bins from his waist to his chest or shoulder. (Testimony).

The claimant testified that following his move to the meat and pie room, which was around the end of June of 2020, he began to develop symptoms in the back side of his neck. (Testimony; DE E:39). Pain came with activities he undertook at work. (DE E:39). He clarified further that he did not begin to experience pain "…until June or late July. After I had already started working for [Lund]…" (DE E:42). He also told his IME physician that he began working at Lund on June 22, 2020. (DE B). Mr. Gonzalez testified at the hearing that he could not recall whether he was transferred to the pie room until he worked full-time for Lund or when he worked for Masterson. (Testimony). At that time he did not receive treatment for his neck. (Testimony). He began to take Tylenol because he thought that his pain stemmed from headaches. (Testimony).

Mr. Gonzalez went to the doctor at a Mayo Clinic in Albert Lea, Minnesota. (Testimony). The doctor saw nothing, so he was sent home. (Testimony).

Following June 18, 2020, Mr. Gonzalez did some self-massage with a machine, but noted that the machine focused on his back and not his neck. (Testimony).

On February 1, 2021, Solomon Ondoma, M.D., issued a medical record following an examination of the claimant on January 28, 2021. (Claimant's Exhibit 5:1-3). Dr. Ondoma found that Mr. Gonzalez had low back pain and developed neck and arm pain about two months later. (CE 5:1). He rated his pain 9 out of 10. (CE 5:1). He told Dr. Ondoma that he completed four weeks of physical therapy along with massage, hydrocodone, and gabapentin. (CE 5:1). Dr. Ondoma reviewed x-rays and MRIs of the lumbar and cervical spine. (CE 5:2). The cervical imaging showed degenerative disk disease at C5-6 "with posterior osteophytes and bilateral lateral recess stenosis." (CE 5:2). Dr. Ondoma opined that Mr. Gonzalez had left-sided cervical radiculopathy associated with degenerative disease at C5-6, which had a "temporal association" with a fall at work. (CE 5:2). Dr. Ondoma wrote, "I explained to him that he clearly has degenerative disease at C5-6, which has developed over the years. The fall at work might have precipitated his onset of symptoms in the left upper limb." (CE 5:2). However, Dr. Ondoma noted that there was no evidence of bony abnormalities or ligamentous issues in the cervical spine. (CE 5:2). Dr. Ondoma recommended targeted steroid injections, and potentially surgical options. (CE 5:3). He made a referral for the injection to Ronald Kloc, M.D. (CE 5:3). Eventually, the claimant had an injection in his neck at MercyOne in Mason City, Iowa. (Testimony). He testified that the injections did not help his pain despite strong pain in his neck. (Testimony).

The claimant slipped and fell again in June of 2021. (Testimony). He felt a shock down his back and the same pain as he previously experienced. (Testimony).

On July 26, 2021, Dr. Ondoma responded to a check-box letter from attorney Mike Roling. (Claimant's Exhibit 2:1-2). Dr. Ondoma agreed that imaging for Mr. Gonzalez showed degenerative changes at C5-6, which were worse on the left. (CE 2:1). There were no acute findings on the imaging. (CE 2:1). Dr. Ondoma further agreed that Mr. Gonzalez's conditions had a "temporal association with a fall at work." (CE 2:1). Dr. Ondoma agreed that a fall at work "likely precipitated" the onset of symptoms in Mr. Gonzalez's left upper limb. (CE 2:1).

On November 8, 2021, David W. Beck, M.D., wrote a letter outlining his opinions. (CE 3:1). Dr. Beck noted that he examined Mr. Gonzalez on November 7, 2021, for low back and neck pain extending into the left arm. (CE 3:1). Dr. Beck found the claimant to have symmetric strength in his upper and lower extremities. (CE 3:1). He reviewed an MRI, which showed disc herniation and degeneration at C5-6. (CE 3:1). Dr. Beck continued, "I explained to Juan that there is nothing I can offer him from his back standpoint." (CE 3:1). He opined that Mr. Gonzalez suffered from chronic low back pain. (CE 3:1). However, Dr. Beck felt that Mr. Gonzalez experienced C6 radiculopathy which was caused by his first fall at work and exacerbated by a second fall. (CE 3:1).

Since the claimant was not improving, Dr. Beck felt it was reasonable to consider an anterior fusion at C5-6. (CE 3:1).

Mr. Gonzalez recounted his evaluation with Dr. Beck, and noted that Dr. Beck recommended a neck surgery. (Testimony). Mr. Gonzalez wished to proceed with the surgery recommended by Dr. Beck. (Testimony). He also recalled that Dr. Beck indicated a likely cause was a fall at work. (Testimony).

Dr. Beck responded to a check-box letter from Attorney Roling dated December 1, 2021. (CE 4:1-2). Dr. Beck indicated agreement that the second fall did not represent a permanent, substantial, or material aggravation to the claimant's neck, "given there is no structural change." (CE 4:1). Further, Dr. Beck provided his medical opinion that "the surgical recommendation still relates to Mr. Gonzalez' condition caused by the first fall." (CE 4:1).

At the arrangement of claimant's counsel, John Kuhnlein, D.O., M.P.H., F.A.C.P.M., F.A.C.O.E.M., performed an independent medical examination of the claimant on January 11, 2023. (DE B:4-27). He issued a report outlining his findings on February 1, 2023. (DE B:4-27). Dr. Kuhnlein is board certified in occupational and environmental medicine, a fellow of the American College of Preventive Medicine, and a fellow of the American College of Occupational and Environmental Medicine. (DE B:19).

Dr. Kuhnlein interviewed Mr. Gonzalez with the assistance of an interpreter. (DE B:4). Mr. Gonzalez told the doctor that he worked for Masterson Staffing at Lund Foods from December 2019 to June of 2020, before being hired by Lund Foods on June 22, 2020. (DE B:4). Mr. Gonzalez recounted working in the meat room and the pie room. (DE B:4). In the meat room, he recounted his job description as noted above. (DE B:4). In the pie room, the claimant worked with large containers of dough which required him to use "static flexion at the waist" while mixing dough. (DE B:4).

Dr. Kuhnlein then reviewed Mr. Gonzalez's medical history, including records dating back to 2013 regarding low back pain. (DE B:5). Mr. Gonzalez relayed his previously provided description of his fall at work. (DE B:5). He reiterated, even after several rounds of questioning, that he had no pain immediately following the injury. (DE B:5). Mr. Gonzalez told the doctor that he developed neck and low back pain at the same time, beginning in July of 2020, which he associated with working with large volumes of dough and meat. (DE B:5). Mr. Gonzalez reported this discomfort to his supervisor and "the person in charge of running the pie room." (DE B:5). By the end of August of 2020, Mr. Gonzalez's neck and back pain increased to where it was "really killing" him. (DE B:5).

Dr. Kuhnlein notes an October 29, 2020, visit with a Dr. Carlson. (DE B:6). Mr. Gonzalez told Dr. Carlson that he removed dough at work that morning when he immediately developed pain in his neck that gradually worsened. (DE B:6). Mr. Gonzalez continued to treat through 2020. (DE B:6-7).

Mr. Gonzalez told Dr. Kuhnlein that he had constant neck pain, which was not activity-dependent. (DE B:12). He complained of reduced range of motion. (DE B:12). His pain began in the right occiput which transited across his neck to his left side. (DE B:12). The pain also went down his left arm, and he had numbness in his left fingertips. (DE B:12). He had low back pain that was waxing and waning depending on activity. (DE B:12). Dr. Kuhnlein reviewed currently assigned restrictions which included: no material handling, no reaching above shoulder height, occasional squatting or kneeling, frequent sitting, position changes every 30 minutes, occasional grasping or repetitive wrist motion, continuous keyboarding, occasional pinching, and specifically an allowance to sit and apply labels. (DE B:13).

Mr. Gonzalez indicated that he performed a job putting labels on boxes. (DE B:13). The position was at the same time light and heavy, according to Mr. Gonzalez. (DE B:13). He felt it was heavy because he worked with labels while his neck was in a static posture, although he later admitted to being able to change positions at will. (DE B:13). Mr. Gonzalez told Dr. Kuhnlein he believed he should not work at all due to his alleged issues. (DE B:13).

Dr. Kuhnlein then examined the claimant and documented the findings of his examination. (DE B:14-15). Dr. Kuhnlein found the claimant to have 0 degrees of cervical flexion, 5 degrees of cervical extension, 5 degrees of right sided cervical bending, 3 degrees of left sided cervical bending, 10 degrees of right cervical rotation, and 15 degrees of left cervical rotation. (DE B:14). Dr. Kuhnlein noted that Mr. Gonzalez moved his neck more than these measurements when discussing his health history. (DE B:14). Dr. Kuhnlein pointed this out to Mr. Gonzalez, re-measured him, and arrived at the above measurements. (DE B:14). Dr. Kuhnlein opined that these were not objective measurements of the range of motion, as the claimant displayed nonphysiologic pain behaviors, even with a minimal range of motion. (DE B:14). Dr. Kuhnlein also noted that simply brushing his finger across the claimant's neck elicited pain in the right occipital area, bilateral paracervical muscles, and the left trapezius muscle. (DE B:14). Mr. Gonzalez also actively resisted passive cervical motion. (DE B:14). He complained of pain in muscles that were not being tested. (DE B:14). Dr. Kuhnlein recounted that Mr. Gonzalez complained of shoulder pain when his wrist muscles were tested. (DE B:14-15).

Based upon his examination and review of the medical records, Dr. Kuhnlein diagnosed Mr. Gonzalez with a C5-6 disc herniation and degenerative disc disease of the cervical spine "without objective evidence of radiculopathy," and chronic musculoskeletal low back pain "without objective evidence of radiculopathy." (DE B:15).

As it regards causation, Dr. Kuhnlein opined that there were "issues with the history Mr. Gonzalez presents that make causation analysis difficult" due to contradictions between statements made during the examination and the medical records. (DE B:16). Dr. Kuhnlein continued his report by indicating it was more likely than not that the claimant's work for Lund Foods, a previously dismissed party, "lit up" the claimant's pre-existing cervical degenerative disease. (DE B:16). Dr. Kuhnlein noted that it was "more likely than not" that the claimant sustained a lumbar strain that

developed into chronic lumbar issues due to his work at Lund. (DE B:16). The doctor cited to the claimant's statements that his job at Lund presented him with much heavier duty requirements than his job with Masterson. (DE B:16). Dr. Kuhnlein again noted that Mr. Gonzalez told him specifically that he suffered no injury during the June 18, 2020, fall. (DE B:16). This was supported by an emergency room medical record of September 13, 2020, which indicated a three-week history of neck pain following his lifting boxes at work. (DE B:16). Dr. Kuhnlein opined that the claimant's neck and back conditions were cumulative injuries that began in August of 2020. (DE B:16). Dr. Kuhnlein continued by noting that the July 27, 2021, fall represented an acute exacerbation of pre-existing lumbar pain. (DE B:16).

Dr. Kuhnlein recommended that the claimant see an occupational medicine physician at MercyOne or Mayo Clinic, along with an occupational therapist. (DE B:18). Dr. Kuhnlein also noted explicitly that he "would be extremely cautious about performing surgery in his case and would instead advise ongoing conservative treatment measures." (DE B:18). Dr. Kuhnlein also advised against a functional capacity evaluation, as the results were "likely to be unhelpful and lead to contradictory testing." (DE B:18). The doctor placed the claimant at maximum medical improvement ("MMI") as of August 28, 2022. (DE B:18). He provided the claimant with a 4 percent whole person impairment based upon the DRE methods in the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, but prefaced his opinions with the admonition that the examination was "complicated by multiple nonphysiologic findings that may be culturally mediated…" (DE B:18).

The doctor noted difficulty in assigning permanent restrictions based upon the results of the claimant's physical examination. (DE B:19). He noted that previously provided restrictions were reasonable, though "very frustrating" considering the results of the examination. (DE B:19).

On May 31, 2023, Dr. Kuhnlein reviewed a subsequent report of Dr. Schmitz, which does not appear to be in the record, and noted none of Dr. Schmitz's opinions altered Dr. Kuhnlein's opinions from his February 1, 2023, report. (DE C:28).

Mr. Gonzalez testified that, at the time of the hearing, he had intense pain in the back of his neck, and down his back. (Testimony). This pain required him to stand periodically. (Testimony). Further, he testified that he took medication in an effort to alleviate his pain. (Testimony). He indicated that his pain had never gone away. (Testimony).

CONCLUSIONS OF LAW

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 Rule of Appellate Procedure 6.904(3).

Arising Out of and in the Course of Employment

The primary disputed issue in this case is whether the claimant's neck injury and subsequent need for surgery pursuant to the opinions of Dr. Beck arose out of, and in the course of, his employment with Masterson.

To receive workers' compensation benefits, an injured employee must prove, by a preponderance of the evidence, that the employee's injuries arose out of, and in the course of the employee's employment with the employer. 2800 Corp. v. Fernandez, 528 N.W.2d 124, 128 (Iowa 1995). 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. Id. An injury arises out of employment when a causal relationship exists between the employment and the injury. Quaker Oats v. Ciha, 552 N.W.2d 143, 151 (Iowa 1996). 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, 3 (Iowa 2000). The Iowa Supreme Court has held that an injury occurs "in the course of employment" when:

> It is within the period of employment at a place where the employee reasonably may be in performing his duties, and while he is fulfilling those duties or engaged in doing something incidental thereto. An injury in the course of employment embraces all injuries received while employed in furthering the employer's business and injuries received on the employer's premises, provided that the employee's presence must ordinarily be required at the place of the injury, or, if not so required, employee's departure from the usual place of employment must not amount to an abandonment of employment or be an act wholly foreign to his usual work. An employee does not cease to be in the course of his employment merely because he is not actually engaged in doing some specifically prescribed task, if, in the course of his employment, he does some act which he deems necessary for the benefit or interest of his employer.

Farmers Elevator Co., Kingsley v. Manning, 286 N.W.2d 174, 177 (Iowa 1979).

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 medical causation is "essentially within the domain of expert testimony." Cedar Rapids Cmty. Sch. Dist. v. Pease, 807 N.W.2d 839, 844-45 (Iowa 2011). The commissioner, as the trier of fact, must "weigh the evidence and measure the credibility of witnesses." Id. The trier of fact may accept or reject expert testimony, even if uncontroverted, in whole or in part. Frye, 569 N.W.2d at 156. When considering the weight of an expert opinion, the fact-finder may consider whether the examination

occurred shortly after the claimant was injured, the compensation arrangement, the nature and extent of the examination, the expert's education, experience, training, and practice, and "all other factors which bear upon the weight and value" of the opinion. Rockwell Graphic Sys., Inc. v. Prince, 366 N.W.2d 187, 192 (Iowa 1985). Unrebutted expert medical testimony cannot be summarily rejected. Poula v. Siouxland Wall & Ceiling, Inc., 516 N.W.2d 910 (Iowa App. 1994). Supportive lay testimony may be used to buttress expert testimony, and therefore is also relevant and material to the causation question.

Iowa employers take an employee subject to any active or dormant health problems, and must exercise care to avoid injury to both the weak and infirm and the strong and healthy. Hanson v. Dickinson, 188 Iowa 728, 176 N.W. 823 (1920). While a claimant must show that the injury proximately caused the medical condition sought to be compensable, it is well established that a cause is "proximate" when it is a substantial factor, or even the primary or most substantial cause to be compensable under the Iowa workers' compensation system. Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417 (Iowa 1994); Blacksmith v. All-American, Inc., 290 N.W.2d 348 (Iowa 1980).

It is well established in workers' compensation that "if a claimant had a preexisting condition or disability, aggravated, accelerated, worsened, or 'lighted up' by an injury which arose out of and in the course of employment resulting in a disability found to exist," the claimant is entitled to compensation. Dep't of Transp., State of Iowa v. Van Cannon, 459 N.W.2d 900, 904 (Iowa 1990). The Iowa Supreme Court has held,

> [A] disease which under any rational work is likely to progress so as to finally disable an employee does not become a "personal injury" under our Workmen's Compensation Act merely because it reaches a point of disablement while work an employer is being pursued. It is only when there is direct causal connection between exertion of the employment and the injury that a compensation award can be made. The question is whether the diseased condition was the cause or whether the employment was a proximate contributing cause.

Musselman v. Ce. Tel. Co., 261 Iowa 352, 359-60, 154 N.W.2d 128, 132 (1967).

It is well settled in Iowa that an employer is liable for all consequences that naturally and proximately flow from an accident to an employee in the usual course of their employment. Oldham v. Scofield & Welch, 222 Iowa 764, 767-68, 266 N.W. 480, 482 (1936). Further disability is compensable when the further disability is the proximate result of the original injury. Id.

Mr. Gonzalez alleges that he fell on June 18, 2020, after slipping on a wet floor while employed by Masterson. He alleges that either a week to several weeks later, he began to experience pain in his neck. He did not seek medical care until sometime later. He also never missed work while employed by Masterson. In late June of 2020, Mr. Gonzalez was hired on as a full-time employee with Lund, who is not a party to this case, having previously reached a settlement with the claimant.

The claimant points to two medical records to support his contention that the June 18, 2020, fall caused his alleged neck injury. The first is a February 1, 2021, report from Dr. Ondoma. Dr. Ondoma was a treating physician of the claimant. Dr. Ondoma opined that Mr. Gonzalez had a left-sided radiculopathy associated with degenerative disk disease at C5-6. Dr. Ondoma connected this to the claimant's fall on June 18, 2020, merely because of a "temporal association" with the fall at work. He continued by noting that the fall at work "might have precipitated his onset of symptoms…" Dr. Ondoma recommended additional care, including injections.

The second report is generated by Dr. Beck. Dr. Beck opined that Mr. Gonzalez had C6 radiculopathy caused by his first fall at work, and later exacerbated by a second fall. Dr. Beck recommended an anterior fusion at C5-6.

The problem is that both Dr. Ondoma and Dr. Beck's opinions are based on faulty information provided by the claimant. The claimant testified on multiple occasions, including in his deposition and at the hearing, that he had no pain immediately following his June 18, 2020, fall. He missed no work. He told multiple medical providers that his pain did not begin until he moved to a meat and pie room. He further testified that he did not move to this room until he became an employee of Lund.

Most persuasive is the report of Dr. Kuhnlein. The claimant selected Dr. Kuhnlein to conduct an IME on his behalf. Dr. Kuhnlein conducted an interview of Mr. Gonzalez with the assistance of an interpreter. Mr. Gonzalez specifically told Dr. Kuhnlein on several occasions, and after several different rounds of questioning, that he experienced no pain immediately following his fall on June 18, 2020. He noted that he then moved to work for Lund on June 22, 2020. By July of 2020, he developed neck and back pain, which he told Dr. Kuhnlein was associated with working with large volumes of dough and meat in the pie room. Dr. Kuhnlein recounted a visit that the claimant had with Dr. Carlson in October of 2020, during which Mr. Gonzalez noted removing dough that morning that caused immediate neck pain.

While the claimant worked for Masterson, he placed labels on jars and boxes. Once he began working at Lund, he started performing much heavier work in the meat and pie room, including lifting bins upwards of 75 pounds. Dr. Kuhnlein opined that it was more likely than not that the claimant's work at Lund "lit up" the claimant's pre-existing degenerative disk disease. Dr. Kuhnlein noted, accurately, that the claimant's statements showed that he performed much heavier physical labor once he started working at Lund. Dr. Kuhnlein cited again to the claimant's own statements that he did not suffer any injury on June 18, 2020. He noted a September 13, 2020, emergency room visit during which Mr. Gonzalez noted a three-week history of neck pain following lifting heavy boxes at work. Dr. Kuhnlein noted that the claimant suffered a cumulative injury that began in August of 2020 following the claimant's heavy lifting with Lund.

The claimant argues that the opinions of Dr. Ondoma and Dr. Beck are the most persuasive in this case. Their main justification is twofold; first, that the doctors are treating doctors, and second that they opined that the June 18, 2020, fall caused the claimant neck issues. The problem is that Dr. Ondoma simply stated that the neck

injury was related because of its temporal relationship to the June 18, 2020, fall. The objective evidence is overwhelmingly contrary to this opinion. The evidence shows that the claimant, through his own admission, and the medical records, had no pain immediately following his June 18, 2020, fall. It was not until he began working for Lund and moved to the meat and pie rooms, wherein he undertook heavy lifting activities, that he started to have increased pain and symptoms. Therefore, his work with Lund, as noted by Dr. Kuhnlein, lit up, his pre-existing condition. I conclude that the claimant did not prove, by a preponderance of the evidence, that his injury arose out of and in the course of his employment with Masterson. Rather, the evidence shows that Mr. Gonzalez's injuries arose out of and in the course of his employment with Lund. Based upon the foregoing, no analysis of the issues regarding alternate medical care is necessary, as the claimant's injuries were not caused by his work at Masterson.

Costs

Claimant seeks an award of costs as outlined in their exhibits. Costs are to be assessed at the discretion of the deputy commissioner hearing the case. See 876 Iowa Administrative Code 4.33; Iowa Code 86.40. 876 Iowa Administrative Code 4.33(6) provides:

> [c]osts 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.

Pursuant to the holding in Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839 (Iowa 2015), only the report of an IME physician, and not the examination itself, can be taxed as a cost according to 876 IAC 4.33(6). The Iowa Supreme Court reasoned, "a physician's report becomes a cost incurred in a hearing because it is used as evidence in lieu of the doctor's testimony," while "[t]he underlying medical expenses associated with the examination do not become costs of a report needed for a hearing, just as they do not become costs of the testimony or deposition." Id. (noting additionally that "[i]n the context of the assessment of costs, the expenses of the underlying medical treatment and examination are not part of the costs of the report or deposition"). The commissioner has found this rationale applicable to expenses incurred by vocational experts. See Kirkendall v. Cargill Meat Solutions Corp., File No. 5055494 (App. December 17, 2018); Voshell v. Compass Group, USA, Inc., File No. 5056857 (App. September 27, 2019).

Based upon my discretion, I decline to award the claimant costs.

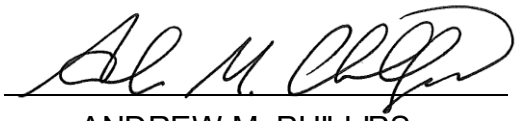
ORDER

THEREFORE, IT IS ORDERED:

That the claimant shall take nothing.

That the defendants shall file subsequent reports of injury (SROI) as required by this agency pursuant to 876 Iowa Administrative Code 3.1(2) and 876 Iowa Administrative Code 11.7.

Signed and filed this 8TH day of November, 2023.



ANDREW M. PHILLIPS
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Dustin Mueller (via WCES)

Benjamin Erickson (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.