

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

ASHLEY EARLE,

Claimant,

vs.

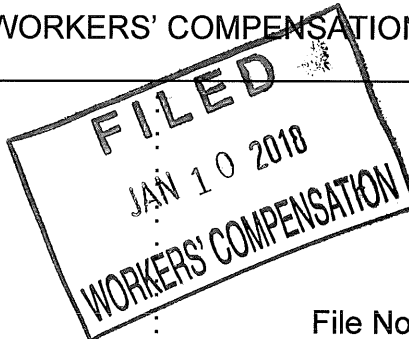
CARING HEARTS HOME CARE, INC.,

Employer,

and

COMMERCE & INDUSTRY
INSURANCE COMPANY,

Insurance Carrier,
Defendants.



File Nos. 5062459, 5062460

ARBITRATION

DECISION

Headnotes: 1402.30, 1402.40,
1803, 2502, 3002

Claimant Ashley Earle filed two petitions in arbitration on September 22, 2016, alleging she sustained injuries to her right knee and back on July 21, 2015, File Number 5062460, and to her back on June 18, 2016, File Number 5062459, while working for the defendant, Caring Hearts Home Care, Inc. ("Caring Hearts"). Caring Hearts, and its insurer, the defendant, Commerce and Industry Insurance Company ("Commerce"), filed an answer in File Number 5062460 on September 30, 2016, admitting Earle had sustained a work injury, and filed an answer in File Number 5062459 on October 6, 2016, denying Earle had sustained a work injury.

An arbitration hearing was held on August 23, 2017, at the Division of Workers' Compensation, in Des Moines, Iowa. Attorney Martin Ozga represented Earle. Earle appeared and testified. Attorney Aaron Oliver represented Caring Hearts and Commerce. Michelle Hixson appeared and testified on behalf of Caring Hearts and Commerce. Joint Exhibits ("JE") 1 through 12, Exhibits 1 through 20, and Exhibits A through M were admitted into the record. The record was held open through October 25, 2017, for the receipt of post-hearing briefs and Exhibits N and 21. Exhibits N and 21 were received and admitted into the record, the briefs were also received, and the record was closed.

Before the hearing the parties prepared a hearing report listing stipulations and issues to be decided. Caring Hearts and Commerce waived all affirmative defenses.

FILE NO. 5062459

STIPULATIONS

1. An employer-employee relationship existed between Caring Hearts and Earle at the time of the alleged injury.
2. Temporary benefits are no longer in dispute.
3. If the injury is found to be a cause of permanent disability, the disability is an industrial disability.
4. At the time of the alleged injury, Earle was single and entitled to four exemptions.
5. The commencement date for permanent partial disability benefits, if any are awarded, is June 19, 2016.
6. Credits are not in dispute.
7. Costs have been paid.

ISSUES

1. Did Earle sustain an injury on June 18, 2016, which arose out of and in the course of her employment with Caring Hearts?
2. Is Earle a credible witness?
3. Is the alleged injury a cause of permanent disability?
4. If the alleged injury is found to be the cause of permanent disability, what is the extent of disability?
5. What is Earle's rate?
6. Is Earle entitled to payment of medical expenses?
7. Is Earle entitled to payment of an independent medical examination?
8. Should costs be awarded to either party?

FILE NO. 5062460

STIPULATIONS

1. An employer-employee relationship existed between Caring Hearts and Earle at the time of the alleged injury.
2. Temporary benefits are no longer in dispute.
3. If the injury is found to be a cause of permanent disability, the disability is a scheduled member disability to the right leg.
4. At the time of the alleged injury, Earle was single and entitled to four exemptions.
5. Prior to the hearing Earle was paid the benefits set forth in Exhibit 7.
6. Costs have been paid.

ISSUES

1. Did Earle sustain an injury on July 21, 2015, which arose out of and in the course of her employment with Caring Hearts?
2. Is Earle a credible witness?
3. Is the alleged injury a cause of permanent disability?
4. If the injury is found to be a cause of permanent disability, has Earle sustained a sequela back injury?
5. If the alleged injury is found to be the cause of permanent disability, what is the extent of disability?
6. If the alleged injury is found to be the cause of permanent disability, is the commencement date for permanency November 16, 2015 or November 25, 2015?
7. What is Earle's rate?
8. Is Earle entitled to payment of medical expenses?
9. Is Earle entitled to payment of an independent medical examination?
10. Are Caring Hearts and Commerce entitled to a credit under Iowa Code section 85.34?
11. Should costs be awarded to either party?

FINDINGS OF FACT

Earle graduated from high school in Maryland. (Transcript, page 14; Exhibits 16, p. 54; 17, p. 9) Following graduation she attended Iowa State University, and completed the requirements for a diploma in liberal studies with a focus on criminal science and a minor in sociology during the summer of 2016. (Tr., p. 14; Exs. 16, p. 54; 17, p. 10) Earle will receive her diploma when she pays her outstanding balance at Iowa State University. (Tr., p. 14) Earle is divorced and lives in Des Moines with her three children. (Exhibit 17, pages 6, 8) Earle is a smoker. (Tr., p. 65; Ex. 17, p. 29) At the time of the hearing Earle was thirty-three. (Tr., p. 14)

Earle has experience working as a physician scheduler, assistant manager, loan document specialist, fast food worker, and customer service representative. (Tr., p. 15; Exs. 16, pp. 55-56; 17, pp. 11-13) Earle currently works full-time as a workers' compensation adjuster for Nationwide Agribusiness. (Tr., p. 15; Exs. 16, p. 55; 17, p. 13)

Nationwide Insurance Company hired Earle on April 29, 2013, to work full time in the call center, where she answered calls from customers making changes in their insurance policies. (Tr., pp. 16, 72; Exs. 16, p. 55; 17, p. 13) After approximately nine months she went to Nationwide Advantage Mortgage and worked in the call center answering questions about mortgages. (Tr., p. 16; Ex. 17, p. 14) Approximately one year later, after Nationwide moved its mortgage business to Ohio, Earle had to find another job within the company and she went to work for Nationwide Agribusiness ("Nationwide"), as a senior claims assistant in workers' compensation. (Tr., p. 17) Earle has worked full-time for Nationwide entities since April 2013. (Tr., p. 72) She has worked in workers' compensation since late 2014 or early 2015.

As a senior claims assistant, Earle reviewed workers' compensation claims, contacted insureds, investigated the seriousness of the injuries, and assigned an adjuster to the case. (Tr., p. 17) Earle was promoted to the position of claims adjuster in November 2016. (Tr., p. 18) Earle is currently paid a salary of \$51,000 per year. (Tr., p. 18; Ex. 17, p. 17)

While she was working for Nationwide Earle applied for a part-time position with Caring Hearts as a home health aide. (Tr., p. 18; Exs. 16, p. 55; 17, p. 31) Earle started working for Caring Hearts on November 18, 2014. (Ex. 17, p. 30) Earle assisted consumers in their homes with cleaning, feeding, and other activities of daily living. (Tr., p. 19; Ex. 17, pp. 31-32) Earle worked for Caring Hearts ten to twenty hours per week and she earned \$10.00 per hour. (Tr., pp. 72-73; Ex. 17, pp. 32-33) Earle's work schedule varied each week. (Tr., p. 73; Ex. 17, p. 33)

This case concerns alleged injuries to Earle's right knee, lumbar spine, and thoracic spine. Earle received treatment for knee and lumbar spine complaints prior to her employment with Caring Hearts.

As a teenager Earle injured her left knee, and she received physical therapy and surgery. (Tr., pp. 22-23) Earle testified after receiving surgery she returned to her normal activities, running track, and playing basketball and softball. (Tr., p. 23)

During her deposition, Earle recalled she had received treatment for her right knee on two occasions before the July 21, 2015 incident. (Tr., pp. 65-66; Ex. 17, p. 21) At hearing Earle testified that after going through her medical records, she actually received treatment for her right knee on four occasions, once in 2008, twice in 2009, and once in 2011. (Tr., pp. 66-67; Ex. 17, 21-23)

During her deposition on March 27, 2017, Earle testified she received treatment for slips and falls, but she did not receive ongoing treatment. (Ex. 17, p. 21) Earle reported she sustained an injury to her knee while working for CDS Global, and for a slip and fall where she treated with William Maher, D.O., her family practitioner. (Ex. 17, p. 21) When questioned when the injury occurred, Earle testified, "I don't remember the date off the top of my head. I believe it's like, 2009, I think, I slipped and fell and just kind of bumped my knee At my residence" and relayed she attended one appointment with Dr. Maher. (Ex. 17, p. 22) During her deposition Earle was a poor historian and she did not recall the four visits she had with medical practitioners to treat right knee ailments.

The record reflects Earle attended an appointment on January 14, 2008, complaining her right knee had been giving out after hitting her knee on a pole at work. (JE 2, p. 4) Earle attended an appointment with Dr. Maher, on August 12, 2009, complaining of right leg pain following a slip and fall at work, causing her knee to feel unstable. (JE 3, p. 8) Earle testified she did not receive any follow-up care from Dr. Maher. (Tr., p. 26) On December 5, 2009, Earle sought emergency medical treatment at Mercy Hospital, complaining of locking and pain in her right knee that had occurred in the past. (JE 4, p. 42) On January 14, 2011, Earle attended an appointment with Patricia Fasbender, D.O., a family practice physician, after she fell at work and injured her right knee on a metal runner on the desk. (JE 3, p. 12, Tr., p. 27)

At hearing Earle denied receiving treatment for her right knee after the February 14, 2011 appointment, until July 21, 2015. (Tr., p. 28) Caring Hearts and Commerce note that from 2013 through 2015, Dr. Maher listed right knee pain as an active problem for Earle, citing to Joint Exhibit 3, pages 14, 16, 18, 20, and 22. (Defendants' Brief, p. 2) The record reflects Earle had a history of right knee pain, she received discrete treatment on four separate occasions for knee pain following slips and falls and contusions at home and work, and she did not receive any ongoing treatment for right knee pain after 2011. (JE 3) Earle's records document Dr. Maher treated her for a sore throat and occasional vomiting, pharyngitis, left foot tenderness after tripping over a cat, ear pain, a sore throat, and chest congestion, and left lower abdominal pain. (JE 3, pp. 15, 17, 19-23)

During her deposition Earle testified she received medical treatment for her back during one pregnancy. (Ex. 17, p. 25) Earle's medical records document she reported

having back pain in 2004 when she fell and landed against a corner of a shelf, in 2005, during a pregnancy in April 2008, and during a pregnancy in February 2011. (JE 1, p. 1; JE 2, p. 6; JE 5, p. 45)

In their post-hearing brief, Caring Hearts and Commerce aver Earle sought treatment for back pain in early 2015, without citing to the record. (Defendants' Brief at 3) Medical records from Earle's family practitioner, document she received treatment for left lower quadrant or abdominal pain, note she had some lower back pain and nausea related to the end of her menses in February 2015, and she attended an annual female wellness checkup in April 2015. (JE 3, pp. 22-28) The record supports Earle reported back pain related to her pregnancies and menses while treating with medical providers. The first report of non-pregnancy-related or menses-related back pain is in her records from January 2016. (Tr., p. 39; JE 11, p. 106) The record does not reflect Earle was experiencing ongoing back pain before her first alleged work injury on July 21, 2015.

On July 21, 2015, Earle arrived at the home of B., a female consumer of Caring Hearts, at 7:00 p.m. and brought B. pork chops to have with her dinner. (Tr., p. 28) Earle prepared B.'s food, including cutting her corn off the cob. (Tr., p. 28) Earle sat with B. at her table while B. ate. (Tr., p. 73) Earle testified,

[s]he started with the corn, and she started kind of exasperating [sic] on the corn. I kind of asked her if she was okay. She wasn't able to respond. She kind of has wheeling chairs around her dining room table, so when she didn't respond after I first said are you okay, I proceeded to get up. I planted my foot first on my right foot, but the chair kind of moved too, so I went one way and the chair went the other way. I think the top part of my body went another way. I immediately felt pain, but of course my number one concern was my client.

(Tr., p. 29) Earle relayed she patted B. on the back and she spit up the corn and she gave her a drink of water before contacting B.'s son. (Tr., p. 29) Earle testified she stayed with B. until 9:30 p.m. and iced her knee after she arrived at home. (Tr., p. 30)

Caring Hearts has a notebook for each consumer. The caregivers who work with the consumers prepare notes concerning each consumer, including the care provided to each consumer. Earle relayed she typically wrote a standard note of what she was going to do, and if something happened, like the coughing or choking incident, she would document it. (Tr., pp. 76-77) Earle documented the incident involving B. in B.'s notebook. (Tr., pp. 74-76) Earle did not document B. choked on corn. (Tr., p. 77) Earle documented "B[.] had a coughing fit about 7:30p.-7:45p. B[.] eating too fast. Please watch her so she slows down." (Ex. 4, p. 27) Earle testified B. is prone to coughing episodes because she has COPD. (Tr., p. 77)

Earle testified the next morning she called Caring Hearts to report her work injury and then sent an e-mail regarding her work injury from her Nationwide e-mail account.

(Tr., pp. 79-80; Ex. 5, p. 28) Earle reported B. choked while eating and Earle "tweaked" her knee while assisting B. (Ex. 5, p. 28; Tr., pp. 31, 78) Earle relayed her knee was "pretty swollen this morning and very painful." (Ex. 5, p. 28) Earle testified she did not contact Caring Hearts because when she arrived home it was late and she did not want to wake or disturb anyone. (Tr., pp. 78-79) A staff member of Caring Hearts answers the telephone twenty-four hours per day. (Tr., p. 79)

Earle sent Caring Hearts two e-mails on July 22, 2015, in the morning, and in the afternoon. (Tr., p. 80) In the notebook Earle documented B. had a coughing incident. (Tr., pp. 81-82) In the morning e-mail Earle reported B. was choking. (Tr., pp. 81-82) Earle testified B. was choking on corn and her breathing was labored for approximately twenty minutes. (Tr., p. 82) Earle stated she did not call 911 because B. had labored breathing often, and elected to call her son, and he came to B.'s residence to make sure she was fine. (Tr., p. 82)

Earle testified that when B. started to cough or choke she was a few feet away from her sitting at an oval-shaped table. (Tr., p. 84) B. was sitting at the head of the table, and Earle was sitting on the side of the table. (Tr., p. 84) Earle stated she could not reach B. where she was sitting, and "[s]ubsequently when I placed down on my right knee first, I felt – my right knee went one way; the chair kind of went the other. I don't think I was completely a hundred percent stable and balanced. I was just kind of rushing because it was an emergency situation. I felt immediate pain in my knee, but B[,] was my number one concern." (Tr., pp. 84, 85) Earle reported she was approximately two steps from B. at the time of the coughing or choking incident, sitting in a rolling chair on a linoleum floor. (Tr., p. 85)

Caring Hearts completed a First Report of Injury form and made an appointment for Earle with Doctors Now. (Ex. 6, p. 30; Ex. 17, p. 40) Earle testified, "I didn't have any issues with my right knee prior to the injury date of July 21st." (Tr., p. 37)

Earle attended an appointment with Amanda Dyvig, PA-C with Doctors Now, on July 22, 2015, complaining of right knee pain from an injury at work the evening before. (JE 6, pp. 50, 54) Dyvig documented Earle reported she had no similar problems in the past and she was injured when "turning to attend to a client in crisis and the motion twisted her knee." (JE 6, p. 50) Dyvig diagnosed Earle with a sprain or strain of the right knee or leg, ordered her to take Ibuprofen and Aleve, prescribed a splint, and imposed restrictions of avoiding kneeling, squatting, jumping, and running entirely, no lifting over the shoulder, from waist to shoulder, or below waist greater than twenty pounds using either arm, and no pushing or pulling greater than twenty pounds. (JE 6, pp. 51, 53, 55) During a follow-up visit on July 29, 2015, Dyvig documented Earle reported her symptoms were worse with movement, on the lateral side of her knee around to the anterior aspect. (JE 6, pp. 56, 60) Dyvig prescribed Relafen, ordered physical therapy, and continued Earle's restrictions. (JE 6, pp. 58-59, 61-62)

On August 12, 2015, Earle attended a follow-up appointment with David Stilley, M.D., with Doctors Now, complaining of constant sharp and shooting right knee pain

following a work injury. (JE 6, p. 63) Dr. Stilley continued Earle's physical therapy, prescribed Meloxicam, ordered Earle to wear a splint as directed, and imposed restrictions of avoiding kneeling and squatting entirely, and no lifting over shoulder, from waist to shoulder, or below waist greater than fifteen pounds. (JE 6, pp. 64-66)

The next day Earle attended an appointment with Carlos Moe, D.O., with Concentra Medical Centers, complaining of right knee pain. (JE 8, p. 81) Dr. Moe assessed Earle with an acute internal derangement of her right knee, prescribed Meloxicam and Oxycodone-Acetaminophen, recommended magnetic resonance imaging of the knee, and imposed a restriction of seated desk work only. (JE 8, pp. 82-85)

Earle underwent right knee magnetic resonance imaging. (JE 9, p. 89) The reviewing radiologist listed an impression of "[s]mall ill-defined region of edema in the superior and lateral aspect of Hoffa's fat pad likely related to impingement. There is no associated meniscal ligament or tendon pathology." (JE 9, p. 89)

Earle's care was transferred to Matthew Weresh, M.D., an orthopedic surgeon. (JE 10) Dr. Weresh examined Earle on September 8, 2015. (JE 10, p. 90) Earle relayed about seven weeks ago she was assisting patient who was "somewhat choking" and she lunged forward to help the patient and she felt a "pop or a give" in her right knee, and her knee had been sore since that time. (JE 10, p. 90) Dr. Weresh ordered x-rays and reviewed the magnetic resonance imaging. (JE 10, p. 91) Dr. Weresh listed an impression of "[r]ecent probable patellar subluxation with anterior knee pain," recommended physical therapy to work on quad strengthening, relayed Earle could wear a brace on her knee, and imposed a twenty pound lifting restriction and restrictions of no squatting or kneeling. (JE 10, pp. 92-93)

During a follow-up appointment on October 12, 2015, Dr. Weresh documented Earle was no longer limping, but reported she felt like her kneecap was not staying in place, and reported when it pops out she has to manually pop it back in. (JE 10, p. 94) Dr. Weresh listed an impression of bilateral patella alta, worse on the right, continued Earle's physical therapy to improve her quad strength and use of a knee brace, and found Earle could return to her caregiver position with restrictions of no bending, squatting, kneeling, or crawling. (JE 10, pp. 94, 96) Dr. Weresh informed Earle she had a chronic condition, "as both patellas are quite mobile." (JE 10, p. 94) Earle testified Dr. Weresh informed her she could have surgery to realign her patella, which could potentially benefit her, but it was "his opinion that this was more genetic and not [her] employer's responsibility." (Tr., p. 35)

On November 16, 2015, Earle returned to Dr. Weresh and relayed she was doing much better, but she continued to experience trouble getting into deep squatted positions and standing up from kneeling on the ground. (JE 10, p. 97) Pursuant to a request from Earle, Dr. Weresh lifted the restrictions, and he released her from care. (JE 10, pp. 97, 99)

Earle testified she was off work from Caring Hearts during the period of time she had restrictions, starting in August 2015, until she resumed working for a client, J., in December 2015. (Tr., pp. 34, 107) Earle was able to perform her duties at Nationwide during the time she had restrictions because her job is sedentary. (Tr., p. 34)

On January 5, 2016, Dr. Weresh responded to an inquiry from Commerce, requesting an impairment rating. (JE 10, p. 100) Dr. Weresh wrote:

[w]e have returned her to work at full duty. She has a genetic and preexisting likelihood of patellar immobility due to her genetic alignment, etc. This was a work related injury but does have some risk of continuing difficulty with this diagnosis. I do feel that she has returned back to MMI without any impairment and she is to follow up with us as needed. Her impairment at this point is 0.

(JE 10, p. 100)

Earle reported after Dr. Weresh released her she continued to have problems with her right knee. (Tr. pp. 36-37) Earle relayed her knee would give out at least once or twice per week during 2015 through 2016. (Tr., p. 37) Earle testified she contacted Commerce in early January 2016, and requested medical treatment on several occasions between January and April 2016, but she did not hear back from Commerce. (Tr., pp. 38-39, 88) Earle testified, "I'm still having difficulties with going from my knees or squatting and getting up." (Tr., p. 36)

Earle alleges she sustained a sequela injury to her lumbar spine while working for Nationwide on January 20, 2016. Earle testified,

I was getting up. At that time I was a senior claims assistant, so I was printing off documents to mail out to a claimant. And I was coming back from the printer, and at that point I was also training other new employees as well. And one of the new employees had a question, so I just kind of stepped into my cubicle, and she came over and came on my left side to ask me a question. I kind of turned to pivot to go ahead and answer her. My knee gave out, and I felt myself falling. I tried to stumble and catch myself but subsequently hit my back on the desk.

(Tr., p. 39) Earle relayed she hit her lower back, "mainly on the right side" and tried to treat her pain with over-the-counter medication. (Tr., p. 39) Earle testified she experienced swelling and bruising on her back. (Tr., p. 93) Earle has not filed a workers' compensation claim against Nationwide for the incident, and noted, "[i]t did occur there, but I knew it was in relation to my knee." (Tr., p. 92) Earle reported on January 23, 2016, she was working with a Caring Hearts client, J., and she was in so much pain "it was just becoming unbearable to do the job," and she went to urgent care after her shift. (Tr., p. 40)

Earle sought medical treatment with Jennifer Penisten, ARNP, with UnityPoint Clinic Urgent Care, on January 23, 2016, reporting right lower back pain radiating down the side of her right leg. (JE 11, p. 106) Penisten documented Earle relayed she has a bad right knee and she "tripped on the way to her office and wound up falling sideways on her right and hitting her back." (JE 11, p. 106) Earle denied having a history of chronic back pain, and reported difficulty sleeping due to the pain. (JE 11, p. 106) Penisten documented she believed Earle had a muscle strain, administered a Toradol injection, prescribed cyclobenzaprine, and released Earle to return to work. (JE 11, pp. 106, 108)

Earle denied that she told Penisten she tripped, and testified, "[m]y knee gave out. I think she must have misunderstood what I was saying. I'm falling backwards and trying to catch myself, and that was the way she took it, but I indicated it was related to a work comp injury." (Tr., pp. 41, 92) Earle acknowledged Penisten did not document any swelling, but relayed she started taking anti-inflammatories and icing her back immediately prior to seeking treatment a few days later. (Tr., pp. 93-94) Earle relayed she did not receive any additional treatment, and she continued to work for Caring Hearts. (Tr., pp. 43-44)

Earle contends she was next injured while working for Caring Hearts on June 18, 2016. R., a client of Caring Hearts, has a dog named Bruce who weighs fifteen pounds. On June 18, 2016, R. asked Earle to give Bruce a bath in the pet spa at her apartment. (Ex. 12, p. 40; Tr., pp. 45; 48) The pet spa contains a ramp to the tub. (Tr., p. 95) Earle testified Bruce did not like to walk up and down the ramp, and he would typically refuse to use it, so she did not use it on June 18, 2016. (Tr., pp. 95-96) Earle testified,

I was giving the dog a bath. I had done it previously before. And the little dog spa is kind of a really small kind of closed-up room, and as I was taking him out of the bath he kind of got spooked, and he kind of wiggled and jiggled, and he was wet. But he's a very older dog, so I didn't want to just drop him or let him go. And in trying to readjust and not drop him, I felt pain and tension in that kind of thoracic part of my back.

(Tr., pp. 46, 47)

Earle documented in R.'s Caring Hearts care notes, that on June 18, 2016, R. "asked if I would take Bruce for a bath @ pet spa." (Ex. C, p. 7) Earle documented "[d]uring Bruce [sic] bath I hurt my back while getting him out. Will notify Caring Hearts later." (Ex. C, p. 7)

During the hearing, the attorney for Caring Hearts and Commerce inquired, and Earle responded:

Q. This one is Exhibit C, page 7, and in this one you wrote that "During Bruce's bath I hurt my back while getting him out." Now, I thought you had already got him out of the tub and were holding onto him when he was

spooked. So did you injure your back while you were getting him out of the spa, or did you injure your back while he wiggled around when you were holding him?

A. I injured my back when he was wiggling around when I was holding him, as I took him out of the bath. I guess for me, I think, that's one motion. I'm taking him out. Until he's touched the ground, he's still in that same process.

(Tr., pp. 100-101)

Earle reported her work injury to her attorney, who reported it to the attorney for Caring Hearts and Commerce on June 20, 2016. (Ex. 10, p. 38; Tr., p. 101) Earle testified that she felt pain and pressure in her thoracic spine after the incident, and relayed her back would stiffen up if she slept wrong. (Tr., p. 50)

On June 27, 2017, Earle sent Caring Hearts an e-mail, noting she had reported the June 18, 2016 work injury to her attorney, and apologized for not contacting Caring Hearts directly. (Ex. 12, p. 40) Earle wrote:

[o]n my second shift with R[.] on 6/18, I injured my back while giving her dog Bruce a bath in the Pet Spa located in the building. At about 5pm, I was giving Bruce a bath, when it was completed I was taking him out of the tub with a towel and he began to move around. In trying not to drop him I must have twisted my back wrong and instantly felt pain in my lower back. I came back to R[.] and let her know and continued to work the remainder of shift. I then went to J[.]'s at 7 pm and continued to work there. J[.] gave me some Tylenol for my back while working. I worked my full shift on Sunday the 19th with J[.] as well. I was still in pain, but continued to complete my shift. When I called n on Wednesday 6/22 it was not related to the back injury, but I had a cold. I am still in pain, but wanted to clarify that the two were not related in regards to missing time. Per my attorney, AIG is aware of the incident in question.

(Ex. 12, p. 40) Earle testified the statement contains a typographical error in that the pain was in her middle back, not her lower back. (Tr., p. 104)

During her deposition, when asked about the incident, Earle testified, "[a]s I was bringing [Bruce] out, another person was bringing their dog in. It kind of startled him. He started wiggling. I tried not to drop him, and that's went I injured my thoracic part of my back." (Ex. 14, p. 60) Earle further testified she was uncertain who the person was, and noted "[t]hey didn't fully come in. They kind of came in. He barked. They shut the door and walked off." (Ex. 14, p. 60)

During cross-examination at hearing, the attorney for Caring Hearts and Commerce inquired about Earle's prior testimony and she responded as follows,

Q. At the top there, it says, quote, "As I was bringing him out, another person was bringing their dog in." So when I took your deposition, you were pretty specific that somebody was bringing their dog in, but now you're not sure?

A. No. I stated that the dog was spooked. There was a lot of people outside, and somebody may have come to the door. I wasn't looking. I just didn't want to drop the dog.

Q. If someone would have come in with their dog, wouldn't you have told him, I'm just about done or something like that?

A. There was no conversation between me and the other person. They popped in and popped out.

(Tr., pp. 99-100)

On July 7, 2016, Caring Hearts sent Earle an e-mail stating Caring Hearts has a policy that if there is an incident with a client the employee is to report it to the office within twenty-four hours. (Ex. 13, p. 41) Caring Hearts informed Earle that her failure to report her work injury was unacceptable. (Ex. 13, p. 41) Earle acknowledged she knew there was a policy that she was to report work injuries, but contends she never received a warning for the first injury with B. (Tr., p. 103) Earle signed the employee handbook containing the policy, acknowledging she had received and reviewed the handbook in May 2015. (Ex. B) Earle received a written warning as a result of the incident. (Ex. D, p. 9)

At the time of the hearing Earle reported she still has episodes with her middle or thoracic spine, but it is not her primary pain and she does not feel the pain every day like she does with her knee and lower back, but she still has issues from time to time. (Tr., p. 101)

Earle returned to Dr. Weresh on June 28, 2016, complaining of persistent knee pain. (JE 10, p. 101) Dr. Weresh examined Earle, noted she seemed "relatively comfortable with the examination," and assessed her with right knee patella alta with patellar instability. (JE 10, p. 101)

Following the appointment Dr. Weresh sent Caring Hearts and Commerce a letter, noting Earle's diagnosis continues to be "patella alta with patellar instability." (JE 10, p. 103) Dr. Weresh opined:

2. I think the connection between her current diagnosis and the work injury of July 21, 2015 is that with her patellar genetics and alignment she is at risk for patellar instability episodes. I think this is evident because she has had symptoms in her contralateral left knee and I think to have these symptoms in her right knee is quite plausible largely because of her genetics, her anatomy, her

increased laxity of her tissues, and her patella alta syndrome, all which are god given situations in her knee. I do not identify any structural changes on exam today. There is no effusion. Her MRI scan does not have a structural lesion that I can relate to the injury of July of 2015.

3. As to the incident in January of 2016 I do feel that the incidence of her knee giving way is from continued difficulties with her genetic structure of her knee with patella alta, etc., and that I think over time this overall shape to her knee is going to be at risk for that. This is very consistent with my message in my last note and given her height, her patella alta, and her laxity the fact that she had problems in her other knee I think she will be very prone to problems with this throughout her lifetime.

I reviewed her past x-rays, and on her Merchant view her patella sits very central in the groove. She does not have a lateral deviated patella. I think the problem with her patella is increased mobility so I think a lateral release or realignment procedure is not an obvious fix for this and my concern is that if she went through appropriate realignment procedure it may not change her symptoms much. I have shared that information with her.

(JE 10, pp. 103-04)

Earle worked with J., a client of Caring Hearts. In July 2016, Earle became involved in a political argument with J. involving Hillary Clinton. (Ex. D, p. 8; Tr., p. 52) J.'s family requested Earle not return to his home and Earle received a written warning. (Ex. D, p. 8; Tr., p. 53-54, 107) Earle did not care for J. after July 2016, and she continued to provide care only to R. through October 23, 2016. (Tr., pp. 54-56)

Commerce contacted Earle to provide a recorded statement regarding the incident involving Bruce. (Ex. 15) The adjuster asked Earle to describe the incident, and she responded:

[o]n, on that date, I arrived at my client's house, and she had a little, like it's a pug-ish dog, and she had asked me, as I've done previously, to take the dog out for a walk. And then she asked me if I would give him a bath. In, in her apartment, they have a [inaudible] spa, like a new building. So I took the dog down to the spa to give him a bath. Got him in the bath, got him all washed up. As I was taking him out of the bath, he started to kind of wiggle free to try to jump down; and since he was already wet, I was trying to catch him. And I kind of pivoted wrong, I turned, and I just had immediate pain going up my back.

(Ex. 15, p. 44) Earle described the pain as being in the middle part of her back. (Ex. 15, p. 44) During her interview Earle denied having a back injury or receiving any treatment for her back before July 2015. (Ex. 15, p. 47)

On September 8, 2016, Commerce informed Earle it was denying Earle's claim "because Ms. Earle has failed to present credible evidence of an injury arising out of her employment on June 18, 2016." (Ex. 1, p. 16)

Robin Sassman, M.D., conducted an independent medical examination for Earle in September 2016. (Ex. 1, p. 1) Dr. Sassman examined Earle and reviewed her medical records. (Ex. 1) Dr. Sassman assessed Earle with right knee pain, low back pain with radicular symptoms, and thoracic back pain. (Ex. 1, p. 8)

Dr. Sassman acknowledged Earle has a preexisting likelihood of patellar immobility due to her genetic makeup, but noted before the July 2015 work injury Earle did not have any limitations, and after the work injury where she twisted her knee, she had ongoing pain and limitations. (Ex. 1, p. 8) Dr. Sassman then opined she considered the work injury "to be a substantial aggravating factor in her current right knee status with the instability and recurrent giving out of the knee." (Ex. 1, p. 8)

Dr. Sassman further opined:

[w]ith regard to the low back, I would consider this to be a sequelae of the original injury that occurred on July 21, 2015. On January 23, 2016, Ms. Earle was at work when she turned and her right knee gave out. She subsequently fell hitting her low back on a chair. Although this happened at her other job at Nationwide, I would consider it to be a sequela of the original injury to her knee because had she not had the original knee injury, her knee would not have given out and she would not have fallen at that particular time.

With regard to the thoracic spine symptoms, it is my opinion that the injury that occurred in June of 2016 was directly and causally related to her thoracic spine symptoms. It was on this date that she was washing a dog for a client (which she had been instructed to do) and the dog was spooked by noise. In order to prevent the dog from falling she twisted and noted pain in the thoracic area. Because she denies having any symptoms in this area prior to the injury occurring, and the mechanism is consistent with her injury leads me to this conclusion.

(Ex. 1, p. 8) Dr. Sassman opined she did not believe Earle was at maximum medical improvement and recommended an orthopedic evaluation of the right knee, and thoracic and lumbar spine magnetic resonance imaging to evaluate for nerve root irritation from a disc issue or a compression fracture. (Ex. 1, pp. 8-9)

Dr. Sassman noted if Earle elected not to pursue additional treatment, she would place her at maximum medical improvement as of her last visit with Dr. Weresh on June 28, 2016. (Ex. 1, p. 9) Using the Guides to the Evaluation of Permanent Impairment (AMA Press, 5th Ed. 2001) ("AMA Guides"), Dr. Sassman opined, "[f]or the right knee, she has no ratable impairment for range of motion. For degenerative changes, according to Table 17-31 on page 544, she can be assigned 7% lower extremity impairment for the knee cartilage interval." (Ex. 1, p. 9) Dr. Sassman noted she did not provide impairment ratings for Earle's lumbar and thoracic spine because she was only asked to opine on causation for the lumbar and thoracic spine, and recommended restrictions. (Ex. 1, p. 9)

Earle injured her right foot in December 2016, when she hit a wall to avoid stepping on her cat. (JE 3, p. 36) An x-ray of her foot was normal, and she was placed in a cam walker. (JE 3, p. 37)

On January 31, 2017, Earle returned to Dr. Maher complaining of back pain for approximately one year. (JE 3, p. 38) Earle told Dr. Maher she injured her back by falling into a desk at work, and reported the pain radiates down her right leg. (JE 3, p. 38) Earle also complained of thoracic pain wrapping around both sides of her body, which she related to an injury on June 18, 2016, where her dog jerked while she was walking. (JE 3, p. 38) Dr. Maher ordered x-rays, and noted the imaging showed some minor scattered degenerative changes in the thoracic spine and noted there "may be a small amounts [sic] of facet arthritis in the lumbar spine." (JE 3, p. 38) Dr. Maher ordered physical therapy, prescribed a muscle relaxer, and noted he could consider ordering magnetic resonance imaging if Earle did not improve with conservative therapy. (JE 3, p. 38) Earle reported she did not receive physical therapy because Nationwide required her to pay for the visits up front and she did not have any money to pay for additional medical expenses. (Tr., p. 55)

In April 2016, Earle accepted \$2,000.00 from J. (Tr., p. 108) She planned to use \$1,500.00 toward her outstanding balance at Iowa State University. (Tr., p. 108) Caring Hearts terminated Earle's employment on May 11, 2017, for accepting \$1,500.00 from J. to help pay for school. (Exs. G, p. 13; 17, p. 77; Tr., pp. 56, 108-09) Earle relayed she knew it was against Caring Hearts' policy to accept money from clients. (Tr., p. 109) Earle signed the employee handbook containing the policy, acknowledging she had received and reviewed the handbook in May 2015. (Ex. B) The last date Earle worked for Caring Hearts was October 23, 2016, when R. moved out of town. (Tr., pp. 56, 107)

In July 2017, Dr. Sassman reexamined Earle, and issued a supplemental report. (Ex. 2) Dr. Sassman did not change her opinions on causation, and again recommended a second opinion from an orthopedic specialist for her right knee condition to determine if any other treatment options would benefit her, improve her symptoms and decrease her limitations, and thoracic and lumbar spine magnetic resonance imaging. (Ex. 2, p. 19) Using Table 17-31, on page 544 of the AMA Guides, Dr. Sassman assigned a seven percent lower extremity impairment for the right knee

cartilage interval, which she converted to a three percent whole person impairment. (Ex. 2, p. 19) For the lumbar spine, using Table 15-3, on page 384, Dr. Sassman placed Earle into DRE Lumbar Category III, and assigned a ten percent whole person impairment relative to the July 21, 2015 injury date. (Ex. 2, p. 19) For the thoracic spine, using Table 15-4, on page 389, Dr. Sassman placed Earle into DRE Thoracic Category III, and assigned a ten percent whole person impairment relative to the June 18, 2016 injury date. (Ex. 2, p. 19) Dr. Sassman recommended the same restrictions. (Ex. 2, p. 20)

Earle testified she saw her family doctor in July 2017, “[m]ainly it was low back pain.” (Tr., p. 106) Earle received lumbar spine magnetic resonance imaging in relation to the visit, and testified the imaging was normal. (Tr., p. 106) Joshua Kimelman, D.O., an orthopedic surgeon, reviewed the imaging and agreed the imaging was normal. (Ex. M, p. 31) Earle testified she received medical treatment for back pain on three occasions, after the January 2016 incident, once at the urgent care clinic, and twice with her family doctor. (Tr., pp. 106-07)

Dr. Kimelman performed an independent medical examination records review for Caring Hearts and Commerce. (Ex. M, p. 28) Dr. Kimelman opined,

[i]n Dr. Sassman’s report of September 28, 2016, there are multiple episodes of right knee problems sustained by Ms. Earle in 2009. She had right knee pain after falling at work. In [sic] January 14, 2011, she was seen by Dr. Patricia Fasbender for right knee pain at work that day after falling, and then another episode on July 21, 2015, injuring the right knee. I believe all of these injuries likely are a result of her local anatomy as indicated by Dr. Weresh and that there was no structural damage done to the knee and that the recurrent pattern of falling was secondary to the inherent instability of her right knee. She had an MRI on August 19, 2015 that showed a small ill-defined region of edema in the superior and lateral aspect of Hoffa’s fat pad; however, this is not a structural injury. Then, on September 8, 2016, Dr. Weresh diagnosed her with probable patellar subluxation with anterior knee pain and was placed on light duty.

Interestingly, she complains of thoracic spine symptoms in June of 2016, secondary to the injury incurred while washing the dog for a client; however, the Workers’ Compensation incident report specifically notes that she injured her back while giving the dog, Bruce, a bath in the pet spa. It was her lower back including the lumbar and lumbosacral area, not the thoracic area, so there is some miscommunication, assuming that the report is in error and that it is the thoracic spine that was injured. Again, in Dr. Sassman’s report, she does not identify structural changes in the back, any post-traumatic injury or restriction of motion, weakness, radicular pain, etc., that would justify a rating of DRE, category 3, with a 10% impairment of the whole person for either the thoracic spine or the lumbar spine. Without seeing x-rays, I cannot comment on the assigned 7% lower

extremity impairment for the knee cartilage loss, except that the MRI did not indicate any cartilage damage, loss, etc., that would justify a 7% impairment as identified by Dr. Sassman on the table 17-31, page 44, that specifically would be related to cartilage loss of joint space on standing films. Additionally, Table 15-4, had no thoracic complaints, that would rate at 10%.

(Ex. M, p. 29) Dr. Kimelman's report contains a typographical error. Table 17-31 of the AMA Guides is found on page 544.

On August 16, 2017, Dr. Kimelman examined Earle, reviewed her records and imaging, and took right knee x-rays. (Ex. M., pp. 30-32) Dr. Kimelman noted Earle had some atrophy in her right leg above the patella compared to the left. (Ex. M, p. 32) He also noted in a right-handed person, the right leg should be larger, rather than smaller. (Ex. M, p. 32) Dr. Kimelman diagnosed Earle with chronic low back pain, dorsal back pain, and recurrent subluxation of the right knee with patella alta and hypoplastic patella with deficient quadriceps strength. (Ex. M, p. 32) Dr. Kimelman disagreed with Dr. Sassman's rating, finding Earle had no loss of cartilage interval, finding she had at least four millimeters of cartilage interval. (Ex. M, p. 32) Dr. Kimelman's report does not provide his actual measurements. (Ex. M, pp. 30-34)

Earle denies that she told Dr. Kimelman she dislocated her right knee when she was on a dance team at Iowa State University. (Tr., pp. 25, 69-70) Earle testified, "I did talk with him about the things that I did through high school and college and how I was very active, but I don't recall any time that I had said specifically that my right knee gave out at any time during my dance career at Iowa State." (Tr., p. 25) Earle attended Iowa State as a full-time student from 2001 through 2006. (Tr., p. 25)

With respect to causation, permanency, and restrictions, Dr. Kimelman opined:

[r]egarding her knee, the answer is no. I disagree with Dr. Sassman's assessment that her knee is 7% impaired. Using Table 17-3, on page 526, of the AMA Guides to Evaluation of Permanent Impairment, 5th Edition, there is no loss of cartilage interval. Regarding her dorsal back pain, she has no restriction of motion. She has no radiculopathy. She has no structural changes, and therefore, as I indicated in my previous letter a DRE thoracic category 3 is 15-18% and requires ongoing neurologic impairment of the lower extremity related to a thoracolumbar injury, which she does not have. As regards to her rating regarding DRE 3 of the lumbar spine, that too would require significant signs of radiculopathy such as dermatomal pain or dermatomal distribution of sensory loss, loss of reflexes, loss of muscle strength or measured unilateral atrophy above or below the knee or a history of a herniated disc or a fracture. She has no herniated disc on the MR. She has no loss of reflexes or weakness, and I would place her at a DRE category 1 for both thoracic and lumbar spine, which is 0% impairment.

(Ex. M, pp. 33-34) Dr. Kimelman's report again contains a typographical error. Dr. Kimelman cites to Table 17-3, on page 526, regarding loss of cartilage interval. Table 17-3 is found on page 527, and involves the calculation of whole person impairments from lower extremity impairments. AMA Guides, p. 527. Table 17-3 does not reference loss of cartilage interval.

Earle testified at hearing she still has issues with her right knee. (Tr., pp. 57-58) Earle relayed she experiences pain in the front part of her right knee along the lateral side up into her thigh, and she has issues with her right knee dislocating. (Tr., p. 58) At times she has to manually hit it back in. (Tr., p. 58) Earle stated that her knee gives way approximately twice a month or so, but she never knows when that is going to occur. (Tr., pp. 58-59)

With respect to her low back, Earle testified it still tightens up and is painful. (Tr., p. 59) Earle reported that she sometimes experiences shooting pain that goes through her right leg a "couple of times a month" and if she does not sleep right she wakes up in pain. (Tr., p. 59) She stated she has similar problems in her thoracic spine, and stated that pain is worse in her low back. (Tr., p. 60) Earle reported her pain affects her job at Nationwide because she sits in a chair. (Tr., p. 60) Earle has an ergonomic chair that assists her back, and she takes walks and breaks to stretch and readjust herself. (Tr., p. 60) At the time of the hearing Earle was taking cyclobenzaprine and tramadol prescribed by Dr. Maher. (Tr., p. 60)

Earle relayed before her work injuries enjoyed dancing, and since her injuries she is no longer able to dance. (Tr., p. 63) Earle spends forty-five minutes to an hour working on her children's hair and reported her legs squirm and relayed it is difficult for her to do their hair. (Tr., p. 64) Her youngest daughter also has attention deficit disorder and weighs forty pounds. (Tr., p. 64) When Earle's daughter has an outburst, she does not have the ability to pick her up and hug her. (Tr., p. 64)

Dr. Sassman was deposed following the hearing. (Ex. 21) Dr. Sassman again opined Earle's July 2015 work injury was a substantial aggravating factor to her right knee condition. (Ex. 21, p. 21) Dr. Sassman testified when she examined Earle, she took an x-ray, which demonstrated Earle had a cartilage space of three millimeters, which gave rise to the rating of seven percent, using Table 17-31, page 544, of the AMA Guides. (Ex. 21, pp. 18-19) Dr. Sassman produced the film which was taken and printed off the CareView System, which is the Iowa Clinic's x-ray system, on the date she examined Earle. (Ex. 21, pp. 34-35) Dr. Sassman testified in the CareView System she can measure cartilage intervals, using an objective measurement. (Ex. 21, p. 35) Dr. Sassman testified she measured the medial and lateral cartilage interval, and "[m]edially, which is the inside of the knee, it was 3.8 millimeters, and then laterally, it was 3.07 millimeters." (Ex. 21, p. 35) Dr. Sassman's measurements are documented on Exhibit 1 to her deposition, which is a copy of the x-ray. (Ex. 21)

Dr. Sassman testified Earle had some back issues when she was pregnant, but resolved with delivery. (Ex. 21, p. 7) Dr. Sassman testified it is common for women to

have back pain during pregnancy, which resolves after giving birth. (Ex. 21, pp. 32-33) Dr. Sassman denied knowing Earle had back pain in 2005, 2008, 2011, and 2015. (Ex. 21, p. 8)

CONCLUSIONS OF LAW

I. Arising Out of and in the Course of Employment, Causation and Permanency

To receive workers' compensation benefits, an injured employee must prove, by a preponderance of the evidence, the employee's injuries arose out of and in the course of the employee's employment with the employer. 2800 Corp. v. Fernandez, 528 N.W.2d 124, 128 (Iowa 1995). An injury arises out of employment when a causal relationship exists between the employment and the injury. Quaker Oats v. Ciha, 552 N.W.2d 143, 151 (Iowa 1996). The injury must be a rational consequence of a hazard connected with the employment, and not merely incidental to the employment. Koehler Elec. v. Willis, 608 N.W.2d 1, 3 (Iowa 2000). The Iowa Supreme Court has held, an injury occurs "in the course of employment" when:

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

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

Caring Hearts and Commerce aver Earle is not a credible witness, warranting dismissal of her claims. Earle rejects the assertion. When assessing witness credibility, the trier of fact "may consider whether the testimony is reasonable and consistent with other evidence, whether a witness has made inconsistent statements, the witness's appearance, conduct, memory and knowledge of the facts, and the witness's interest in the [matter]." State v. Frake, 450 N.W.2d 817, 819 (Iowa 1990). At the time of her alleged work injuries, Earle was working for Nationwide in the area of workers' compensation. Earle has an obvious interest in this case, given she is seeking workers' compensation benefits.

The claimant bears the burden of proving the claimant's work-related injury is a proximate cause of the claimant's disability and need for medical care. Ayers v. D & N Fence Co., Inc., 731 N.W.2d 11, 17 (Iowa 2007); George A. Hormel & Co. v. Jordan, 569 N.W.2d 148, 153 (Iowa 1997). "In order for a cause to be proximate, it must be a 'substantial factor.'" Ayers, 731 N.W.2d at 17. A probability of causation must exist, a mere possibility of causation is insufficient. Frye v. Smith-Doyle Contractors, 569 N.W.2d 154, 156 (Iowa Ct. App. 1997). The cause does not need to be the only cause, [i]t only needs to be one cause." Armstrong Tire & Rubber Co. v. Kubli, 312 N.W.2d 60, 64 (Iowa 1981).

The question of medical causation is "essentially within the domain of expert testimony." Cedar Rapids Cmty. Sch. Dist. v. Pease, 807 N.W.2d 839, 844-45 (Iowa 2011). The deputy commissioner, as the trier of fact, must "weigh the evidence and measure the credibility of witnesses." Id. The trier of fact may accept or reject expert testimony, even if uncontroverted, in whole or in part. Frye, 569 N.W.2d at 156. When considering the weight of an expert opinion, the fact-finder may consider whether the examination occurred shortly after the claimant was injured, the compensation arrangement, the nature and extent of the examination, the expert's education, experience, training, and practice, and "all other factors which bear upon the weight and value" of the opinion. Rockwell Graphic Sys., Inc. v. Prince, 366 N.W.2d 187, 192 (Iowa 1985).

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

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

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

A. July 21, 2015 Right Leg Injury

1. Prior Injuries to the Right Leg

Caring Hearts and Commerce avers Earle falsely testified during her deposition that she received treatment for her right knee on two occasions before the July 21, 2015 incident. (Defendants' Brief, pp. 2, 14) During her deposition, Earle recalled she had

received treatment for her right knee on two occasions before the July 21, 2015 incident. (Tr., pp. 65-66; Ex. 17, p. 21) At hearing Earle testified that after going through her medical records, she actually received treatment for her right knee on four occasions, once in 2008, twice in 2009, and once in 2011. (Tr., pp. 66-67; Ex. 17, 21-23).

During her deposition on March 27, 2017, Earle testified she received treatment for slips and falls, but she did not receive ongoing treatment. (Ex. 17, p. 21) Earle revealed she sustained an injury to her knee while working for CDS Global, and for a slip and fall where she treated with Dr. Maher. (Ex. 17, p. 21) When questioned when the injury occurred, Earle testified, "I don't remember the date off the top of my head. I believe it's, like, 2009, I think, I slipped and fell and just kind of bumped my knee At my residence" and revealed she attended one appointment with Dr. Maher. (Ex. 17, p. 22) During her deposition Earle was a poor historian and she did not recall the four visits she had with medical practitioners to treat her right knee ailments.

The record reflects Earle attended an appointment on January 14, 2008, complaining her right knee had been giving out after hitting her knee on a pole at work. (JE 2, p. 4) Earle attended an appointment with Dr. Maher on August 12, 2009, complaining of right leg pain following a slip and fall at work, causing her knee to feel unstable. (JE 3, p. 8) Earle testified she did not receive any follow-up care from Dr. Maher. (Tr., p. 26) On December 5, 2009, Earle sought emergency medical treatment at Mercy Hospital, complaining of locking and pain in her right knee that had occurred in the past. (JE 4, p. 42) On January 14, 2011, Earle attended an appointment with Dr. Fasbender, after she fell at work and injured her right knee on a metal runner on the desk. (JE 3, p. 12, Tr., p. 27)

At hearing Earle denied receiving treatment for her right knee after the February 14, 2011 appointment, until July 21, 2015. (Tr., p. 28) Caring Hearts and Commerce note that from 2013 through 2015, Dr. Maher listed right knee pain as an active problem for Earle, citing to Joint Exhibit 3, pages 14, 16, 18, 20, and 22. (Defendants' Brief, p. 2) The record reflects Earle had a history of right knee pain, she received discrete treatment on four separate occasions for knee pain following slips and falls and contusions at home and work, and she did not receive any active, ongoing treatment for right knee pain after 2011. (JE 3) During the visits in question, Dr. Maher treated Earle for a sore throat and occasional vomiting, pharyngitis, left foot tenderness after tripping over a cat, ear pain, a sore throat, and chest congestion, and left lower abdominal pain. (JE 3, pp. 15, 17, 19-23)

While testifying concerning her preexisting right knee problems, I did not observe Earle engage in any furtive movements, and her eye contact and rate of speech were both appropriate. I do not find Earle's report that she received treatment for her right knee on two occasions, when it was actually four, troubling. I found Earle's testimony at hearing concerning the prior treatment she received for her right knee reasonable and consistent with the other evidence I believe.

2. The July 21, 2015 Incident

In their post-hearing brief, Caring Hearts and Commerce aver Earle's statements and testimony are inconsistent as to whether B. had choked or coughed, contemporaneous documents do not mention a right knee injury, and she failed to report the incident that evening. (Defendants' Brief at 4) I do not find the argument persuasive.

The record reflects B. had COPD, which affected her breathing. Whether B. was coughing or choking is immaterial. The records support B. was struggling while eating, which was impacting her airway. While Earle's documentation in the caregiver notes the night of the incident was brief, she documented the incident.

Earle testified she was a few feet away from B. and she could not reach her, requiring her to raise and move from her wheeled chair on the side of the table. Earle consistently reported she was sitting at a table on a chair with wheels at the time of the incident. (Tr., p. 84) Caring Hearts and Commerce aver Earle testified "she was not sitting across from B[.] at the table." (Defendants' Brief at 5) Earle testified B. "would just be like more at the head of the table, and I was subsequently on the side." (Tr., p. 84) There was no evidence presented to the contrary at hearing.

Caring Hearts and Commerce challenge Earle's alleged delay in reporting the incident as well. At the time of the incident Earle worked full-time for Nationwide, and part-time for Caring Hearts. Earle testified she left B.'s home around 9:30 p.m., and she returned to work at Nationwide the next morning. Earle reported the incident the next morning, within Caring Hearts' twenty-four hour reporting policy. I do not find the defendants' argument persuasive.

While testifying concerning the incident involving B., I did not observe Earle engage in any furtive movements, and her eye contact and rate of speech were both appropriate. I do not find the alleged "inconsistencies" support a finding Earle is not a credible witness. I found Earle's testimony at hearing concerning the incident involving B. reasonable and consistent with the other evidence I believe.

3. Causation and Permanency

Earle had a history of right knee problems before she commenced her employment with Caring Hearts. (Tr., pp. 66-67; Ex. 17, 21-23). She has also been diagnosed with right knee patella alta with patellar instability, a genetic condition. (JE 10, p. 103) Three physicians have provided opinions regarding causation, Dr. Weresh, the treating orthopedic surgeon, Dr. Sassman, an occupational medicine physician who performed an independent medical examination for Earle, and Dr. Kimelman, an orthopedic surgeon who performed an independent medical examination for Caring Hearts and Commerce. I find Dr. Sassman's opinion more persuasive than the opinions of Drs. Weresh and Kimelman.

Doctors Now provided the initial treatment to Earle. Dyvig examined Earle the day after the injury and imposed restrictions. (JE 6, pp. 51, 53, 55) Dyvig continued the restrictions on July 29, 2015, and Dr. Stilley also imposed restrictions on August 12, 2015. (JE 6, pp. 56-62)

On August 13, 2015, Earle's care was transferred to Dr. Moe with Concentra. (JE 8, p. 81) Dr. Moe also imposed a restriction of seated work only. (JE 8, pp. 82-85) Earle received right knee magnetic resonance imaging after her visit with Dr. Moe.

In September 2015, Dr. Weresh, examined Earle, reviewed her imaging, listed an impression of a recent probable patellar subluxation with anterior knee pain, recommended physical therapy and continued use of a knee brace, and imposed restrictions. (JE 10, pp. 90-93) Dr. Weresh continued to treat Earle and informed her he believed her condition was likely going to be a chronic problem because her patellas are quite mobile. (JE 10, p. 94) During her November 16, 2015 appointment with Dr. Weresh, Earle requested Dr. Weresh lift her restrictions so she could return to work for Caring Hearts. (JE 10, p. 97) Dr. Weresh lifted Earle's restrictions and released her from care. (JE 10, pp. 97, 99)

Dr. Weresh responded to an inquiry from Commerce on January 5, 2016, requesting an impairment rating. (JE 10, p. 100) Dr. Weresh wrote:

[w]e have returned her to work at full duty. She has a genetic and preexisting likelihood of patellar immobility due to her genetic alignment, etc. This was a work related injury but does have some risk of continuing difficulty with this diagnosis. I do feel that she has returned back to MMI without any impairment as she is to follow up with us as needed. Her impairment at this point is 0.

(JE 10, p. 100)

On June 28, 2016, following the alleged incident in January 2016, Dr. Weresh examined Earle. (JE 10, pp. 103-04) Dr. Weresh again diagnosed Earle with patella alta with patellar instability, did not identify any structural lesions when reviewing her imaging, and opined the January 2016 "incidence of her knee giving way is from continued difficulties with her genetic structure of her knee" and will be prone to problems throughout her lifetime. (JE 10, pp. 103-04)

Dr. Sassman examined Earle, reviewed her imaging, and took additional x-rays in September 2016. (Ex. 1) Dr. Sassman recognized Earle has a preexisting likelihood of patellar immobility due to her genetic makeup. (Ex. 1, p 8) Dr. Sassman noted before the July 2015 work injury Earle did not have any limitations, and after the work injury where she twisted her knee, she had ongoing pain and limitations, and opined she considered the work injury "to be a substantial aggravating factor in her current right knee status with the instability and recurrent giving out of the knee." (Ex. 1, p. 8) The evidence presented at hearing is consistent with Dr. Sassman's finding. The record

evidence does not support Earle had ongoing pain or limitations with respect to her right knee prior to the July 21, 2015 work injury. Using the AMA Guides, Dr. Sassman assigned a seven percent permanent impairment rating for degenerative changes "for the knee cartilage interval." (Ex. 1, p. 9)

In August 2017, Dr. Kimelman examined Earle, reviewed her records and imaging, and took right knee x-rays. (Ex. M., pp. 30-32) Dr. Kimelman noted Earle had some atrophy in her right leg above the patella compared to the left. (Ex. M, p. 32) He also noted in a right-handed person, the right leg should be larger, rather than smaller. (Ex. M, p. 32) Dr. Kimelman disagreed with Dr. Sassman's rating, finding Earle had no loss of cartilage interval, finding she had at least four millimeters of cartilage interval. (Ex. M, p. 32) Dr. Kimelman's report does not provide his actual measurements. (Ex. M, pp. 30-34)

Dr. Sassman was deposed following the hearing. (Ex. 21) Dr. Sassman again opined Earle's work injury was a substantial aggravating factor to her right knee condition. (Ex. 21, p. 21) Dr. Sassman testified when she examined Earle, she took an x-ray, which demonstrated Earle had a cartilage space of three millimeters, which Dr. Sassman used to assign the seven percent rating using Table 17-31, page 544, of the AMA Guides. (Ex. 21, pp. 18-19) Dr. Sassman produced the film which was taken and printed off the CareView System, which is the Iowa Clinic's x-ray system, on the date she examined Earle, which is attached to Exhibit 21. (Ex. 21, pp. 34-35) Dr. Sassman testified in the CareView System she can measure cartilage intervals, using an objective measurement. (Ex. 21, p. 35) Dr. Sassman testified she measured the medial and lateral cartilage interval, and "[m]edially, which is the inside of the knee, it was 3.8 millimeters, and then laterally, it was 3.07 millimeters." (Ex. 21, p. 35) Dr. Sassman's measurements are documented on Exhibit 1 to her deposition, which is a copy of the x-ray. (Ex. 21)

Dr. Kimelman did not provide his actual measurements of the medial and lateral cartilage intervals of Earle's right knee. He did not testify at hearing. Dr. Sassman testified by deposition concerning the actual, objective measurements she made of the cartilage interval of Earle's right knee. Based on the record evidence and the objective findings presented by Dr. Sassman, I conclude her opinion is the most persuasive.

B. January 20, 2016 Sequela Lumbar Spine Injury

1. Prior Injuries to the Back

Caring Hearts and Commerce allege Earle provided false statements and testimony concerning treatment she received for her back prior to the July 21, 2015 incident. In her recorded statement Earle denied receiving treatment for a back condition before July 2015. (Ex. 15, p. 47) During her deposition Earle testified she received medical treatment for her back during one pregnancy. (Ex. 17, p. 25) Earle's medical records reveal she reported having back pain in 2004, when she fell and landed

against a corner of a shelf, in 2005, during a pregnancy in April 2008, and in February 2011, during a pregnancy. (JE 1, p. 1; JE 2, p. 6; JE 5, p. 45)

In their post-hearing brief, Caring Hearts and Commerce aver Earle sought treatment for back pain in early 2015, without citing to the record. (Defendants' Brief at 3) Medical records from Earle's family practitioner, document she received treatment for left lower quadrant or abdominal pain, noted she had some lower back pain and nausea related to the end of her menses in February 2015, and she attended an annual female wellness checkup in April 2015. (JE 3, pp. 22-28) The record supports Earle reported back pain related to her pregnancies and menses while treating with medical providers. The first report of non-pregnancy-related or menses-related back pain is in her records from January 2016. (Tr., p. 39; JE 11, p. 106) The record does not reflect Earle was experiencing ongoing back pain before January 20, 2016.

2. Account of the January 20, 2016 Incident

Earle testified on January 20, 2016,

I was getting up. At that time I was a senior claims assistant, so I was printing off documents to mail out to a claimant. And I was coming back from the printer, and at that point I was also training other new employees as well. And one of the new employees had a question, so I just kind of stepped into my cubicle, and she came over and came on my left side to ask me a question. I kind of turned to pivot to go ahead and answer her. My knee gave out, and I felt myself falling. I tried to stumble and catch myself but subsequently hit my back on the desk.

(Tr., p. 39) Earle relayed she hit her lower back, "mainly on the right side" and tried to treat her pain with over-the-counter medication. (Tr., p. 39) Earle testified she experienced swelling and bruising on her back. (Tr., p. 93)

Earle sought treatment with Penisten, complaining of right lower back pain radiating into her right leg on January 23, 2016. (JE 11, p. 106) Caring Hearts and Commerce challenge Earle's account of the injury, noting Penisten did not document any swelling in Earle's back. (Defendants' Brief, p. 7; JE 11, p. 106) At hearing Earle acknowledged Penisten did not document any swelling, but relayed she started taking anti-inflammatories and icing her back immediately prior to seeking treatment a few days later. (Tr., pp. 93-94) I do not find her testimony troubling. Penisten assessed Earle with a muscle strain, administered a Toradol injection, and released Earle to return to work without restrictions. (JE 11, pp. 106, 108)

Caring Hearts and Commerce further challenge Earle's testimony because at hearing she testified her right knee "'dislocated again' merely while she was standing in her cubicle and pivoting to visit with a co-worker," when records from her first medical visit document she "tripped on the way to her office." (Defendants' Brief, p. 7) Earle denied that she told Penisten she tripped, and testified, "[m]y knee gave out. I think she

must have misunderstood what I was saying. I'm falling backwards and trying to catch myself, and that was the way she took it, but I indicated it was related to a work comp injury." (Tr., pp. 41, 92) I again do not find Earle's testimony regarding this appointment troubling.

Earle did not receive any additional treatment for her low back pain until January 31, 2017, when she attended an appointment with Dr. Maher. (JE 3, p. 38) Dr. Maher documented Earle informed him she injured her back when "she sort of fell into a desk." (JE 3, p. 38) Dr. Maher's record is consistent with Earle's testimony. However, this record and her testimony differ from Dr. Sassman's recollection of how Earle described the work injury to her.

In her report Dr. Sassman documented Earle sustained an injury to her lumbar spine when her right knee gave out and she struck her back on her chair. During Dr. Sassman's deposition following the hearing, the defendants' attorney inquired, and Dr. Sassman responded, as follows,

Q. Describe for me how Ms. Earle told you she hurt her back in that incident.

A. She indicated that she was at her job at Nationwide, and she went to go sit down and pivoted, and her right knee went out. She tried to catch herself from falling and fell into her chair. After that happened, she noted immediate pain in the low back.

(Ex. 21, p. 11) As discussed by Caring Hearts and Commerce in their post-hearing brief, Earle's testimony at hearing regarding the circumstances leading to her injury differs from Dr. Sassman's report and testimony. (Defendants' Brief, p. 7) No effort was made by Earle to correct Dr. Sassman's report. Dr. Sassman relayed throughout her deposition Earle had reported she fell into her chair. (Ex. 21, pp. 13-14, 21) No effort was made by Earle to correct Dr. Sassman's testimony during her deposition. I find this inconsistency concerning the circumstances leading to the alleged injury troubling.¹ I do not find Earle's testimony credible concerning the circumstances leading to the alleged January 20, 2016 sequela injury reasonable and consistent with the other evidence I believe. Earle has not established she sustained a sequela injury to her lumbar spine in January 2016.

C. June 18, 2016 Thoracic Spine Injury

Earle alleges she sustained a work injury to her thoracic spine on June 18, 2016. Earle documented in R[.]'s care notes on the date of the alleged injury, "[d]uring Bruce

¹ Caring Hearts and Commerce further contend Earle's testimony that she requested medical treatment from Commerce on several occasions, and that her private health insurer required her to pay for medical expenses up front is false. (Defendants' Brief 6) Caring Hearts and Commerce did not present any evidence supporting this assertion at hearing. I do not find these arguments persuasive.

bath I hurt my back while getting him out. Will notify Caring Hearts later.” (Ex. C, p. 7) Earle sent Caring Hearts an e-mail on June 27, 2017, describing the incident as follows:

[o]n my second shift with R[.] on 6/18, I injured my back while giving her dog Bruce a bath in the Pet Spa located in the building. At about 5pm, I was giving Bruce a bath, when it was completed I was taking him out of the tub with a towel and he began to move around. In trying not to drop him I must have twisted my back wrong and instantly felt pain in my lower back. I came back to R[.] and let her know and continued to work the remainder of shift. I then went to J[.]’s at 7 pm and continued to work there. J[.] gave me some Tylenol for my back while working. I worked my full shift on Sunday the 19th with J[.] as well. I was still in pain, but continued to complete my shift. When I called in on Wednesday 6/22 it was not related to the back injury, but I had a cold. I am still in pain, but wanted to clarify that the two were not related in regards to missing time. Per my attorney, AIG is aware of the incident in question.

(Ex. 12, p. 40) During the hearing Earle testified the statement contains a typographical error in that the pain was in her middle back, not her low back. (Tr., p. 104) The record does not reflect Earle made any attempt to correct the statement prior to the hearing. I find this troubling, considering the totality of the evidence, including the inconsistencies between Earle’s testimony concerning her alleged lumbar spine injury, and the information she provided to Dr. Sassman, the physician she retained to conduct an independent medical examination.

In her answers to interrogatories, Earle documented she reported the incident to “Tim Snobley” with Caring Hearts on June 20, 2016. (Ex. 17, p. 65) Earle did not directly report the incident to “Tim Snobley” or anyone else from Caring Hearts on June 20, 2016. (Ex. 17, p. 65; Tr., pp. 101-02) Earle reported her work injury to her attorney, and he relayed the information to Caring Hearts and Commerce. (Tr., p. 101; Ex. 10, p. 38)

During direct examination at hearing in September 2017, Earle testified, “as I was taking [Bruce] out of the bath he kind of got spooked, and he kind of wiggled and jiggled, and he was wet. But he’s a very older dog, so I didn’t want to just drop him or let him go. And in trying to readjust and not drop him, I felt pain and tension in that kind of thoracic part of my back.” (Tr., p. 47)

Earle testified during her deposition in March 2017, “[a]s I was bringing [Bruce] out, another person was bringing their dog in. It kind of startled him. He started wiggling. I tried not to drop him, and that’s went I injured my thoracic part of my back.” (Ex. 17, p. 60) Earle further testified she was uncertain who the person was, and noted “[t]hey didn’t fully come in. They kind of came in. He barked. They shut the door and walked off.” (Ex. 17, p. 60) Earle’s deposition testimony differs from her testimony during direct examination, in that she did not mention another person came into the spa who spooked or startled Bruce.

During cross-examination at hearing, the attorney for Caring Hearts and Commerce inquired about Earle's prior testimony and she responded as follows,

Q. At the top there, it says, quote, "As I was bringing him out, another person was bringing their dog in." So when I took your deposition, you were pretty specific that somebody was bringing their dog in, but now you're not sure?

A. No. I stated that the dog was spooked. There was a lot of people outside, and somebody may have come to the door. I wasn't looking. I just didn't want to drop the dog.

Q. If someone would have come in with their dog, wouldn't you have told him, I'm just about done or something like that?

A. There was no conversation between me and the other person. They popped in and popped out.

(Tr., pp. 99-100) While she was testifying, I did not find Earle's testimony credible. She denied making the statement. Earle was very specific concerning the incident in her deposition. She did not allege she was confused during her deposition, or provide any other explanation for the inconsistency.

Based on all of the evidence, I do not find Earle's account of the incident credible. Earle has not established she sustained an injury to her thoracic spine on June 18, 2016, arising out of and in the course of her employment with Caring Hearts.

D. Medical Expenses

Earle seeks to recover medical expenses set forth in Exhibit 20 for treatment of the alleged thoracic spine injury from June 18, 2016, and the alleged sequela lumbar spine injury. Given my findings that she failed to meet her burden of proof concerning the thoracic spine injury and sequela lumbar spine injury, Earle is not entitled to recover the medical expenses she seeks.

II. Rate

Earle avers the rate for the July 21, 2015 date of injury is \$539.55. Caring Hearts and Commerce aver the rate is \$207.98. Earle contends her rate should be determined under Iowa Code section 85.36(9), and Caring Hearts and Commerce aver Earle's rate should be determined under Iowa Code section 85.36(6).

"The compensation to be received by an injured employee is based on 'weekly earnings' at the time of injury." Swiss Colony, Inc. v. Deutmeyer, 789 N.W.2d 129, 134 (Iowa 2010). The term "weekly earnings" is defined in Iowa Code section 85.36 as,

gross salary, wages, or earnings of an employee to which such employee would have been entitled had the employee worked the customary hours for the full pay period in which the employee was injured, as regularly required by the employee's employer for the work or employment for which the employee was employed.

Iowa Code section 85.36 sets forth several methods for determining an injured employee's compensation or rate. Mercy Med. Ctr. v. Healy, 801 N.W.2d 865, 870 (Iowa Ct. App. 2011).

Earle contends her employment from Caring Hearts and Nationwide should be used in calculating her weekly rate under Iowa Code section 85.36(9). Caring Hearts and Nationwide aver Earle's rate should be calculated under Iowa Code section 85.36(6). Iowa Code section 85.36(9), provides:

[i]f an employee earns either no wages or less than the usual weekly earnings of the regular full-time adult laborer in the line of industry in which the employee is injured in that locality, the weekly earnings shall be one-fiftieth of the total earnings which the employee has earned from all employment during the twelve calendar months immediately preceding the injury.

In Deutmeyer, the claimant worked forty to forty-five hours per week for Webber Metals, and thirty hours per week for Swiss Colony. Deutmeyer was severely injured while working for Swiss Colony and argued he was a part-time employee of Swiss Colony, and his wages at both Webber Metals and Swiss Colony should be used in calculating his weekly rate under Iowa Code section 85.36(9). The deputy commissioner found Deutmeyer was a part-time employee and calculated his weekly rate according to Iowa Code section 85.36(9).

The Iowa Supreme Court noted, whether an employee works forty hours per week is not the sole criterion for determining whether the employee "earns less" than similar laborers in the employee's field, and found if the Iowa Legislature "[h]ad intended to establish a forty-hour week as standard for full-time employment, it could have done so." Deutmeyer, 789 N.W.2d at 135 (citing King v. City of Mt. Pleasant, 474 N.W.2d 564, 566 (Iowa 1991); Hornby v. State, 559 N.W.2d 23, 25 (Iowa 1997)). The court held "[Iowa Code] section 85.36(9) is applicable only where a claimant earns less than the usual weekly earnings of a full-time adult laborer in his or her 'line of industry.'" Id. The court found the commissioner observed there was "no evidence" of the 'usual weekly earnings' of laborers in Deutmeyer's field in the record" and found the commissioner's rate calculation under Iowa Code section 85.36(9) was not supported by substantial evidence. Id. The court then remanded the matter for the agency to determine the proper rate under the statute.

Caring Hearts paid Earle bi-weekly, and she earned \$10.00 per hour. Exhibits 18 and N document the hours Earle worked during the twelve-month period prior to her

work injury. (Exs. N; 18) Earle did not work more than 20.50 hours in any two-week period during the twelve-month period before her work injury. (Exs. N, 18, p. 58) During the fourteen weeks prior to her work injury Earle earned weekly average earnings of \$88.06 per week from Caring Hearts. During the year before her work injury, she earned weekly average earnings of \$70.85.

During the defendants' direct examination of Hixson, Hixson agreed ten to twenty hours per week was "typical for a part-time caregiver in [her] company." (Tr., p. 114) Hixson further testified, "[i]t is written in our handbook that no hours are guaranteed specifically because we cannot determine what will happen with the client at any given time" and responded "[a]ll of the employees that work for us are considered part-time whether they work full-time or not." (Tr., p. 114) No information was presented regarding earnings of other employees of Caring Hearts working as caregivers.

Finding Earle's average weekly earnings of \$70.85 in line with the usual weekly earnings of a full-time adult laborer in her line of industry under Deutmeyer would lead to an absurd and unjust result. At the time of Earle's work injury the minimum wage in Iowa was \$7.25 per hour. A person working twenty hours per week, earning \$7.25 per hour, would gross average weekly earnings of \$145.00. Earle worked part-time for Caring Hearts, as confirmed by Hixson. Hixson testified all Caring Hearts' employees work part-time. Iowa Code section 85.36(6) provides the proper analysis for determining Earle's rate.

Exhibits N and 18 contain pay records for Earle. For the year before her work injury, Earle earned \$38,328.92 from Nationwide. Dividing this amount by fifty results in gross average weekly earnings of \$766.58. For the year before her work injury, Earle earned \$3,542.40 from Caring Hearts. Dividing this amount by fifty results in gross average weekly earnings of \$70.85. Adding the two amounts together results in gross average weekly earnings of \$837.43. Using the ratebook in effect at the time of her work injury, Earle's rate is \$539.55.²

III. Extent of Disability

As discussed above, I found Dr. Sassman's causation opinion regarding the right knee condition most persuasive. Knee impairments are included as scheduled losses. Iowa Code § 85.34(2)(o); Caylor v. Employers Mut. Cas. Co., 337 N.W.2d 890, 894 (Iowa Ct. App. 1983) The schedule provides a maximum award of 220 weeks of compensation. Iowa Code § 85.34(2)(o). Dr. Sassman assigned an impairment rating of seven percent to the right lower extremity. I did not receive information that would persuade me to deviate from the schedule. Therefore, under the schedule, Earle is entitled to 15.4 weeks of permanent partial disability benefits, at the rate of \$539.55 per week.

² <https://www.iowaworkcomp.gov/pdfs> (2015-2016 Ratebook).

IV. Commencement Date

Earle contends the commencement date for permanency is November 25, 2015. Caring Hearts and Commerce aver the commencement date for permanency is November 16, 2015. Dr. Weresh released Earle to full-duty without restrictions on November 16, 2015.

“Compensation for permanent partial disability shall begin at the termination of the healing period.” Evenson v. Winnebago Indus., Inc., 881 N.W.2d 360, 372 (Iowa June 3, 2016) (quoting Iowa Code § 85.34(2)). Under the statute, healing period benefits continue:

until the employee has returned to work or it is medically indicated that significant improvement from the injury is not anticipated or until the employee is medically capable of returning to employment substantially similar to the employment in which the employee was engaged at the time of injury, whichever occurs first.

Iowa Code § 85.34(1). Under the statute, November 16, 2015, is the commencement date for permanency.

V. Independent Medical Examination

Earle seeks to recover the cost of Dr. Sassman’s independent medical examination. Caring Hearts and Commerce aver Earle should not be entitled to recover any costs, including the cost of the independent medical examination. After receiving an injury, the employee, if requested by the employer, is required to submit to examination at a reasonable time and place, as often as reasonably requested to a physician, without cost to the employee. Iowa Code § 85.39. If an evaluation of permanent disability has been made by a physician retained by the employer and the employee believes the evaluation is too low, the employee “shall, upon application to the employer and its insurance carrier, be reimbursed by the employer the reasonable fee for a subsequent examination by a physician of the employee’s own choosing.” Id. Dr. Sassman performed an independent medical examination of Earle after Dr. Weresh opined Earle had not sustained a permanent impairment. Under the statute, Earle is entitled to recover the cost of the independent medical examination.

In the case of Des Moines Area Regional Transit Authority v. Young, the Iowa Supreme Court held:

[w]e conclude section 85.39 is the sole method for reimbursement of an examination by a physician of the employee’s choosing and that the expense of the examination is not included in the cost of a report. Further, even if the examination and report were considered to be a single, indivisible fee, the commissioner erred in taxing it as a cost under administrative rule 876-4.33

because the section 86.40 discretion to tax costs is expressly limited by Iowa Code section 85.39.

867 N.W.2d 839, 846-47 (Iowa 2015). Dr. Sassman's bill for the September 2016, independent medical examination and her report is itemized. (Ex. 19, p. 90) Dr. Sassman charged \$1,256.00 for the examination, and \$161.50 for an x-ray she reviewed for her report of Earle's right knee. There was no evidence presented at hearing challenging the cost of Dr. Sassman's bill as excessive. Under Young, Earle is entitled to recover the \$1,256.00 cost of Dr. Sassman's independent medical examination. The \$161.50 cost of the x-ray Earle is also entitled to recover. Id.

VI. Costs

Earle seeks to recover the \$100.00 filing fee for the petition, and \$1,648.50 cost of Dr. Sassman's report. (Ex. 19, p. 87) Rule 876 IAC 4.33(6), provides

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

The administrative rule expressly allows for the recovery of the remaining costs Earle seeks to recover. Using my discretion, I find the \$100.00 filing fee, and the \$1,648.50 cost of Dr. Sassman's report should be assessed to Caring Hearts and Commerce.

ORDER

Claimant shall take nothing with respect to File Number 5062459.

With respect to File Number 5063460:

The claimant is awarded fifteen point four (15.4) weeks of permanent partial disability benefits, at the rate of five hundred thirty-nine and 55/100 dollars (\$539.55), commencing on November 16, 2015.

Defendants shall pay accrued benefits in a lump sum with interest on all received weekly benefits pursuant to Iowa Code section 85.30.

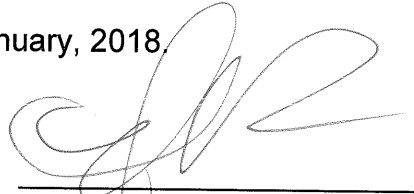
Defendants are entitled to a credit for benefits previously paid.

Defendants shall provide the medical care ordered in this decision.

Defendants shall reimburse the claimant one hundred and 00/100 dollars (\$100.00) for the filing fee, one thousand two hundred fifty-six and 00/100 dollars (\$1,256.00) for the cost of Dr. Sassman's independent medical examination, the cost of one hundred sixty-one and 50/100 dollars (\$161.50) for the cost of the x-ray, and one thousand six hundred forty-eight and 50/100 dollars (\$1,648.50) for Dr. Sassman's report.

Defendants shall file subsequent reports of injury as required by this agency pursuant to rules 876 IAC 3.1(2) and 876 IAC 11.7.

Signed and filed this 10th day of January, 2018.



HEATHER L. PALMER
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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.