BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

ASHLEY GRAPER, Claimant, vs. DS ENTERPRISES, L.C., d/b/a YELLOW CAB OF IOWA CITY, Employer, and UNINSURED, Insurance Carrier, Defendants.	File No. 20701203.01 ARBITRATION DECISION Head Note Nos.: 1402.20, 2902

STATEMENT OF THE CASE

Claimant, Ashley Graper, filed a petition for arbitration against DS Enterprises, L.C. d/b/a Yellow Cab of Iowa City, an uninsured employer. This case came before the undersigned for an evidentiary hearing on March 10, 2022, via CourtCall.

The parties filed a hearing report at the commencement of the hearing. On the hearing report, the parties entered into numerous stipulations. Those stipulations were accepted and no factual or legal issues relative to the parties' stipulations will be made or discussed. The parties are now bound by their stipulations.

The evidentiary record includes Joint Exhibits 1 through 7, Claimant's Exhibits 1 through 5, and Defendant's Exhibits A through I. Claimant testified on her own behalf. Defendant called Rod Blair and David Stoddard to testify. The evidentiary record closed at the conclusion of the evidentiary hearing on March 10, 2022.

The undersigned requested post-hearing briefs in this matter. Both parties filed briefs on or before May 6, 2021. The case was considered fully submitted to the undersigned on May 6, 2021.

ISSUES

The parties submitted the following disputed issues for resolution:

1. Whether an employer-employee relationship existed at the time of the alleged injury;

2. Whether claimant sustained a back injury that arose out of and in the course of her employment on April 23, 2019;

2. Whether claimant gave timely notice of the alleged back injury pursuant to Iowa Code section 85.23;

3. Whether the alleged injury caused permanent disability and, if so, the extent of claimant's entitlement to permanent partial disability benefits;

4. Whether claimant is entitled to reimbursement of an independent medical evaluation pursuant to Iowa Code section 85.39;

5. Whether claimant is entitled to an award of penalty benefits pursuant to Iowa Code section 86.13; and

6. Costs.

FINDINGS OF FACT

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

Ashley Graper alleges she sustained a low back injury on April 23, 2019. More specifically, she asserts that she injured her low back while attempting to change a tire on a vehicle she was driving for Yellow Cab of Iowa City ("Yellow Cab").

One of the main issues in this case is whether an employer/employee relationship existed between claimant and the defendant. Ms. Graper completed a "Driver Contract Application" with Yellow Cab on August 11, 2013. (Exhibit 3, page 27) Ms. Graper later entered into an independent contractor agreement with Yellow Cab on August 28, 2013. (Ex. 3, p. 25) The independent contractor agreement indicated that Ms. Graper "shall at all times act as an independent contractor with respect to the Company, and not as an employee or agent of the Company, except that the Company shall determine the driving dates and times for the Independent Contractor." (Ex. 3, p. 22) The agreement further provided that Ms. Graper was not entitled to receive various benefits traditionally associated with an employee/employer relationship, including workers' compensation benefits. (Id.)

Ms. Graper largely controlled her own work schedule. (Hearing Transcript, page 71) That being said, there is evidence that Ms. Graper was contracted to work 5:00 a.m. to 12:00 p.m. on Mondays, Tuesdays, Thursdays, and Fridays. (Ex. 3, p. 28) Ms. Graper did not drive her own personal vehicle or pay for the gas she used while driving for Yellow Cab. (Hr. Tr., pp. 18-19) However, she did have to pay a fuel surcharge for each fare. (Hr. Tr., p. 67)

At hearing, Ms. Graper agreed that she signed the agreement and understood she was agreeing to work for Yellow Cab as an independent contractor. Ms. Graper was aware she would not receive any benefits from Yellow Cab, and she would be responsible for paying her own expenses. (Hr. Tr., pp. 66-67)

At the beginning of each shift, Ms. Graper would present to Yellow Cab and select a vehicle for the day. (Hr. Tr., p. 17) She would then follow a checklist and inspect said vehicle. (Id.; Ex. 3, p. 26) Next, Ms. Graper would sign in to her account on a tablet to notify dispatch she was available to receive fares. Notifications regarding available fares were sent to Ms. Graper's tablet throughout her shift. (Id.; see also Hr. Tr., p. 21) Pick-up and drop-off points are entered by dispatch and displayed on Ms. Graper's tablet. (Hr. Tr., pp. 105-106) Each ride is then tracked by two GPS systems and saved to Yellow Cab's reporting system. (Hr. Tr., pp. 103-105) Ms. Graper also documented her rides on a worksheet she kept in her taxicab. (See Hr. Tr., p. 17) At the end of her shift, Ms. Graper would cross reference the accuracy of her sheet with Yellow Cab's printouts. (Id.)

On April 23, 2019, Ms. Graper started her workday around 5:00 a.m. She recalled making three "school runs." (Id.) Claimant testified that she was dropping off a passenger at Southeast Junior High School in Iowa City when she noticed that the back tire of her vehicle was flat. (Hr. Tr., p. 26) After noticing the flat tire, Ms. Graper pulled into the parking lot of the Mercer Park Recreation Center and parked her vehicle. (Id.) After closing out her passenger's trip, Ms. Graper alleges that she called dispatch to notify them of the issue. (Hr. Tr., pp. 26-27) According to Ms. Graper, Denise Fountain answered her call. Ms. Fountain told Ms. Graper that the Yellow Cab office was busy and suggested that she attempt to change the tire on her own. (Hr. Tr., p. 27)

Ms. Graper exited her taxi and located a tire iron and jack in the trunk of the taxicab. (Hr. Tr., p. 27) Once she had the tire jack in place, Ms. Graper placed the tire iron on the lug nuts and began the process of removing the deflated tire. Ms. Graper testified that she had to push down on the tire iron with her leg to loosen the lug nuts. (Id.) While pushing down on the second lug nut, Ms. Graper felt as though a disc "slipped out of" her spine. (Hr. Tr., p. 28) She testified that the pain she experienced was so severe that she fell to her knees. (Id.) When she was eventually able to stand, Ms. Graper reentered her vehicle and called dispatch for assistance. Ms. Fountain agreed to request assistance and, at some point, told Ms. Graper that help was on the way. (Id.)

While waiting for assistance, Ms. Graper contacted Robert Hatcher, D.C., a local chiropractor. (Id.) Ms. Graper asserts that she reported her work injury to Dr. Hatcher during this phone call. (Hr. Tr., p. 29)

Ten to fifteen minutes later, two mechanics met Ms. Graper in the Mercer Park parking lot and replaced her tire. (Id.) Ms. Graper testified that after the mechanics changed her tire, she drove directly to Dr. Hatcher's office for an adjustment. (Hr. Tr., p. 30; see Joint Exhibit 2, page 18)

After the adjustment, Ms. Graper returned to work and completed two additional runs. (See Hr. Tr., p. 30) She testified that she had originally planned on taking the rest of the day off due to her pain; however, she decided to continue working because the employer had "good runs" available and she wanted the extra money. (Id.) Indeed, it appears claimant's last ride of the day spanned 180 miles. (Ex. A, p. 2)

At this juncture, it is important to note that claimant's testimony regarding the events that transpired on the alleged date of injury is not corroborated by other documentary evidence or credible testimony.

As previously discussed, Ms. Graper testified that she was dropping off a passenger at Southeast Junior High School when she noticed that the back tire of her vehicle was flat. (Hr. Tr., p. 26) After noticing the flat tire, Ms. Graper pulled into the parking lot of the Mercer Park Recreation Center and parked her vehicle. (Id.)

The evidentiary record provides a different version of events. At hearing, defendant introduced "Driver Audit" forms, "Check Out Sheets," and Trip Reports for School Passengers into evidence. While the reports confirm that claimant made three school runs on April 23, 2019, none of the reports reflect that Ms. Graper dropped off a passenger at Southeast Junior High School on the morning of April 23, 2019. (See Ex. A, pp. 2-3; Ex. F, pp. 23-24)

According to the log sheets, Ms. Graper had six fares on April 23, 2019, and three of them were considered "school runs." (Ex. A, pp. 2-3; Ex. F, pp. 23-24) The first school run ended at Alexander Elementary School at 6:40 a.m. The next two runs went to City High at 8:24 a.m. and 8:30 a.m. (Ex. A, p. 2; Ex. F, pp. 23-24) The "Driver Audit Sheet" for April 23, 2019, which includes Ms. Graper's handwritten notes, also indicates that Ms. Graper drove a passenger to Alexander Elementary before making two trips to City High. (Ex. A, pp. 2-3) The records do not indicate that claimant dropped off or picked up any fares at Southeast Junior High, on South First Avenue, on Bradford Drive, or at a location adjacent to Mercer Park.

At hearing, Ms. Graper explained that she might have accidentally written down "City High" instead of "Southeast Junior High"; however, such an explanation seems unlikely given the GPS technology and verification process implemented by Yellow Cab.

Each ride is tracked by both the driver and GPS technology. At the beginning of each shift, Yellow Cab drivers log in on a tablet located inside their taxicab to notify dispatch that they are available to accept fares. Thereafter, drivers receive notifications regarding available fares, including pick-up and drop-off locations, on their tablet. (Hr. Tr., p. 21) After accepting an assignment, drivers "start" and "end" each ride by hitting the corresponding button on their tablet. (Hr. Tr., p. 104) Once the driver starts the ride, the pick-up time and GPS location are transmitted to Yellow Cab and logged in the dispatch system. (See Hr. Tr., pp. 104-105) Similarly, once the driver "ends" the ride, the drop-off time and GPS location are transmitted to Yellow Cab and logged in the dispatch system. (Hr. Tr., p. 106) The pick-up and drop-off locations initially entered by

the passenger/dispatch are automatically updated in the system to reflect the actual pick-up and drop-off locations via GPS. (Hr. Tr., p. 109)

To ensure the records are accurate, drivers keep a daily log of their fares. Ms. Graper testified that at the end of her shifts, she double checked the accuracy of her log sheet with Yellow Cab's printouts. (Hr. Tr., p. 17) Ms. Graper's April 23, 2019, log sheet matches Yellow Cab's April 23, 2019, audit report. (Ex. A, pp. 2-3; Ex. F, pp. 23-24) Neither report reflects that Ms. Graper dropped off a passenger at Southeast Junior High School on the morning of April 23, 2019. Neither report reflects that Ms. Graper dropped off a passenger at Mercer Park.

Even if the undersigned accepted Ms. Graper's testimony that she accidentally wrote down "City High" instead of "Southeast Junior High," she provided no explanation as to why the audit report and the trip report for school passengers would reflect City High as the GPS-based drop-off location. While technology is far from infallible, it is highly unlikely that the GPS system provided an inaccurate location, and that said inaccurate location happened to be the exact same location Ms. Graper independently and accidentally wrote down.

School runs have one additional method of authentication as each run is verified by the various school districts in the area. Yellow Cab sends trip reports, along with an invoice, to local school districts on a monthly basis. (Hr. Tr., p. 82) The school districts then verify the student information provided on the trip reports and pay Yellow Cab for its services. (Hr. Tr., pp. 82-83) While it was not specifically addressed by either party, there is no testimony or documentary evidence in the record to suggest that City High disputed the two trips listed in the April 23, 2019, report.

Along the same lines, it is difficult to accept Ms. Graper's testimony regarding when she presented to Dr. Hatcher. Initially, Ms. Graper testified that she presented to Dr. Hatcher right after the mechanics were done changing her tire. (Hr. Tr., p. 30) However, on cross examination, Ms. Graper testified that she presented to Dr. Hatcher around 9:00 a.m., "immediately after" she dropped her last student off at school. (Hr. Tr., p. 44) Obviously, Ms. Graper would not have been able to present to Dr. Hatcher immediately after she dropped her last student off at school as this is when she testified that she noticed the flat tire.

It is also difficult to accept Ms. Graper's testimony that she presented to Dr. Hatcher as soon as the mechanics were done changing her tire. According to the driver audit and check-out sheets, claimant made her last school run to City High at 8:25 a.m. (See Ex. A, p. 2) The reports note that claimant did not start her next ride until 9:36 a.m. (See Ex. A, p. 2) Given this information, claimant would have only had a one-hour window to pull into Mercer Park, call dispatch to request assistance, attempt to change a flat tire, sustain the alleged injury, collect herself, call dispatch for a second time, wait approximately 10 to 15 minutes for the mechanics to arrive (Hr. Tr., p. 29), wait an additional amount of time while the mechanics changed out the flat tire, drive to Dr. Hatcher's office, receive at least a 15-minute adjustment per Dr. Hatcher's notes (JE2,

p. 15), and then drive to the address provided on the driver audit report (Ex. A, p. 2). The reported timeline is highly improbable.

Further undermining claimant's testimony is the fact Dr. Hatcher's medical notes are void of any reference to the alleged work injury. The notes provide, "She claims that her back has been hurting her for the past couple of weeks and is getting worse. The pain does radiate into her legs at times. The symptoms are causing her trouble sleeping with and getting into a comfortable position." (JE2, p. 18)

There is evidence that claimant presented to Dr. Hatcher on April 23, 2019. It is reasonable to accept that claimant presented to Dr. Hatcher between 8:25 a.m. and 9:36 a.m., as Dr. Hatcher's medical record notes that claimant returned to work following her adjustment. However, if claimant presented to Dr. Hatcher's office between 8:25 a.m. and 9:36 a.m. on April 23, 2019, it is highly unlikely claimant's injury, and the events preceding the appointment, occurred as alleged by claimant.

Next, claimant's testimony regarding who witnessed or had knowledge of the alleged injury is not corroborated by credible testimony.

BB's Dispatching, L.C. provides mechanical servicing for the taxicabs owned by Yellow Cab and driven by Yellow Cab drivers. At the time of the alleged injury, BB's Dispatching only employed two mechanics. Those mechanics were Jeff Stoddard and Kevin Flynn.[1] Both individuals provided sworn affidavits in this case. (Exhibit C, page 17; Exhibit D, page 19)

Neither individual recalled assisting Ms. Graper with a flat tire on or about April 23, 2019. (Ex. C, p. 18; Ex. D, p. 20) That being said, neither individual chose overly confident wording in their affidavits. Mr. Stoddard's affidavit provides, "I am almost certain that Kevin and I did not leave the shop to assist Ashley Graper with a changing out a flat tire on April 23, 2019." (Ex. C, p. 18) Mr. Flynn's affidavit provides, "I have no recollection of leaving the shop with Jeff to assist Ashley Graper with a changing out a flat tire on April 23, 2019." (Ex. D, p. 20) Both affidavits also provide, "I do not recall ever assisting a female driver with changing a tire. I do not recall ever assisting a driver at or near Mercer Park in Iowa City." (Ex. C, p. 18; Ex. D, p. 20) Aside from the language used in the affidavits, I have no reason to doubt the credibility of Mr. Stoddard and Mr. Flynn.

The affidavits also discuss Yellow Cab's roadside assistance policy. According to Mr. Stoddard and Mr. Flynn, Yellow Cab has a policy providing that when drivers experience mechanical difficulties away from the office and shop, they need to arrange for their own roadside assistance. They further explained that, "Generally, [we] do not provide any type of roadside assistance to Yellow Cab's drivers." (Ex. C, p. 17; Ex. D, p. 19) Additionally, the driver guidelines attached to Ms. Graper's independent contractor agreement further provides, "Drivers shall replace any flat tire that occurs during the

[1] Jeff Stoddard is part-owner of DS Enterprises, L.C. and BB's Dispatching, L.C. (Ex. C, p. 17)

shift with the spare tire that is equipped with each car. Failure to do so will result in a fine of $25 during the daytime or $35 at night." (Ex. 3, p. 26)

Ms. Graper asserts that she informed Ms. Fountain and "everybody that [she] saw in the office that day[.]" (Hr. Tr., p. 62) When asked to clarify who "everybody" was, claimant testified that she told Roger, Shellie, and Keith. (Hr. Tr., p. 64) She did not provide last names. (See id.) Claimant did not obtain witness statements or call any of these individuals to testify live at the evidentiary hearing.

Ms. Fountain testified via deposition in this case. As such, I did not have the opportunity to observe Ms. Fountain or her demeanor. In general, Ms. Fountain confirmed that Ms. Graper called dispatch and asked for assistance with changing a tire on the date of the alleged injury. (Exhibit 4, page 47, Deposition Transcript pages 9-10) According to Ms. Fountain, Ms. Graper called approximately 30 to 40 minutes later and reported that she had injured her back attempting to change the tire. (Ex. 4, p. 52, Depo. p. 22)

Aside from these general facts, Ms. Fountain's testimony largely conflicts with claimant's testimony. For instance, Ms. Fountain testified that she was unsure of when Ms. Graper requested assistance. She estimated that the initial phone call occurred around 1:00 p.m. or 2:00 p.m. (Ex. 4, p. 49, Depo. p. 11) Next, Ms. Fountain testified to her belief that she sent a different driver, as opposed to a mechanic, to assist Ms. Graper with the flat tire. (Ex. 4, Depo. p. 49) Ms. Fountain was reasonably sure she sent a driver and not a company mechanic because sending a mechanic to assist a driver with a mechanical issue was considered a "last resort." (Ex. 4, pp. 50-53, Depo. pp. 13, 25) She further stated that it was not uncommon for Yellow Cab to send a nearby driver to assist with a flat tire. (Ex. 4, pp. 49-50, Depo. pp. 12-13) Ms. Fountain also testified to her belief that the mechanics had already left for the day by the time Ms. Graper called in and requested assistance. (Ex. 4, p. 53, Depo. p. 25) Lastly, Ms. Fountain was certain that Ms. Graper took the rest of the day off after sustaining the alleged injury. (Ex. 4, pp. 49, 54, Depo. pp. 11, 31)

Ms. Fountain no longer works for Yellow Cab. At her deposition, Ms. Fountain testified that she was fired. (Ex. 4, p. 53, Depo. p. 26) Defendant asserts that Ms. Fountain voluntarily terminated the employment relationship following a change in her work hours. According to defendant, Ms. Fountain's hours were changed during the COVID-19 pandemic to adjust for a decrease in staff. (Hr. Tr., p. 93) Upon learning of the schedule changes, Ms. Fountain became upset and allegedly threw a set of keys at a co-worker in frustration. She then walked off the job. (Id.) Defendant asserts that Ms. Fountain has since made derogatory comments about Yellow Cab on social media. (Hr. Tr., p. 100)

Defendant challenges Ms. Fountain's credibility. Defendant's challenge stems from Ms. Fountain's criminal record, the timing of her reporting, and the circumstances surrounding her separation from Yellow Cab. Most notably, defendant asserts that Ms. Fountain has been convicted of theft 11 times as an adult. Ms. Fountain did not deny

the allegation when confronted with the same at her deposition; however, she testified that all her convictions were at least seven years old. (Ex. 4, p. 50, Depo. pp. 15-16) Defendant further asserts that prior to her separation, Ms. Fountain considered Ms. Graper a "scammer" and she did not believe that Ms. Graper was entitled to workers' compensation benefits. (Hr. Tr., p. 91)

I do not find Ms. Fountain to be a credible witness. While Ms. Fountain had a general understanding of what occurred on the alleged date of injury, her recollection of events was markedly different from Ms. Graper's testimony. Her testimony is not supported by the evidentiary record as a whole. As such, I assign no weight to Ms. Fountain's testimony.

In addition to her co-workers, Ms. Graper asserts that she reported her alleged work injury to the various medical providers in this case. Her testimony is not corroborated by the contemporaneous medical records, which are void of any reference to a work-related injury until September 3, 2019.

At hearing, Ms. Graper was adamant that she told Dr. Hatcher she had just injured her low back changing a tire at work. (Hr. Tr., pp. 51-52) However, there is no evidence to support a finding that Ms. Graper described the alleged work injury to Dr. Hatcher at the April 23, 2019, appointment. (JE2, p. 18) Instead, Dr. Hatcher's notes provide that Ms. Graper described "having some lower back pain that is very intense at times. She claims that her back has been hurting her for the past couple of weeks and is getting worse." (Id.) I find it highly unlikely Dr. Hatcher would fail to document a reported mechanism of injury. Moreover, Dr. Hatcher's notes are consistent with the pre-existing medical records in evidence describing flare-ups in September and October 2018 that were affecting her daily life, work, and ability to take care of two kids. (See JE1, pp. 1-4)

Two days later, Ms. Graper presented to her primary care physician, Scott Larson, M.D. (Joint Exhibit 1, page 5) Notably, Ms. Graper reported an acute onset of pain while trying to change a tire two days prior. (Id.) The record notes that Ms. Graper presented to a chiropractor on the date of injury, but the treatment was not helpful. (Id.) While this medical record supports the description of injury, there is no mention of the injury occurring at work. (See JE1, pp. 5-6) To this end, no medical record collected between April 23, 2019, and September 3, 2019, documents claimant's condition as work-related. Claimant's failure to reference the injury as work-related is relevant in this case as there is evidence that claimant has worked on cars outside of her employment with Yellow Cab, and, at a later medical appointment, claimant detailed how she was injured changing a tire on her van. (See Hr. Tr., p. 38; JE4, p. 27)

As previously stated, the first medical record to describe claimant's injury as work-related is dated September 3, 2019. (JE7, p. 88) On September 3, 2019, claimant presented to Brent Overton, M.D. for a surgical consultation and reported that she sustained an injury to her low back earlier in the summer while working for Yellow Cab. (Id.) Unlike other instances in which claimant has described the alleged injury, claimant

told Dr. Overton that the injury occurred after she kicked a tire iron to loosen the lug nut. (Id.)

Defendant asserts this is around the time it first learned of claimant's alleged injury. (See Hr. Tr., p. 86) According to Rod Blair, the current manager of Yellow Cab, Ms. Graper contacted him in early September 2019, reported the work injury, and inquired about workers' compensation benefits. (Hr. Tr., p. 86; see Hr. Tr., pp. 80-81) Mr. Blair notified Ms. Graper of her status as an independent contractor and relayed that she would not be able to receive workers' compensation for the alleged injury because of said status. (Id.)

Mr. Blair further testified that Ms. Graper texted him in September 2019 to let him know that she would not be available for work because she had a surgery scheduled. (Hr. Tr., pp. 97-88) The alleged text exchange was entered into evidence. (Exhibit I) Unfortunately, I cannot assign any weight to the text messages in evidence with respect to defendant's notice defense. This is because the text messages in evidence are dated September 18, 2019. (Ex. I, p. 46) Ms. Graper underwent surgery on September 4, 2019. (JE6, pp. 86-87) The text exchange in evidence references a surgery scheduled for November 18, 2019. (Ex. I, p. 46) A review of the medical records in evidence suggests that this surgery was to remove claimant's tonsils. (See JE1, p. 15)

While I acknowledge that Ms. Graper described the alleged mechanism of injury to her medical providers, there is no indication claimant specifically described her condition as work-related until at least September 3, 2019, when she presented for a surgical consultation with Dr. Overton. I find Ms. Graper did not describe her condition as work-related when describing her condition to her medical providers between April 23, 2019, and September 2, 2019. I could potentially accept the assertion that a single physician failed to adequately document the oral history he or she obtained from Ms. Graper; however, it becomes significantly more difficult to accept that multiple medical providers failed to document Ms. Graper's allegations of a work injury.

Ultimately, this case comes down to the credibility of claimant's testimony and how the injury allegedly occurred. It is difficult to reconcile claimant's rendition of events with the sworn affidavits of Mr. Stoddard and Mr. Flynn, the Driver Audit forms, Ms. Graper's own handwritten notes, the Check Out Sheets, and the trip reports for school passengers from April 23, 2019. Considering the numerous inconsistencies within Ms. Graper's testimony, I do not accept her version of events for April 23, 2019, as credible. I find that Ms. Graper's evidence is not sufficiently credible and cannot be relied upon in this case. Given the lack of credible evidence regarding the events of April 23, 2019, I find that Ms. Graper failed to prove by a preponderance of the evidence that she sustained an injury while changing a tire at work on April 23, 2019.

I recognize that the evidentiary record contains an expert medical opinion addressing causation and impairment. Mark Taylor, M.D. conducted an independent medical evaluation of Ms. Graper on August 17, 2020. (Exhibit 1, pp. 1-10) Having found Ms. Graper failed to prove a work injury occurred on April 23, 2019, I find the

expert medical opinions offered by Dr. Taylor are not entitled to any weight as his opinions are reliant upon the accuracy of the history and information he was provided.

All other factual disputes are moot.

CONCLUSIONS OF LAW

The initial disputed issue is whether claimant carried her burden of proving she sustained a low back injury arising out of and in the course of his employment with defendant on April 23, 2019.

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

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

The question of causal connection is essentially within the domain of expert testimony. The expert medical evidence must be considered with all other evidence introduced bearing on the causal connection between the injury and the disability. Supportive lay testimony may be used to buttress the expert testimony and, therefore, is also relevant and material to the causation question. The weight to be given to an expert opinion is determined by the finder of fact and may be affected by the accuracy of the facts the expert relied upon as well as other surrounding circumstances. The expert opinion may be accepted or rejected, in whole or in part. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); IBP, Inc. v. Harpole, 621 N.W.2d 410 (Iowa 2001); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995). Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417 (Iowa 1994). Unrebutted expert medical

testimony cannot be summarily rejected. Poula v. Siouxland Wall & Ceiling, Inc., 516 N.W.2d 910 (Iowa App. 1994).

In the matter at hand, I found claimant's rendition of events was not credible. Having found claimant failed to carry her burden of proof, I conclude that Ms. Graper's claim for benefits must also fail.

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

Defendants denied liability for this claim and did not obtain a corresponding medical causation opinion or impairment rating prior to Dr. Taylor's August 17, 2020, evaluation. Claimant has not established the prerequisites for reimbursement of Dr. Taylor's evaluation pursuant to Iowa Code section 85.39.

Claimant also asserts a claim for costs. Costs are assessed at the discretion of the agency. Iowa Code section 86.40. Given that claimant failed to prove a compensable claim, I conclude that none of her costs should be assessed. I conclude that each party should bear its own costs.

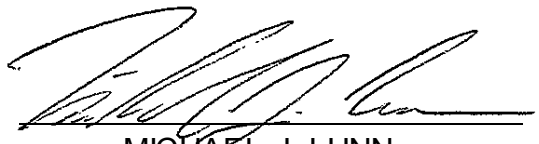
ORDER

THEREFORE, IT IS ORDERED:

Claimant shall take nothing from these proceedings.

The parties shall bear their own costs related to this contested case proceeding.

Signed and filed this 30th day of September, 2022.



MICHAEL J. LUNN
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served as follows:

Eric Bigley (via WCES)

Adam Tarr (via WCES)

Siobhan Briley (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.