BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

MICHELLE MCKIM, Claimant, vs. DYERSVILLE FOOD BANK, INC., D/B/A PAYLESS FOODS CORP., Employer, and SOCIETY INSURANCE COMPANY, Insurance Carrier, Defendants.	File No. 5065088 ARBITRATION DECISION Head Notes: 1402.30, 1402.40, 1402.60, 2501, 2502

STATEMENT OF THE CASE

Claimant, Michelle McKim n/k/a Michelle Kuhlemeier, filed an original notice and petition alleging she sustained a work-related injury on March 27, 2016. Claimant alleged the work injury affected her lungs and respiratory system. (Original Notice and Petition) Dyersville Food Bank, Inc. d/b/a Payless Foods Corporation is the named employer, and Society Insurance Company is the named insurance carrier.

This case came before Deputy Workers' Compensation Commissioner Michelle A. McGovern for an arbitration hearing on March 21, 2019 in Des Moines. The hearing transcript was filed with the Iowa Division of Workers' Compensation on April 5, 2019.

Claimant testified at hearing. Defendants called Mr. Rick Smejkal, the director of operations for Payless, to testify. The parties offered Joint Exhibits 1 through 4. Claimant offered Exhibits 1 through 4. Defendants offered Exhibits A through F. The exhibits were admitted as evidence in the case.

Post-hearing briefs were filed on May 10, 2019. The case was deemed fully submitted to Deputy McGovern on that date.

The Iowa Workers' Compensation Commissioner has determined that Deputy Commissioner McGovern is currently unavailable to the agency. Therefore, on December 10, 2019 and pursuant to Iowa Code section 17A.15(2), Commissioner Cortese delegated this file to the undersigned for preparation and filing of an arbitration decision. Pursuant to Iowa Code section 17A.15(2), the undersigned inquired of the parties whether they believed demeanor of a witness is a substantial factor in the case.

The undersigned offered to hear those portions of the testimony again for which demeanor was considered a substantial factor. On December 11, 2019, claimant's counsel confirmed via e-mail to the undersigned that claimant has no objection to the undersigned drafting an arbitration decision without further evidentiary hearing. On December 12, 2019, defendants similarly confirmed they do not have an objection based on demeanor. Therefore, pursuant to Iowa Code section 17A.15(2) and the Commissioner's Order of Delegation filed on December 10, 2019, the undersigned performs a review of the evidentiary record in this case and issues this arbitration decision at the direction of the Commissioner.

ISSUES

The disputed issues presented for determination are:

1. Whether claimant sustained an injury on March 27, 2016, which arose out of and in the course of her employment.

2. Whether the alleged injury caused permanent disability.

3. The extent of claimant's entitlement to permanent disability benefits, if any.

4. Whether the past medical expenses sought by claimant are causally related to the alleged work injury of March 27, 2016.

5. Claimant is requesting the payment of an independent medical evaluation (IME) pursuant to Iowa Code section 85.39.

FINDINGS OF FACT

After reviewing the hearing transcript and reviewing all written exhibits introduced at the arbitration hearing, I enter the following findings of fact:

Claimant is a 51-year-old woman. (Transcript, page 7) She has a GED, which she obtained in 1983. (Tr., p. 8) Claimant obtained certification as a certified nursing assistant in 1983. (Tr., p. 15) She last worked as a CNA 20-25 years ago and no longer holds a valid CNA certification. (Joint Exhibit 4, p. 3; Tr., p. 16) She also obtained an associate's degree in electronics, which she obtained in 1990. (Tr., p. 8)

Claimant began working for the employer, which was known by a different business name, in November 2011. She started as a cashier. Within a month of commencing employment, claimant was promoted to pricing manager. (Tr., p. 13) In April 2012, the business was sold to the current employer, Payless. (Tr., p. 43)

As the pricing manager, claimant performed mainly office work. She estimated that she spent 90 percent of her work time in her office. (Tr., p. 44) In mid-2012, claimant began experiencing extreme fatigue. She noticed that she began passing out, or becoming severely drowsy at work. (Tr., pp. 18-19)

By March 2016, claimant was experiencing severe symptoms within 15-30 minutes of reporting to work. She testified that she felt fine when at home, but that she would "be out cold" within 15 to 30 minutes of reporting to work. (Tr., p. 18) Claimant testified that she would go for a walk outside to try to wake up and that she would feel ok if she was at home for a day or two, but that she would simply "go to sleep" when working in her office at work. (Tr., p. 19)

In March 2016, claimant told her personal physician Nirmal Bastola, M.D., that she could not continue and they pursued additional testing to determine the cause of her fatigue. (Tr., p. 19) Dr. Bastola ordered additional testing, including a blood draw to test for carbon monoxide poisoning. Claimant understood that blood work to demonstrate a 12.1 carbon monoxide level, which she also understands constitutes carbon monoxide poisoning. (Tr., p. 20)

Following this testing, claimant purchased a carbon monoxide monitor. She initially installed the monitor in her home. Despite being installed for four to five days, the carbon monoxide monitor did not alarm at her personal residence. (Tr., p. 20)

Claimant then took the carbon monoxide monitor to Payless and installed it in her office. Within a day of installing the monitor in her work office, it began to alarm at Payless. (Tr., pp. 21-23; Joint Ex. 4, p. 10) Claimant testified that the monitor alarmed almost every day after she installed it at work and she often found it alarming when she arrived at work. (Tr., pp. 22-23)

According to claimant's testimony, the employer believed claimant's monitor was malfunctioning. Therefore, Payless purchased a commercial grade carbon monoxide monitor and installed it in claimant's office. (Tr., pp. 22-2) Claimant produced photos she took of the numeric readings demonstrated by the carbon monoxide detector purchased by the employer. Those photographs are at Claimant's Exhibit 3 and demonstrate readings of 61, 71, and 89. (Claimant's Ex. 3, pp. 1-3) No specific testimony was offered to demonstrate the significance of the readings photographed by claimant. It is presumed that the readings are parts per million, but that was not confirmed in the evidence offered in this case.

The employer denies that claimant sustained an injury that arose out of and in the course of employment. (Answer and Hearing Report) However, the employer concedes that the carbon monoxide detectors installed in claimant's office did alarm on various occasions during the period of time claimant asserts she was exposed to carbon monoxide. (Tr., p. 95)

Review of the medical records demonstrates that claimant was first tested for carbon monoxide on March 28, 2016. That test demonstrated a carboxyhemoglobin level of 7.1 percent. (Joint Ex. 1, p. 8) The employer took claimant's complaints seriously. The employer called Alliant Energy, who obtained a positive reading for some carbon monoxide within the employer's premises. (Joint Ex. 4, p. 11)

Claimant testified in her deposition that repairs were attempted, but the carbon monoxide monitor alarmed again approximately four days after Alliant Energy investigated the problem. (Joint Ex. 4, p. 11) This time, the employer called a contractor to investigate the potential for carbon monoxide in claimant's office.

The contractor recommended repairs and the employer performed those repairs. Unfortunately, claimant's symptoms did not resolve. A second blood test was performed on May 24, 2016. That test demonstrated a 7.4 percent result for carboxyhemoglobin. (Joint Ex. 1, p. 9)

Following the second test, claimant's personal physician recommended that she be off work for a period of 30 days. (Tr., p. 59; Joint Ex. 4, p. 12; Joint Ex. 2, p. 7) The employer requested that claimant work from home during this period of time. Claimant agreed and worked from home from June 3, 2016 through June 27, 2016. (Tr., p. 59) Claimant testified that her symptoms improved during this period of time. (Tr., p. 61)

During her absence from the workplace in June 2016, claimant continued to seek medical care. Bloodwork performed on June 2, 2016, immediately before claimant began working at home, demonstrated a carboxyhemoglobin rate of 4.1 percent. (Joint Ex. 1, p. 10) When tested again on June 10, 2016, claimant's blood work demonstrated a 7.6 percent carboxyhemoglobin rate. (Joint Ex. 1, p. 11) On June 24, 2016, claimant's carboxyhemoglobin rate remained at 7.5 percent. (Joint Ex. 1, p. 12; Joint Ex. 2, p. 11) Claimant had no explanation why her bloodwork readings documenting carbon monoxide exposure increased during the period of time she was away from the employer's premises.

Two experts were hired to offer causation opinions in this case. Claimant retained Sunil Bansal, M.D. Dr. Bansal evaluated claimant on February 1, 2019. Dr. Bansal recorded a subjective history that included three or four carbon monoxide leaks at the employer's place of business as well as another employee passing out at work. (Claimant's Ex. 1, p. 5) These facts are only included in this evidentiary record via hearsay comments from claimant to Dr. Bansal that were not repeated or proven at trial.

Dr. Bansal also records that claimant reported, "She took a month off at the end of 2016, and at the end of this time she again had labs drawn, which she states were fine. However, after returning to work her levels rose again." (Claimant's Ex. 1, p. 5) These facts were specifically refuted by claimant on cross-examination at trial.

Claimant testified:

> Q: ... And then on page 5 at the bottom there of the page, that last paragraph, it reads, "She took a month off work at the end of 2016, and at the end of this time, she, again, had labs drawn, which she states were fine. However, after returning to work, her levels rose again." Did I read that correctly?

A: That's what it says.

Q: You testified earlier that your employment with Payless ended in July of 2016, is that right?

A: Yes.

Q: So it would be incorrect when he writes that at the end of 2016, you had some labs drawn. Is that your understanding as well?

A: Yeah, the – it looks like the time is wrong.

Q: And it also states that after returning to work, your levels rose again. Did I read that part right?

A: That's what it says, yes.

Q: We previously discussed that actually while you were off work, your levels rose; is that right?

A: Yes. According to the information you provided, yes.

Q: So when I read that Dr. Bansal reports, "After returning to work, labs rose again," you would agree with me that's an incorrect statement?

A: I don't know if it's correct or incorrect. I was never provided medical to have them testified again.

(Tr., pp. 68-69)

Dr. Bansal's erroneous history is difficult to understand. In his report, Dr. Bansal records that he had pertinent medical records available, which documented the timeline of events. (Claimant's Ex. 1, pp. 1-4) Dr. Bansal specifically identifies as pertinent a September 8, 2016 office note from Dr. Bastola. Dr. Bansal quotes from that record, noting, "Since she left said workplace, her symptoms have resolved." (Claimant's Ex. 1, p. 4) Clearly, based on this record review, Dr. Bansal should have known that claimant was out of the work place prior to September 2016. Dr. Bansal's history indicating that claimant was off work in late 2016 makes no sense and is erroneous.

Dr. Bansal's subjective history that claimant had labs drawn after her time off work and that those labs were "fine" is also inaccurate. (Claimant's Ex. 1, p. 5) Again, Dr. Bansal's history that claimant's "levels rose again" after she returned to work is also inaccurate.

Ultimately, Dr. Bansal opines, "Ms. McKim incurred carbon monoxide poisoning from an exposure while working at Payless Foods." (Claimant's Ex. 1, p. 7) Dr. Bansal opines that this presumed carbon monoxide poisoning resulted in "neuropsychiatric

sequelae, including daytime somnolence." (Claimant's Ex. 1, p. 7) Dr. Bansal opines that claimant sustained a five percent permanent impairment of the whole person as a result of carbon monoxide poisoning at Payless. (Claimant's Ex. 1, p. 7) Dr. Bansal imposes permanent work restrictions that "restrict her from duties that require sustained cognitive functioning." (Claimant's Ex. 1, p. 7)

One of Dr. Bansal's conclusions that claimant's carbon monoxide poisoning was from work exposure is because "she had a markedly elevated carboxyhemoglobin (proxy for CO poisoning) values around the time of alleged exposure." (Claimant's Ex. 1, p. 7) Dr. Bansal makes no mention or explanation of the fact that claimant's carboxyhemoglobin rates actually increased during her time away from the employer's premises. Dr. Bansal's history and analysis have glaring errors that reduce this deputy's confidence in his opinions.

Defendants retained Maxwell S. Cosmic, M.D., to perform a records review and offer medical opinions. Dr. Cosmic is fellowship trained in pulmonary and critical care medicine. He is a member of the American College of Chest Physicians and has practiced in pulmonary and critical care medicine since 2003. (Defendants' Ex. A, pp. 4-7)

Dr. Cosmic appears to have reviewed generally the same medical records reviewed by Dr. Bansal. He also appears to have been made aware of an OSHA inspection, which demonstrated no carbon monoxide upon air sampling at the employer's business. (Defendants' Ex. A, p. 2; Defendants' Ex. E) Dr. Bansal makes no mention of the OSHA air sampling performed at Payless in his report. (Claimant's Ex. 1) Dr. Cosmic also records an accurate history, detailing that claimant's carboxyhemoglobin "levels did not come down when she was away from her workplace." (Defendants' Ex. A, p. 2)

Dr. Cosmic notes claimant's smoking history and provides medical analysis of the effects of smoking and carbon monoxide test results that is not discussed or detailed in Dr. Bansal's report. For instance, Dr. Cosmic states:

> Her carboxyhemoglobin levels were 7.1-7.4% while working and 4.1-7.6% after being away from workplace. Half-life of carboxyhemoglobin in a patient breathing room air is approximately 250-320 min. If she did not have continued exposure to carbon monoxide, carboxyhemoglobin levels should have come down to less than 3%, which is normal. But in her case it still remained high and as much as 7.6%, even after she had been away from her workplace for about 10 days. **In smokers, carboxyhemoglobin levels can be as high as 10-15%.** In nonsmokers carboxyhemoglobin levels could be as much as 3%.

(emphasis in original) (Defendants' Ex. A, p. 2)

Dr. Cosmic's explanation of the half-life of carboxyhemoglobin is accepted. Given this relatively short half-life, claimant's carboxyhemoglobin levels should have significantly decreased during the month she was away from work. In fact, carbon monoxide exposures in May 2016 should not be reflected in the carboxyhemoglobin results obtained in mid to late June according to Dr. Cosmic's explanation and analysis. This makes sense to the undersigned and is accepted as accurate. Neither claimant nor Dr. Bansal have reasonable or convincing explanations why claimant's carboxyhemoglobin rates did not precipitously drop after she left the employer's premises for a month.

Dr. Cosmic offered medical conclusions, stating:

> Documented increased carboxyhemoglobin levels in Ms. McKim's blood varied from 4.1 to 7.6. These high levels are due to her cigarette smoking. The levels did not come down when she was away from her workplace. This clearly indicates that her carboxyhemoglobin levels were not related to any workplace exposure.

(Defendants' Ex. A, p. 2)

Dr. Cosmic further opined:

> Ms. McKim's symptoms of fatigue, tiredness and daytime sleepiness are nonspecific. There are several explanations for these symptoms in her case. She has COPD. She has obstructive sleep apnea. She has depression. She had been on Cymbalta which can cause fatigue. In fact, Cymbalta was discontinued on 6/24/2016. According to reports from Mayo Clinic, during her evaluation on 9/27/2016 most of her symptoms had resolved. There was resolution of daytime sleepiness. Although her obstructive sleep apnea is mild she had been using CPAP since she is a snorer. There are sufficient number of explanations for her symptoms rather than presumed carbon monoxide poisoning.

(Defendants' Ex. A, p. 3)

Dr. Cosmic also specifically addressed the opinions of Dr. Bansal. He opined:

> I refute Dr. Sunil Bansal's statement saying that she has neuropsychiatric sequelae from carbon monoxide poisoning. Her symptoms are not consistent with neuropsychiatric sequelae. Her measured carboxyhemoglobin levels were between 4.1 and 7.6, which are very unlikely to lead on to long-term sequelae.
>
> In summary, Ms. McKim's incidental discovery of increased carboxyhemoglobin levels in her blood is due to her cigarette smoking. The levels detected are well within the range described in literature in

> smokers. Her nonspecific symptoms have alternate explanation. Assertion that she has neuropsychiatric sequelae from carbon monoxide poisoning is too farfetched and in my opinion not true.

(Defendants' Ex. A, p. 3)

I find that Dr. Cosmic has superior credentials, training, and experience in the treatment of diseases such as carbon monoxide poisoning. Dr. Cosmic appears to have a better understanding of the history of claimant's exposure to carbon monoxide and his analysis is better supported by medical literature and research. I find the opinions of Dr. Cosmic to be most convincing in this record.

Therefore, I find that claimant has proven she was exposed to some levels of carbon monoxide at Payless. However, claimant has not proven that her elevated carboxyhemoglobin levels are causally related to any minor exposure to carbon monoxide at the employer's premises. Claimant has not proven any permanent impairment or permanent effects resulted from her exposures at Payless.

I find that claimant proved some incidental exposures to carbon monoxide at Payless, but claimant has not proven any residual effects of those incidental exposures. Claimant has not proven that any of the medical treatment she obtained is causally related to carbon monoxide exposures at Payless. Claimant's ongoing, elevated carboxyhemoglobin levels are more likely related to her long history and ongoing smoking habit, as documented and opined by Dr. Cosmic.

CONCLUSIONS OF LAW AND RATIONALE

The first issue for determination is whether claimant sustained an injury, which arose out of and in the course of her employment with Payless on March 27, 2016. 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" referred 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).

A personal injury contemplated by the workers' compensation law means an injury, the impairment of health or a disease resulting from an injury which comes about, not through the natural building up and tearing down of the human body, but because of trauma. The injury must be something that acts extraneously to the natural processes of nature and thereby impairs the health, interrupts or otherwise destroys or damages a part or all of the body. Although many injuries have a traumatic onset, there is no requirement for a special incident or an unusual occurrence. Injuries which result from cumulative trauma are compensable. Increased disability from a prior injury, even if brought about by further work, does not constitute a new injury, however. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); Ellingson v. Fleetguard, Inc., 599 N.W.2d 440 (Iowa 1999); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995); McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985). An occupational disease covered by chapter 85A is specifically excluded from the definition of personal injury. Iowa Code section 85.61(4) (b); Iowa Code section 85A.8; Iowa Code section 85A.14.

While a claimant is not entitled to compensation for the results of a preexisting injury or disease, its mere existence at the time of a subsequent injury is not a defense. Rose v. John Deere Ottumwa Works, 247 Iowa 900, 76 N.W.2d 756 (1956). If the claimant had a preexisting condition or disability that is materially aggravated, accelerated, worsened or lighted up so that it results in disability, claimant is entitled to recover. Nicks v. Davenport Produce Co., 254 Iowa 130, 115 N.W.2d 812 (1962); Yeager v. Firestone Tire & Rubber Co., 253 Iowa 369, 112 N.W.2d 299 (1961).

In this case, the employer conceded at trial that the carbon monoxide detectors installed in claimant's office periodically alarmed. Inspection by Alliant and a

subsequent contractor demonstrated potential causes or sources of carbon monoxide. The employer made repairs and a buffer that potentially caused carbon monoxide was stored in a different location. Therefore, I found that claimant proved some exposure to carbon monoxide at the employer's premises.

This exposure to carbon monoxide is something that acts extraneously to the natural processes of nature and thereby impairs the health, interrupts or otherwise destroys or damages a part or all of the body. Therefore, I conclude that claimant proved she was exposed to carbon monoxide at the employer's premises and that she sustained an injury arising out of and in the course of her employment.

PERMANENT PARTIAL DISABILITY BENEFITS

The next disputed issue is whether claimant has proven the March 27, 2016 injury caused permanent disability and, if so, the extent of claimant's entitlement to permanent disability benefits. 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).

I found Dr. Bansal's history and causation to be flawed. Instead, I found the medical opinions of Dr. Cosmic to be more convincing. Accordingly, the undersigned found that any elevated carboxyhemoglobin levels demonstrated during claimant's blood testing were incidental findings caused by claimant's long history and ongoing habit of smoking.

As Dr. Cosmic opined, "Ms. McKim's incidental discovery of increased carboxyhemoglobin levels in her blood is due to her cigarette smoking." (Defendants'

Ex. A, p. 3) Having found none of the elevated carbon monoxide levels to be related to the incidental exposures at her employment, I similarly rejected the opinion that claimant developed neuropsychiatric sequelae as a result of those incidental exposures. Claimant failed to prove any permanent impairment, permanent restrictions, or permanent disability as a result of incidental exposures to carbon monoxide at work. Claimant has not proven entitlement to any permanent disability benefits.

PAST MEDICAL EXPENSES

The next issue for determination is claimant's entitlement to past medical expenses. Claimant attached an itemization of past medical expenses totaling $9,762.00 to the hearing report. Claimant's counsel also asserted outstanding prescription medication costs totaling $927.67 at the commencement of hearing and those are also considered.

Defendants concede that the medical care was reasonable and necessary. Defendants also concede that the medical treatment was causally related to claimant's respiratory condition. However, defendants dispute that the medical care was causally related to the March 27, 2016 work injury. (Hearing Report)

Claimant established she sustained a work injury on March 27, 2016. However, she did not prove by a preponderance of the evidence that her subsequent medical treatment or symptoms were causally related to her carbon monoxide exposure at Payless. For the reasons outlined above relative to claimant's request for permanent disability benefits, the undersigned concludes that claimant failed to prove causal connection of her requested medical expenses.

INDEPENDENT MEDICAL EVALUATION PURSUANT TO IOWA CODE SECTION 85.39

The final issue for determination is claimant's entitlement to reimbursement for an independent medical evaluation pursuant to Iowa Code section 85.39. Claimant contends that she should be reimbursed for the evaluation performed by Dr. Bansal. Claimant introduced Dr. Bansal's billing statement at Claimant's Exhibit 1, page 9. Dr. Bansal's billing statement reflects that he performed his evaluation on February 19, 2019. (Claimant's Ex. 1, p. 9)

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).

"Our legislature established a statutory process to govern examinations of an injured worker in order to obtain a disability rating to determine the amount of benefits required to be paid by the employer." Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839, 847 (Iowa 2015). "If the injured worker wants to be reimbursed for the expenses associated with a disability evaluation by a physician selected by the worker, the process established by the legislature must be followed." Id.

Although Iowa Code section 85.39 provides a mechanism for the employee to obtain reimbursement for an evaluation with a physician of her own choosing, the statutory process must be followed. "An employer, however, is not obligated to pay for an evaluation obtained by an employee outside the statutory process." Id. at 844. The initial requirement to qualify for an independent medical evaluation pursuant to Iowa Code section 85.39 is that the employer must first obtain an evaluation of permanent impairment by a physician of its choosing.

In this case, Dr. Bansal evaluated claimant at her request on February 19, 2019. Defendants later obtained a record review and report from Dr. Cosmic dated February 22, 2019. However, defendants did not obtain an evaluation or permanent impairment rating from a physician of their choosing prior to Dr. Bansal's evaluation. Claimant did not prove the necessary qualifying element to obtain reimbursement of Dr. Bansal's evaluation pursuant to Iowa Code section 85.39.

ORDER

THEREFORE, IT IS ORDERED:

Claimant takes nothing.

Signed and filed this 12th day of December, 2019.

William H. Grell

WILLIAM H. GRELL
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Richard R. Schmidt (via WCES)
Kathryn Johnson (via WCES)
Stephen Spencer (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 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.