BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

AMY BEBOUT, Claimant, vs. IOWA DEPARTMENT OF HUMAN SERVICES, Employer, and STATE OF IOWA, Insurance Carrier, Defendants.	:	File No. 1645935.01 ARBITRATION DECISION Head Notes: 1100, 1104, 1402.30 1402.40, 1802, 1803

Claimant, Amy Bebout, filed a petition in arbitration seeking workers' compensation benefits from Iowa Department of Human Services , employer, and State of Iowa, insurer, both as defendant. The hearing occurred before the undersigned via CourtCall on June 2, 2021.

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 in this decision. The parties are now bound by their stipulations.

The evidentiary record consists of Joint Exhibits 1 through 4, Claimant's Exhibits 1 through 11, and Defendants' Exhibits A through C. All exhibits were received without objection.

Claimant testified on her own behalf. Claimant also called Lisa Wischler and Debra Johnson on her behalf. Defendant did not call any witnesses. The evidentiary record closed at the conclusion of the evidentiary hearing. Both parties served their post-hearing briefs on July 2, 2021, at which time this case was deemed fully submitted to the undersigned.

ISSUES

The parties submitted the following disputed issues for resolution:

1. Whether claimant's March 26, 2018, injury arose out of and in the course of her employment;

2. Whether the injury caused temporary disability and, if so, the extent of claimant's entitlement to temporary disability benefits;

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

4. Whether claimant is entitled to an award of past medical expenses;

5. Whether claimant is entitled to reimbursement for the fees associated with an independent medical examination under Iowa Code section 85.39; and

6. Costs.

FINDINGS OF FACT

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

Amy Bebout, a social worker for the Department of Human Services (DHS), was injured walking from her car to her office in the Scott County Administrative Center on the morning of March 26, 2018. At approximately 8:15 a.m., Ms. Bebout parked her personal vehicle in a public parking space on West 4th Street, just south of the Administrative Center. (Hearing Transcript, page 62) While the Scott County Administrative Center has an employee parking lot, Ms. Bebout was not permitted to utilize the same. As such, Ms. Bebout parked her vehicle on the street, as close to the Administrative Center as possible. (Id.) It is undisputed that the street and crosswalks that span 4th Street are not owned or controlled by the employer; rather, they are maintained and controlled by the City of Davenport. After finding a parking space, Ms. Bebout exited her vehicle and walked along the curb towards the back of her vehicle. (Hr. Tr., pp. 62-63) According to Ms. Bebout, snowbanks were present between the sidewalk and West 4th Street. Unfortunately, Ms. Bebout's right foot became stuck in a snowbank. This caused Ms. Bebout to lose her balance and fall behind her vehicle. After pulling herself up and gathering her things, Ms. Bebout called her supervisor. Claimant's supervisor and some co-workers subsequently came out and helped Ms. Bebout into her car and drove her to Concentra for medical treatment. (Hr. Tr., p. 64)

After defendant denied compensability, Ms. Bebout presented to Myles Luszczyk, D.O. for medical treatment. (JE3) An MRI of the right ankle dated July 26, 2018, revealed a partial tear of the peroneal brevis tendon with evidence of tenosynovitis, a tear of the anterior talofibular ligament and strains of the posterior talofibular ligament and deltoid ligament. (JE3, pp. 28-29) Ms. Bebout did not pursue surgical intervention on her right ankle as she was told that she would need to be off work for approximately three months and she had already exhausted all of her leave at work. (Ex. 11, p. 52) Sunil Bansal, M.D. conducted an independent medical evaluation of claimant and assessed claimant with eleven percent (11%) right lower extremity impairment due to range of motion deficits. (Ex. 4, p. 15) Dr. Bansal recommended permanent restrictions of no prolonged standing or walking greater than 30 minutes, and avoid multiple stairs and walking on uneven ground. (Id.) Defendant did not obtain an impairment rating or request an evaluation of claimant's impairment prior to Dr.

Bansal's independent medical examination. As such, I find claimant is not entitled to reimbursement for the fees associated with Dr. Bansal's IME.

Claimant sought workers' compensation benefits from her employer, a self-insured employer (defendant). Defendant, relying on the "going and coming" rule, denied claimant's injuries were compensable.

Claimant has worked as a social worker for DHS since 2007. (Hr. Tr., p. 50) As a social worker, claimant develops case plans, writes reports, meets with families, conducts home visits, transports children, and appears in court. When she was not conducting home visits or appearing in court, claimant worked out of the DHS office located on the third floor of the Scott County Administrative Center in Davenport, Iowa. (Hr. Tr., p. 38)

On the date of injury, claimant was on her way to the Administrative Center. According to the job description for a Social Worker II, claimant, and similarly situated employees, were expected to work from 8:00 a.m. to 4:30 p.m. However, claimant testified she regularly worked outside of the normal business hours. (Hr. Tr., pp. 55, 59-60) More specifically, claimant testified she regularly worked two nights per week, and sometimes three. (Hr. Tr., p. 60) She further testified that she had to work around the schedules of the children and families she was assigned to. (Id.)

All three witnesses testified to what a typical day as a social worker for DHS looks like. (See Hr. Tr., pp. 14-15, 33-34, 55) Ms. Wischler testified the social worker position did not have a fixed location or fixed hours. (Hr. Tr., p. 18) Ms. Wischler and Ms. Johnson testified that social workers could be in and out of the office up to six times per day depending on the casework assigned. (Hr. Tr., p. 14; see Hr. Tr., pp. 42-43) At times, social workers would be able to plan their schedules; however, they were also expected to respond to emergency situations. According to Ms. Wischler, social workers were sometimes expected to adhere to a one-hour response time. (Id.) Claimant primarily handled cases in Scott County; however, she was, at times, expected to travel outside of Scott County. (See Hr. Tr., p. 15)

Travel was an essential component of claimant's employment. As a social worker, claimant traveled to homes, schools, hospitals, mental health centers, substance abuse centers, courts, and various other places throughout the State of Iowa. (See Hr. Tr., pp. 52, 55) Claimant routinely used her own vehicle for travel. Claimant was paid mileage if she used her personal vehicle for work; however, she was not reimbursed for travel to and from her home in Blue Grass, Iowa. Claimant was required to keep a log of how many miles she traveled in a given day. Then, at the end of the month, she would fill out a voucher requesting reimbursement from the state. (Hr. Tr., p. 15) At times, claimant would have to install car seats in her personal vehicle to transport children. The state provided the necessary car seats. (Hr. Tr., p. 43) Alternatively, claimant had the ability to sign-out a state-owned vehicle, "if it was available." (See Hr. Tr., pp. 15, 34, 56)

Lisa Wischler and Debra Johnson testified that having a vehicle was a requirement of their employment with DHS. (Hr. Tr., pp. 14, 34) More specifically, Ms. Johnson testified social worker IIs were required to have a valid driver's license, to be

insured, and to have a means of transportation. (Hr. Tr., p. 34) Whether using her own vehicle or one provided by the state, having access to a vehicle was instrumental in meeting with families, conducting home visits, and transporting children.

As previously mentioned, claimant was not allowed to park her personal vehicle in the parking lot attached to the Administrative Center. Claimant's parking privileges were revoked after she violated the Campus Parking Policy. As a result, claimant could not park in any county owned parking place. Individuals banned from parking in the Administrative Center parking lot still had the option of parking in the "5th & Western" lot or on the street. (Ex. 2, p. 4; Hr. Tr., pp. 22, 23, 39, 79) There is no evidence that DHS management instructed claimant to park on the street; however, it is clear parking on the street was common practice for employees working at the Administrative Center. Additionally, the Scott County Parking Map in evidence depicts the four main parking lots and provides, "On-street parking also available." (Ex. 1, p. 1)

The Campus Parking Policy acknowledges that there is limited parking available to visitors, customers, and employees near the Administrative Center. The Campus Parking Policy does not guarantee off-street parking for county or state employees, employees temporarily assigned to a campus building, other organizations occupying workspace in or at county facilities, or volunteers working at the county campus. (Ex. 2, p. 2) The parking policy, coupled with the parking bans, was "extremely frustrating" to DHS employees and "added to a lot of inconvenience, a lot of unnecessary time consumption" for social workers who were constantly coming and going from the office. (Hr. Tr., p. 21)

For reasons that will be addressed in the Conclusions of Law section, I find the evidence as a whole indicates that Ms. Bebout was required to drive her own vehicle to work for use during her workday. As such, I find the trip to and from work is by that fact alone embraced within the course of employment. I further find that claimant's injury arose out of and in the course of employment.

Having found claimant's injury arose out of and in the course of her employment, the next issue to be addressed is whether the injury caused temporary and permanent disability.

The parties stipulate that Ms. Bebout was off work between March 26, 2018, and July 5, 2018, as a result of the alleged work injury. Ms. Bebout returned to her full duty position with DHS on July 6, 2018. (See Ex. 5, p. 18; Ex. 11, p. 51) Dr. Bansal placed claimant at maximum medical improvement as of August 29, 2018. (Ex. 4, p. 15)

Dr. Bansal is the only physician to offer an opinion as to claimant's level of functional impairment. Utilizing the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, Dr. Bansal assessed claimant with 11 percent lower extremity impairment due to range of motion deficits. (Id.) I accept Dr. Bansal's assessment as credible and convincing, and find claimant sustained permanent disability as a result of the work injury.

Ms. Bebout also seeks an award of past medical expenses. Defendant concedes that the expenses were causally connected to the medical conditions upon

which the claim of injury is based. (Hearing Report) Having found that the claimed injury occurred, I similarly find that the claimed past medical expenses are causally connected to the March 26, 2018, work injury, the fees charged by the providers are fair and reasonable, and the treatment was reasonable and necessary.

Costs will be addressed in the Conclusions of Law section.

CONCLUSIONS OF LAW

The threshold issue in this case is whether Ms. Bebout's injury arose out of and in the course of her employment.

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.

This case is largely concerned with the "in the course of" prong. With regard to "in the course of," the general rule is that, absent special circumstances, an employee is not entitled to compensation for injuries occurring off of the employer's premises on the way to and from work. Frost v. S.S. Kresge, 299 N.W.2d 646, 648 (Iowa 1980). An employee who has a fixed place to work and fixed hours to work is not covered by workers' compensation on the way to and from work. Waterhouse Water Cond. v. Waterhouse, 561 N.W.2d 55, 57-58 (Iowa 1997); Frost v. S.S. Kresqe Co., 299 N.W.2d 646, 648 (Iowa 1980); Quaker Oats Co. v. Ciha, 552 N.W.2d 143,150-51 (Iowa 1996)

This legal proposition is frequently referred to as the "going and coming" rule. Bailey v. Batchelder, 576 N.W.2d 334, 339 (Iowa 1998) ("[U]nder 'the going and coming' rule, workers' compensation does not cover an injury occurring off of the employer's premises, on the way to or from work."). The rationale for the going and coming rule is that as an employee travels to work he or she is engaged in his or her own business, and the employment commences only after the employee reaches the employer's premises. See Otto v. Independent Sch. Dist., 237 Iowa 991, 994, 23 N.W.2d 915, 916 (1946).

There are several recognized exceptions to this rule. See Frost, 299 N.W.2d at 648–49. These exceptions apply "when it would be unduly restrictive to limit coverage of compensation statutes to the physical perimeters of the employer's premises." Ciha, 552 N.W.2d at 151.

Additionally, under a separate rule which acts as an exception to the "going and coming" rule, an employee's trip to and from work is considered within the course of employment if the employee is required, as a part of his or her employment, to provide a vehicle for use during the working day. See Davis v. Bjorenson, 229 Iowa 7, 11, 293 N.W. 829, 830 (1940); 1 A. Larson, The Law of Workmen's Compensation § 17.50 at 4–239 (1985). The rule has been called the "Personal Vehicle" rule, "Own Conveyance" rule, and "required vehicle" rule.

The Iowa Supreme Court has recognized, under certain circumstances, that when the special demands of a job make it incumbent upon the employee to have ready transportation, travel to and from work may be considered within the course of employment. Medical Assocs. Clinic, P.C. v. First Nat'l Bank of Dubuque, 440 N.W.2d 374, 375 (Iowa 1989). In recognizing this rule, the Iowa Supreme Court cited Professor Larson:

> As stated by Professor Larson:
>
> > The theory behind this rule is in part related to that of the employer-conveyance cases: the obligations for the job reach out beyond the premises, make the vehicle a mandatory part of the employment environment, and compel the employee to submit to the hazards associated with private motor travel, which otherwise he would have the option of avoiding. But in addition there is at work the factor of making the journey part of the job, since it is a service to the employer to convey to the premises a major piece of equipment devoted to the employer's purposes. Since these are the reasons supporting the rule, care must be exercised not to confuse these cases with the more common cases ... in which attention is focused exclusively on the journey itself—in particular, on the question: was the employee paid for the time or expenses of the journey itself? In the present category, it is immaterial whether the employee is compensated for the time or expenses of the journey, since work-connection is independently established by the fact of conveying the vehicle to the operating premises. 1 A. Larson, § 17.50 at 4–239–44.

Medical Assocs. Clinic, P.C., 440 N.W.2d at 375-376.

The "own conveyance" rule was applied by the court to allow compensation in Davis and Medical Assocs. Clinic, P.C.

In Davis, the claimant worked as a mechanic for a business. Under the employment agreement, the claimant regularly furnished his automobile to the employer for use in the business as a service car. 293 N.W. at 829. The claimant took the vehicle home at night and answered emergency service calls overnight. Id. During regular business hours, the claimant's vehicle was used in the business by the claimant and by other employees, and the employer furnished gas and oil for the vehicle. Id. The claimant was injured while driving his vehicle twelve blocks from his home on the way to his employer early in the morning. Id. The court found the claimant's injury arose out of and in the course of his employment because the vehicle was an instrumentality of the business given the claimant was required under his contract to drive his own vehicle

from his home to the shop where it was available to his employer for use in his employer's business. Id. at 830. The court found that "the car was an instrumentality of the business at all hours of the day and was subject to that use at night." Id. It was claimant's duty to take the car to work for its use in the business and "in so doing he was performing for his employer a substantial service required by his employment at the place and in the manner so required." Id.

In Medical Associates Clinic. P.C., Miles Martin, a thoracic surgeon, died in an automobile accident on his way from home to work at Mercy Hospital in Dubuque. 440 N.W.2d at 374. Dr. Martin had an employment contract with Medical Associates Clinic, which required him to personally pay automobile and transportation expenses he incurred in his work as a physician, and which provided his employer was under no obligation to pay the expenses. Id. at 374-75. Medical Associates argued the Davis case was distinguishable because Davis was required by contract to provide a vehicle, the vehicle was used by all of the employees to make service calls, and the employer furnished the gas and oil for the vehicle. Id. at 376. The court disagreed, concluding the employer read the Davis case too narrowly. The court noted, "[w]hat was significant was that claimant was required to bring the vehicle to work for its use in the business to make service calls. As a result, 'claimant had no selection of his mode of travel to work.'" Id. The court found Dr. Martin (1) was required to bring his vehicle to work, (2) he had no fixed hours or work situs and instead made frequent trips between the Medical Associates office and several area hospitals, and (3) it was incumbent upon Dr. Martin to have ready transportation available. Id.

Defendant asserts there is no evidence that claimant's contract for hire required her to furnish her own method of transportation. While claimant's employment contract was not submitted into the evidentiary record, Ms. Wischler and Ms. Johnson both testified that having a vehicle was a requirement of their employment with DHS. (Hr. Tr., pp. 14, 34) More specifically, Ms. Johnson testified social worker IIs were required to have a valid driver's license, to be insured, and to have a means of transportation. (Hr. Tr., p. 34) Defendant did not present any evidence to rebut the claims made by Ms. Wischler and Ms. Johnson. I accept the testimony of claimant's witnesses as credible.

Importantly, travel was a major component of claimant's job. It is undisputed that travel and the ability to travel was required for social worker IIs. In the matter at hand, the evidence as a whole indicates that the use of claimant's personal vehicle was required. Claimant's vehicle was regularly used to conduct home visits and transport children. Claimant's vehicle was also utilized in emergency situations where it would be impractical to obtain a vehicle from the state vehicle pool. There is no testimony as to whether the vehicle pool has a sufficient number of vehicles for daily use by all social workers and other state employees; however, it is difficult to imagine that the pool could meet such demand. To this end, claimant testified she could obtain a vehicle from the state vehicle pool "if one was available." Surely DHS would have been surprised and dismayed if all social worker IIs arrived at work by bus or taxi to perform their duties each day. Such actions would negatively impact response times and, consequently, negatively impact the services provided to children in the State of Iowa. It is undoubtedly a benefit to the employer that claimant conveyed to work a major piece of

equipment devoted to employer's purposes.

A number of defendant's arguments fail to recognize the distinguishing characteristics within the "own conveyance" class of cases and, instead, treat claimant's case like a normal going and coming case. Similar to the defendants in Medical Associates, DHS reads the holdings in Davis and Medical Associates too narrowly. In doing so, defendant focuses almost exclusively on the journey itself, rather than the obligations of the job. Factors such as whether claimant was compensated for the time or expenses of the journey, whether she was on call or responding to an emergency situation, and whether she was performing a job duty at the time of injury are immaterial under the "own conveyance" framework. As discussed above, the work-connection is independently established by the fact she conveyed her personal vehicle to the operating premises in order to have it available for her employer's purposes during the day. See Medical Associates, 440 N.W.2d at 376. ("What was significant was that claimant was required to bring the vehicle to work for its use in the business to make service calls.") Like the claimant in Davis and Medical Associates, claimant was engaged in conveying her personal vehicle to the employer's place of business as it was regularly used by claimant for her employer's purposes throughout the workday.

Defendant questions whether the own conveyance rule applies when the accident occurred, not during the trip itself, as was the case in Davis and Medical Associates, but after the driving portion of the trip had ended. Professor Larson argues such a distinction is inconsequential. He explains:

> If the car trip from home to office was in the course of employment under the special rule, it would appear illogical to carve out a small segment of the total trip, that from garage to office, and for that distance reconvert the trip to a personal one. After all, the employee had to use his car to get to work because he had to have it available for his employer's purpose during the day; it follows that he had to put the car in a garage; and thereafter he had to travel from the garage to the office. In short, the character of the journey from beginning to end was colored by the employment requirement of furnishing his own car during the day.

1 A. Larson, The Law of Workmen's Compensation § 15.05[4] at 15–16 (2009) In such a scenario, the vehicle is essentially treated as a floating fragment of the premises, and Iowa has long held that injuries sustained during travel between two separate premises of an employer can be covered under a divided premises exception. (See Frost v. S.S. Kresge Co., 299 N.W.2d at 649) This line of thought is consistent with the language used by the court in Davis and Medical Associates. (See Davis, 293 N.W.2d at 830) ("an employee's trip to and from work is considered within the course of employment if the employee is required, as a part of his employment, to provide a vehicle for his use during the working day.") An employee's trip to work does not end when the vehicle is parked. Absent a deviation, it would be illogical to carve out a small segment of the total trip, that from on-street parking to office, and for that distance reconvert the trip to a personal one. The character of claimant's journey from beginning to end was colored by the employment requirement of furnishing her own vehicle during the day.

Ultimately, I find claimant was required to bring her vehicle to work. Her work as a social worker II necessitated that she regularly travel to various locations within the county and state. The uncertainty surrounding her day-to-day activities and the possibility of a child emergency made it incumbent upon her to have ready transportation available. In summary, the facts of this case demonstrate that Ms. Bebout was required to bring her vehicle to work for its use in furtherance of the employer's interests. I therefore conclude claimant's injury arose out of and in the course of her employment.

Claimant also argued that the work injury fell within other recognized exceptions to the general "going and coming" rule. I find it unnecessary to address whether any other exceptions apply to the facts of this case as it has been determined that the injury occurred within the course and scope of employment under the "own conveyance" rule.

For the sake of argument, there is ample evidence to support a finding that this case is compensable under the "zone of protection" exception to the premises rule. Ms. Bebout sustained an injury in an area customarily or habitually used by other DHS employees. DHS employees utilized on-street parking if they were banned from other parking lots, if the regular parking lots were full, or if parking on-street was simply more convenient. The employer was aware that employees parked on the streets surrounding the administrative building, and the employee parking map specifically references the availability of on-street parking. The site of Ms. Bebout's injury was so closely related in time, location, and employee usage to the work premises to bring the claimant within the zone of protection. (See Frost, 299 N.W.2d at 649-650) Defendant briefly argues that it did not exercise control over the area where claimant's injury occurred. While the exercise of control was a factor considered in the "Extension of Premises" exception, the exercise of control was immaterial to the court's "zone of protection" analysis. (See Frost, 299 N.W.2d at 649)

At this juncture, it is worth pointing out that the undersigned did not expressly find whether Ms. Bebout had both a fixed place and fixed hours of work. Waterhouse Water Conditioning, Inc. v. Waterhouse, 561 N.W.2d 55, 58 (Iowa 1997) ("The [Going and Coming Rule] only applies to employees who have both a fixed place and fixed hours of work.") This is because the "own conveyance" rule is not an exception to the Going and Coming rule, it only *acts* as an exception to the Going and Coming rule. 1 A. Larson, The Law of Workmen's Compensation § 17.50 at 4–239 (1985). In other words, it is an exclusion from the Going and Coming rule rather than an exception to the Going and Coming rule. This point is highlighted in Medical Assocs. Clinic, P.C., wherein the court relied upon the "own conveyance" rule to allow compensation despite the fact the claimant "had no fixed hours or work situs." 440 N.W.2d at 376 ("In short, the facts demonstrate Martin was required to bring his car to work for its use in furtherance of Medical Associates' practice. We therefore conclude Martin's death in an automobile accident on the way to work arose out of and in the course of his employment.")

Having concluded that the injury occurred in the course and scope of claimant's employment, I must also decide whether claimant has proven she sustained injuries as a result of that accident. 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).

Ms. Bebout seeks an award of healing period benefits from March 26, 2018, through July 5, 2018. Defendant stipulates that claimant was off work during this period of time.

Iowa Code section 85.34(1) provides healing period benefits are payable to an injured worker who has suffered permanent partial disability until (1) the worker has returned to work; (2) the worker is medically capable of returning to substantially similar employment; or (3) the worker has achieved maximum medical recovery.

In this instance, claimant was not capable of performing substantially similar employment between March 26, 2018, and July 5, 2018, and she was not placed at MMI until August 29, 2018. Having found that claimant returned to work on July 6, 2018, I conclude claimant is entitled to an award of healing period benefits from March 26, 2018, through July 5, 2018. Iowa Code section 85.34(1)

Having found the medical opinions of Dr. Bansal most convincing in the evidentiary record, I also found that claimant proved a causal connection between her claim of permanent disability and the March 26, 2018, work injury.

Under the Iowa Workers' Compensation Act, permanent partial disability is compensated either for a loss or loss of use of a scheduled member under Iowa Code section 85.34(2)(a)-(u) or for loss of earning capacity under section 85.34(2)(v). The extent of scheduled member disability benefits to which an injured worker is entitled is determined by using the functional method. Functional disability is "limited to the loss of the physiological capacity of the body or body part." Mortimer v. Fruehauf Corp., 502 N.W.2d 12, 15 (Iowa 1993); Sherman v. Pella Corp., 576 N.W.2d 312 (Iowa 1998).

In all cases of permanent partial disability described in paragraphs "a" through "u", or paragraph "v" when determining functional disability and not loss of earning

capacity, the extent of loss or percentage of permanent impairment shall be determined solely by utilizing the guides to the evaluation of permanent impairment, published by the American Medical Association, as adopted by the workers' compensation commissioner by rule pursuant to chapter 17A. Lay testimony or agency expertise shall not be utilized in determining loss or percentage of permanent impairment pursuant to paragraphs “a” through “u”, or paragraph “v” when determining functional disability and not loss of earning capacity. Iowa Code section 85.34(2)(x)

Having found claimant established a permanent injury to her right lower extremity, I conclude claimant is entitled to an award of permanent partial disability benefits. Iowa Code section 85.34(2)(p).

Where an injury is limited to a scheduled member the loss is measured functionally, not industrially. Graves v. Eagle Iron Works, 331 N.W.2d 116 (Iowa 1983). The 2017 statutory amendments also change prior case law, which held that functional disability was not limited to an impairment rating. As revised, Iowa Code section 85.34(2)(x) provides that when determining functional disability, the extent of loss or percentage of permanent impairment shall be determined solely by utilizing the guides to the evaluation of permanent impairment, published by the American medical association, as adopted by the workers' compensation commissioner by rule pursuant to chapter 17A. Lay testimony or agency expertise shall not be utilized in determining loss or percentage of permanent impairment. Iowa Code section 85.34(2)(x).

Having adopted the impairment rating assigned by Dr. Bansal, I found claimant proved a functional loss of 11 percent to the right lower extremity. Pursuant to Iowa Code section 85.34(2)(w), claimant is entitled to a proportional award equivalent to 11 percent of 220 weeks. Therefore, I conclude that claimant is entitled to an award of 24.2 weeks of permanent partial disability benefits, commencing on August 30, 2018. Iowa Code section 85.34(2)(p), (w).

Ms. Bebout seeks to recover any unpaid medical bills and out-of-pocket medical expenses causally related to the work injury. A list of the medical expenses can be found in Exhibit 9.

An employer is required to furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance, hospital services and supplies, and transportation expenses for all conditions compensable under the workers' compensation law. Iowa Code § 85.27(1). The employer has the right to choose the provider of care, except when the employer has denied liability for the injury. The Iowa Supreme Court has held the employer has the right to choose the provider of care, except when the employer has denied liability for the injury, or has abandoned care. Iowa Code § 85.27(4); Bell Bros. Heating & Air Conditioning v. Gwinn, 779 N.W.2d 193, 204 (Iowa 2010).

Ms. Bebout sustained a work injury arising out of and in the course of her employment. Having reached this conclusion, I similarly conclude that she has established entitlement to past medical expenses. Defendant shall pay medical providers directly, reimburse claimant for any payments made, and shall hold claimant harmless against any liens or third-party payments for all causally related medical

expenses contained in Exhibit 9.

Ms. Bebout next asserts a claim for reimbursement of her independent medical evaluation pursuant to Iowa Code section 85.39. Specifically, claimant requests reimbursement of Dr. Bansal's $2,472.00 charge. Alternatively, claimant requests that the costs associated with Dr. Bansal's report be taxed as a cost against defendant.

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.

Defendant is 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).

However, claimant must establish the pre-requisites of Iowa Code section 85.39 to establish entitlement to reimbursement. "An employer ... is not obligated to pay for an evaluation obtained by an employee outside the statutory process." Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839, 844 (Iowa 2015).

In this case, claimant obtained an evaluation by Dr. Bansal, which provided an impairment rating. Defendant did not obtain an evaluation or permanent impairment rating from a physician of its choosing prior to Dr. Bansal's evaluation. Claimant contends a blanket denial should serve as the equivalent of a zero percent impairment rating. This position is contrary to the Iowa Supreme Court's literal interpretation of Iowa Code section 85.39. See, e.g., DART v. Young, 867 N.W.2d 839, 847 (Iowa 2015). In that decision, the Supreme Court held that an employee can obtain an IME at the employer's expense only if an evaluation of permanent disability has been made by an employer-retained physician. The record in this case shows there was no impairment rating from any physician chosen by defendant because defendant determined the alleged injury did not arise out of and in the course of employment. There is no evidence claimant obtained defendant's consent to the IME, nor did defendant agree to pay the cost of the IME. As such, claimant cannot recover the cost of Dr. Bansal's IME under section 85.39.

The cost of Dr. Bansal's IME report is recoverable from defendant as a taxable cost under rule 876-4.33. Only the cost associated with the preparation of the written report can be reimbursed as a cost at hearing under rule 876-4.33. Young, 867 N.W.2d, at 846-847. Dr. Bansal's invoice is itemized. Dr. Bansal charged $1,941.00 for drafting his report. Defendant asserts no argument with respect to the reasonableness of Dr. Bansal's fees. As such, I find the cost of obtaining Dr. Bansal's report is appropriate and assessed pursuant to 876 IAC 4.33(6).

Finally, Ms. Bebout requests costs be assessed against defendant. Costs are assessed at the discretion of the agency. Iowa Code section 86.40.

Claimant is seeking her filing fee in the amount of $100.00, and service costs in the amount of $13.34. These are permissible costs pursuant to rule 876 IAC 4.33(7) and 876 IAC 4.33(3). I conclude defendant is liable for these costs.

Claimant is also seeking $100.00 for her deposition transcript. This is a permissible cost pursuant to rule 876 IAC 4.33(2). I conclude defendant is liable for this cost.

As analyzed above, claimant is also entitled to the costs associated with Dr. Bansal's IME report.

ORDER

THEREFORE, IT IS ORDERED:

Defendant shall pay claimant healing period benefits from March 26, 2018 through July 5, 2018.

Defendant shall pay claimant twenty-four and one-fifth (24.2) weeks of permanent partial disability benefits commencing on August 30, 2018.

All weekly benefits shall be paid at the stipulated weekly rate of seven hundred seventeen and 64/100 dollars ($717.64) per week.

Defendant shall reimburse claimant's costs totaling two thousand one hundred fifty-four and 34/100 dollars ($2,154.34).

Signed and filed this 18th day of January, 2022.

MICHAEL J. LUNN
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served as follows:

Andrew Bribriesco (via WCES)

Meredith Cooney (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.