BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

ARIONNA LAWSON,	:	
Claimant,	:	File No. 19700566.01
vs.	:	
WENDY'S,	:	ARBITRATION DECISION
Employer,	:	
and	:	
ILLINOIS CASUALTY COMPANY,	:	Head Note Nos.: 1108.20, 1803
Insurance Carrier, Defendants.	:	

STATEMENT OF THE CASE

Arionna Lawson, the claimant, filed a petition in arbitration, seeking workers' compensation benefits from the defendants, employer Wendy's and insurance carrier Illinois Casualty Company (ICC). Under agency scheduling procedures and orders of the Iowa Workers' Compensation Commissioner, the undersigned presided over a hearing held via Internet-based video on December 11, 2020. Lawson appeared personally and by attorney James P. Hoffman. Wendy's appeared through employer representative Karla McCarthy, the general manager at the Wendy's restaurant where Lawson works, and both defendants appeared by attorney Christine E. Westberg Dorn.

ISSUES

Under rule 876 IAC 4.149(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 Lawson sustain an injury arising out of and in the course of her employment with Wendy's on November 2, 2019?

2) Did the alleged injury cause Lawson permanent disability?

3) Is Lawson entitled to reimbursement for the cost of an independent medical examination (IME) under Iowa Code section 85.39?

4) Is Lawson entitled to alternate care under Iowa Code section 85.27?

5) Are costs taxed against the defendants under Iowa Code section 86.40?

STIPULATIONS

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

1) An employer-employee relationship existed between Lawson and Wendy's at the time of the alleged work injury.

2) At the time of the stipulated injury:

   a. Lawson's gross earnings were two hundred forty-five and 91/100 dollars ($245.91) per week.

   b. Lawson was single.

   c. Lawson was entitled to two exemptions.

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.

FINDINGS OF FACTS

The evidentiary record in this case consists of the following:

- Joint Exhibits (Jt. Ex.) 1 through 2;
- Claimant's Exhibits (Cl. Ex.) 1 through 3;
- Defendants' Exhibits (Def. Ex.) A through G; and
- Hearing testimony by Lawson and McCarty.

After consideration of the evidentiary record, the undersigned makes the following findings of fact.

Lawson was 28 years old at the time of hearing. (Hrg. Tr. p. 10) She has been diagnosed with bipolar 1 disorder with psychotic features, depression, anxiety, post-traumatic stress disorder (PTSD), obsessive compulsive disorder (OCD), and attention deficit hyperactivity disorder (ADHD). (Jt. Ex. 1, pp. 1–3; Def. Ex. B, p. 2) Her conditions can affect her ability to sleep. (Jt. Ex. 1, pp. 1–3)

Wendy's is a national fast-food chain specializing in hamburgers, french fries, and Frosties. (Hrg. Tr. p. 11) It employed Lawson at a restaurant in Keokuk, Iowa. (Hrg. Tr. p. 10) Her job duties included cooking and working at the cash register. (Hrg. Tr. p. 10)

Lawson testified under oath during the hearing. (Hrg. Tr. pp. 10–35) So did McCarty, the general manager who hired her twice to work at Wendy's and was her supervisor at the time in question and the time of hearing. (Hrg. Tr. pp. 36–43) McCarty was not present at the restaurant during the events in question. (Hrg. Tr. p. 38; Def. Ex. A, p. 1) Her knowledge of the events is therefore generally secondhand.

No other Wendy's employees testified under oath in this case. Instead, the defendants included amongst their exhibits written statements obtained as part of the human resources investigation Wendy's conducted after Lawson complained to McCarty about the events in question, each signed by a Wendy's employee. (Def Ex. A) The assertions in the written statements are hearsay. The statements were not made under oath. None of the assertions contained in the statements have been subjected to cross-examination. For these reasons, they are generally less credible than Lawson's sworn testimony at hearing.

Wendy's had a policy of typically allowing its employees to take restroom breaks as needed. (Hrg. Tr. p. 20) An employee who must take a break must inform a manager so that their duties are performed during the break. (Hrg. Tr. pp. 20, 42) On the date in question, Lawson was working at Wendy's and experiencing her menstrual period. (Hrg. Tr. p. 10) She took three restroom and two smoke breaks during her shift. (Hrg. Tr. p. 19)

Kelsey Dupy was working at the same time as Lawson and Brandon Parker, a manager on duty that day. (Hrg. Tr. p. 12; Def. Ex. A, p. 5) She asked Lawson to use a tampon. (Hrg. Tr. p. 13; Def. Ex. A, p. 5) Dupy used the restroom without incident. (Hrg. Tr. p. 13; Def. Ex. A, p. 5)

Later that day, Lawson was cleaning near the cash register. (Hrg. Tr. p. 11) She asked Parker if she could go to the restroom to change her tampon. (Hrg. Tr. p. 11) Parker denied her request and did so again after she asked a second time. (Hrg. Tr. p. 12)

Because of Parker's denial, Lawson bled through her underwear and the black pants that are part of the standard Wendy's uniform. (Hrg. Tr. pp. 12) Lawson began to cry. (Hrg. Tr. p. 13) Coworkers laughed at Lawson and made fun of her. (Hrg. Tr. pp. 26–27)

Dupy told Lawson to go to the restroom despite Parker's denial. (Hrg. Tr. p. 13) Dupy covered Lawson's duties while she did so. (Def. Ex. A, p. 5) Lawson went to the restroom to clean up as best she could. (Hrg. Tr. p. 13) When Lawson returned from the restroom, Wendy's employees were still laughing and joking. (Hrg. Tr. p. 27)

Parker told her to go home for the day. (Hrg. Tr. p. 13) She noticed she had been clocked out. (Hrg. Tr. p. 13) Lawson asked Parker why he had clocked her out. (Hrg. Tr. p. 14) He told her that he did so because she went to the restroom without his permission. (Hrg. Tr. p. 14)

Lawson learned from coworkers at Wendy's that Parker found the events funny. (Hrg. Tr. p. 15) He laughed and made jokes about what happened. (Hrg. Tr. p. 15) Nonetheless, Parker later apologized in earnest for how he treated her. (Hrg. Tr. p. 14)

Lawson did not miss any work due to the events of that day. (Hrg. Tr. p. 24) She was not scheduled to work for a couple of days. (Hrg. Tr. p. 24) Lawson worked her next shift as scheduled. (Hrg. Tr. p. 24)

McCarty reviewed surveillance footage from the time in question here. (Hrg. Tr. p. 41–42) The defendants did not offer the video into evidence because the system automatically deletes footage after one week. (Hrg. Tr. p. 42) According to McCarty's testimony, the footage of the bun room she reviewed did not show multiple employees making fun of Lawson. It only showed her talking with Parker. (Def. Ex. A, p. 1) Assuming McCarty's summary of what the video showed, it does not undermine Lawson's sworn assertions sufficiently to discredit them.

The events made Lawson emotional. (Hrg. Tr. p. 14) She felt embarrassed and singled out. (Hrg. Tr. p. 14) They caused her nightmares that continued to the time of hearing. (Hrg. Tr. p. 14)

A few weeks after the events at Wendy's, Lawson spoke to her doctors at Keokuk Community Health Center about the issue because she felt she needed to resume taking medication for anxiety and depression. (Hrg. Tr. p. 19) She received a referral to Juli Graham, a psychiatrist. (Hrg. Tr. p. 26) No physician advised Lawson not to work due to the events of November 2, 2019. (Hrg. Tr. p. 29)

Steven Miller, M.S., performed an IME that included phone conversations with Lawson on September 3, 5, and 8, 2020. (Cl. Ex. 1, p. 2) There is an insufficient basis in the evidence from which to conclude Miller review medical records as part of the IME process. Likewise, there is no indication Miller knew of Lawson's preexisting conditions. Miller issued a report, entitled "Case Review," on September 10, 2020, in which he opined:

> Arionna Lawson is a 28-year-old, working mother of 3 children. On Nov. 2nd, 2019, she experienced a workplace trauma that will require her to make difficult emotional and psychological adjustments. The humiliation she suffered from the simple act of asking to use the restroom left her with strong negative emotions like anger, depression, anxiety and a fearfulness that has generalized to dreading her own menstrual periods. Fortunately, Ms. Lawson is comfortable with the psychotherapeutic environment and sees it as desirable in any plan to help her cope with the future.

> It is within a high degree of psychological certainty that the incident at Wendy's on Nov. 2nd, 2019 and its aftermath almost 1 year ago caused Ms. Lawson emotional harm that continues today and which will require remediation in order for her to resume a happy, fulfilling life.

(Cl. Ex. 1, pp. 2–3)

The defendants arranged for Lawson to undergo an IME with Rhea Allen, M.D., on November 17, 2020. (Def. Ex. B) Dr. Allen reviewed Lawson's medical records from the Keokuk Community Health Center from October 30, 2018, through October 20, 2020, medical records from Fort Madison Community Hospital from November 26, 2019, through October 2, 2020, Lawson's deposition transcript, Lawson's IME questionnaire responses, and Miller's IME report. (Def. Ex. B, p. 1) She also met with Lawson. (Def. Ex. B, p. 2) Based on the records review and conversation with Lawson, Dr. Allen issued an IME report dated November 19, 2020, with following conclusions:

- Lawson sustained no temporary disability from the events of November 2, 2019. (Def. Ex. B, p. 4)
- Lawson sustained no permanent disability from the events in question. (Def. Ex. B, p. 4)
- Lawson requires follow-up care as necessary for her preexisting conditions, but no such care is necessary due to events of November 2, 2019. (Def. Ex. B, p. 4)

Dr. Allen based in part her medical opinions in the IME report on a review of Lawson's medical records. There is no indication Miller reviewed any medical records or was aware of Lawson's preexisting conditions when issuing his opinion in this case. Because Dr. Allen's opinion is based on a more complete understanding of Lawson's medical history, it is more persuasive than Miller's.

Lawson remains employed at Wendy's. No medical professional has prescribed Lawson work restrictions due to the events of November 2, 2019. There is an insufficient basis in the evidence from which to conclude the incident of November 2, 2019, caused a medical basis for Lawson to miss work. Lawson has missed work due to pregnancy and child birth, which Wendy's has accommodated.

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 injuries at issue in this case occurred after July 1, 2017, the Iowa Workers' Compensation Act, as amended in 2017, applies. Smidt v. JKB Restaurants, LC, File No. 5067766 (App. December 11, 2020).

1. Injury.

Under Iowa Code section 85.3(1), an employer (such as Wendy's) must pay compensation according to the Iowa Workers' Compensation Act for any all personal injuries sustained by an employee (such as Lawson) arising out of and in the course of employment. Iowa Code section 85.61(7) defines the term "personal injury arising out of and in the course of employment" to "include injuries to employees whose services are being performed on, in, or about the premises which are occupied, used, or controlled by the employer, and also injuries to those who are engaged elsewhere in places where their employer's business requires their presence and subjects them to dangers incident to the business."

The Iowa Supreme Court has held:

> A personal injury, contemplated by the Iowa Workmen's Compensation Law, obviously means an injury to the body, the impairment of health, or a disease, not excluded by the act, which comes about, not through the natural building up and tearing down of the human body, but because of a traumatic or other hurt or damage to the health or body of an employee. The injury to the human body here contemplated must be something, whether an accident or not, that acts extraneously to the natural processes of nature, and thereby impairs the health, overcomes, injures, interrupts, or destroys some function of the body, or otherwise damages or injures a part or all of the body.

Black v. Creston Auto Co., 281 N.W. 189, 192–93 (1938) (internal quotations and citations omitted).

Moreover, "the term 'personal injuries' as used in Iowa Code section 85.3(1) encompasses a mental injury as well as a physical injury." Dunlavey v. Econ. Fire and Cas. Co., 526 N.W.2d 845, 851 (Iowa 1995). This includes a mental injury related to a physical injury as well as a "pure nontraumatic mental injury." Id. Iowa is therefore among "the majority of states with workers' compensation statutes similar to ours in allowing workers to recover for mental injuries caused by unusual stress in the work environment." Id. at 853.

The claimant bears the burden to prove:

1) Factual or medication causation; and

2) Legal causation. Id. (citing Newman v. John Deere Ottumwa Works of Deere & Co., 372 N.W.2d 199, 202 (Iowa 1985) and Schreckengast v. Hammermills, Inc., 369 N.W.2d 809, 810 (Iowa 1985)).

At issue here is factual or medical causation. "Causation in fact involves whether a particular event in fact caused certain consequences to occur." Id. (citing

Schreckengast, 369 N.W.2d at 810–11 & n. 3). In a workers' compensation case, this means medical causation, i.e., "whether the employee's injury is causally connected to the employee's employment." Id (citing Schreckengast, 369 N.W.2d at 810). "Whether an injury has a direct causal connection with the employment or arose independently thereof is essentially within the domain of expert testimony." Id. at 853 (citing Deaver v. Armstrong Rubber Co., 170 N.W.2d 455, 464 (Iowa 1969)). The opinion of a psychologist may be considered on the question of medical causation in a workers' compensation case stemming from an alleged mental injury. IBP, Inc. v. Al-Gharib, 604 N.W.2d 621, 630–32 (Iowa 2000).

Here, Lawson contends she sustained an injury after Wendy's management refused to allow her to timely use the restroom while she was menstruating, which caused her to bleed through her underwear and pants and other Wendy's employees to mock her for it. The defendants dispute whether the events occurred. As found above, Lawson's account of the events on November 2, 2019, is the most credible because she was there at the time in question and testified under oath, subject to cross-examination, about it.

Miller, Lawson's expert of choice, opined Lawson sustained an "emotional harm" because she "experienced a workplace trauma that will require her to make difficult emotional and psychological adjustments." In contrast, Dr. Allen, the defense expert, did not dispute Lawson experienced an injury. Instead, Dr. Allen focused on whether the injury caused a temporary or permanent disability. Miller is therefore more persuasive on the question of causation.

For these reasons, Lawson has met her burden of proof. The evidence establishes it is more likely than not she sustained an emotional injury arising out of and in the course of her employment with Wendy's on November 2, 2019.

2. Permanent Disability.

The "broad purpose of workers' compensation" is "to award compensation (apart from medical benefits), not for the injury itself, but the disability produced by a physical injury." Bell Bros. Heating and Air Conditioning v. Gwinn, 779 N.W.2d 193, (Iowa 2010) (citing 4 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law § 80.02, at 80–2 (2009)). With the 2017 amendments, the legislature altered how this is done under the Iowa Workers' Compensation Act. Multiple of these legislative changes are at issue in the current case.

A mental injury is an unscheduled injury under the Iowa Workers' Compensation Act. Ehteshamfar v. UTA Engineered Sys. Div., 555 N.W.2d 450, 453–54 (Iowa 1996). Prior to the 2017 amendments, unscheduled injuries such as mental injuries were automatically compensated based on the impact on the claimant's earning capacity using the industrial disability framework. See, e.g., id. For injuries on or after July 1, 2017, however, the legislature codified at Iowa Code section 85.34(2)(*v*) a new requirement for industrial disability to be considered:

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

The record shows that at the time of hearing, Lawson was still employed at Wendy's in the same position she held at the time of the alleged injury. Lawson was on a leave of absence due to the birth of a child. The evidence shows Wendy's reduced her hours because of her pregnancy and the birth of her child, not because of the alleged injury. There is no indication the alleged injury has reduced the salary, wages, or earnings Lawson receives. See McCoy v. Menard, Inc., File No. 1651840.01 (App. April 9, 2021). Therefore, under the statute, Lawson's entitlement to benefits must be determined based only upon her functional impairment resulting from the alleged injury, not in relation to her earning capacity.

In the current case, no medical professional opined Lawson required work restrictions because of the emotional injury she sustained on November 2, 2019. No medical professional opined the injury caused Lawson to be unable to work during a period of recovery. No expert has opined the injury caused Lawson a permanent impairment, using the Fifth Edition of the AMA Guides or otherwise.

The only expert opinion on impairment or disability is Dr. Allen, whose opinion on the question of permanency is more credible than Miller's because the record shows Dr. Allen reviewed medical records and knew of Lawson's preexisting mental conditions. Dr. Allen opined Lawson did not sustain a permanent impairment because of the emotional injury on November 2, 2019. This decision therefore adopts Dr. Allen's opinion on permanent disability.

Consequently, Lawson failed to meet her burden of proof on the question of permanent disability. There is an insufficient basis in the evidence from which to conclude the November 2, 2019 emotional injury caused a permanent disability under the Iowa Workers' Compensation Act. Lawson is therefore not entitled to permanent partial disability benefits.

3. IME Reimbursement.

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. March 27, 2020) (citing Reh v. Tyson Foods, Inc., File No. 5053428 (App. March 26, 2018)); see also Phillips v. Kimberley Farms, Inc., File No. 5057945, p. 15 (Arb. April 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 the agency interpretation of the statute, 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.

The Iowa Court of Appeals considered the agency's interpretation of Iowa Code section 85.39 with respect to whether an employer must pay for an IME of an injured employee when the employer has not obtained an impairment rating in Kern v. Fenchel, Doster & Buck, P.L.C., No. 20-1206, 2021 WL 3890603 (Iowa App. September 1, 2021) (slip copy) (application for further review pending before the Iowa Supreme Court as of November 18, 2021). The court reversed the 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. The court determined the agency had erroneously interpreted Iowa Code section 85.39 and caselaw construing it. Id. at *5 ("We see no conflict applying our supreme court's interpretation of section 85.39 in *Young* to a finding that Dr. Paulson's opinion on lack of causation was tantamount to a zero percent impairment rating and, in fact, we find such interpretation compelling."). Thus, the court concluded that an employer-chosen doctor's opinion finding that an alleged injury did not arise out of and in the course of 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.

This case differs from Kern in the timing of the parties' respective IMEs. Lawson spoke with Miller for an IME in early September and Miller's IME report is dated September 10, 2020. Then Lawson underwent an IME with Dr. Allen on November 17, 2020. Dr. Allen's report is dated November 20, 2020. Because Miller's examination and report predate Dr. Allen's examination and report, Lawson could not have obtained the report because she disagreed with the opinion of the employer's chosen doctor, as required by the statute. Therefore, Lawson is not entitled to reimbursement for Miller's IME under Iowa Code section 85.39.

4. Costs.

"All costs incurred in the hearing before the commissioner shall be taxed in the discretion of the commission." Iowa Code § 86.40. "Fee-shifting statutes using 'all costs' language have been construed 'to limit reimbursement for litigation expenses to those allowed as taxable court costs.'" Des Moines Area Reg'l Transit Auth. v. Young, 867 N.W.2d 839, 846 (Iowa 2015) (quoting City of Riverdale v. Diercks, 806 N.W.2d 643, 660 (Iowa 2011)). Statutes and administrative rules providing for recovery of costs are strictly construed. Id. (quoting Hughes v. Burlington N. R.R. Co., 545 N.W.2d 318, 321 (Iowa 1996)).

Lawson did not prevail on permanent disability or entitlement to IME reimbursement. Therefore, it would be inappropriate to tax costs against the defendants in this case. The parties shall be responsible for paying their own hearing costs.

ORDER

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

1) Lawson shall take nothing further in this case.

2) The parties shall be responsible for paying their own hearing costs. Each party shall pay an equal share of the cost of the transcript.

Signed and filed this 5th day of January, 2022.

BENJAMIN G. HUMPHREY
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

James Hoffman (via WCES)

John Densberger (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.