

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

MYRON MACK,

Claimant,

vs.

DSC LOGISTICS, LLC,

Employer,

and

LIBERTY MUTUAL INSURANCE, CO.,

Insurance Carrier,
Defendants.

File No. 20003348.01

ARBITRATION DECISION

Head Notes: 1108.50, 1402.30, 2206,
2601.10

STATEMENT OF THE CASE

Myron Mack, claimant, filed a petition in arbitration seeking workers' compensation benefits from DSC Logistics, LLC, employer, and Liberty Mutual Insurance, as defendants. The hearing was held on June 3, 2022. Pursuant to an order from the Iowa Workers' Compensation Commissioner, this case was heard via videoconference using Zoom with all parties and the court reporter appearing remotely.

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

Myron Mack and Jared Longfield testified live at the trial. The evidentiary record also includes joint exhibits 1-12 and defendants' exhibits A-C. All exhibits were received into the record without objection. The parties submitted post-hearing briefs on July 15, 2022, at which time the case was fully submitted to the undersigned.

ISSUES

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

1. Whether claimant sustained an injury that arose out of and in the course of his employment with DSC Logistics on February 18, 2020.

2. Whether the claimant is entitled to temporary disability or healing periods benefits because of the alleged injury.
3. Whether the alleged injury resulted in any permanent disability; and if so,
4. The extent of claimant's entitlement to permanent disability benefits.
5. The commencement date for permanent partial disability benefits, if any are awarded.
6. Whether claimant is entitled to payment of the medical expenses in claimant's exhibit 10.
7. Whether claimant is entitled to alternate medical care.
8. Whether claimant is entitled to recover the cost of an independent medical examination pursuant to Iowa Code section 85.39
9. Assessment of costs.

FINDINGS OF FACT

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

At the time of the hearing the claimant, Myron Mack (hereinafter "Mack") was 66 years old. (Hearing Transcript, p. 13) Mack attended Osceola High School, graduating in 1974. (Id. at 14; JE. 1, p. 1) His past employment consists of working as a payload operator at a fertilizer plant, seasonal construction work, and driving a forklift at a pet food processing plant, a construction company, and a chemical company, as well as transporting crew members for the railroad. (Tr., pp. 14-17; JE 1, p. 1)

Mack began working for the employer, DSC Logistics, in 2013.¹ (Tr., p. 18) He drove a forklift for the lysine 25kg line. (Id. at 18, 99) He worked on the night shift Sunday through Wednesday. (Tr., p. 27) His shift started between 5:00 and 7:00 p.m. and ended between 5:00 and 7:00 a.m. (Id.) His job duties consisted of using the forklift

¹In the hearing transcript, the employer is referred to by several different names. These include the following: DSC Logistics, LLC; CJ America Bio; Korea Express and CJ Logistics. (Tr., pp. 17-18, 83-84) According to Longfield's testimony, this is the result of an acquisition by CJ Logistics and contractual labor agreements between the remaining companies. (Id.) It is the undersigned's understanding that the correct employer for this action is DSC Logistics, and the employer will be referred to by this name for the remainder of the decision.

to move finished pallets from the lysine line to the warehouse and building pallets. (Id. at 18-19, 99-102) Mack testified that to “build pallets,” an operator lifts one pallet using the forklift, then he or she would get off the forklift, pick up a cardboard slipsheet by hand and place it on top the wooden pallet, then get back on the forklift and repeat the same process with the next pallet. (Tr., pp.18-19) Mack testified that he would build 160-180 pallets each shift, and each pallet took approximately 45 seconds to build. (Id. at 18-20) Mack stated he tried to get all his pallets built during the first 6 hours of his shift. (Id. at 75)

The plant where Mack worked had both electric and gas-powered forklifts. (Tr., p. 21) He testified that it was 18 inches from the ground to the top of the first step on the electric forklift. (Id.) And then another 10 inches to the platform where the driver sat. (Id.) He thought the top of the first step in the gas-powered forklift was 10-11 inches from the ground, and the platform where the driver sat was 7 inches above the step. (Id.) Mack testified it was easier to get on and off the gas-powered forklifts. (Id. at 22) He also testified that the suspension was rougher on the electric forklifts. (Id.) According to Mack, he was only allowed to drive electric forklifts at the time of his alleged injury. (Id. at 76)

At the hearing, Jared Longfield (hereinafter “Longfield”), also provided testimony about Mack’s job duties. (See, Tr., pp. 102-105) Longfield is a senior supply chain manager for CJ America Bio, a sister company to DSC Logistics. (Id. at 82-83) However, at the time of Mack’s alleged injury, Longfield worked for DSC Logistics. (Id. at 84) In 2019, his job title was supply chain leader. (Id.) In 2020, his title changed to supply chain manager. (Id.) He was not Mack’s direct supervisor. (Id. at 85) However, Mack’s supervisors, Mark Hutchinson and Lacy Harms, reported directly to Longfield. (Id.) He worked first shift, which started between 7:00 to 8:00 a.m. and ended around 7:00 to 8:00 p.m.; he did not directly observe Mack performing his job duties. (Id. at 86) Longfield, however, testified he has a good understanding of Mack’s work duties and is knowledgeable about his past job performance. According to Longfield, 150 was the maximum number of pallets Mack would have potentially built during a shift. (Tr., p. 102) He explained that this figure was based upon the optimum production history of the plant. (Id.) Longfield noted that first shift workers were also responsible for building pallets. (Id. at 101-102) He testified, “First shift does not like to come in to have no pallets, so they would build the pallets to make sure that there was plenty.” (Id.) According to Longfield, generally at the beginning of each shift there are already 100-300 pallets built and ready. (Id. at 104) Longfield stated that during a normal 12-hour shift, the plant uses about 80 pallets. (Id.)

In December 2019, DSC Logistics asked Longfield to investigate several complaints about Mack’s work performance and behavior toward other employees.² (Tr., pp. 88-90) Longfield testified he completed this investigation and compiled a report

² Longfield was asked to give examples of the alleged misconduct. (Tr., p. 93) He testified Mack gave the production workers at the plant inappropriate nicknames, urinated off the loading dock, and left work without building pallets for the next shift. (Id. at 90-94)

documenting Mack's alleged bad behavior. (Id.) Defendants have not produced a copy of Longfield's report; it is not in the hearing record. On February 11, 2020, Mack received a final written warning for inappropriate behavior. (Ex. A, p. 8) On March 19, 2020, DSC Logistics terminated Mack's employment for demeaning and/or insulting another employee. (Ex. B, p. 12)

At the time of the hearing Mack was not working. (Tr., p. 40) He testified that he looked for work after his termination but was unable to secure a new position. (Id. at 41) He then decided to collect early retirement because of his wife's health. (Id. at 40) In 2018, his wife had a stroke that left her partially paralyzed. (Id. at 24) She now resides at a nursing home. (Id.) Mack testified he retired so he could draw social security benefits to pay her nursing home bills. (Id. at 40-41) He receives \$1,400 a month. (Id. at 73) His wife's nursing home bill is \$5,500 a month. (Id. at 41)

Mack alleges he suffered an injury to his neck/body-as-a-whole on February 18, 2020. (See Petition.) At the time of his alleged work injury, Mack had just returned to work following surgery for a non-work-related umbilical hernia. (See JE 7, p. 98) Mack underwent the repair surgery on December 5, 2019. (JE 4, p. 27-28) He returned to work on February 9, 2020. (Tr., p. 26) At the hearing, Mack testified that he was operating an electric forklift truck on February 18, 2020, when he felt "a sharp pain in my lower part of the neck and the upper part of my shoulders right in the – more or less like right in your spinal cord." (Id.) Mack testified he thought the cause of this new neck pain was getting on and off the forklift. (Id.) According to Mack, there was no night shift supervisor on duty at that time, so he did not report the injury that night. (Id. at 27) He testified that he notified his supervisor, Lacy Harms, of the injury soon after that, but she could not find an incident form for him to fill out. (Id. at 28) On February 25, 2020, Mack filled out an injury report. (JE 1, p. 2) He indicated he got the form from his niece, who worked in the office at the CJ America Bio plant. (Tr., p. 28)

Mack testified he sought treatment with a chiropractor for his neck issues two or three days after the alleged work incident. (Tr., p. 28) The treatment did not lessen his neck complaints, so he returned to the chiropractor a week later. (Id. at 29) According to Mack's testimony, at this appointment the chiropractor told him his neck issues were "too far gone. I cannot help you anymore. . . .you'd be better off to file this under workmen's comp."³ (Id.) On March 3, 2020, Mack notified his employer of the chiropractor's opinion; DSC Logistics authorized further treatment at Trinity Occupational Medicine in Fort Dodge, Iowa. (Id. at 29-30; JE 5, p. 47)

On March 10, 2020, Mack was evaluated by Judith D. Nelson, ARNP. (JE 5, p. 47) Ms. Nelson's treatment note indicates Mack developed neck pain after being back at work for a week and he saw a chiropractor for both neck and shoulder pain, before turning it in as a work comp injury on February 24th at his chiropractor's suggestion. (Id.)

³The treatment note from this visit is not in the hearing record. In fact, none of Mack's chiropractor records are in evidence.

Ms. Nelson diagnosed him with cervicgia, ordered a course of physical therapy, and provided work restrictions.⁴ (JE 5, pp. 47-50) On March 20, 2020, defendants requested Ms. Nelson's opinion on the cause of Mack's neck and right shoulder complaints. (Id. at 51) Defendants asked whether his work at DSC Logistics was a substantial factor in the onset of Mack's right shoulder and neck pain. (Id.) Ms. Nelson replied "no." (Id.) Mack returned to see Ms. Nelson on March 25, 2020. (Id. at 52). He reported no improvement in his symptoms. (Id. at 53) Ms. Nelson ordered additional physical therapy. (Id. at 54)

Mack returned to Ms. Nelson for treatment on April 8, 2020. (JE 5, p. 56) His symptoms remained the same with no improvement. (Id. at 57) In her treatment notes, Ms. Nelson writes "With little to no change the likelihood that his discomfort is related to arthritic changes versus work related injury increase." (Id.) She recommended he continue with conservative care and work restrictions. (Id.) Mack's final appointment with Ms. Nelson took place on April 29, 2020. (Id. at 60) Again, he reported no improvement in his symptoms. (Id. at 61) Ms. Nelson declared his pain complains were "most likely" related to arthritic changes versus the work injury. (Id.) She placed him at maximum medical improvement (MMI) and opined he had no permanent impairment from the alleged work injury. (Id.) She also indicated he should see his PCP for future treatment of his neck complaints. (Id.) Her treatment note lists medical causation for his neck complaints as undetermined. (Id. at 62)

At the request of defendants, Mack underwent an independent medical examination (IME) with Joseph Chen, M.D. on May 26, 2020. (See JE 6) Dr. Chen's report indicates he reviewed Mack's past treatment records. (Id. at 71-72) These records show that Mack underwent vascular surgery for arterial disease with Michael Willerth, M.D. (Id. at 71) He also had right shoulder surgery with Dr. Bergstrom in 2012, and treated with Mark Palit, M.D., in 2017 for renewed right shoulder pain. (Id.) Dr. Palit's records also indicate that Mack was seeing his chiropractor, Dr. Laird, weekly for pain complaints at that time. (JE 2, p. 4) Dr. Palit diagnosed Mack with a right shoulder strain and recommended physical therapy. (Id. at 5-7) Mack also treated with Dr. Palit for low back pain with radiation to his lower extremities in 2018 and 2019. (Id. at 7) At that time, Dr. Palit diagnosed him with degenerative disc disease of the lumbar spine. (Id. at 9) He recommended physical therapy, epidural steroid injections, radiofrequency ablation, and Gabapentin. (Id. at 7-13) Dr. Chen also reviewed records detailing Mack's umbilical hernia surgery in December 2019 and his post-operative care following the operation.⁵ (JE 6, p. 72)

⁴The history portion of this treatment note indicates Mack experienced a similar neck "injury" in 2017, but his pain resolved when he was allowed to use a gas-powered forklift, rather than an electric forklift. (JE 5, p. 48)

⁵ Mack also received treatment for headaches and jaw pain with William Andrews, M.D., from September 2019 through April 2021. (JE 3, pp. 14-25) These records are not mentioned in either Dr. Chen or Dr. Sassman's reports. (See, JE 6 and JE 7).

Dr. Chen diagnosed Mack with chronic myofascial neck pain, pre-existing age-appropriate cervical spondylosis, right shoulder pain status post subacromial decompression and distal clavicular excision in 2017 with limited right shoulder ROM in flexion and abduction. (JE 6, p. 75) Dr. Chen opined Mack had sustained a temporary aggravation of his pre-existing cervical spondylosis on February 18, 2020. (Id. at 77) Dr. Chen did not believe this aggravation was substantial or material. (Id.) He agreed with Judith Nelson that Mack reached MMI for this aggravation on April 30, 2020. (JE 6, p. 75) He did not assign any permanent impairment for the February 18, 2020 date of injury, nor did he assign permanent work restrictions for the alleged injury. (See id. at 76-77)

At the behest of his attorney, Mack attended a second IME with Robin Sassman, M.D. on December 3, 2020. (JE 7) Dr. Sassman also reviewed Mack's past treatment records. (Id. at 92-94) Dr. Sassman's report states that prior to the alleged injury on February 18, 2020, Mack "saw a chiropractor once every two months for neck discomfort," but did not espouse any persistent neck pain or radicular symptoms before the injury date. (Id. at 94) Dr. Sassman diagnosed him with cervical pain with radicular symptoms. (Id. at 100) She opined Mack's work at DSC Logistics was a substantial aggravating factor in the development of his cervical pain because, 1) Mack denied having any cervical symptoms prior to the alleged injury date, and 2) he was forced "to ascend and descend the stairs of the electric forklift 200+ times per night." (Id.) Dr. Sassman's report states that Mack built around 200 pallets per night, which forced him to get on and off the forklift approximately 200-225 times in 6 hours. (Id. at 98) She recommended further treatment—an MRI of Mack's cervical spine and pain management or injection therapy. (Id. at 101) She, however, stated that if he chose not to pursue further treatment, the MMI date for his alleged injury was January 18, 2020. (Id.) Dr. Sassman assigned 15 percent whole person impairment for radiculopathy signs on examination, citing to Table 15-5 in the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition. (Id.) Her report recommends restrictions of limit lifting, pushing, pulling, and carrying to no more than 20 pounds and avoid vibratory and/or power tools. (Id. at 101-102)

Defendants asked Dr. Chen to review the IME report authored by Dr. Sassman. (JE 6, p. 84). On February 23, 2021, Dr. Chen authored a supplemental report disagreeing with Dr. Sassman's diagnosis of Mack's neck complaints because there was no objective medical evidence to support a finding of cervical radiculopathy. (JE 6, p. 86) He also disagreed with her opinions on causation, permanent impairment, MMI date, and the need for further treatment and permanent restrictions. (Id. at 86-88)

In May 2021, Mack's family doctor ordered an MRI of his cervical spine. (Tr., p. 33; JE 9, p. 112) It revealed a broad-based, left-sided paracentral disc protrusion at C6-C7 and mild degenerative changes. (Id. at 113) On June 30, 2021, Mack's cervical MRI was reviewed by David W. Beck, M.D. (JE 8, p. 103) He recommended a C6-7 anterior discectomy and fusion with internal fixation. (Id.)

Mack's counsel met with Dr. Beck in October 2021. (JE 8, p. 106) Following the conference, Mack's attorney sent Dr. Beck a request for a follow-up report in the form of a check-the-box letter. (Id.) Dr. Beck complied. (Id.) In his response, Dr. Beck agreed with the following statements,

- 1) The repetitive work Mack was doing with regards to building pallets in February of 2020, materially aggravated or caused Mack's neck symptoms leading to his need for C6-7 anterior discectomy and fusion surgery.
- 2) The changed dynamics at work (going from a gas forklift to an electric forklift with different step heights in February of 2020) also contributed to Mack's neck symptoms and need for surgical intervention.

(JE 8, p. 106) The report does not contain any details about the job description provided to Dr. Beck, nor does it articulate whether Dr. Beck reviewed Mack's prior treatment records before providing his causation opinion. (Id.)

In November 2021, defendants asked Dr. Chen to review Dr. Beck's causation opinion. (JE 6, p. 89) Dr. Chen's response reiterates that in his medical opinion, using an electric forklift instead of a gas-powered forklift would not lead to a cervical injury. (Id.) He also opined that building pallets over the course of 9 days was not a plausible mechanism for Mack's alleged neck injury. (Id.) Dr. Chen stated that Mack's need for neck surgery was causally related to his pre-existing cervical spondylosis. (Id.)

On January 18, 2022, Dr. Beck performed the C6-7 anterior discectomy, decompression and fusion with allograft and internal fixation. (JE 8, p. 108-109). Mack saw Dr. Beck for follow-up care on February 14, 2022. (Id. at 110) Dr. Beck's treatment note from that date states that Mack felt great following surgery and his radicular pain was gone. (Id.) Dr. Beck instructed Mack to follow-up as needed and released him from his care. (Id.) He did not give Mack any permanent work restrictions. (Id.)

Mack relies upon the opinions of Dr. Sassman and Dr. Beck to prove his claim.⁶ I do not find either persuasive. In her report, Dr. Sassman provides two arguments to support her conclusion that Mack's neck symptoms were caused and/or aggravated by his work at DSC Logistics. Those are: 1) that Mack had no cervical symptoms prior to the alleged date of injury, and 2) that Mack built 200 pallets each night, forcing him to get on and off the forklift 200-225 times in approximately 6 hours. (JE 7, pp. 98, 100) Neither of those statements are supported by the evidence in the record. According to Dr. Sassman's own report, prior to the alleged date of injury, Mack was already seeing a "chiropractor once every two months for neck discomfort." (Id. at 94) This statement is bolstered by Mack's own hearing testimony about his chiropractor visits. (Tr., pp. 57-58) It is also supported by prior medical records showing Mack was suffering from neck pain

⁶ In his post-hearing brief, Mack also relies upon the causation opinion of Judith Nelson, ARNP. (See Claimant's Brief, pp. 5-6) The undersigned does not find this argument compelling. As claimant acknowledges, Ms. Nelson's causation opinions are at best unclear, and at worst contradictory. (Id.)

in 2019. (JE 3, p. 15) Additionally, I find Dr. Sassman's reliance on Mack's job description problematic. The job description outlined in Dr. Sassman's report does not match the job description Mack provided during the hearing. Mack told Dr. Sassman he built 200 pallets per night, which caused him to get on and off the forklift 220-225 times during a 6-hour shift. (JE 7, p. 100) However, during the hearing Mack testified he only built 160 – 180 pallets a night. (Tr., pp. 19) Further, Longfield testified that the number of pallets built per shift was even lower. He stated 150 was the maximum number of pallets Mack could build during a shift, but the actual number was probably lower based upon the factory's past production figures. (Id. at 101-104) While the undersigned cannot determine exactly how many pallets Mack built a shift, it is clear that the job description provided to Dr. Sassman is inaccurate, as it does not match the description Mack gave at hearing, and widely differs from the description given by Longfield. For these reasons, I give little weight to Dr. Sassman's opinion.

The undersigned finds Dr. Beck's opinion to be equally problematic. Dr. Beck's response letter is very sparse. It does not contain a recitation of the job description claimant provided. It also does not summarize what medical records, if any, Dr. Beck reviewed before providing his opinions. Given this, the undersigned cannot determine whether Dr. Beck had an accurate understanding of Mack's job duties at DSC Logistics or a complete record of Mack's prior medical treatment. Dr. Beck may have been given the same inaccurate job description provided to Dr. Sassman. Additionally, Dr. Beck's first treatment record in June 2021, states Mack was suffering from neck pain and bilateral arm pain with tingling. (JE 8, p. 103) This does not match Mack's symptom presentation at his first evaluation in March 2020. At that time, Mack presented to Ms. Nelson with neck pain that radiated into his right shoulder. (JE 5, p. 47) There is no mention of his left arm in that record and Ms. Nelson notes that his physical examination was "Negative for hands falling asleep, numbness and tingling." (Id. at 48) Similarly, when Dr. Chen evaluated Mack in May 2020, he denied "any radiating pain into his arms or hands," and showed no sensory loss in his bilateral upper extremities. (JE 6, p. 73-74) There is no indication that Dr. Beck was ever informed of Mack's evolving symptoms or given a complete history of his alleged injury. For these reasons, I also give little weight to Dr. Beck's opinion.

Given the above, I find Mack failed to carry his burden of proof to show he sustained a permanent injury that arose out of and in the course of his employment with DSC Logistics on February 18, 2020. Because Mack failed to meet his burden of proof on causation, the remaining issues concerning entitlement to additional temporary benefits, permanent disability, commencement date, payment of medical expenses, potential credits, and entitlement to alternate medical care are moot; the undersigned will make no fact findings on those issues.

Mack is seeking reimbursement for the IME performed by Dr. Sassman. Claimant was not successful in his case against defendants. I find he is not entitled to reimbursement for the cost of Dr. Sassman's IME, due to his lack of success at hearing. Mack also seeks reimbursement for the cost of his counsel's phone conference with Dr.

Beck and the filing fee. Mack was not generally successful in his case. Each party shall bear their own costs.

CONCLUSIONS OF LAW

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

The claimant has the burden of proving by a preponderance of the evidence that the alleged injury occurred and that it both arose out of and in the course of the employment. Quaker Oats Co. v. Ciha, 552 N.W.2d 143 (Iowa 1996); Miedema v. Dial Corp., 551 N.W.2d 309 (Iowa 1996). The words “arising out of” refer to the cause or source of the injury. The words “in the course of” refer to the time, place, and circumstances of the injury. 2800 Corp. v. Fernandez, 528 N.W.2d 124 (Iowa 1995). An injury arises out of the employment when a causal relationship exists between the injury and the employment. Miedema, 551 N.W.2d 309. The injury must be a rational consequence of a hazard connected with the employment and not merely incidental to the employment. Koehler Electric v. Wills, 608 N.W.2d 1 (Iowa 2000); Miedema, 551 N.W.2d 309. An injury occurs “in the course of” employment when it happens within a period of employment at a place where the employee reasonably may be when performing employment duties and while the employee is fulfilling those duties or doing an activity incidental to them. Ciha, 552 N.W.2d 143.

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

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

When an expert's opinion is based upon an incomplete or incorrect history, it is not necessarily binding on the commissioner or the court. It is then to be weighed, together with other facts and circumstances, the ultimate conclusion being for the finder of the fact. Musselman v. Central Telephone Company, 154 N.W.2d 128 (Iowa 1967); Bodish v. Fischer, Inc., 257 Iowa 516, 133 N.W.2d 867 (1965). The commissioner as trier of fact has the duty to determine the credibility of the witnesses and to weigh the evidence, together with the other disclosed facts and circumstances, and then to accept or reject the opinion. Dunlavey v. Economy Fire and Casualty Co., 526 N.W.2d 845 (Iowa 1995).

Based on the above findings of fact, I conclude that Mack failed to meet his burden of proof to show he sustained a permanent injury that arose out of and in the course of his employment with DSC Logistics on February 18, 2020. Mack relied upon the opinions of Dr. Sassman and Dr. Beck to causally relate his neck injury to his employment at DSC Logistics. However, as explained above, those opinions are entitled to very little weight as they appear to rely on an inaccurate job description and an incomplete and/or inaccurate medical history. Claimant shall take nothing from these proceedings.

Mack is seeking reimbursement for his IME with Dr. Sassman. A claimant's right to reimbursement for an IME exam is controlled by Iowa Code section 85.39. This section permits an employee to be reimbursed for a 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. Iowa Code section 85.39(2)(2019). However, this right to reimbursement is also dependent upon the claimant's success at hearing. Iowa Code section 85.39(2), states,

An employer is only liable to reimburse an employee for the cost of an examination conducted pursuant to this subsection if the injury for which the employee is being examined is determined to be compensable under this chapter or chapter 85A or 85B. An employer is not liable for the cost of such an examination if the injury for which the employee is being examined is determined not to be a compensable injury.

Id.

Defendants are not liable for this claim. Mack has not established the prerequisites for reimbursement of Dr. Sassman's evaluation pursuant to Iowa Code section 85.39.

Mack also asserts a claim for costs. Specifically, Mack seeks reimbursement for the phone conference with Dr. Beck and the filing fee for this action. Costs are assessed at the discretion of the agency. Iowa Code section 86.40. Mack failed to prove a compensable claim; therefore, I conclude that none of his costs should be assessed. I conclude that each party should bear its own costs.


ORDER

THEREFORE, IT IS ORDERED:

Claimant shall take nothing from these proceedings.

Each party shall bear their own costs.

Signed and filed this 24th day of October, 2022.


AMANDA R. RUTHERFORD
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Janece Valentine (via WCES)

Peter Thill (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.