BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

ENES KAJTEZOVIC,	:	
	:	File No. 19005940.01
Claimant,	:	
vs.	:	ARBITRATION DECISION
TYSON FOODS, INC,	:	
Employer,	:	
Self-Insured,	:	Headnotes: 1802, 1803, 2501,
Defendant.	:	2502, 2701

STATEMENT OF THE CASE

Claimant, Enes Kajtezovic, filed a petition in arbitration seeking workers' compensation benefits from Tyson Foods (Tyson), self-insured employer. This matter was heard on July 1, 2021, with a final submission date of September 30, 2021.

The record in this case consists of Joint Exhibits 1 through 14, Claimant's Exhibits 1 through 6, Defendant's Exhibits A through G, and the testimony of claimant. Serving as interpreter was Karmela Lofthus.

The parties filed a hearing report at the commencement of the arbitration hearing. On the hearing report, the parties entered into various stipulations. All of those stipulations were accepted and are hereby incorporated into this arbitration decision and no factual or legal issues relative to the parties' stipulations will be raised or discussed in this decision. The parties are now bound by their stipulations.

ISSUES

1. Whether there is a causal connection between the injury and the claimed medical expenses.

2. Whether the injury resulted in a temporary disability.

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

4. The commencement date of permanent partial disability benefits.

5. Whether claimant is entitled to reimbursement for an independent medical evaluation (IME) under Iowa Code section 85.39.

6. Whether claimant is entitled to alternate medical care under Iowa Code section 85.27.

7. Credit.

FINDINGS OF FACT

Claimant was 48 years old at the time of hearing. Claimant was born in Bosnia. Claimant graduated from high school in Bosnia. Claimant had one year of college in Bosnia. (Hearing Transcript pp. 14-15)

Claimant moved to the United States in 1997. Since moving to the US, claimant has taken English classes. Claimant began with Tyson in 1997. Claimant worked various production line jobs at Tyson. Claimant eventually was promoted to a supervisor position. (TR pp. 15-16) At the time of hearing, claimant was still working as a supervisor with Tyson. (TR p. 16)

Claimant's prior medical history is relevant. In December of 2015 claimant was evaluated for back and left sided pain. (Joint Exhibit 1, p. 5) In December of 2017 claimant was seen for neck and back pain. (JE 2, pp. 32-33) In April of 2018 claimant was evaluated for upper back pain and pain in the shoulder and trapezius area. (JE 1, pp. 6-19)

On June 22, 2018, claimant was pushing hogs when he slipped on a patch of ice. Claimant's body twisted and he fell, landing on his buttocks. Claimant had pain in the lower back and reported the injury. (TR pp. 18-19)

Records indicate claimant went to health services at Tyson, but did not want to open a case and treated the injury with ibuprofen. Claimant treated himself for approximately one month. (Claimant's Exhibit 1, p. 21)

Claimant was evaluated by Robert Gordon, M.D., on August 14, 2018, at the onsite physician services at Tyson. Claimant was assessed as having lumbosacral pain and radicular left leg complaints. Claimant was recommended to take a burst and taper prescription of prednisone, Flexeril and physical therapy. (JE 3, pp. 116-117)

Claimant returned to Dr. Gordon on August 28, 2018, with continued complaints of back pain and radicular symptoms. An MRI was recommended. (JE 3, p. 118) Claimant had a lumbar MRI on August 3, 2018. It showed an L4-5 disc bulge on the right and an annular fissure/tear. (JE 4, p. 135)

Claimant returned to Dr. Gordon on September 11, 2018. Claimant's MRI was discussed, and Dr. Gordon referred claimant for lumbar injections. (JE 3, pp. 119-120)

Claimant saw Frank Hawkins, M.D., at the Allen Pain Clinic on October 1, 2018. Claimant had a lower back pain radiating to the left leg and to the foot. Claimant had an

L5-S1 epidural steroid injection (ESI). Dr. Hawkins noted that while the MRI showed a disc bulge on the right, this did not preclude claimant from having left-sided pain. (JE 5, pp. 138-139)

Claimant returned to Dr. Gordon on October 16, 2018. Claimant had temporary relief from the injections. Claimant was referred back to Dr. Hawkins. (JE 3, p. 121)

Claimant returned to Dr. Hawkins on October 25, 2018. Claimant was given a second ESI at the L4-5 level. (JE 5, pp. 140-141)

Claimant returned in follow-up with Dr. Gordon on November 6, 2018. Claimant indicated the second injection provided little relief. Claimant was referred for a surgical consultation. (JE 3, pp. 122-123)

Claimant was evaluated by Chad Abernathey, M.D., on November 30, 2018. Dr. Abernathey assessed claimant as having low back pain related to an annular tear at L4-5 following a work-related incident. Surgery was not recommended. (JE 6, p. 146)

Claimant returned to Dr. Gordon on December 11, 2018. Claimant was recommended to take Mobic and Elavil. (JE 3, p. 124)

Claimant returned to Dr. Gordon on January 15, 2019 and January 29, 2019. Claimant continued to have lower back pain with radiculopathy. Dr. Gordon recommended another injection. (JE 3, pp. 125-127)

Claimant returned to Dr. Hawkins on February 7, 2019. Claimant was given a third ESI. (JE 5, pp. 142-143)

Claimant returned to Dr. Gordon on February 19, 2019. Claimant indicated some improvement in his left leg symptoms following the injection, but he still had back pain. Dr. Gordon recommended claimant have a fourth ESI. (JE 3, p. 128)

Claimant returned to Dr. Hawkins on March 7, 2019, and received a fourth injection at the L5 level. (JE 5, pp. 144-145) Records indicate this injection did not help with symptoms. (JE 3, p. 129)

Claimant returned to Dr. Hawkins on March 19, 2019. Claimant indicated the injection did not help with pain. Claimant testified he still had left leg and lower back pain at this time. (TR p. 22) Dr. Gordon found claimant at maximum medical improvement (MMI), and released him to return to work with no restrictions. (JE 3, p. 129)

Records indicate an e-mail was sent to Dr. Gordon indicating claimant was unable to sleep due to pain and was requesting a second opinion. (Ex. 1, p. 23) Claimant saw Dr. Gordon on March 26, 2019. Claimant had increasing pain. Claimant was referred back to Dr. Abernathey. Dr. Gordon had again released claimant from

care and found claimant had no permanent impairment or permanent restrictions. (JE 3, p. 130)

Claimant returned to Dr. Abernathey on April 12, 2019. Dr. Abernathey recommended another lumbar MRI. (JE 6, p. 147) Claimant underwent the MRI. It showed a slightly more pronounced disc herniation at the L4-5 level and a disc bulge at L5-S1 with a small central disc protrusion. (JE 4, p. 136)

In an April 19, 2019 note, Dr. Abernathey indicated he had reviewed the new MRI. Based on the new MRI, Dr. Abernathey again recommended against surgery. Dr. Abernathey recommended claimant continue conservative management with Dr. Gordon. (JE 6, p. 147)

Claimant returned to Dr. Gordon on May 7, 2019. Dr. Gordon recommended against any further treatment. He found claimant had no permanent impairment or permanent restrictions. He returned claimant to work at full duty. (JE 3, pp. 131-132)

In letters dated May 16, 2019, and June 18, 2019, Tyson denied claimant any further authorized care based on Dr. Gordon's May 17, 2019 note. (Defendant's Exhibit C and D)

Claimant said he sought medical treatment after his release from Dr. Gordon as he continued to experience pain in his legs and lower back. (TR p. 24)

On June 27, 2019, claimant was seen by Katie Baker, D.O., at the UnityPoint Health Emergency Department. Claimant had back pain at a level 10, where 10 is excruciating pain. Claimant was treated with prednisone. (JE 7)

Claimant was seen by Mahesh Mohan, M.D., on July 2, 2019. Claimant had L5-S1 radicular pain for approximately one year. Claimant was given an ESI injection at the L4-5 level on July 8, 2019. (JE 2, pp. 39-40)

On September 10, 2019, claimant had another ESI with Dr. Mohan at the L4-5 level. (JE 2, p. 54)

On October 17, 2019, and October 25, 2019, claimant had two EMGs. Both studies were unremarkable. (JE 2, p. 103; JE 8)

On November 14, 2019, claimant underwent another lumbar MRI. Findings on that MRI were similar to that of the April 2019 MRI. (JE 4, p. 137)

Claimant was evaluated by Hiroto Kawasaki, M.D., at the University of Iowa Hospitals and Clinics (UIHC) on December 27, 2019. Claimant had experienced back pain and radicular symptoms for 18 months and had undergone therapy and multiple injections. Claimant was assessed as having bilateral facet arthritis and stenosis at the

L4-S1 levels with radicular pain in the buttocks and left lower extremity. Surgery was recommended. (JE 10, pp. 160-168)

Claimant underwent surgery on February 4, 2020, consisting of an L5 laminectomy/foraminotomy. (JE 10, pp. 172-176)

Claimant worked until February 4, 2020, when he had surgery with Dr. Kawasaki. Claimant said Dr. Kawasaki took him off work for six weeks following surgery. He said the surgery helped some with his leg and lower back pain, but the pain did not completely go away. (TR pp. 26-27)

Claimant saw Dr. Kawasaki on March 20, 2020. Claimant still had significant neuropathic pain, but indicated a lot of his leg symptoms had resolved. Dr. Kawasaki recommended physical therapy. (JE 10, pp. 177-182)

Due to the COVID-19 pandemic, claimant was unable to engage in physical therapy for an extended period. Claimant began physical therapy in late June of 2020. (Ex. 1, p. 25)

Claimant returned to Dr. Kawasaki on August 14, 2020. Claimant had pain in both the right and left legs. Dr. Kawasaki ordered another MRI. Claimant underwent a CT scan on the same date. The CT scan showed stable post-surgery changes at the L5 level on the left side. (JE 10, pp. 192-198)

A lumbar MRI was performed on September 25, 2020. It showed stable degenerative changes, but no new disc herniation. Claimant saw Dr. Kawasaki on the same day. Dr. Kawasaki recommended against further surgery, but recommended additional physical therapy. (JE 10, pp. 199-206)

Claimant underwent physical therapy in September and October of 2020. The records indicate physical therapy provided minimal benefit. (Ex. 1, p. 26)

On October 5, 2020, claimant was evaluated by Justin Wikle, M.D., at the UIHC. Claimant had continued chronic lower back pain since a 2018 work injury with radicular symptoms in the right leg. Claimant was assessed as having lumbar radiculopathy. Dr. Wikle recommended an L5 injection on the right side. (JE 10, pp. 208-215)

In an October 14, 2020, letter, Dr. Kawasaki recommended claimant be restricted to lifting up to 30 pounds and avoid excessive twisting and bending. He recommended claimant continue to have physical therapy and pain management. He recommended a functional capacity evaluation (FCE). (JE 10, p. 216)

In late November 2020, claimant returned to work at Tyson.

In a December 28, 2020 report, Mark Taylor, M.D., gave his opinions of claimant's condition following an independent medical evaluation (IME). Claimant had

lower back pain going bilaterally into the buttocks and into the lower extremities bilaterally. Left leg pain was worse than the right. Claimant had an average pain at a 7 to 8 level. (Ex. 1, p. 26)

Dr. Taylor assessed claimant as having chronic lumbago, left worse than right, with left lower extremity radiculitis. Dr. Taylor opined claimant's back injury was causally related to the June 22, 2018, fall at work. He opined claimant reached MMI as of October 15, 2020. Dr. Taylor found claimant had a 13 percent permanent impairment to the body as a whole based on finding that claimant fell into the DRE Lumbar Category III under the AMA Guides to the Evaluation of Permanent Impairment (5th Edition). He recommended claimant continue with a 30-pound lifting restriction and have the ability to alternate between sitting, standing and walking as needed. (Ex. 1, pp. 28-30)

In a January 10, 2021 letter, Dr. Gordon gave his opinions of claimant's condition after reviewing Dr. Taylor's report. Dr. Gordon indicated his opinions regarding permanent restrictions and permanent impairment did not change following his review of Dr. Taylor's report. He also opined claimant did not require any further treatment. (Ex. B, pp. 2-3)

Dr. Gordon noted that claimant never had right leg symptoms when he evaluated claimant. He criticized Dr. Taylor's use of the Guides to find a permanent impairment rating for claimant as he felt the rating was not fully explained. (Ex. B, p. 3)

On April 9, 2021, in response to a letter written by claimant's counsel, Dr. Kawasaki opined that claimant's fall on June 22, 2018, materially aggravated claimant's underlying pre-existing condition of the lumbar spine. He also opined that the surgery he performed on claimant was necessitated by the June 22, 2018, fall at work. He recommended claimant should not lift more than 30 pounds and avoid excessive twisting and bending. (JE 10, pp. 218-219)

Claimant testified he had returned to work as a production supervisor and continues to work that position despite the pain in his lower back and legs. (TR p. 35) Claimant said he has to constantly change positions to walking, sitting and standing to avoid pain. (TR p. 36)

Claimant testified he saw Penumetsa Raju, M.D., a psychiatrist, to help him deal with pain. He said he would like to continue to see Dr. Raju. He said he would like to continue to see Dr. Kawasaki and would like to continue treatment with Dr. Kawasaki. (TR pp. 30-31)

Claimant testified that his sleep has been adversely affected due to back and leg pain. (TR p. 32) He said he sometimes will use a cane when he walks. (TR p. 51)

CONCLUSIONS OF LAW

The first issue to be determined is whether there is a causal connection between the injury and the claimed medical expenses.

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

The employer shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance, and hospital services and supplies for all conditions compensable under the workers' compensation law. The employer shall also allow reasonable and necessary transportation expenses incurred for those services. The employer has the right to choose the provider of care, except where the employer has denied liability for the injury. Section 85.27. Holbert v. Townsend Engineering Co., Thirty-second Biennial Report of the Industrial Commissioner 78 (Review-Reopening October 1975).

The parties stipulate that claimant had a work-related injury occurring on June 22, 2018. The parties dispute whether claimant's back surgery was causally connected to the June 22, 2018, work injury.

Records indicate the claimant reported back pain and leg pain to Dr. Gordon. (JE 3, pp. 116-134) Claimant also reported back pain and leg symptoms to Dr. Hawkins, Dr. Abernathey, Dr. Mohan, and Dr. Kawasaki. (JE 5; JE 6; JE 2; JE 10, p. 160)

Claimant was authorized to see Dr. Abernathey by the defendant. Dr. Abernathey recommended against surgery. However, Dr. Abernathey did not opine that the surgery performed by Dr. Kawasaki was unreasonable and unnecessary. (JE 6, p. 147)

Dr. Mohan found claimant's work injury materially aggravated claimant's pre-existing back problems, and referred claimant to Dr. Kawasaki. (JE 2, p. 114)

As noted, claimant underwent lumbar spine surgery on February 4, 2020, performed by Dr. Kawasaki. Claimant testified that while he still had lower back and leg pain, surgery improved his symptoms. (TR pp. 26-27)

Dr. Kawasaki, who performed the surgery, opined the surgery was causally related to claimant's work injury. (JE 10, pp. 217-219)

Dr. Taylor, who performed an IME, opined that claimant's need for surgery was causally related to the June 2018 work injury. (Ex. 1, p. 29)

Only Dr. Gordon opined that claimant's work injury did not require further treatment after he released claimant from care as of July 2, 2019. (Ex. B, p. 3) Dr. Gordon's opinions regarding the causal connection between the injury and claimant's

need for surgery, and claimant's permanent impairment, are problematic for several reasons.

In his January 10, 2020 rebuttal letter, Dr. Gordon notes, "Dr. Abernathey, did concur with me, that Mr. Kajtezovic was at MMI with zero percent impairment per letter dictated 05/01/2019." (Ex. B, p. 2) There is no letter in the record from Dr. Abernathey indicating he concurred with Dr. Gordon that claimant was at MMI with zero percent impairment. Dr. Abernathey's note from May 1, 2019, does not say claimant is at MMI and has no permanent impairment. (JE 6, p. 147)

Second, on May 1, 2019, Dr. Abernathey recommended against surgery and returned claimant to Dr. Gordon for continued conservative care. (JE 6, p. 147) Dr. Gordon did not give claimant continued conservative care. He instead released claimant to return to work at full duty with no restrictions. (JE 3, pp. 131-132)

Third, as noted above, Dr. Taylor did find that claimant had a 13 percent permanent impairment under the Guides. In his January 10, 2021, rebuttal letter, Dr. Gordon notes that Dr. Taylor, ". . . does not explain how he arrived at this determination. The criteria were not fulfilled for the assignment of the 13% WPI rating per the AMA Guides to the Evaluation of Permanent Impairment, 5th Edition, as Dr. Taylor's clinical examination did not fulfill clinical findings that would fulfill this impairment category, nor did the MRI findings . . ." (Ex. B. p. 3)

This is not true. Dr. Taylor's report finds that claimant had radiculopathy based upon his exam and interview with claimant. The record also has repeated references to a diagnosis of radiculopathy from Dr. Hawkins, Dr. Mohan, Dr. Kawasaki and Dr. Taylor. (JE 5, pp. 139, 140, 142; JE 2, pp. 38, 45, 47, 51, 59, 77; JE 10, p. 172; Ex. 1, p, 28) An MRI finding of a herniated disc is not required for a finding of permanent impairment under table 15-3, page 385, under the DRE Lumbar Category III.

Because of these concerns with Dr. Gordon's opinions regarding causation, claimant's need for surgery, and permanent impairment, it is found that Dr. Gordon's opinions regarding claimant's need for surgery, and the causal link between claimant's injury and permanent impairment, are found not credible.

The credible testimony of claimant is that he still has lower back pain and pain in his lower extremities. The record indicates claimant had lower back pain and pain in his lower extremities following his fall at work. Drs. Mohan, Kawasaki and Taylor all opine that claimant's pre-existing back condition was materially aggravated by his fall at work. Dr. Kawasaki and Dr. Taylor found the surgery, and other treatment performed after May 16, 2019, was causally related to claimant's injury. The opinions of Dr. Gordon regarding claimant's injury and the causal link between his need for surgery are found not credible. Given this record, claimant has carried his burden of proof that his surgery and the treatment after May 16, 2019, are causally connected to his June of 2018 work injury. Defendant is liable for the medical costs detailed in Claimant's Exhibit 6.

On a related issue, defendant contends they are not liable for medical costs detailed in Claimant's Exhibit 6. (Defendant's Post-Hearing Brief, pp. 4-5) Defendant relies on the holding in Bell Bros. Heating and Air Conditioning v. Gwinn, 779 N.W.2d 193, 206 (Iowa 2010) Defendant contends they are only liable for the payment of unauthorized care if claimant can prove the unauthorized care provided a more favorable medical outcome than would have been achieved by the care authorized by the employer. (Defendant's Post-Hearing Brief, p. 4)

Defendant's reliance on Gwinn in this matter is misplaced. Under Gwinn, the defendant can be made to pay for unauthorized care if the unauthorized care has a more favorable outcome than the authorized care. In this case, defendant stopped providing care for claimant's lower back and leg condition as of May 16, 2019. (Ex. C and D) After that date, defendant did not offer any care for claimant's injury. There is no comparison to be made in this situation between the benefit of the unauthorized and the authorized care because after May 16, 2019, defendant did not authorize any care.

Assuming for argument's sake the standard in Gwinn still applies, it is found that claimant can still carry his burden of proof that unauthorized care provided a more favorable outcome than the care authorized by defendant. Claimant testified the surgery and subsequent treatment provided by Dr. Kawasaki and other providers improved his condition. This care is obviously more favorable than the no care authorized by defendant.

The next issue to be determined is whether the injury resulted in a temporary disability.

Healing period compensation describes temporary workers' compensation weekly benefits that precede an allowance of permanent partial disability benefits. Ellingson v. Fleetguard, Inc., 599 N.W.2d 440 (Iowa 1999). Section 85.34(1) provides that healing period benefits are payable to an injured worker who has suffered permanent partial disability until the first to occur of three events. These are: (1) the worker has returned to work; (2) the worker medically is capable of returning to substantially similar employment; or (3) the worker has achieved maximum medical recovery. Maximum medical recovery is achieved when healing is complete and the extent of permanent disability can be determined. Armstrong Tire & Rubber Co. v. Kubli, Iowa App., 312 N.W.2d 60 (Iowa 1981). Neither maintenance medical care nor an employee's continuing to have pain or other symptoms necessarily prolongs the healing period.

When an injured worker has been unable to work during a period of recuperation from an injury that did not produce permanent disability, the worker is entitled to temporary total disability benefits during the time the worker is disabled by the injury. Those benefits are payable until the employee has returned to work, or is medically capable of returning to work substantially similar to the work performed at the time of injury. Section 85.33(1).

Claimant was off work the day of his surgery of February 4, 2020, until Dr. Kawasaki released him to light duty on March 20, 2020. (JE 10, p. 181) Claimant missed work from June 19, 2020, until November 26, 2020, for physical therapy and pain management. (JE 10, pp. 181, 187; JE 1, p. 29) Claimant is due temporary benefits for these periods of time. Defendant is entitled to a credit for the net short-term disability they paid for claimant during these dates that claimant was off work. The parties indicated in e-mails dated September 28, 2021, that they stipulated claimant received $17,995.24 in short-term disability benefits.

The next issue to be determined is whether claimant is entitled to permanent partial disability benefits.

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 was injured on June 22, 2018. Claimant credibly testified that over three years after the date of injury he continues to have pain in his back and legs. Claimant underwent back surgery. He has been given lifting restrictions. Dr. Taylor opined that claimant has a permanent impairment from the June 22, 2018, work injury. As discussed above, the opinions of Dr. Gordon regarding permanent impairment are found not credible. Given this record, claimant has carried his burden of proof his injury of June 22, 2018, resulted in permanent impairment.

Only one expert has opined regarding the extent of claimant's permanent impairment. Dr. Taylor found claimant had a 13 percent permanent impairment to the body as a whole. (Ex. 1, p. 30)

Claimant returned to his work at Tyson in his job as a supervisor.

Iowa Code section 85.34(2)(v) (2017) provides, in relevant part:

> [I]f an employee who is eligible for compensation under this paragraph returns to work or is offered work for which the employee receives or would receive the same or greater salary, wages or earnings, than the employee received at the time of the injury, the employee shall be compensated based only upon the employee's functional impairment resulting from the injury, and not in relation to the employee's earning capacity.

Given this record, claimant is entitled to 65 weeks of permanent partial disability benefits (13 percent x 500 weeks).

Dr. Taylor found claimant at MMI as of October 15, 2020. (Ex. 1, p. 30) Permanent partial disability benefits shall commence as of this date.

The next issue to be determined is whether claimant is entitled to reimbursement of an IME.

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

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

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 independent medical evaluation 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 Supreme Court, in Young noted that in cases where Iowa Code section 85.39 is not triggered to allow for reimbursement of an independent medical examination (IME), a claimant can still be reimbursed at hearing the costs associated with the preparation of the written report as a cost under rule 876 IAC 4.33. Young at 846-847.

Dr. Gordon, the employer-retained expert, gave his opinions of claimant's permanent impairment in a report dated May 7, 2019. (JE 3, pp. 131-132) Dr. Taylor, the employee-retained expert, issued his report regarding permanent impairment in a report dated December 28, 2020. (Ex. 1) Given this chronology, claimant is due reimbursement for costs associated with Dr. Taylor's IME.

The next issue to be determined is whether claimant is entitled to alternate medical care.

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.

An application for alternate medical care is not automatically sustained because claimant is dissatisfied with the care he has been receiving. Mere dissatisfaction with the medical care is not ample grounds for granting an application for alternate medical care. Rather, the claimant must show that the care was not offered promptly, was not reasonably suited to treat the injury, or that the care was unduly inconvenient for the claimant. Long v. Roberts Dairy Co., 528 N.W.2d 122 (Iowa 1995).

On May 1, 2019, claimant was evaluated by Dr. Abernathey. Dr. Abernathey recommended against surgery, but recommended claimant continue to remain on conservative care. (JE 6, p. 147) Claimant returned to Dr. Gordon on May 7, 2019. Instead of prescribing continued conservative care, Dr. Gordon released claimant from care completely and returned claimant to full duty. (JE 3, pp. 131-132) In letters dated May 16, 2019 and June 18, 2019, Tyson declined authorization for any further care. (Ex. C and D)

Claimant credibly testified that he continued to have ongoing symptoms. Because Tyson failed to provide further care, claimant was forced to seek treatment on his own. As noted above, claimant had ongoing care with Dr. Mohan, Dr. Kawasaki, and Dr. Raju. Dr. Wikle opined that claimant should have ongoing pain management with the University of Iowa Hospitals and Clinics or Dr. Mohan. (JE 10, p. 213) As noted above, Dr. Gordon's opinions regarding claimant's need for continued care is found not credible. Claimant testified he had been treating with Dr. Raju to help deal with his chronic pain and depression. Claimant testified he would like to continue to treat with Dr. Raju.

Dr. Abernathey, an authorized provider, recommended continued conservative care. Defendant ignored that recommendation. Defendant denied claimant any continued authorized care. Defendant's denial of claimant's continued ongoing care is considered unreasonable given the recommendation by Dr. Abernathey. Claimant credibly testified he has ongoing symptoms. Claimant was forced to seek additional care on his own. Claimant's subsequent care is found to be causally connected to his work injury. Dr. Kawasaki and Dr. Taylor recommended claimant have ongoing care of his lower back condition. Given this record, claimant has carried his burden of proof he is entitled to the requested alternate medical care.

ORDER

Therefore it is ordered:

That defendant shall pay claimant healing period benefits from February 4, 2020, through March 20, 2020; June 19, 2020, through November 26, 2020; and February 19, 2021, through March 2, 2021, at the rate of eight hundred thirty-two and 91/100 ($832.91) per week.

That defendant shall pay claimant sixty-five (65) weeks of permanent partial disability benefits at the rate of eight hundred thirty-two and 91/100 ($832.91) per week commencing on October 15, 2020.

That defendant shall pay accrued weekly benefits in a lump sum together with interest at an annual rate equal to the one-year treasury constant maturity published by the federal reserve in the most recent H15 report settled as of the date of injury, plus two percent.

That defendant shall pay claimant's medical expenses as detailed in Claimant's Exhibit 6.

That defendant shall reimburse claimant for expenses related to Dr. Taylor's IME.

That defendant shall authorize and pay for continued care for claimant with Dr. Kawasaki, Dr. Mohan, and Dr. Raju.

That defendant shall pay costs.

That defendant shall file subsequent reports of injury as required under Rule 876 IAC 3.1(2).

Signed and filed this 18th day of January, 2022.

JAMES F. CHRISTENSON
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Gary Nelson (via WCES)

Jason Wiltfang (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.