

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

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SCOTT SILL,

Claimant,

vs.

AMERICOLD LOGISTICS, LLC,

Employer,

and

HARTFORD FIRE INSURANCE CO.,

Insurance Carrier,  
Defendants.

**FILED**

APR 17 2015

WORKERS COMPENSATION

File No. 5043406

ARBITRATION DECISION

Head Note Nos.: 1100; 1402.20; 1402.30

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STATEMENT OF THE CASE

Claimant, Scott Sill, filed a petition in arbitration seeking workers' compensation benefits from Americold Logistics, LLC, employer, and Hartford Fire Insurance Company, insurance carrier, both as defendants, as a result of an alleged injury sustained on November 1, 2012. This matter came on for hearing before Deputy Workers' Compensation Commissioner, Erica J. Fitch, on May 6, 2014, in Des Moines, Iowa. The record in this case consists of claimant's exhibits 1 through 6, defendants' exhibits A through F, and the testimony of the claimant, Angela Slagel, and Emily Yount. The parties were provided the opportunity to submit post-hearing briefs, the matter being fully submitted on June 6, 2014.

ISSUES

The parties submitted the following issues for determination:

1. Whether claimant sustained an injury on November 1, 2012, which arose out of and in the course of his employment;
2. Whether claimant's claim is barred for failure to give timely notice under Iowa Code section 85.23;
3. Whether the alleged injury is a cause of temporary disability;

4. Whether claimant is entitled to temporary disability benefits from January 17, 2013 to August 4, 2013;
5. Whether the alleged injury is a cause of permanent disability;
6. The extent of claimant's industrial disability;
7. Whether claimant is entitled to payment of various medical expenses; and
8. Whether claimant is entitled to reimbursement of an independent medical evaluation (IME) pursuant to Iowa Code section 85.39.

The stipulations of the parties in the hearing report are incorporated by reference in this decision.

#### FINDINGS OF FACT

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

Claimant was 47 years of age at the time of hearing. He attended school through the 9<sup>th</sup> grade, after which claimant dropped out of high school. He subsequently obtained his GED. Claimant denied any formal postsecondary or vocational education or training. (Claimant's testimony)

In 1987, claimant was convicted for false use of a financial instrument. (Exhibit E, page 1) Claimant testified he was convicted for writing bad checks and sentenced to 10 years of incarceration. Claimant testified he was paroled but left the county, resulting in a parole violation, which led him to be returned to prison. Claimant testified he served approximately 3 ½ years of his total sentence. (Claimant's testimony)

Claimant's work history includes work as a press operator, forklift driver, shipper/receiver, picker/packer, warehouse laborer and supervisor, placements through temporary staffing agencies, and his work for defendant-employer. Claimant began work at defendant-employer on October 15, 2012 as a warehouse laborer. Claimant was required to pull orders of food products, usually weighing 15 to 30 pounds, with no weights over 50 pounds. He would place the products on a pallet on a forklift and drive the forklift between picking locations. (Ex. B, p. 2; Ex. F, pp. 5-14) Claimant testified defendant-employer is a union employer and new employees serve a 90-day probationary period. (Claimant's testimony)

At evidentiary hearing, claimant testified he was involved in a forklift accident on October 22, 2012, which resulted in the forklift striking a wall. Claimant denied any

immediate physical symptoms, stating he felt shaken up by the accident. Claimant testified he proceeded to report the accident to his supervisor, Anthony Edwards. (Claimant's testimony)

Claimant and Mr. Edwards completed accident investigation reports on October 22, 2012. By such forms, claimant reported the forklift accident and indicated he was capable of continuing work. Claimant denied any body parts were injured or affected by the accident and indicated he did not request or require medical attention. (Ex. D, p. 2)

Claimant testified on the date following the accident, he approached Mr. Edwards and complained of the inability to move his right arm and shoulder. According to claimant, Mr. Edwards indicated claimant's failure to report a physical injury immediately following the accident posed a problem and could potentially threaten both men's jobs. Claimant testified he was on probation and needed the job, financially speaking. Claimant testified he therefore elected to wait and see if his complaints would resolve. (Claimant's testimony)

By his deposition testimony, claimant testified to essentially the same chain of events. Although the chain of events is consistent, claimant did testify the forklift accident occurred on November 1, 2012. Claimant indicated he was involved in a forklift accident during which the forklift struck a wall. Immediately thereafter, claimant informed his supervisor, Mr. Edwards of the accident. The following day, claimant reportedly informed Mr. Edwards he had been injured in the accident. (Ex. F, pp. 15-16) Claimant testified he declined medical treatment as Mr. Edwards indicated he would need to get upper management involved and both men were concerned they would lose their jobs. (Ex. F, p. 20)

Between the forklift accident in October 2012 and January 2013, claimant continued to work, generally working 35 to 40 hours per week. He denied missing any work on account of shoulder complaints. (Claimant's testimony)

At the conclusion of his probationary period, claimant testified he sought medical care for his shoulder complaints. Claimant indicated he was under a physician's care for an abscessed tooth and at follow-up for this care, mentioned his right shoulder complaints. (Claimant's testimony)

The record contains a medical note dated January 13, 2013 from Trinity Medical Center/Trinity Express Care-Moline. At that visit, claimant presented with complaints of left upper tooth pain for one month and right shoulder pain since the prior night. (Ex. A, p. 1) The history of right shoulder complaints indicates claimant "while being outside on his porch fell asleep and landed on the ground and hit the shoulder against the floor" while smoking a cigarette. (Ex. A, p. 2) Ghassan Rahhal, M.D. ordered x-rays to evaluate claimant's right shoulder. (Ex. 4, p. 112; Ex. A, p. 2) The x-rays were negative, without evidence of fracture, dislocation, or other bony abnormality. (Ex. 3, pp. 97-98; Ex. 4, p. 109) Dr. Rahhal assessed a shoulder sprain, removed claimant

from work the following day and prescribed Lortab. Claimant was also informed he could use a sling. (Ex. 4, p. 112; Ex. A, pp. 2-3)

The following day, January 14, 2013, claimant presented to Milan Medical Group. A patient history form was completed, on which claimant checked "no" to a question which inquired if the injury occurred at work. (Ex. 3, p. 70) Claimant presented to Nancy Lank, D.O., who noted claimant reported developing right shoulder pain after claimant "slipped at home on his deck, and fell off about 4 feet and landed on his shoulder." (Ex. 3, p. 74; Ex. A, p. 4) The duration of claimant's right shoulder pain is noted as one to two days. (Ex. 3, p. 74; Ex. A, p. 4) X-rays of the right shoulder were negative. (Ex. 3, p. 78) Dr. Lank assessed shoulder and supraspinatus sprains, prescribed hydrocodone-acetaminophen and ibuprofen 800 mg, and ordered physical therapy. (Ex. 1, pp. 1-2; Ex. 3, pp. 72, 76; Ex. A, p. 6)

Claimant presented for an initial physical therapy evaluation at Milan Medical Group on January 16, 2013. Physical therapy records note an onset of right shoulder symptoms on January 13, 2013, secondary to a four-foot fall from a deck. (Ex. 3, p. 79; Ex. A, p. 7)

Claimant did not return to work for defendant-employer. He contacted the human resources department at defendant-employer and spoke with Emily Yount regarding his medical condition and his entitlement to benefits. He advised Ms. Yount he was injured at home. (Claimant's testimony)

Ms. Yount testified at evidentiary hearing. Ms. Yount testified she is employed as a human resources payroll associate for defendant-employer. Ms. Yount testified claimant never reported an alleged work injury to her personally, nor to her knowledge did he report an alleged injury to anyone in her department. Ms. Yount also testified Mr. Edwards never informed her claimant claimed an injury. In January 2013, Ms. Yount testified claimant contacted her by telephone, indicated he fell at home, and expressed concern over being disciplined for missing work when he did not have leave available. Ms. Yount testified she provided claimant with the telephone number for Cigna. Cigna carries a short-term disability policy to which defendant-employer contributes. This policy is not payable on occurrence of work-related injuries. (Ms. Yount's testimony)

Ms. Yount's testimony was consistent with the evidence in the record. Her demeanor gave the undersigned no reason to doubt Ms. Yount's veracity. Ms. Yount is found credible.

On January 17, 2013, claimant returned to Dr. Lank. The medical record again notes claimant fell off his deck on Saturday, January 12, 2013, and injured his right shoulder. Claimant requested a referral to a physical therapist in his insurance network. Dr. Lank removed claimant from work pending clearance from the physical therapist to return to heavy lifting. Claimant also requested completion of the physician portion of an application for disability benefits. (Ex. 3, pp. 80-81, 96; Ex. A, pp. 9-10)

Claimant submitted an UNUM accident claim form to Cigna, in hopes of receiving short-term disability benefits. The unsigned, but completed, portion of the form indicates claimant slipped off his back porch onto his right shoulder on January 12, 2013. (Ex. 3, p. 89; Ex. A, p. 11) The physician statement portion of the application, signed by Dr. Lank on January 17, 2013, indicates claimant was unable to work due to sprains of the shoulder and supraspinatus. It further indicates the diagnosed conditions were a result of an accidental injury unrelated to claimant's employment. (Ex. 3, pp. 93-94; Ex. A, p. 13)

Claimant began receiving short-term disability benefits effective January 15, 2013. (Ex. C, p. 1) Cigna's records indicate the benefits were paid as a result of damaged muscles of the right shoulder which claimant sustained when he fell on a jack and landed on his side. (Ex. C, pp. 4-5)

On January 22, 2013, claimant presented to Rock Valley Physical Therapy for an initial evaluation. The record notes a mechanism of injury of claimant falling "off a deck 2 Saturdays ago." Claimant reported landing upon his shoulder, striking the shoulder upon a piece of wood. (Ex. 1, p. 12; Ex. A, p. 16) The record indicates the right shoulder condition resulted in an inability to work. Ex. 1, p. 4) An undated Rock Valley Physical Therapy record indicates right shoulder symptoms began on January 12, 2013. (Ex. 1, pp. 5-6)

On January 26, 2013, claimant was laid off by defendant-employer as part of a reduction in force. (Ms. Yount's testimony; Ex. D, pp. 1-2)

Claimant continued to undergo physical therapy at Rock Valley Physical Therapy. (Ex. 1, p. 3; Ex. 3, p. 100; Ex. A, p. 19)

On February 8, 2013, claimant underwent MRI and arthrogram of his right shoulder. The reading radiologist opined the arthrogram yielded results suspicious for a partial tear of the rotator cuff tendon. (Ex. 3, p. 101) The reading radiologist opined the MRI revealed a full thickness supraspinatus tendon tear; partial thickness infraspinatus tendon tear; SLAP tear; and acromioclavicular joint arthropathy. (Ex. 2, p. 68; Ex. A, p. 15)

At the referral of Dr. Lank, claimant presented to Orthopaedic Specialists, P.C. on February 14, 2013. A medical history form denotes a complaint of right shoulder pain with an onset of January 12, 2013. (Ex. A, p. 22) Claimant informed Jason LeGare, ARNP, he injured his shoulder falling off a deck onto a chunk firewood pile approximately four weeks prior. (Ex. 3, p. 103; Ex. A, p. 23) X-rays of that date revealed a mild type 2 downsloping acromion with significant hypertrophy about the acromioclavicular (AC) joint, as well as some degenerative changes. (Ex. 3, p. 103; Ex. A, p. 23) Mr. LeGare reviewed claimant's MRI and opined it revealed a full thickness supraspinatus tear; partial infraspinatus tear; SLAP tear; and acromioclavicular joint arthropathy. Mr. LeGare assessed right shoulder pain; right shoulder rotator cuff tear, full thickness supraspinatus and partial infraspinatus; SLAP lesion; and AC joint arthropathy with downsloping acromion. He referred claimant to

Tuvi Mendel, M.D. for surgical consultation. (Ex. 3, p. 104; Ex. A, p. 24) In the interim, claimant was referred for additional physical therapy. (Ex. 1, p. 7)

Following evaluation, on March 19, 2013, Dr. Mendel performed surgery to treat diagnoses of right shoulder impingement with rotator cuff tear. During the procedure, Dr. Mendel performed right shoulder arthroscopic glenohumeral joint labral debridement and synovectomy; right shoulder open biceps tendon tenodesis with large rotator cuff repair; subacromial decompression; and acromioclavicular joint resection. (Ex. 4, pp. 105-106; Ex. A, pp. 27-28)

Claimant presented to physical therapy at Rock Valley Physical Therapy on March 29, 2013. On that date, claimant reported a history of injury of a forklift accident, with the forklift striking a wall. (Ex. 1, p. 29) Beginning on April 23, 2013, Rock Valley Physical Therapy records denote an injury date of November 1, 2012. (Ex. 1, p. 48)

On August 5, 2013, claimant returned to Dr. Mendel. Dr. Mendel noted claimant was doing well and would like to be released and return to work. Dr. Mendel assessed claimant as doing very well status rotator cuff repair, with slight deficits in strength. He recommended continued observation of claimant's shoulder, with claimant to return as needed. Dr. Mendel released claimant to return to work, regular duty, without restrictions. Although he did not impose permanent restrictions, Dr. Mendel cautioned claimant to use common sense and exhibit caution with overhead activities. (Ex. A, p. 26)

Claimant received short-term disability benefits through August 11, 2013. From these benefits, claimant grossed \$4,903.59 and netted \$4,405.30. (Ex. C, pp. 1-2) As claimant was released to work as of August 6, 2013, claimant was overpaid \$175.00. Records indicate Cigna unsuccessfully attempted to recoup this overpayment. (Ex. C, p. 2)

Following Dr. Mendel's release, claimant became eligible and began receiving unemployment benefits. (Claimant's testimony)

At the arranging of claimant's counsel, claimant presented to Richard Kreiter, M.D. on September 4, 2013 for IME. Dr. Kreiter noted a history of injury of claimant being thrown backwards during a forklift accident on November 1, 2012, striking his right shoulder against a concrete wall. (Ex. 6, p. 115) Dr. Kreiter opined claimant presented as "pleasant, cooperative, and very honest." (Ex. 6, p. 114)

Following examination, Dr. Kreiter assessed adhesive capsulitis of the right shoulder, with chronic pain and weakness. (Ex. 6, p. 116) He opined the injury of November 1, 2012 resulted in permanent impairment to claimant's right shoulder. Based upon decreased range of motion, resection of the clavicle, and strength deficits, Dr. Kreiter opined claimant sustained a 22 percent right upper extremity or 13 percent whole person impairment. Dr. Kreiter recommended permanent restrictions, including limiting overhead work with the right arm; avoidance of excessive pulling, pushing,

polishing, and raking with the right arm; and a maximum lift of 45 to 50 pounds from floor to bench level. (Ex. 6, p. 114)

At defendants' request, on December 27, 2013, claimant presented to board-certified occupational medicine physician, Rick Garrels, M.D., for IME. Claimant reported being involved in a forklift accident on November 1, 2012. He denied symptoms on the date of the accident, but reported experiencing some difficulty moving his right arm the following day. Claimant indicated he refused medical treatment and continued working as he remained in his probationary period at work. (Ex. A, p. 38)

Following records review, interview, and examination, Dr. Garrels assessed:

1. Forklift accident, 11/1/2013 [sic]
2. Fall off deck 1/12/2013
3. Right shoulder injury with internal derangement
4. Status post arthroscopic right shoulder debridement and synovectomy, open biceps tenodesis and rotator cuff repair, subacromial decompression and AC joint resection, 3/19/2013

(Ex. A, p. 39)

Dr. Garrels opined the record presented to him lacked support for a finding that any event prior to January 12, 2013 caused or materially aggravated a right shoulder condition. (Ex. A, pp. 39-40) On the specific question of the cause of the right shoulder condition which necessitated claimant's need for medical treatment from January 13, 2013 onward, Dr. Garrels opined:

There is clear documentation that [claimant's] right shoulder condition resulted from a fall at home. There is very consistent history across multiple providers during his care to support this conclusion. The patient would have had significant limitations and not been capable of work and activities of daily living and nothing supports this had occurred prior to the fall at home on 1/12/2013. The surgical intervention was several months after the alleged work injury and there was [sic] no intraoperative findings to support an injury [sic] old injury to the rotator cuff or labrum. The injury mechanism from the fall is consistent with the traumatic findings of the case.

(Ex. A, p. 40)

Although not work-related, Dr. Garrels opined claimant's right shoulder condition resulted in permanent impairment. Specifically, Dr. Garrels opined the distal clavicle resection warranted a ten percent right upper extremity or six percent whole person impairment rating. Dr. Garrels opined claimant had recovered fully following surgical intervention and did not require additional medical treatment. (Ex. A, p. 40)

Claimant received unemployment benefits until approximately December 26, 2013. Within the same week as the unemployment benefits ended, claimant secured employment through a temporary staffing agency. The staffing agency placed claimant at a recycling facility. At the recycling facility, claimant is tasked with cleaning, including use of a broom and shovel. Claimant had maintained such employment for slightly longer than 90 days at the time of evidentiary hearing and expressed belief he would shortly be hired on a full time basis. Claimant is uncertain what job he will be placed in if hired on a full time basis. He earns \$10.50 per hour; he earned \$12.86 per hour at defendant-employer. (Claimant's testimony)

By a letter dated January 8, 2014, Dr. Mendel confirmed claimant's injury history as reported to him throughout the course of his treatment of claimant as a fall onto claimant's right shoulder in approximately January 2013. He indicated this reported mechanism of injury was consistent with the type of injury he observed and treated, including surgical intervention. Dr. Mendel denied claimant reporting any work incident or activity as a cause of the right shoulder condition. (Ex. A, pp. 29-30)

Claimant testified to continued limitations as a result of the alleged right shoulder injury. Specifically, claimant expressed inability to lift his arm straight above his head or behind his back in the same fashion as before the alleged work injury. Claimant indicated he is unable to hold his right arm outstretched at his side for as long as his left arm, and doing so results in pain. He also develops pain if he rolls onto his right shoulder while sleeping, thus prompting claimant to sleep on a couch rather than in a bed. Additionally, claimant reported numbness of the fingers of his right hand. Claimant denied use of pain medications. (Claimant's testimony)

Claimant resides with his girlfriend of 17 years, Angela Slagel. (Claimant's testimony) Ms. Slagel testified at evidentiary hearing. Ms. Slagel testified she has resided with claimant for the past 17 years. Ms. Slagel testified claimant did not fall at home in January 2013. She indicated she witnessed claimant mislead the provider at Trinity Medical Center regarding sustaining a fall at home; she indicated she interrupted and said the injury occurred at work, but her comments were not considered by the doctor. Ms. Slagel admitted she was aware of claimant misleading medical providers and defendant-employer, but did not attempt to correct the misinformation. Instead, Ms. Slagel testified she told claimant to tell everyone the truth. (Ms. Slagel's testimony)

Ms. Slagel's testimony is consistent with that offered by claimant. Specifically, Ms. Slagel testified claimant did not suffer a fall at home in January 2013. She further testified she attempted to inform a medical provider at Trinity Medical Center that claimant had been injured at work, but her comments were ignored in favor of claimant's reports. The question of Ms. Slagel's credibility is complicated by her tacit involvement in claimant's deceit. Claimant admits to providing inaccurate information during the pendency of this claim. Ms. Slagel admits to knowledge of these inaccurate reports and took no steps to correct the action. While the undersigned acknowledges it is not Ms. Slagel's responsibility to control claimant or the manner in which he proceeds in his workers' compensation claim, I do have difficulty providing credibility to the accounts of



an individual who admittedly allowed a pattern of deceit to continue. Therefore, it is found Ms. Slagel's testimony is not credible.

Claimant admitted to stating inaccurate information during the pendency of this alleged injury; specifically, claimant testified he gave inaccurate information each time he reported sustaining an injury at home. Claimant maintains the testimony he provided at evidentiary hearing, namely that he injured his right shoulder during the forklift accident at work, is an accurate history. (Claimant's testimony)

### CONCLUSIONS OF LAW

The first issue for determination is whether claimant sustained an injury on November 1, 2012, which arose out of and in the course of his employment with defendant-employer.

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

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 Elec. v. Wills, 608 N.W.2d 1 (Iowa 2000); Miedema, 551 N.W.2d 309. An injury occurs "in the course of" employment when it happens within a period of employment at a place where the employee reasonably may be when performing employment duties and while the employee is fulfilling those duties or doing an activity incidental to them. Ciha, 552 N.W.2d 143.

The claimant has the burden of proving by a preponderance of the evidence that the injury is a proximate cause of the disability on which the claim is based. A cause is proximate if it is a substantial factor in bringing about the result; it need not be the only cause. A preponderance of the evidence exists when the causal connection is probable rather than merely possible. George A. Hormel & Co. v. Jordan, 569 N.W.2d 148 (Iowa 1997); Frye v. Smith-Doyle Contractors, 569 N.W.2d 154 (Iowa App. 1997); Sanchez v. Blue Bird Midwest, 554 N.W.2d 283 (Iowa App. 1996).

The question of causal connection is essentially within the domain of expert testimony. The expert medical evidence must be considered with all other evidence introduced bearing on the causal connection between the injury and the disability. Supportive lay testimony may be used to buttress the expert testimony and, therefore, is also relevant and material to the causation question. The weight to be given to an expert opinion is determined by the finder of fact and may be affected by the accuracy

of the facts the expert relied upon as well as other surrounding circumstances. The expert opinion may be accepted or rejected, in whole or in part. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); IBP, Inc. v. Harpole, 621 N.W.2d 410 (Iowa 2001); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995). Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417 (Iowa 1994). Unrebutted expert medical testimony cannot be summarily rejected. Poula v. Siouxland Wall & Ceiling, Inc., 516 N.W.2d 910 (Iowa App. 1994).

Claimant's testimony at evidentiary hearing was consistent with his deposition testimony, with the exception of the specific date of the alleged work injury. Each time, claimant testified he sustained his right shoulder condition as a result of the forklift accident which occurred at work. Despite this consistency, claimant's testimony is inconsistent with all the medical records dated before March 29, 2013. During this period, claimant underwent extensive care with multiple providers, including undergoing surgical intervention. Throughout this period, claimant reported a consistent mechanism of injury of falling at his home in mid-January 2013. The medical care received coincided contemporaneously with such a mechanism of injury, with claimant seeking medical attention the date after the reported fall at home. Additionally, claimant sought disability benefits on the basis of such a fall at home and informed a human resources associate at defendant-employer that he fell at home.

Claimant testified he provided inaccurate information to each of these providers and in connection with his application for short-term disability benefits. He requests the undersigned find his testimony on the alleged work injury credible. Claimant testified he provided inaccurate information out of fear for the jobs of himself and Mr. Edwards.

At evidentiary hearing, claimant's demeanor provided the undersigned with no independent reason to doubt his veracity. However, it remains clear that claimant engaged in dishonesty throughout the pendency of this claim. If I were to believe claimant's testimony, the fact remains that claimant intentionally misled multiple medical providers, the human resources department of defendant-employer, and the short-term disability policy holder. In doing so, claimant procured disability benefits to which he would not have been entitled had he indicated an alleged work injury. Additionally, claimant has a criminal conviction for false use of a financial instrument, a fact which draws claimant's credibility into question.

The greater weight of evidence presented indicates claimant did not sustain a right shoulder injury during the forklift accident at defendant-employer. The accident forms created contemporaneously to the work accident deny any injury. While claimant indicated he revised this report the date following the work injury, there is no evidence to support his account. Even by claimant's account, after he reported this injury to Mr. Edwards, claimant still denied medical treatment. Claimant attributed this denial to fear for his own job and for the job of his supervisor. At the time of the forklift accident, claimant had been employed by defendant-employer for slightly over a week. Why claimant would refuse to seek much needed medical attention out of fear for the job of a man he knew for less than 10 days escapes the undersigned.

However, it is understandable for an individual to fear losing his own job during a probationary period. Such an argument for delay in seeking medical treatment or providing false information to medical providers as to the cause of injury is more plausible; however, after claimant was laid off in January 2013, he maintained his purportedly inaccurate statements for approximately two months. It was during this period when claimant underwent orthopedic evaluation and surgery, a time when individuals should be expected to provide truthful and accurate information to a surgeon in hopes of receiving the most appropriate treatment possible. Said surgeon, Dr. Mendel, indicated claimant consistently reported a history of a fall at home. He opined this reported mechanism of injury was consistent with the condition he observed and treated, including during surgery. This sentiment is echoed by Dr. Garrels, who opined the surgical findings did not support the existence of an old injury.

Dr. Garrels also opined claimant's traumatic injury findings were consistent with the mechanism of injury of the fall at home. Dr. Garrels further opined claimant's right shoulder condition would have resulted in significant limitations and an inability to work. It was after the reported fall at home that claimant sought contemporaneous medical treatment and relayed a consistent mechanism of injury for over two months. During this period, claimant did not return to work. The facts support the opinions rendered by Dr. Garrels, namely that claimant's right shoulder condition did not arise from the forklift accident, but from a fall at home on January 12, 2013.

It is not necessary for the undersigned to determine, however, whether claimant's condition is causally related to an intervening fall at home on January 12, 2013. The relevant inquiry is if claimant has met his burden of proving by a preponderance of the evidence that he sustained an injury arising out of and in the course of his employment with defendant-employer. Claimant has simply failed to meet this burden.

For the reasons set forth *supra*, the undersigned finds claimant is not a credible witness. As the undersigned is unable to rely upon claimant's own testimony in support of his claim, claimant must have supplied another form of evidence to support his claim in order to prevail. Claimant attempted to find such support in the report of Dr. Kreiter; however, Dr. Kreiter never specifically addressed the question of causal relationship between claimant's condition and the alleged work injury. His opinion is therefore entitled to no weight as compared to the opinions of Dr. Mendel and Dr. Garrels.

The undersigned found claimant was not a credible witness. The IME physician retained by claimant offered no opinion to counter the opinions of Dr. Mendel and Dr. Garrels. The opinions of both Dr. Mendel and Dr. Garrels support a determination that claimant did not sustain an injury in connection with the forklift accident, but more plausibly as a result of a fall at home in January 2013. While claimant's girlfriend, Ms. Slagel, testified claimant never fell at home, her credibility is also in question, as outlined *supra*.

It is ultimately claimant who bears the burden of proving by a preponderance of the evidence that he sustained an injury arising out of and in the course of his employment. Layperson testimony supporting his position is not credible, no medical

providers have offered supportive opinions, and no other contemporaneous evidence supports claimant's position. It is therefore determined claimant has failed to meet his burden. As claimant has failed to meet his burden in establishing a work-related injury, consideration of the issues of timely notice, causation and entitlement to temporary disability benefits, causation and extent of permanent disability, and claimant's entitlement to payment of medical expenses incurred in treatment of his right shoulder condition is unnecessary, as moot.

The final issue for determination is whether claimant is entitled to reimbursement for an IME 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 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). 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 seeks reimbursement for Dr. Kreiter's IME. However, the facts surrounding the IME do not support an award of reimbursement. No employer-retained physician evaluated claimant prior to claimant seeking the services of Dr. Kreiter. Therefore, claimant has not met the threshold requirement to warrant reimbursement of Dr. Kreiter's IME bill.

#### ORDER

THEREFORE, IT IS ORDERED:

Claimant shall take nothing from these proceedings.

Defendants shall file subsequent reports of injury as required by this agency pursuant to rule 876 IAC 3.1(2).

Costs are taxed to claimant pursuant to rule 876 IAC 4.33.

Signed and filed this 17th day of April, 2015.

  
ERICA J. FITCH  
DEPUTY WORKERS'  
COMPENSATION COMMISSIONER

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EJF/srs

**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. ,