BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

FILED
MAR 02 2015
WORKERS' COMPENSATION

APRIL ORRIS, Claimant, vs. COLLEGE COMMUNITY SCHOOL DISTRICT, Employer, and EMC INSURANCE COMPANIES, Insurance Carrier, Defendants.	File No. 5025576 REVIEW-REOPENING DECISION Head Note Nos.: 1402.40; 2501; 2905; 2907

STATEMENT OF THE CASE

April Orris, claimant, filed a petition seeking review-reopening of a prior decision of this agency. Specifically, claimant seeks to review and reopen an October 30, 2009 arbitration decision, which was summarily affirmed by the Iowa Workers' Compensation Commissioner on November 15, 2010 and ultimately affirmed by the Iowa Court of Appeals in a June 27, 2012 decision on judicial review.

In the underlying arbitration decision, the presiding deputy commissioner found that Ms. Orris sustained injuries to her right elbow, right shoulder, and neck. The deputy commissioner also found Ms. Orris suffered from fibromyalgia aggravated by the work injury, as well as chronic pain. The deputy commissioner also found that claimant sustained a mental injury as a result of the work injury but determined the mental injury was not permanent. The deputy commissioner in the underlying arbitration proceeding awarded claimant a 30 percent industrial disability as a result of her work injury occurring on May 20, 2005.

Claimant filed a review-reopening petition on December 16, 2013, seeking an increase in her permanent disability award. This review-reopening proceeding came on for hearing before the undersigned on January 6, 2015 in Cedar Rapids, Iowa.

Claimant was the only witness that testified live at the time of the review-reopening hearing. Claimant offered exhibits 1 through 12 and defendants offered exhibits A through K. Exhibit A contains 18 subparts and Exhibit K contains two subparts. All exhibits were received into the evidentiary record without objection.

The parties also submitted a hearing report, which contains stipulations. The parties' stipulations were accepted by the presiding deputy commissioner and are now relied upon in entering this decision. No findings or conclusions will be entered with respect to the parties' stipulations and the parties are bound by those agreements.

ISSUES

The parties submitted the following disputed issues for resolution:

1. Whether claimant has established a substantial change in condition sufficient to justify a reopening of the October 30, 2009 arbitration decision, as affirmed in the November 15, 2010 appeal decision.

2. If claimant has established a substantial change in condition, the extent of claimant's current industrial disability and resulting entitlement to permanent partial disability benefits, including a claim for permanent total disability under either the traditional industrial disability analysis or under the odd-lot doctrine.

3. Whether claimant is entitled to an award of past medical expenses contained at Exhibit 9.

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

5. Whether costs should be assessed against either party.

FINDINGS OF FACT

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

In an October 30, 2009 arbitration decision, another deputy workers' compensation commissioner concluded that Ms. Orris sustained injuries to her right shoulder, right elbow, cervical spine pain, fibromyalgia, and temporary mental injuries that were causally related to her work injury at College Community School District on May 20, 2005. (Arbitration Decision, page 17) Claimant was awarded a 30 percent industrial disability in the arbitration decision. Ms. Orris now contends that her condition has substantially worsened since the 2009 arbitration hearing and that her 30 percent industrial disability award should be reviewed and increased.

April Orris has not attempted to return to full-time employment since the 2009 arbitration hearing despite the findings in the arbitration decision that she was capable of working as a full-time teacher under certain conditions. Ms. Orris has continued to work as a part-time tutor for students since the 2009 arbitration hearing and testified that she would like to take on additional students for tutoring next school year. She is clearly capable of continuing to work as a tutor, similar to the duties she was performing at the time of the 2009 arbitration hearing.

Ms. Orris has not identified any economic changes that warrant an increase of her industrial disability award. Rather, her claim in this review-reopening proceeding is that her physical condition and specifically her fibromyalgia condition and resulting symptoms have worsened. Ms. Orris has not produced evidence or argued that any of the other physical conditions and injuries she sustained in the May 2005 work injury has substantially worsened since the 2009 arbitration hearing. Instead, she focuses upon and asserts that her fibromyalgia condition, symptoms, and resulting flare-ups of that condition are substantially worse since the 2009 arbitration hearing.

Ms. Orris describes continuous and worsening symptoms related to her fibromyalgia since the 2009 arbitration hearing. Ms. Orris continues to utilize prescription medications to control or manage her fibromyalgia symptoms. She experiences severe muscular pain all over her body, severe fatigue, daily headaches and sleep disturbances.

Many of Ms. Orris' medications and reported physical symptoms are similar to those she reported at the time of her 2009 arbitration hearing. However, Ms. Orris testifies that the flare-ups she experiences from her fibromyalgia are now more severe, more frequent and last longer. Ms. Orris contends that the severity, frequency, and duration of her fibromyalgia symptoms are now worse and constitute a substantial change in condition since the 2009 arbitration hearing.

Defendants contend that claimant has not experienced a significant or substantial change in condition. Defendants point to the similarity of claimant's reported symptoms, the fact that her medications are similar to (at least the purpose for each medication used) those utilized in 2009, and identify throughout the medical records that claimant's reported flare-ups are similar in frequency, duration, and even in seasonal timing as those reported in and before 2009.

In the prior arbitration decision, the deputy found that Ms. Orris "[T]ook both Cymbalta and Lyrica. Occasionally, she used Darvocet for pain. She testified she experienced chronic pain her neck, right shoulder, legs[,] hands, feet and hips and her hands were stiff." (Arbitration Decision, p. 15) Although some of the medications have changed, Ms. Orris continues to take medications with pain relieving qualities (Hydrocodone and Tramadol) and for nerve-related pain (Lyrica). Ms. Orris now takes a sleep aid (Trazadone), but clearly had sleep disturbances at the time of the 2009 hearing. The only other new prescription medication Ms. Orris is taking is Embrel, which is to control symptoms related to and slow the progression of psoriatic arthritis. However, claimant's psoriatic arthritis is not proven to be related to her fibromyalgia or to the May 20, 2005 work injury. (Exhibit A-17, p. 1; Ex. A-18, p. 1)

There is really no question that Ms. Orris continues to experience significant flare-up of symptoms related to her fibromyalgia diagnosis. Her testimony about the symptoms she experiences is consistent with the medical records, prior findings in the 2009 arbitration decision, and generally credible. Ms. Orris' presentation and appearance at hearing were consistent with her testimony and the medical records.

Ms. Orris moved slowly at hearing and appeared to experience significant difficulties with daily tasks such as walking, sitting, and standing.

In addition to her own subjective reports of increased severity, frequency, and duration, claimant offers the medical opinions of her independent medical evaluator, Sunil Bansal, M.D., in support of her claim. Dr. Bansal did not evaluate claimant prior to the 2009 hearing. In that sense, he is not able to directly evaluate whether her condition has worsened from 2009 to the present.

Dr. Bansal evaluated Ms. Orris in 2011. (Ex. 1, pp. 1-41) Dr. Bansal's October 13, 2011 report was performed as part of a Social Security disability application and determination. In 2011, Dr. Bansal offered medical opinions quite similar to those offered by John D. Kuhnlein, D.O., claimant's independent medical evaluator for the 2009 arbitration hearing. In his 2011 report, Dr. Bansal records subjective complaints similar to those reported at the time of the 2009 hearing and offers opinions pertaining to claimant's ability to return to gainful employment similar to those offered by Dr. Kuhnlein prior to the 2009 hearing. I find that the symptoms, condition, and recommendations made in Dr. Bansal's 2011 report are not substantial changes in claimant's condition that would warrant an increase in her industrial disability award.

However, Dr. Bansal reevaluated Ms. Orris in 2014 and authored a second report dated October 31, 2014. (Ex. 1, pp. 42-54) In his 2014 report, Dr. Bansal opined that Ms. Orris' symptoms in 2014 "[A]re similar in scope, but have increased in frequency and intensity from the symptoms elicited form her history at the October 2011 evaluation." (Ex. 1, p. 52) Dr. Bansal further opined, "[S]he has more intense and more frequent flare-ups ('bad days'). Her ability to endure tactile stimuli such as shoes over her feet has decreased. These symptoms, all related to her fibromyalgia specifically, were present in 2011, but have increased in intensity and/or frequency." (Ex. 1, p. 53)

No other physician has specifically discussed whether Ms. Orris' condition has worsened or deteriorated. Recognizing that Dr. Bansal's opinions are somewhat reliant upon Ms. Orris' subjective complaints and recollection, he is still in a position to have personally observed Ms. Orris to compare her condition over the period of time from 2011 to 2014. I accept Dr. Bansal's medical opinion pertaining to claimant's worsening condition and I find that Ms. Orris has proven she sustained a worsening of her fibromyalgia symptoms between 2011 and 2014. Therefore, I find that Ms. Orris has proven by a preponderance of the evidence that her fibromyalgia condition or symptoms have substantially changed and worsened since the 2009 arbitration hearing.

The second factual dispute to be determined is whether the substantial worsening of Ms. Orris' fibromyalgia is causally related to the initial work injury. Two physicians have offered opinions on this issue. Dr. Bansal opines, "[F]rom both mechanistic and temporal standpoints, her current fibromyalgia is related to her May 20, 2005 injury at College Community Schools. Her continued symptomatology has followed a logical medical progression, and is consistent with the medical literature on the subject." (Ex. 1, p. 52) Dr. Bansal further opines that claimant's "[C]linical course

has followed a typical pattern for post traumatic fibromyalgia, initiating from the work injury on May 20, 2005." (Ex. 1, p. 51)

Dr. Bansal cites four studies, but provides no discussion of the conclusions of those studies to support his analysis and conclusions. Interestingly, one of the resources Dr. Bansal cites is the Mayo Clinic's website. (Ex. 1, p. 51) That website indicates that "People who quit work or drop all activities tend to do worse than do those who remain active." (www.mayoclinic.ord/diseases-conditions/fibromyalgia/basics/lifestyle-home-remedies/con-20019243) That same website notes that increased stress can increase symptoms related to fibromyalgia. Nothing in the Mayo Clinic's website suggests that fibromyalgia is a progressive disease or that it is expected to worsen with time.

The only other physician to address whether claimant's worsening of fibromyalgia symptoms since 2009 is causally related to the 2005 injury is Shahin Bagheri, M.D. (Ex. A-18) Dr. Bagheri was claimant's treating rheumatologist until 2011. Given that he has not evaluated claimant since 2011, Dr. Bagheri is not in a great position to assess or opine whether claimant's condition has worsened since 2011. Therefore, Dr. Bagheri appropriately declined any comment or assessment of Ms. Orris' functional abilities at the present time.

However, as Ms. Orris' former treating rheumatologist, Mr. Bagheri is qualified to provide opinions about the cause of any current symptoms or worsening of her condition. In this respect, Dr. Bagheri provides a thorough analysis and explanation of fibromyalgia and how its symptoms can wax and wane over time. Dr. Bagheri cites and explains the results of specific clinical studies of patients with fibromyalgia. (Ex. A-18, pp. 1-3) Interestingly, two of the studies cited by Dr. Bagheri have a co-author (F. Wolfe) that was also a co-author of one of the studies cited by Dr. Bansal. (Compare Ex. 1, p. 52 with Ex. A-18, p. 4 and Ex. A-18, p. 5)

Dr. Bagheri explains that, "Fibromyalgia in general is a condition with occasional, and sometimes frequent, flare-ups. It is not unusual for patients to experience wax and wane in their symptoms, including pain, fatigue and sleep problems. Most patients with fibromyalgia continue to have chronic pain and fatigue." (Ex. A-18, pp. 1-2) After reviewing several clinical studies and explaining their significance, Dr. Bagheri opines:

> Although fibromyalgia is lifelong, it does not get worse and is not fatal. Some studies show that fibromyalgia symptoms remain stable over the long term, while others report that more than a quarter of patients see improvement in their pain symptoms over time. Studies suggest that regular exercise improves the outlook. People with significant life crises or who are on disability have a poorer outcome. . . .

(Ex. A-18, pp. 2-3)

Considering the credibility and accuracy of these competing opinions requires evaluation of the physicians' respective credentials, training, as well as their perspective and ability to assess claimant's condition. Clearly, Dr. Bansal has an advantageous position having evaluated claimant in 2011 and again in 2014. He has clearly evaluated claimant most recently and had a chance to take a recent history from Ms. Orris. Dr. Bansal cites certain medical studies and articles, though he does not really explain the outcomes of those studies or their significance and applicability to this case.

Dr. Bagheri is a rheumatologist. Treatment of fibromyalgia is clearly within his medical specialty. Dr. Bagheri is familiar with claimant's work injury, her symptoms, and her medical care having served as her treating rheumatologist. However, he has not observed or examined claimant since 2011.

Review of the October 30, 2009 arbitration decision reveals some helpful information. In the arbitration decision, the deputy commissioner was required to make findings regarding whether claimant's fibromyalgia is causally related to her work injury in 2005. In analyzing that issue, the deputy commissioner quoted from a brochure issued by the Arthritis Foundation.

The Arthritis Foundation brochure states, "Although symptoms may vary in intensity, the overall condition rarely worsens over time. In a small study that traced how people with fibromyalgia felt 10 years after diagnosis, the study authors found that although symptoms may persist, many people felt better with treatment and time." (Arbitration Decision, pp. 17-18) The Arthritis Foundation brochure appears to be consistent with the findings of the studies cited and discussed by Dr. Bagheri.

The Arthritis Foundation brochure also states, "[F]actors such as infectious illness, physical trauma, emotional trauma, or hormonal changes may trigger the development of generalized pain, fatigue and sleep disturbances that characterize the condition." (Arbitration Decision, p. 18) Claimant's independent medical evaluator for the 2009 arbitration hearing was Dr. Kuhnlein. In his report in preparation for the 2009 hearing, Dr. Kuhnlein specifically noted, "[D]epression and anxiety can exacerbate fibromyalgia." (Ex. A-2, p. 15)

Ms. Orris has experienced several emotional traumas since the 2009 hearing. She reported to her own evaluator, Dr. Bansal, that she has all but lost her relationship with her mother because her mother is a "difficult person" and claimant "cannot deal with the stress surrounding her mother." (Ex. 1, p. 27) Claimant has experienced the stress of moving from Iowa to Texas in 2012. (Tr., pp. 7-8) Claimant's move was also precipitated by the desire to be with her sister, who developed an end stage, terminal cancer. (Ex. 2, p. 139) Claimant specifically moved to Texas to be with her dying sister as much as possible. (Tr., pp. 7-8) Clearly, this was a stressor for claimant.

Shortly after claimant moved to Texas, she had a nephew that became ill. (Tr., p. 48; Ex. 2, p. 139) Shortly before the review-reopening hearing, claimant's husband was also diagnosed with cancer. (Tr., pp. 44, 48) In the summer of 2014, Ms. Orris was diagnosed with psoriatic arthritis, which causes significant pain in her feet and loss of mobility and physical function. (Ex. A-15; Ex. A-16; Ex. A-17) These are clearly additional personal life stressors that are unrelated to the original work injury. In fact, claimant admits that personal stressors can and do aggravate her fibromyalgia symptoms. (Tr., p. 48)

In spite of all of these personal stressors, Dr. Bansal provides very little analysis (if any) about this issue. Considering the number and severity of the stressors involved in Ms. Orris' life since the 2009 hearing and considering her own admission that these stressors have a significant impact on aggravating her fibromyalgia symptoms, it is difficult to understand why Dr. Bansal does not address their significance or effect on her condition.

Dr. Bagheri's explanation of the typical course of fibromyalgia symptoms as remaining the same or decreasing with time is supported by the medical research he cites. Dr. Bagheri's explanation that stress can cause an increase or exacerbation of fibromyalgia symptoms is supported by the medical research he cites and by claimant's own admission. Dr. Bagheri's opinions appear most consistent with the facts of this case, particularly given the number of stressors in Ms. Orris' life and those stressors temporal relationship to claimant's increase in fibromyalgia symptoms since 2011.

Therefore, when I weigh the competing causation opinions offered by Dr. Bansal and Dr. Bagheri, I find the opinions of Dr. Bagheri to be more convincing in this case. Having accepted Dr. Bagheri's opinions, I find that Ms. Orris has failed to prove that her increase or exacerbation of fibromyalgia symptoms is causally related to her initial work injury in May 2005.

Claimant seeks an award of certain medical expenses contained in exhibit 9. Each of the charges listed on the medical expense summary in exhibit 9 will be considered in the order they are listed on that summary. The first charges claimed are from Cherry Blossum Spa for a date of service of November 28, 2014 and totaling $60.00. Other than the billing statement for Cherry Blossum Spa, I do not identify any medical documentation that such services are recommended or prescribed by an authorized medical provider. Claimant mentioned massages in her deposition, but did not indicate these were prescribed medical services. (Ex. G, pp. 63-64) I find that claimant has not proven that the massage services at Cherry Blossum Spa are causally related to her work injury, reasonable or necessary medical treatment, or that they were recommended or prescribed by any authorized medical provider.

Claimant next itemizes charges from the Family Health Center of Bastrop for dates of service from September 14, 2012 through October 16, 2013. Ms. Orris selected this medical provider after she moved to Texas. She did not notify the

defendants that she was moving. She did not request that defendants identify an authorized medical provider for her in Texas. Ms. Orris has not proven that any of the treatment rendered by the medical providers as Family Health Center of Bastrop resulted in a more beneficial outcome than could have been achieved through authorized medical care.

Ms. Orris seeks an order awarding the expenses for physical therapy services provided by Garner & Riley from October 4, 2012 through May 2, 2014. Garner & Riley provided physical therapy services to Ms. Orris upon a referral from claimant's personal physician at Family Health Center of Bastrop. (Ex. 2, p. 85) Having concluded that the care rendered through Family Health Center of Bastrop was not authorized and not proven to be more beneficial than care that could have been rendered through an authorized provider, I come to a similar finding with respect to the physical therapy rendered at Garner & Riley.

The next provider listed is Physicians Clinic of Iowa for dates of services by Dr. Bagheri on November 16, 2019 and December 5, 2011. On page 33 of their post-hearing brief, defendants concede that they owe the charges submitted by Dr. Bagheri (Physicians Clinic of Iowa) for treatment in November 2009 and December of 2011. (Ex. 9, pp. 1, 17-18) The charges for Dr. Bagheri's services were submitted and paid through a private health insurance carrier. (Ex. 9, pp. 17-18) Defendants will be ordered to satisfy the charges for Dr. Bagheri's medical services.

Claimant also seeks award of medical expenses submitted by Dr. Szalasny with Scott & White Healthcare for dates of service from November 20, 2013 through September 24, 2014. Claimant began treatment with Olga V. Szalasny, M.D., upon a referral from her unauthorized personal physicians at the Family Health Center of Bastrop. (Ex. 2, p. 122) Claimant did not notify defendants of this referral or request authorization of Dr. Szalasny. Claimant has not established that Dr. Szalasny's treatment provided a more beneficial outcome than other authorized care could have provided. Defendants ultimately did agree to authorize Dr. Szalasny, but did not formally authorize the physician until December 12, 2014. (Ex. D)

Therapeutic Massage Works billing expenses are itemized by claimant in exhibit 9 for dates of service from October 12, 2012 through August 18, 2014. Similar to the charges submitted for Cherry Blossum Spa, claimant has not established that the services rendered at Therapeutic Massage Works were authorized or prescribed by an authorized medical provider. She has not established that these services were medically reasonable or necessary to treat her work injury.

Ms. Orris also seeks charges incurred at the University of Iowa Hospitals and Clinics (UIHC) between February 22, 2010 and February 3, 2011. The medical note from Rebecca S. Tuetken, M.D., at UIHC indicates that claimant presented to that clinic for a second opinion pertaining to her fibromyalgia. (Ex. 2, p. 7) One of claimant's friends recommended Dr. Tuetken. (Ex. G, pp. 58-59) The medical referral to UIHC

was made by claimant's personal physician, Jill E. Flory, M.D., and was not an evaluation defendants were made aware of or that they authorized before it occurred.

Claimant described her appointment with Dr. Tuetken as a "waste of time" when discussing it with Dr. Flory. (Ex. 2, p. 24) Ultimately, Dr. Tuetken essentially recommended that claimant continue with the care already offered and recommended by the authorized rheumatologist, Dr. Bagheri. (Ex. G, pp. 58-59) I find that the evaluation with Dr. Tuetken at UIHC was not authorized by defendants. It was not proven to be a necessary medical evaluation. Claimant did not establish that the evaluation with Dr. Tuetken resulted in a more beneficial outcome than could have been achieved through authorized medical care.

The October 11, 2010 evaluation at UIHC was again at the recommendation and referral of claimant's personal physician. That evaluation was not authorized and no evidence was introduced to demonstrate that the evaluation provided a more beneficial medical outcome than authorized care offered by defendants.

The third charge sought involves an evaluation occurring on February 3, 2011 at UIHC. During that visit, claimant saw a nurse practitioner in rheumatology, who ultimately offered an injection into claimant's left hip for a diagnosis of trochanteric bursitis. (Ex. 2, p. 66) Claimant has not asserted and there is no evidence that the treatment for claimant's left hip on February 3, 2011 was related to the May 2005 work injury.

Finally, claimant seeks an award of various prescription medications from January 9, 2011 through November 8, 2014. Defendants contend that no charges for medications other than Lyrica and Savella should be ordered because Dr. Flory was not an authorized provider. Indeed, as noted above, Dr. Flory was not an authorized medical provider. Claimant introduced no evidence to establish that the medications Dr. Flory prescribed provided a more beneficial outcome than other authorized care that could have been offered.

Ms. Orris seeks reimbursement for the independent medical evaluation charges submitted by Dr. Bansal. Dr. Bansal performed his evaluation on October 31, 2014. (Ex. 1, pp. 42-54) Dr. Bansal submitted charges totaling $2,795.00 as a result of his evaluation. (Ex. 10, p. 2)

Defendants did not obtain a report from any physician providing a permanent impairment rating since the 2009 arbitration hearing. Dr. Bansal did not offer a permanent impairment rating for claimant's conditions in his October 31, 2014 report.

CONCLUSIONS OF LAW AND REASONING

Claimant brings this review-reopening proceeding. A review-reopening proceeding is appropriate whenever there has been a substantial change in condition since a prior arbitration award or settlement. Kohlhaas v. Hog Slat, Inc., 777 N.W.2d

387 (Iowa 2009). Under Iowa Code section 86.14(2), this agency is authorized to reopen a prior award or settlement to inquire about whether the condition of the employee warrants an end to, diminishment of, or increase of compensation. Id.

Upon review-reopening, claimant has the burden to show a change in condition related to the original injury since the original award or settlement was made. The change may be either economic or physical. Blacksmith v. All-American, Inc., 290 N.W.2d 348 (Iowa 1980); Henderson v. Iles, 250 Iowa 787, 96 N.W.2d 321 (1959). A mere difference of opinion of experts as to the percentage of disability arising from an original injury is not sufficient to justify a different determination on a petition for review-reopening. Rather, claimant's condition must have worsened or deteriorated since the time of the initial award or settlement. Bousfield v. Sisters of Mercy, 249 Iowa 64, 86 N.W.2d 109 (1957). A failure of a condition to improve to the extent anticipated originally may also constitute a change of condition. Meyers v. Holiday Inn of Cedar Falls, Iowa, 272 N.W.2d 24 (Iowa App. 1978).

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).

Having determined that claimant's fibromyalgia symptoms are worse and/or more frequent but that the worsening is not causally related to claimant's work injury of May 20, 2005, I conclude that Ms. Orris has not proven that she sustained a substantial change in her condition that is related to the original injury. Therefore, I conclude that Ms. Orris has not established entitlement to reopening, or increase, of her prior industrial disability award. Iowa Code section 86.14(2).

Ms. Orris seeks an award of medical expenses, as outlined and itemized in exhibit 9. The employer shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance, and hospital services and supplies for all conditions compensable under the workers' compensation law. The employer shall also allow reasonable and necessary transportation expenses incurred for those services. The employer has the right to choose the provider of care, except where the employer has denied liability for the injury. Section 85.27. Holbert v. Townsend Engineering Co., Thirty-second Biennial Report of the Industrial Commissioner 78 (Review-Reopening October 1975).

Defendants concede they owe the charges from Dr. Bagheri at Physicians Clinic of Iowa, as outlined and itemized in exhibit 9. Defendants will be ordered to pay these expenses directly to claimant or otherwise satisfy those expenses. Krohn v. State, 420 N.W.2d 463 (Iowa 1988).

Claimant has not established that medical charges from Cherry Blossum Spa Therapeutic Massage Works, or the UIHC were reasonable and necessary medical charges. Therefore, I conclude that claimant's request for those medical expenses should fail.

Defendants assert that the medical claimed expenses in exhibit 9 (other than Dr. Bagheri) should be denied because they were unauthorized and claimant failed to meet her burden to establish the medical services provided a more beneficial outcome than other authorized medical care could have provided. I found that defendants established the various medical charges were unauthorized. Claimant introduced no evidence to establish that the unauthorized medical expenses provided a more beneficial outcome. Claimant was required to meet this burden pursuant to Bell Bros. Heating v. Gwinn, 779 N.W.2d 193 (Iowa 2010), in order to recover unauthorized medical expenses. I conclude that claimant has not met her burden of proof on these issues and all requests for medical expenses, other than the conceded charges from Dr. Bagheri, are denied.

Claimant also seeks reimbursement of Dr. Bansal's independent medical evaluation charges. 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 are responsible only for reasonable fees associated with claimant's independent medical examination. Claimant has the burden of proving the reasonableness of the expenses incurred for the examination. See Schintgen v. Economy Fire & Casualty Co., File No. 855298 (App. April 26, 1991). Claimant need not ultimately prove the injury arose out of and in the course of employment to qualify

for reimbursement under section 85.39. See Dodd v. Fleetguard, Inc., 759 N.W.2d 133, 140 (Iowa App. 2008).

In the review-reopening setting, defendants do not owe an independent medical evaluation unless they have obtained another permanent impairment rating from a physician of their own choosing since the prior award or settlement. Kohlhaas v. Hog Slat, Inc., 777 N.W.2d 387 (Iowa 2009). In this case, I found that defendants have not obtained a medical report from any physician regarding permanent impairment since the 2009 arbitration hearing. I also found that Dr. Bansal did not offer a permanent impairment rating as part of his independent medical evaluation report dated October 30, 2014.

I conclude that claimant failed to establish entitlement to reimbursement of Dr. Bansal's independent medical evaluation fee for at least two reasons. First, claimant did not establish that defendants obtained a permanent impairment rating from a physician of their own choosing prior to Dr. Bansal's evaluation occurring. Second, Iowa Code section 85.39 permits an evaluation for the purpose of obtaining an evaluation of permanent impairment. In this case, Dr. Bansal did not even offer an opinion as to permanent impairment. Therefore, I conclude that claimant is not entitled to reimbursement of Dr. Bansal's fee pursuant to Iowa Code section 85.39.

Finally, each party submits a statement of costs and seeks reimbursement of those costs. Assessment of costs is a discretionary function of the agency. Iowa Code section 86.40.

Defendants have prevailed on the majority of the disputed issues in this case. However, the issue of the change in condition was a reasonable dispute. Claimant also obtained an award of certain medical expenses for which defendants offered no explanation why they had not been paid prior to the time of the review-reopening. Therefore, exercising the agency's discretion, I conclude that each party should bear its own costs.

ORDER

THEREFORE, IT IS ORDERED:

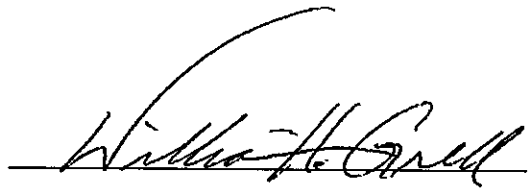
Claimant shall take nothing further with respect to her claim for additional permanent disability benefits.

Defendants shall pay to claimant, or otherwise satisfy, all medical expenses incurred for treatment by Dr. Bagheri (Physicians Clinic of Iowa) for dates of service of November 16, 2009 and December 5, 2011, as outlined and itemized in claimant's exhibit 9.

The parties shall bear their own costs associated with this case.

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

Signed and filed this 2nd day of March, 2015.



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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.