

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JO ANN KONCHAN,

Claimant,

vs.

ENGLISH VALLEY NURSING CARE CENTER,

Employer,

and

BERKSHIRE HATHAWAY HOMESTATE INSURANCE CO.,

Insurance Carrier,  
Defendants.

File Nos. 5068222, 5068223

ARBITRATION DECISION

Headnote: 1803

**STATEMENT OF THE CASE**

Jo Ann Konchan seeks workers' compensation benefits from the defendants, employer English Valley Nursing Care Center (English Valley) and insurance carrier Berkshire Hathaway for alleged injuries to the body as a whole:

- Under File No. 5068222, on May 5, 2016; and
- Under File No. 5068223, on May 15, 2016.

The agency consolidated the petitions into one case and set the case for hearing. Pursuant to agency rules and orders, the undersigned presided over an arbitration hearing on March 18, 2021, held via internet-based video. Konchan participated personally and through attorney Joanie Grife. The defendants participated by and through attorney Robert Gainer.

**ISSUES**

Under rule 876 IAC 4.19(3)(f), the parties jointly submitted a hearing report defining the claims, defenses, and issues submitted to the presiding deputy commissioner. The hearing report was approved and entered into the record via an order because it is a correct representation of the disputed issues and stipulations in this case. The parties identified the following disputed issues in the hearing report:

- 1) Did Konchan sustain an injury arising out of and in the course of her employment with English Valley?
- 2) Is Konchan entitled to temporary total disability (TTD) or healing period (HP) benefits?
- 3) What is the nature and extent of permanent disability, if any, caused by the alleged injury?
- 4) What is the commencement date for permanent partial disability benefits, if any are awarded?
- 5) Is Konchan entitled to reimbursement for medical expenses?
- 6) Is Konchan entitled to future care?
- 7) Is Konchan entitled to recover the cost of an independent medical examination (IME) under Iowa Code section 85.39?
- 8) If Konchan is entitled to workers' compensation benefits, are the defendants entitled to a credit?
- 9) Is Konchan entitled to taxation of the costs against the defendants?

### **STIPULATIONS**

In the hearing report, the parties entered into the following stipulations:

- 1) An employer-employee relationship existed between Konchan and English Valley at the time of the alleged injuries.
- 2) At the time of the alleged injuries:
  - a) Konchan's gross earnings were four hundred fifty-three and 55/100 dollars (\$453.55) per week.
  - b) Konchan was single.
  - c) Konchan was entitled to one exemption.

The parties' stipulations in the hearing report are accepted and incorporated into this arbitration decision. The parties are bound by their stipulations. This decision contains no discussion of any factual or legal issues relative to the parties' stipulations except as necessary for clarity with respect to disputed factual and legal issues.

### **FINDINGS OF FACT**

The evidentiary record in this case consists of the following:

- Joint Exhibits (Jt. Ex.) 1 through 14;
- Claimant's Exhibits (Cl. Ex.) 1 through 13;
- Defendants' Exhibits (Def. Ex.) A through L; and
- Hearing testimony by Konchan.

After careful consideration of the evidence and the parties' post-hearing briefs, the undersigned enters the following findings of fact.

### **1. Education and Work History.**

Konchan was 52 years of age at the time of hearing. (Hrg. Tr. p. 14) She began working at age 16 after she dropped out of high school. (Hrg. Tr. pp. 14, 17) Konchan earned her GED in the year 2000. (Hrg. Tr. p. 15)

Konchan has a varied work history. She worked as a server and hostess in casinos. (Hrg. Tr. pp. 17–18) This entailed typical duties for such positions, including serving food and drinks, clearing tables, and moving tables and chairs to accommodate parties of larger sizes. (Hrg. Tr. pp. 17–18)

Konchan worked as a paraeducator assisting a student with a disability (Hrg. Tr. p. 19) The student's disability limited mobility such that she had to help him transfer to a wheelchair, use the restroom, and get in and out of vehicles. (Hrg. Tr. p. 19) This involved lifting students weighing as much as seventy-five pounds when providing assistance. (Hrg. Tr. p. 19)

Scholl Homes hired Konchan as a service coordinator for contractor work on residences. (Hrg. Tr. p. 20) She was the point person who inspected homes for issues with plumbing, paint, trim, windows, etc. (Hrg. Tr. p. 20) The job required a lot of walking and travel as well as bending and stooping. (Hrg. Tr. pp. 20–21)

Konchan has held jobs as a janitor and housekeeper. (Hrg. Tr. pp. 21–22) These jobs entailed dusting, sweeping, mopping, moving furniture, and carrying boxes. (Hrg. Tr. pp. 21–22) At one point she owned and operated her own cleaning business, Jo Mama Cleaning, which serviced clients with big warehouses. (Hrg. Tr. p. 22)

Konchan also worked with people with disabilities in their homes. (Hrg. Tr. p. 22) She assisted them with bathing, getting dressed, cooking, cleaning, laundry, with range of motion, using stairs, going to the bathroom, taking medication, and communicating with nurses. (Hrg. Tr. pp. 22–23)

At Riverbend, Konchan performed factory work for Amana refrigeration. (Hrg. Tr. p. 23) She worked twelve-hour shifts, during which she frequently bent and stooped when processing parts on the assembly line. (Hrg. Tr. 23) Konchan also had to lift over thirty pounds. (Hrg. Tr. p. 23) After Konchan sustained a work injury, Riverbend assigned her to perform light-duty work at Second Mile. (Hrg. Tr. p. 24)

Konchan's next job was at Home Instead, again working at the homes of people who had disabilities. (Hrg. Tr. p. 25) She assisted with cooking, cleaning, bathing, getting dressed, laundry, and taking medications. (Hrg. Tr. p. 25) The work was physically demanding because Konchan had to help clients in the bathroom, shower, and bed. (Hrg. Tr. p. 25) She also had to help some to walk with a gait belt. (Hrg. Tr. p. 25)

In 2015, Konchan earned her license as a certified nursing assistant (CNA) at Iowa Valley Community College. (Hrg. Tr. p. 15) She worked as a CNA at St. Francis and Optima. (Hrg. Tr. p. 26) English Valley hired her as a full-time CNA on September 17 of that same year. (Cl. Ex. 5, p. 39) Konchan worked between forty and sixty hours per week, earning about \$11.00 an hour. (Hrg. Tr. p. 28) Her job duties included:

- Bathing individuals while they were in bed, including helping them to roll over during the bath;
- Helping individuals get dressed;
- Feeding individuals;
- Helping individuals perform wheelchair transfers;
- Helping individuals walk with a gait belt and walker or cane;
- Coordinating care with nursing and physical therapy; and
- Helping individuals with their range of motion.

(Cl. Ex. 5, p. 39; Hrg. Tr. p. 26)

On May 5, 2016, Konchan and a coworker were helping a resident get from the commode to her bed using a gait belt. (Hrg. Tr. pp. 31–32) The resident began to fall while they were lifting the resident up to put her in bed. (Hrg. Tr. p. 32) This caused Konchan to feel pain in her back and in the back of her left knee. (Hrg. Tr. p. 32) She credibly described the pain as “popping, burning, sharp, stabbing, and throbbing.” (Hrg. Tr. p. 32)

Konchan reported her injury to the director of nursing at English Valley. (Hrg. Tr. p. 32) She took three days off work because she was unable to get out of bed due to her pain level. (Hrg. Tr. pp. 32–33) Konchan had two scheduled days off as well. (Hrg. Tr. p. 32) She returned to work on May 10 and was physically able to perform her job duties. (Hrg. Tr. p. 33)

On May 15, 2016, Konchan and another coworker were helping a resident transfer from the commode to her wheelchair. (Hrg. Tr. p. 33) The resident asked Konchan to close the curtains. (Hrg. Tr. p. 33) Konchan stood upright and stepped back to close the curtains when she felt a pop and burning sensation in her back and the

back of her left knee. (Hrg. Tr. p. 33) She fell against the bed railing and to the ground. (Hrg. Tr. p. 33) Konchan was unable to get up. (Hrg. Tr. p. 33)

Konchan notified the director of nursing. (Hrg. Tr. p. 33) She was unable to finish her shift. (Hrg. Tr. p. 33) The defendants directed the care for Konchan's back. (Hrg. Tr. p. 34) After leaving work on May 15, 2016, Konchan never returned to work because English Valley discharged her effective November 15, 2016, due to her work restrictions. (Hrg. Tr. p. 28; Cl. Ex. 6)

Despite Konchan's ongoing and worsening symptoms she searched for work in earnest. (Cl. Ex. 8) However, she was unable to find a new job. Consequently, she applied for and was ultimately found eligible for disability benefits from the federal Social Security Administration (SSA). (Cl. Ex. 9)

## **2. Medical Treatment & IMEs.**

Konchan has a history of left-knee pain dating back years and prompted her to seek care from 2011 through 2014. (Jt. 2, pp. 4, 8, 30, 36; Hrg. Tr. p. 97) Her knee would regularly give out on her. (Jt. Ex. 2, pp. 9, 25) Konchan's knee problems date back to an injury she sustained as a teenager. (Jt. Ex. 2, p. 30) As recently as 2014, Konchan sought care for her knee because:

- It was giving out two to three times a week;
- Catching, popping, and clicking in the joint;
- Intense pain that worsened with walking, climbing stairs, and getting out of a car. (Jt. Ex. 2, pp. 30, 41a–41b)

On November 24, 2014, Konchan was in a car crash in which her vehicle was T-boned. (Jt. Ex. 3, p. 200) She went to the emergency room by ambulance with complaints of pain at a level of three on a scale from zero to ten in her left hip, neck, and abdomen. (Jt. Ex. 3, p. 200) Dr. Gregory Neyman noted, "She had an extensive workup including head, cervical spine and abd[omen]/pelvis CT scans all of which were reported as normal." (Jt. Ex. 2, p. 211)

There is an insufficient basis in the evidence from which to conclude Konchan sought care for complaints of back pain after this. It is more likely than not Konchan was not experiencing ongoing back pain from the November 24, 2014 car crash to May 5, 2016. The weight of the evidence establishes Konchan's back pain following the car crash was temporary and resolved.

There is no indication Konchan received care for her back or leg between May 5 and May 15, 2016. The defendants directed care after her May 15, 2016 incident at work. They sent her to Dr. Daniel Hogan, who noted "intolerable low back pain" that radiated into both legs, with her left-leg pain the worst of the two. (Jt. Ex. 4, p. 224) He

diagnosed Konchan with a low back strain and ordered magnetic resonance imaging (MRI). (Jt. Ex. 4, p. 229)

On June 1, 2016, Dr. Ernest Perea interpreted the MRI to be “completely reassuring” because it “show[ed] no neural foraminal stenosis, spinal stenosis, or impingement on nerves” and “mild, really quite pristine findings of [de]generation that is very, very mild.” (Jt. Ex. 4, p. 232) Dr. Perea opined, “I believe she has a huge psychological component to her pain and we will use standard of care and compassion and bring her along to recover completely.” (Jt. Ex. 4, p. 233) He prescribed aggressive physical therapy. (Jt. Ex. 4, p. 233)

On June 10, 2016, Dr. Perea noted “no acute injuries have been discerned” via x-ray or MRI. (Jt. Ex. 4, p. 235) He performed an eighteen bilateral point fibromyalgia workup and concluded it was “highly suspicious with 14 of 18 points positive for wincing pain possibly magnified or possibly due to discernible diagnosis such as an arthritis or fibromyalgia.” (Jt. Ex. 4, p. 235) Dr. Perea reached out to Dr. Lisa Schwiebert, Konchan’s family physician, to discuss care and requested that she test her for fibromyalgia and arthritis. (Jt. Ex. 4, p. 235) But Konchan refused fibromyalgia and rheumatoid arthritis workups by Dr. Schwiebert and opted for focused physical therapy instead. (Jt. Ex. 4, p. 237)

Konchan’s symptoms did not improve. During a June 24, 2016 follow-up exam with Dr. Perea she reported pain at a level of ten out of ten mainly focused over the lumbar/low back between L1 and S1. (Jt. Ex. 4, p. 239) Dr. Perea opined “neurological findings might be helpful, but she does not have any objective findings on her MRI of the low back.” (Jt. Ex. 4, p. 239) He referred Konchan for a second opinion with an orthopedic specialist “to see if we are missing anything.” (Jt. Ex. 4, p. 239)

On July 15, 2016, Konchan saw Dr. Benjamin MacLennan at Steindler Orthopedic Clinic. (Jt. Ex. 8, p. 304) Dr. MacLennan “[e]xplained that her x-rays and MRI are benign. No stenosis on the MRI.” (Jt. Ex. 8, p. 306) He recommended she return to Dr. Perea and see a pain psychologist for further evaluation and treatment. (Jt. Ex. 8, p. 306)

Dr. Perea ordered an electromyography (EMG)/nerve conduction study. (Jt. Ex. 4, pp. 242–43) The results showed “[n]o indication for radicular symptoms.” (Jt. Ex. 4, p. 246) On July 27, 2016, Dr. Perea found Konchan at maximum medical improvement (MMI) because he could “not opine with reasonable medical certainty that this is a work-related condition” due to the fact there were “no objective or structural changes or signs to explain her pain.” (Jt. Ex. 4, p. 246)

Dr. Schwiebert referred Konchan to the University of Iowa Hospitals and Clinics (UIHC) and Pain Centers of Iowa for care relating to her condition. (Jt. Ex. 7, p. 274) Konchan participated in physical therapy at UIHC, where they noted involuntary spasms on August 17, 2016. (Jt. Ex. 10, p. 311) Dr. Namrata Singh, a rheumatologist at UIHC, concluded her pain was “not consistent with autoimmune disease.” (Jt. Ex. 2, p. 44) Konchan received psychiatric care, multiple injections, medial branch blocks, and

radiofrequency ablations. (Jt. Ex. 2, pp. 45–199; Jt. Ex. 11, pp. 321–45) None of these treatments provided Konchan with relief for more than a short period of time. (Jt. Ex. 2, pp. 41b–199; Jt. Ex. 11, pp. 321–45)

Dr. John Kuhnlein performed an IME on Konchan on March 28, 2018, that included an in-person examination and review of medical records. (Cl. Ex. 1) Dr. Kuhnlein noted Konchan “relates no significant low back pain” before May of 2016 and noted her 2014 care following the car crash. (Cl. Ex 1, pp. 2, 6) He also noted in his report “she had long-standing left knee pain.” (Cl. Ex. 1, p. 3) This assessment is in line with the evidence regarding Konchan’s medical history. Thus, Dr. Kuhnlein’s opinion is based on an accurate understanding of Konchan’s preexisting pain complaints relating to her back and left leg.

With respect to Konchan’s falls, Dr. Kuhnlein states:

Ms. Konchan relates that she has had several falls as a result of spiking back pain that caused her leg to give way. She had episodes both on February 12, 2017, and April 13, 2017. She relates the February 12, 2017, incident caused her to fall down six steps and permanently worsened her back and leg symptoms.

(Cl. Ex. 1, p. 4)

In the years following Dr. Kuhnlein’s first IME, Konchan developed neck pain, tingling in both hands and feet, migraines, brain fog, shaking, facial drooping, and weakness and numbness in her right side. (Jt. Ex. 12, pp. 371a–371i) Konchan’s growing complaints resulted in her receiving care from Dr. Lara Lazarre, a neurologist with MercyOne in Iowa City. (Jt. Ex. 12, p. 371a) Dr. Lazarre initially treated Konchan’s headaches with Botox. (Jt. Ex. 12, pp. 371f–371g)

On July 14, 2020, Dr. Kuhnlein performed a second IME that included a review of medical records relating to Konchan’s care from December 2017 through May 21, 2019, and a physical examination. (Cl. Ex. 1, pp. 11–18) Dr. Kuhnlein then issued a second IME report on September 9, 2020. (Cl. Ex. 1, p. 11) Dr. Kuhnlein did not change his opinions on causation, when Konchan reached MMI, or her permanent impairment rating. (Cl. Ex. 1, pp. 18–19)

Konchan underwent a medical examination with defense expert Dr. Charles Wadle on June 5, 2020. (Def. Ex. C, p. 9) He reviewed her medical records and conducted an interview. (Def. Ex. C, pp. 9–15) Dr. Wadle stated he could not make a distinct mental health diagnosis with respect to Konchan’s condition. (Def. Ex. C, pp. 13–14) Thus, according to Dr. Wadle’s report, Konchan did not have a diagnosable mental health condition, let alone one caused by alleged falls at work in May of 2016. (Def. Ex. C, pp. 13–14) Dr. Wadle also opined Konchan had no permanent mental impairment under the Guides because she had no diagnosable mental health condition. (Def. Ex. C, p. 15)

On November 30, 2020, Dr. Lazarre noted, "During visit, it was apparent she has features of [Parkinson's disease,] which is likely complicating her overall health." (Jt. Ex. 12, p. 371f) In the records for Konchan's next appointment on December 30, 2020, Dr. Lazarre noted she "[h]as [Parkinson's disease], but unable to tolerate Sinemet. Wants to just focus on [physical therapy] and try a new med in a couple months." (Jt. Ex. 12, p. 371k)

On January 5, 2021, Konchan underwent a medical examination with defense expert Dr. Jeffrey Westpheling. (Def. Ex. A, p. 1) He performed a physical examination and reviewed medical records, then wrote a report. (Def. Ex. A, pp. 1–6) On the question of causation, Dr. Westpheling opined:

I do not believe [Konchan's] work activities at English Valley nursing care center on May 5, 2016 and/or May 15, 2016 caused or substantially aggravated, accelerated, worsened, or "lit up" [her] left knee and low back conditions. As noted by several examiners including myself, examination findings are not consistent with a known physiologic disorder nor explained on an organic basis based on test results including imaging and nerve function studies. [Konchan's] history is also inconsistent given that there is documentation in the medical record[s] of back complaints and significant left knee complaints prior to the work incidents of May 2016, although [she] denied during interview. Either way, given that her current complaints are not consistent with physical injuries to either the left knee or low back, I do not conclude that any prior conditions could have been substantially aggravated, accelerated, worsened, or "lit up" by the events of May 2016.

At the time of hearing, Konchan suffered from constant pain that is sharp, stabbing, throbbing, burning, and numbing. (Hrg. Tr. p. 72) She could do little to mitigate her pain level. (Hrg. Tr. p. 72) Moving made it worse. (Hrg. Tr. p. 72)

Konchan's pain significantly impacts her ability to sleep. (Hrg. Tr. p. 73) She is unable to sleep on her back or side because it causes her to feel a sensation of tingling, numbing, and burning. (Hrg. Tr. p. 73) Konchan often wakes up in a lot of pain during the night. (Hrg. Tr. p. 73) She typically is only able to sleep for two or three hours a night. (Hrg. Tr. p. 73) Konchan sometimes goes two or three days without sleeping. (Hrg. Tr. p. 74)

Konchan's activity is limited. She uses a walker or a cane to help her more safely move. (Hrg. Tr. p. 72) She has an accessible parking pass for her vehicle. (Hrg. Tr. pp. 72–73) Konchan can no longer go swimming, boating, dancing, zip-lining, or four-wheeling. (Hrg. Tr. p. 76) Her physical limitations also prevent her from doing the laundry, washing dishes, or cooking. (Hrg. Tr. p. 77)

## CONCLUSIONS OF LAW

In 2017, the Iowa legislature amended the Iowa Workers' Compensation Act. See 2017 Iowa Acts, ch. 23. The 2017 amendments apply to cases in which the date of an alleged injury is on or after July 1, 2017. Id. at § 24(1); see also Iowa Code § 3.7(1). Because the injury at issue in this case occurred before July 1, 2017, the Iowa Workers' Compensation Act in effect before the 2017 amendments applies. Smidt v. JKB Restaurants, LC, File No. 5067766 (App. Dec. 11, 2020).

### 1. Causation.

An employer covered by the Iowa Workers' Compensation Act must "provide, secure, and pay compensation according to the provisions of this chapter for any and all personal injuries sustained by an employee arising out of and in the course of the employment, and in such cases, the employer shall be relieved from other liability for recovery of damages or other compensation for such personal injury." Iowa Code § 85.3(1). "A claimant must prove by a preponderance of the evidence that an alleged injury for which the claimant is seeking workers' compensation benefits arose out of and in the course of employment." St. Luke's Hosp. v. Gray, 604 N.W.2d 646, 652 (Iowa 2000) (citing Quaker Oats Co. v. Ciha, 552 N.W.2d 143, 150 (Iowa 1996)). Establishing a mere possibility is not enough to satisfy this burden; a claimant must show it is more likely than not the alleged injury is related to the claimant's employment. See id.

"An injury 'arises out of' employment if there is a causal connection between the employment and the injury." Id. at 652 (citing Bailey v. Batchelder, 576 N.W.2d 334, 338 (Iowa 1998)). The Iowa Supreme Court has articulated a two-prong analysis for gauging causation under the Iowa Workers' Compensation Act: (1) factual or medical causation; and (2) legal causation. City of Cedar Rapids v. Bd. of Trustees of Mun. Fire & Police Retirement Sys. of Iowa, 572 N.W.2d 919, 922 (Iowa 1998). Here, the parties' dispute factual or medical causation.

"Whether an injury has a direct causal connection with the employment or arose independently thereof is essentially within the domain of expert testimony." IBP, Inc. v. Harpole, 621 N.W.2d 410, (Iowa 2001) (quoting Dunlavey v. Econ. Fire & Cas. Co., 526 N.W.2d 845, 853 (Iowa 1995)). The weight given an expert's opinion "may be affected by the completeness of the premise given the expert and other surrounding circumstances." Dunlavey, 526 N.W.2d at 853. The agency must weigh the evidence in a case and accept or reject an expert opinion based on the entire record. Id. For example, "When an expert's opinion is based upon an incomplete history, the opinion is not necessarily binding upon the [agency]." Id. The agency may accept or reject an expert opinion in whole or in part.

Throughout the course of Konchan's medical care, multiple doctors have been unable to diagnose the cause of her back and leg pain because of a lack of objective evidence supporting such a finding. Dr. Kuhnlein is the only expert to link her symptoms to the alleged work injuries in May of 2016. On the question of whether Konchan's

condition arose out of and in the course of her employment with English Valley, Dr. Kuhnlein opined:

Ms. Konchan relates that she has had several falls as a result of spiking back pain that caused her leg to give way. She had episodes both on February 12, 2017, and April 13, 2017. She relates the February 12, 2017, incident caused her to fall down six steps and permanently worsened her back and leg symptoms.

In Dr. Kuhnlein's 2020 report, his opinion on causation was unchanged. Thus, Dr. Kuhnlein's understanding of the cause of Konchan's falls in 2017 is based on her opinion regarding their cause as opposed to a complete understanding of her history of falls. As found above, Konchan told care providers in 2014 she was falling two to three times per month due to leg issues. Based on the contents of Dr. Kuhnlein's report, it does not appear he knew of Konchan's history of falling before May of 2016. It is more likely than not Dr. Kuhnlein adopted Konchan's opinion that her 2017 falls were the result of symptoms caused by the 2016 work injuries without knowledge of the fact she had fallen multiple times per month due to leg issues in 2014. This undermines Dr. Kuhnlein's opinion on causation, which is based on the belief Konchan's 2016 work injuries caused the 2017 fall that permanently aggravated her lumbar symptoms.

Konchan's worsening symptoms also negatively impact the persuasiveness of Dr. Kuhnlein's opinion on causation. Since May of 2016, Konchan developed neck pain, tingling in both hands and feet, migraines, brain fog, shaking, facial drooping, and weakness and numbness in her right side. No doctor has linked Konchan's increasingly worse symptomology to a 2017 sequela fall or the alleged 2016 work injuries. There is an insufficient basis in the evidence from which to conclude her worsening symptoms can be traced back to the fall in February 2017, which in Dr. Kuhnlein's opinion had only worsened her back and leg symptoms.

Defense expert Dr. Westpheling was aware of Konchan's history of falls and knee complaints because he reviewed the medical records for the care she sought due to those complaints. He opined, based on his examination and review of her medical records, there was no indication in the imaging or testing performed during her care that she sustained an aggravation of a preexisting condition in May of 2016. Because Dr. Westpheling had a more accurate understanding of Konchan's medical history, his opinion is more persuasive.

Moreover, the evidence shows it is more likely than not Konchan has Parkinson's disease. Dr. Lazarre noted suspicions she had Parkinson's disease on November 30, 2020. In the medical records for Konchan's December 30, 2020 appointment, Dr. Lazarre expressly states she has Parkinson's disease. Dr. Kuhnlein's records review ended with records from May 21, 2019. Thus, it appears he did not know of Konchan's subsequent diagnosis.

The evidence shows Konchan had troubles falling before the work injury and these problems gradually worsened as did her symptoms. There is an insufficient basis

in the record from which to conclude Konchan's issues falling are related to her work with English Valley. Her history of falls, increasingly worse symptoms, and subsequent diagnosis of Parkinson's disease make Dr. Kuhnlein's opinion on causation unpersuasive.

With respect to Konchan's mental injury claim, only one expert opined. That is Dr. Wadle. He concluded Konchan did not have a diagnosable mental health condition. He tied her mental issues to chronic pain. As discussed above, there is an insufficient basis in the evidence from which to conclude Konchan's ongoing and worsening pain complaints were caused by the alleged May 2016 falls while working at English Valley. Therefore, Konchan has not met her burden of proof on the question of causation with respect to her alleged mental injury.

For these reasons, Konchan has failed to meet her burden of proof. The evidence does not establish her May 2016 falls while working at English Valley were a substantial factor in causing Konchan's leg and back pain or mental condition. Because Konchan has not proven causation, this decision does not address the other issues disputed in this case except for that dealing with IME reimbursement.

## **2. IME.**

Konchan was not required to prevail on the question of causation under the pre-2017 amendments version of the Iowa Workers' Compensation Act to be entitled to reimbursement for an IME. Under the version of Iowa Code section 85.39 that governs this case, an injured employee is not required to prove the alleged injury arose out of and in the course of employment before the employer is responsible for reimbursement of IME costs. Dodd v. Fleetguard, Inc., 759 N.W.2d 133, 140 (Iowa App. 2008); see also Miracle v. UFP Tech., Inc., File No. 5056559 (App. Mar. 13, 2019). However, a claimant is only entitled to reimbursement for one IME for every disability rating obtained from a doctor of the defendants' choice. Larson Mfg. Co. v. Thorson, 763 N.W.2d 842, 861 (Iowa 2009).

Before September 1, 2021, the Commissioner recognized a distinction between a medical opinion on causation and one on the nature and extent of permanent disability when determining whether the cost of an IME may be reimbursed to the claimant under Iowa Code section 85.39. Barnhart v. John Deere Dubuque Works of Deere & Company, File No. 5065851, p. 2 (App. Mar. 27, 2020) (citing Reh v. Tyson Foods, Inc., File No. 5053428 (App. Mar. 26, 2018)); see also Phillips v. Kimberley Farms, Inc., File No. 5057945, p. 15 (Arb. Apr. 24, 2019) ("The Commissioner has made it abundantly clear that a medical opinion on some other issue such as causation or restrictions is not the equivalent of an impairment rating.") Under this agency precedent, an injured employee could only obtain reimbursement for an IME in response to an opinion on permanent impairment by an employer-chosen doctor. Id. No reimbursement was available if the employer-chosen doctor opined only on causation. Id.

On September 1, 2021, the Iowa Court of Appeals issued its opinion in Kern v. Fenchel, Doster & Buck, P.L.C., 966 N.W.2d 326 (Iowa App. 2021) (Table). The court

reversed an agency decision denying IME reimbursement because the employer-chosen doctor had opined only on causation and had not addressed what, if any, disability the claimant had sustained. Id. at \*2–\*5. In doing so, the court determined the agency had erroneously interpreted Iowa Code section 85.39 and Iowa Supreme Court precedent construing it. Id. The court concluded that an employer-chosen doctor’s opinion finding that a workers’ alleged injury or condition did not arise out of and in the course of the workers’ employment constitutes an opinion of no disability and the cost of an IME sought due to disagreement with such an opinion is reimbursable under section 85.39. Id.

Here, Dr. Perea opined he could not conclude with a reasonable degree of medical certainty Konchan’s pain complaints were caused by her May 2016 falls at work. After that, Dr. Kuhnlein performed his IME and issued a detailed report. Therefore, Konchan is entitled to reimbursement for the cost of Dr. Kuhnlein’s 2018 IME of three thousand eight hundred seventy-two and 50/100 dollars (\$3,872.50).

**ORDER**

Based on the above findings of fact and conclusions of law, it is ordered:

- 1) Konchan shall take no workers’ compensation benefits from this case.
- 2) The defendants shall reimburse Konchan three thousand eight hundred seventy-two and 50/100 dollars (\$3,872.50) for the reasonable expenses of Dr. Kuhnlein’s 2018 IME.
- 3) The parties shall be responsible for paying their own hearing costs.

Signed and filed this 16<sup>th</sup> day of February, 2022.

  
BENJAMIN G. HUMPHREY  
DEPUTY WORKERS'  
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Joanie Grife (via WCES)

Robert Gainer (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.