

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

APRIL HALVERSON,

Claimant,

vs.

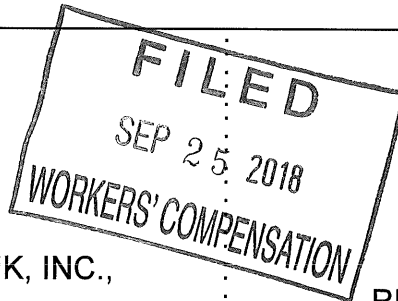
DYERSVILLE FOOD BANK, INC.,

Employer,

and

DONEGAL MUTUAL INS. CO. d/b/a
LeMARS INSURANCE COMPANY,

Insurance Carrier,
Defendants.



File No. 5048905

REVIEW-REOPENING and
PARTIAL COMMUTATION
DECISION

Head Note Nos.: 2905, 2907, 3303

Claimant April Halverson was awarded permanent total disability benefits following an arbitration hearing on September 9, 2015. Defendants Dyersville Food Bank, Inc. ("Dyersville Food Bank"), and Donegal Mutual Insurance Company, doing business as LeMars Insurance Company ("LeMars") appealed the decision. On June 29, 2017, Workers' Compensation Commissioner Joseph Cortese, II, issued a decision affirming the award of permanent total disability benefits, reversing the award of temporary benefits, and awarding permanent total disability benefits from the date of injury, June 1, 2013. Dyersville Food Bank and LeMars did not appeal the decision.

On June 26, 2017, Halverson filed a petition for partial commutation. Dyersville Food Bank and LeMars requested a hearing in response to the petition on June 28, 2017. Halverson dismissed the June 26, 2017 petition for partial commutation, and filed a new petition for partial commutation on June 30, 2017.

Dyersville Food Bank and LeMars filed a petition for review-reopening on November 3, 2017, alleging the dispute is "[w]hether the Claimant's refusal to submit to medical treatment which is designed to minimize Claimant's disability and does not seriously engager claimant's life or health warrants a reduction, suspension or forfeiture of compensation." Halverson filed an answer to the petition for review-reopening on January 4, 2018. The matter was scheduled for hearing on May 3, 2018.

On April 2, 2018, Dyersville Food Bank and LeMars filed a motion to consolidate the petition for partial commutation and petition for review-reopening. The motion was granted on April 9, 2018.

A hearing was held on May 3, 2018, at the Division of Workers' Compensation in Des Moines, Iowa. Attorney Daniel Anderson represented Halverson. Halverson appeared and testified. Attorney Thomas Read represented Dyersville Food Bank and LeMars. Exhibits 1 through 5 were admitted into the record. Halverson objected to the admission of Exhibits A through S on the basis of relevancy. Ruling was reserved on the admission of the defendants' exhibits. Relevancy is a low threshold in an administrative hearing. Halverson's objection goes to weight, as opposed to admissibility of the exhibits. Exhibits A through S were admitted into the record. The record was held open through July 11, 2018, for the receipt of post-hearing briefs. The briefs were received and the record was closed.

Before the hearing the parties prepared a hearing report, listing stipulations and issues to be decided.

STIPULATIONS

1. An employer-employee relationship existed at the time of the work injury.
2. Halverson sustained an injury on June 1, 2013, which arose out of and in the course of her employment.
3. The alleged injury is a cause of temporary and permanent disability.
4. Temporary benefits are no longer in dispute.
5. Halverson was awarded permanent total disability benefits, at the rate of \$185.49 per week, commencing on June 1, 2013.
6. Halverson's weekly rate is \$185.49.
7. Medical benefits are no longer in dispute.
8. Credits are no longer in dispute.
9. Dyersville Food Bank and LeMars have stipulated they are not alleging a change of "[p]hysical condition or employment condition." (Transcript, page 12)

ISSUES

1. Should Halverson's permanent total disability benefits be terminated for refusal of medical treatment?
2. Should Halverson's permanent total disability benefits be suspended under Iowa Code section 85.39?
3. If Halverson's permanent total disability benefits are suspended under Iowa Code section 85.39, can a partial commutation be ordered?

4. Should Halverson's request for a partial commutation be granted?
5. Should costs be assessed against either party?

FINDINGS OF FACT

Following an arbitration hearing, the deputy workers' compensation commissioner issued an arbitration decision on December 1, 2015, finding Halverson sustained a work injury causing permanent material aggravations to her preexisting low back condition and depression, and awarding permanent total disability benefits commencing on June 1, 2014, at the rate of \$185.49 per week. Dyersville Food Bank and LeMars appealed the arbitration decision and denied liability during the pendency of the appeal.

Dyersville Food Bank and LeMars had issued a check in January 2015, in the amount of \$6,361.60 for the final payment of permanent partial disability benefits for the eight percent permanent impairment rating assigned by Joseph Chen, M.D. (Exhibit 4, p. 2) Dyersville Food Bank and LeMars did not pay any additional permanent benefits to Halverson. Halverson was not working and she lived with her daughter and parents. Halverson had no income other than food assistance. Her family loaned her money for her subsistence.

On February 24, 2016, Halverson's counsel sent a letter to counsel for Dyersville Food Bank and LeMars, noting he had received a letter sent to Psychiatric Associates of NW Iowa indicating her care was being transferred from Sara King, NP, to a psychiatrist. (Ex. 3, p. 1) Halverson's counsel inquired whether Dyersville Food Bank and LeMars were now accepting compensability for her psychiatric claim, and if not, they could not direct Halverson's care, as set forth in Iowa Code section 85.27.

On March 23, 2016, counsel for Dyersville Food Bank and LeMars sent an electronic mail message responding to the letter, stating,

I agree with your research that an employer cannot both deny a claim and, yet, direct the medical care. However, the situation where an employer denies a claim but simultaneously tries to direct the medical care arises pre-hearing and pre-Deputy Decision. Once a decision has been made, and the Decision is the employer is to provide medical care, the employer no longer has the option to "deny compensability" or to "deny the causal connection." We are trying to provide medical services to the Claimant which we assumed the Claimant would readily welcome. Please let me know whether Ms. Halverson intends to follow through with the offered medical care.

(Ex. 3, p. 2)

Counsel for Dyersville Food Bank and LeMars sent an electronic message to Halverson's counsel on April 28, 2016, stating they were accepting compensability of

the psychological injury in the case. (Ex. C, p. 2) Halverson's counsel responded the same date stating Halverson had been treating with King and she requested Dyersville Food Bank and LeMars authorize treatment with King. (Ex. C, p. 2)

The evening of June 22, 2016, counsel for Dyersville Food Bank and LeMars, responded to the April 28, 2016 request, stating Dyersville Food Bank and LeMars wanted Halverson to be seen by a psychiatrist. (Exs. D, p. 1; E, p. 1) On June 27, 2016, Halverson's counsel responded Halverson preferred to stay with King. (Ex. E, p. 1)

On August 19, 2016, Halverson attended an appointment with Abdur Rahim, M.D., a psychiatrist selected by Dyersville Food Bank and LeMars. (Ex. F, pp. 1-5) Dr. Rahim examined Halverson and diagnosed her with major depression, recurrent, moderate, nonpsychotic general anxiety disorder, and post-traumatic stress disorder. (Ex. F, p. 4) Dr. Rahim documented Halverson has a history of recurrent depression, anxiety with panic attacks, and post-traumatic stress disorder, and he believed her depression has increased since her work injury, noting she has not been able to do a lot of things which she was able to do before, which has caused increased frustration, stress, and depression. (Ex. F, p. 4) Dr. Rahim continued Halverson's medications, and stated further adjustment to her medication would be done by King, her psychiatric provider. (Ex. F, p. 4) Halverson has continued to treat with King. (Ex. G, pp. 1-4) Dyersville Food Bank and LeMars have not paid for any treatment with King since Dr. Rahim examined her and recommended she continue treating with King. (Tr., p. 31) As of the May 3, 2018 hearing, Dyersville Food Bank and LeMars had not scheduled an additional independent medical examination with any provider concerning Halverson's psychological conditions or offered to pay for any additional mental health treatment.

On September 12, 2016, Emi Chapman, a nurse case manager for Dyersville Food Bank and LeMars, contacted Halverson's counsel to schedule an appointment with an orthopedic surgeon in Waterloo. (Ex. H, p. 3) Halverson's counsel and Chapman exchanged e-mail correspondence and Halverson's counsel noted Dyersville Food Bank and LeMars had denied compensability for the injury and had appealed the arbitration decision, and that unless they accepted compensability for the claim they had no right to direct Halverson's care. (Ex. H, pp. 1-3) The request does not provide whether the appointment was for treatment under Iowa Code section 85.27, or an independent medical examination under Iowa Code section 85.39.

On Friday October 21, 2016, Halverson's counsel sent an electronic message to Chapman in response to an e-mail sent on Wednesday that week scheduling an appointment with Dr. Chen the following Monday. (Ex. 3, p. 3) Halverson's counsel noted

[y]ou may recall from my e-mail on September 12 that the workers' compensation insurance carrier is still denying compensability of Ms. Halverson's injury. The carrier is alleging Ms. Halverson fabricated her work injury and is appealing the deputy's determination to the contrary. I

previously indicated given the carrier's ongoing denial, it has no right to direct her care. Please let me know if and when the denial is reversed and weekly benefits are reinstated.

(Ex. 3, p. 3)

Counsel for Dyersville Food Bank and LeMars sent an electronic message to Halverson's counsel on November 18, 2016, stating an appointment had been scheduled for Halverson to see Dr. Chen at the University of Iowa Hospitals and Clinics on November 28, 2016, at 12:30 p.m., pursuant to Iowa Code section 85.39. (Ex. I, p. 1)

Halverson's counsel sent a letter to counsel for Dyersville Food Bank and LeMars on November 21, 2016, by electronic mail, stating he could not agree to the evaluation given the short timeline, with the upcoming Thanksgiving holiday. (Ex. K, p. 1) Halverson's counsel stated he did not see how the independent medical examination request was reasonable or appropriate given Dyersville Food Bank and LeMars were continuing to deny compensability of Halverson's claim and had denied payment of weekly benefits ordered by the deputy workers' compensation commissioner, noting he failed to see how a return to Dr. Chen, a physiatrist, would be a reasonable response to the worsening psychological condition noted by Dr. Rahim, who had recommended continuing care with King. (Ex. K, p. 1) Halverson's counsel also noted:

[m]oreover, Dr. Chen has already provided extensive treatment and evaluation of Ms. Halverson. When he saw her on April 2, 2014, he indicated she had reached MMI and that "Further modalities and ongoing treatments in a medical setting are not recommended." When we asked for additional care in July 2015, Ms. Halverson was directed back to Dr. Chen, who she saw on September 28, 2015. At that time, Dr. Chen indicated her increased symptoms were not related to her work injury, and were likely due to poor sleep and increased psychosocial stressors. Dr. Chen offered to make a referral outside of workers' compensation to a pain clinic, but then cautioned her that he didn't believe she needed an epidural steroid injection. I fail to see how yet another evaluation with Dr. Chen would be appropriate. Additionally, Dr. Chen's office is more than 80 miles from Ms. Halverson, who has consistently reported difficulties riding in a car for long distances.

As noted above, the original justification provided to "refer" Ms. Halverson to another provider was to address treatment options for an alleged worsening psychological condition. It is my understanding your clients may have additional treatment records which have not been provided. If so, please pass them along for my review. In light of the above, if you can provide me with any additional information that might help me evaluate the reasonableness of any proposed IME request, that would be helpful. It would also be helpful if you would provide me with

sufficient time to evaluate and discuss any proposed IME with Ms. Halverson. This latest request essentially only provided me with three working days' notice. In my experience, most providers will provide at least thirty days' notice.

(Ex. K, p. 2)

Counsel for Dyersville Food Bank and LeMars sent a response electronic message to Halverson's counsel on November 30, 2016, stating,

Ms. Halverson cancelled her appointment with De [sic] Chen scheduled for November 28th by calling UIHC at about 9:30 am on the 28th and saying she wasn't going to reschedule and that she was going to contact her attorney. In your letter you expressed concerns that the time constraints prevented you from discussing a \$85.39 examination with Ms. Halverson including the right an employer has to such an examination and the ramifications to the employee of refusing to submit to a reasonable request for an examination. We have rescheduled this \$85.39 examination for **January 9, 2017 at 12:00 noon** which is the earliest date Dr. Chen had available. You will receive a letter dated November 30, 2016 from Emi Chapman, RN, Medical Case Manager, with further details.

The reason for this examination is founded in this passage from Dr. Rahim's office notice of August 19, 2016 in which Dr. Rahim opined that Ms. Halverson's increased depression is a ramification of her back pain because she can't "do a lot of things which she was able to do before [the injury]". . . .

In September, we had the nurse case manager try to assist with a referral to an orthopedic doctor in Waterloo which you initially rebuffed on the grounds that, legally, a carrier that denies a claim also forfeits the right to direct medical care. The nurse case manager explained to you that Ms. Halverson's depression had worsened because of the back pain and the hope was to see if there was anything that could be done to alleviate that pain. We set up an appointment with Dr. Chen to have him examine Ms. Halverson on October 24, 2016 but on October 21, 2016 Ms. Halverson cancelled the appointment. On November 18th we set up another appointment with Dr. Chan [sic] for November 28th but you needed more time to explain the nature of a \$85.39 exam to Ms. Halverson and so Ms. Halverson phoned UIHS [sic] the morning of November 28th and, again, cancelled the appointment with Dr. Chen.

Is there some reason why Ms. Halverson doesn't want to see Dr. Chen? We've paid to have her transported before and we'll pay for her transportation again to and from Waterloo. Ms. Halverson seemed to do well under Dr. Chen's care at the UIHC Spine Center in 2014 and he

would certainly be a logical starting point for an evaluation of her current circumstances. Perhaps a fresh perspective would be enlightening.

Please let us know of the special needs Ms. Halverson has for her January 9th §85.39 examination with Dr. Chen.

(Ex. M, p. 1)

Counsel for Halverson responded to the electronic letter with an electronic letter on December 27, 2016, stating Halverson would not attend the scheduled appointment with Dr. Chen. (Ex. N., p. 1) Halverson's counsel further stated,

[f]inally, your prior correspondence rather pointedly asks why Ms. Halverson does not want to return to see Dr. Chen. I do not want to engage in any further back and forth with you on this issue. However, the fact is I am unable to provide Ms. Halverson with any credible explanation of the carrier's desire to return her to Dr. Chen, other than as an attempt to create additional evidence to be utilized in a review-reopening proceeding. Ms. Halverson knows your clients continue to assert that she completely fabricated the occurrence of her work injury and that she is engaging in insurance fraud. She understands your clients are continuing to deny benefits on this basis. Any explanation that the carrier wants to return her to Dr. Chen now out of a genuine concern for her well-being rings hollow. This is reinforced by the fact that Dr. Chen has repeatedly indicated he has no care to offer, and that he has previously rendered opinions favorable to the insurance carrier. Moreover, the recent opinions cited reference her psychological problems, and the attribution of those problems to her long-standing physical condition from her injury is nothing new. I simply do not believe the proposed evaluation has any possibility of improving Ms. Halverson's condition, nor do I believe the carrier is genuinely engaged in any effort to do so. Your efforts to bully me into agreeing to have her attend the evaluation with Dr. Chen have only served to reinforce my suspicions. I do not believe the requested evaluation has anything to do with improving Ms. Halverson's condition, nor do I believe the requested IME is reasonable under the circumstances, as outlined above and in my prior correspondence of November 21.

Please let me know if and when the carrier reverses its ongoing denial of this claim, and when benefits will be initiated.

(Ex. N, p. 2)

On June 29, 2017, Commissioner Cortese issued a decision affirming the deputy workers' compensation commissioner's finding Halverson sustained an injury while working for Dyersville Food Bank that caused permanent material aggravations to her preexisting low back condition and depression, and awarding permanent total disability

benefits at the rate of \$185.49 per week, but reversing the deputy workers' compensation commissioner's award of temporary disability benefits, and finding permanent total disability benefits commence from the date of injury, June 1, 2013. Commissioner Cortese's decision was not appealed.

Halverson filed a petition for partial commutation on June 30, 2017. Dyersville Food Bank and LeMars filed a petition for review-reopening on November 3, 2017, alleging the dispute is "[w]hether the Claimant's refusal to submit to medical treatment which is designed to minimize Claimant's disability and does not seriously endanger claimant's life or health warrants a reduction, suspension or forfeiture of compensation."

On July 11, 2017, counsel for Dyersville Food Bank and LeMars sent an electronic message to Halverson's counsel stating an appointment had been scheduled for Halverson with Dr. Chen on August 25, 2017, noting, "Dr. Chen needs to see Ms. Halverson first to determine if she needs to go through the spine rehab program again. If Dr. Chen recommends this program for Ms. Halverson the employer will furnish this medical treatment including transportation expenses pursuant to Code Section 85.27." (Ex. O, p. 1)

Dyersville Food Bank and LeMars issued a check in the amount of \$23,234.53, on July 20, 2017, for permanent total disability plus interest for June 1, 2013 through January 8, 2017. (Ex. 4, p. 1) As of the May 3, 2018 hearing, no additional permanency benefits have been paid as ordered by Commissioner Cortese.

On August 3, 2017, Halverson's counsel sent a letter to counsel for Dyersville Food Bank and LeMars, advising he had received correspondence scheduling an evaluation with Dr. Chen in Iowa City on August 25, 2017, and stating Halverson was not interested in further treatment with Dr. Chen or going through the spine rehabilitation program again. (Exs. 3, p. 9; Q, p. 1) Halverson's counsel summarized the communication between the parties and stated, in part,

[a]s you know, Ms. Halverson has already participated in Dr. Chen's spine rehab program. She still has the video, exercise bands, and the cognitive behavioral therapy tools which the program teaches. She understandably feels that participation in the same program a second time would not improve her condition. Moreover, it would either require extensive daily transportation between Iowa City and Waterloo, or an extended stay in motel facilities, away from her family support structure. Please advise your clients and Dr. Chen's office that Ms. Halverson does not plan to attend the scheduled appointment at this juncture.

(Exs. 3, p. 10; Q, p. 2)

Halverson went to the emergency department at Allen Memorial Hospital on August 3, 2017, complaining while she was shopping she "felt her hip had 'gone out of place again'" and she was experiencing back pain. (Ex. P, p. 2) Halverson relayed she

has a DVD with physical therapy and stretching exercises for low back pain she received from the UIHC spine clinic. (Ex. P, p. 3) Hospital staff administered a HYDROMORPHONE injection for pain and recommended Halverson continue with her previous discharge instructions from the UIHC spine clinic. (Ex. P, p. 3) Hospital staff did not recommend any additional treatment.

Pursuant to a request from counsel for Dyersville Food Bank and LeMars, Dr. Chen issued a letter on September 25, 2017, which provides, "[t]he UI Spine Rehabilitation Program helps to teach motivated individuals with chronic back pain to use methods to improve their physical function and manage pain through consistent physical exercise and teaching of cognitive-behavioral or mental exercises." (Ex. R, p. 2) Dr. Chen noted successful completion of the program has shown reductions in "overall pain disability" and improvements in physical health. (Ex. R, p. 2) Dr. Chen noted Halverson completed the program in April 2014. (Ex. R, p. 2) He also wrote, "[t]o clarify your questions, the Spine Rehabilitation Program is **not design [sic] to cure an individual's disability or pain**. Participation in this program has **not endangered any of the hundreds of participants' life or health** since the Program's inception in the 1980's," and noted "most motivated individuals will experience some objective improvements in their physical and mental health status measures" after participating in the program, and "[t]here have been [sic] not been any instances that an individual's participation. . . has led to a worsening of their chronic pain condition." (Ex. R, p. 2) (emphasis in original) Dr. Chen's letter does not indicate he had reviewed any of Halverson's medical records, whether he was recommending any additional treatment for Halverson, or whether he believes any patient who has completed the Spine Rehabilitation Program will benefit from attending the program a second time. (Ex. R)

Halverson attended Dr. Chen's two-week Spine Rehabilitation Program in February 2014. (Tr., p. 31) At that time Halverson was living in North Liberty with her daughter and her commute to the program took fifteen to thirty minutes. (Tr., pp. 34, 39-40) At the time Halverson attended the program Dyersville Food Bank and LeMars were not paying her weekly workers' compensation benefits. (Tr., p. 38)

Halverson testified,

[i]t's an excellent program with anybody that has back issues, I can say that. I loved it. It was very informative. It was –made me feel confident in doing exercises I wasn't sure if I should or should not do with my back. People were great, doctors were great. The program was terrific.

(Tr., p. 32) Halverson relayed the program gave her the tools to try to deal with her pain. (Tr., p. 41) Halverson testified the program helped her with her confidence, but,

[p]ain-wise, not so much; slightly. But just to have the confidence to know I can bend over or I can do this without being in the hospital. And, you know, it gave me a confidence to be able to try to make myself better on my own away from the clinic.

(Tr., p. 41)

Halverson relayed when Dr. Chen discharged her in April 2014 he recommended she continue with the exercises she learned during the Spine Rehabilitation Program. (Tr., p. 32) When Halverson returned to Dr. Chen in September 2014, he had no further treatment recommendations. (Tr., p. 33) Halverson testified "[Dr. Chen] had no further recommendations, treatment. He said there was nothing else he could do for me, but if I still wanted to be his patient, he'd be more than happy to see me on my own insurance." (Tr., p. 33)

Halverson reported she received a DVD from Dr. Chen with exercises that runs thirty to forty-four minutes. (Tr., p. 42) Halverson performs the exercises on the video three to five days per week. (Tr., p. 42)

Halverson acknowledged Dyersville Food Bank and LeMars requested she return to Dr. Chen in October 2016, and November 2016, January 2017, and August 2017. (Tr., p. 34) Halverson testified she has not attended the appointments "[b]ecause there was nothing further that doctor could do for me, from his mouth. And in the records that has been recorded." (Tr., p. 34)

Halverson also treated with Dr. Hassani, a neurologist, and Maria Metcalf, ARNP, in Waterloo, after moving to Waterloo before the original arbitration hearing. (Tr., pp. 44-47) Dr. Hassani administered four trigger point injections before the original arbitration hearing. (Tr., p. 45) Halverson relayed the trigger point injections did not provide her with any significant relief after sixteen hours. (Tr., pp. 46-47) Halverson testified Metcalf prescribed gabapentin. (Tr., p. 48) At the time of the most recent hearing, it had been nearly a year since she had seen Metcalf. (Tr., p. 48) Halverson relayed she would be attending an appointment with Metcalf in July when she is due to see her. (Tr., p. 60)

Halverson also reported in November 2017, she saw Mary Amend, an advanced registered nurse practitioner working with Russell Buchanan, M.D., a neurosurgeon. (Tr., p. 50) Halverson relayed Amend did not believe she was a surgical candidate or provide her with any additional treatment recommendations other than physical therapy. (Tr., pp. 50-51) Halverson stated she went to physical therapy three times, and decided to do her exercises at home on her own. (Tr., p. 51)

Halverson also saw Farid Manshadi, M.D., a physiatrist, in November 2017. (Tr., p. 59) Halverson relayed Dr. Manshadi rolled her on her side, pushed a trigger point, pulled out her leg, and she screamed in pain during the manipulative treatment. (Tr., pp. 59-60) Halverson did not return to Dr. Manshadi after the appointment. (Tr., pp. 59-60)

Since 2014 Halverson has treated with her primary care provider, Dr. Lies. (Tr., p. 43) At the time of the hearing Halverson was taking gabapentin, hydrocodone, and Flexeril for her back condition, and Xanax, Zoloft, and prazosin for her psychological

conditions. (Tr., pp. 35-38) Halverson has been taking hydrocodone and Flexeril on and off since 2013. (Tr., p. 36) In an average week Halverson takes between two to three hydrocodone pills, but she may take four to six if she is having a bad week. (Tr., pp. 36-37) She also recently received four Toradol shots the month before the hearing recommended by Dr. Lies. (Tr., pp. 37, 44) Halverson also applies ice and heat, exercises, and takes turmeric as a supplement. (Tr., p. 38) Halverson's medical bills have been paid by Iowa Medicaid. (Tr., p. 39)

Halverson testified she works on her conditions with counseling, exercise, and through the medical care she receives. (Tr., p. 63) Halverson has not identified any medical treatment or other providers she would like to go to. (Tr., pp. 63-64)

At hearing I had the opportunity to observe Halverson testify under oath. She maintained direct eye contact, and her rate of speech was normal and fluid. Halverson did not engage in any furtive movements. Halverson testified she benefitted from Dr. Chen's program, and she continues to perform the exercises she learned during the program. I found her testimony during the hearing reasonable and consistent with the other evidence I believe. I found Halverson to be a credible witness.

Brian Murphy prepared a proposal for a partial commutation report on February 28, 2018. (Ex. 1) Murphy he is a certified investment management analyst. (Ex. C, p. 4) At the time of his report, Murphy noted Halverson was not receiving weekly workers' compensation benefits, but she was receiving \$192.00 per month in food stamps through the state of Iowa. (Ex. 1, p. 1) Murphy noted Halverson does not have any problems with substance abuse or gambling. (Ex. 1, p. 1)

Murphy noted Halverson planned to spend \$11,500.00 for short-term upgrades to her daughter's home to install a walk-in tub, relocate the laundry, and mitigate radon in the basement, \$2,500.00 for long-term upgrades to her daughter's home to install hand railings, ramp, and dishwasher, and \$15,000.00 for a used vehicle. (Ex. 1, p. 2) Murphy recommended Halverson invest the remaining funds in a conservative portfolio of fifty percent stocks and fifty percent fixed income. (Ex. 1, p. 3)

Murphy noted Halverson had \$39,000.00 in student loan debt that would likely be forgiven by the Social Security Administration. (Ex. 1, p. 2) Halverson has no knowledge concerning investments and informed Murphy she would hire a professional advisor to help her manage a lump sum award. (Ex. 1, p. 2)

At the time of the May 3, 2018, hearing Halverson was fifty-two. (Tr., p. 17) Halverson lives the majority of her time with her daughter in Waterloo. (Tr., p. 17) Halverson also lives part-time with her parents in Evandale, Iowa, a ten minute drive from Waterloo. (Tr., pp. 17-18) If the partial commutation is granted, Halverson intends to live with her daughter full time.

Dyersville Food Bank and LeMars paid Halverson a lump sum check of \$6,361.00 on January 5, 2015. (Tr., p. 20) Halverson did not receive weekly workers' compensation benefits for over two years. (Tr., p. 20) During that time her daughter, brother, and parents loaned her \$2,800.00 for living expenses. (Tr., p. 20) Halverson used the remaining \$3,500.00 to purchase two pairs of tennis shoes, and a seat to help her get in and out of her car, and she lived off the remaining money for approximately six months. (Tr., p. 20)

The original arbitration decision was filed on December 1, 2015. Dyersville Food Bank and LeMars did not pay Halverson any weekly workers' compensation benefits from January 2015 until July 20, 2017, when they paid a lump sum payment of \$23,234.53, for the period of June 1, 2013, through January 8, 2017, after receiving the June 29, 2017 appeal decision from Commissioner Cortese. (Tr., p. 19; Ex. 4) Dyersville Food Bank and LeMars have not paid any additional permanent total disability benefits to Halverson.

The Social Security Administration issued a decision on April 6, 2018, finding Halverson became disabled on December 3, 2015, and awarding her monthly benefits of \$809.00 and back benefits of \$11,627.75. (Ex. 2) Halverson will receive her first \$777.00 Social Security Disability Insurance ("SSDI") check in May 2018. (Ex. 2; Tr., p. 18) Halverson testified the Social Security Administration has reduced her monthly payments from \$809.00 to \$777.00 because the Social Security Administration believes she is receiving permanent total disability benefits from Dyersville Food Bank and LeMars. (Tr., p. 18) Dyersville Food Bank and LeMars have not been paying Halverson permanent total disability benefits ordered by this agency.

Halverson testified she will pay her daughter \$400.00 for rent per month when she receives her first SSDI check. (Tr., p. 22) In the past she paid her daughter as much as she could. (Tr., p. 22)

Halverson does not have a car payment or any recurring bills, other than a monthly telephone bill of \$32.61. (Tr., p. 22) Halverson has a student loan that is being forgiven given she has qualified for SSDI. (Tr., p. 65) Halverson does not have any credit cards or credit card debt. (Tr., pp. 22-23) Halverson testified she does not have a substance abuse problem or any problems or addictions related to gambling. (Tr., p. 29) Dyersville Food Bank and LeMars did not present any contrary evidence at hearing.

Halverson's daughter owns her home and has offered to allow Halverson to live with her full time. (Tr., p. 24) Halverson's daughter is a traveling nurse and she is often gone. (Tr., p. 17) Halverson has been living with her parents and her daughter.

Halverson is seeking a partial commutation to make her daughter's home more accessible so Halverson can be more independent and live with her daughter full time. (Tr., pp. 17-18, 24) Halverson would like to move the laundry room upstairs, install a dishwasher, install ramps on the front and back of the home, install railings on the front

and back decks, widen some door structures, and install a walk-in tub with safety bars, to make it safer for her to get around. (Tr., p. 24) Halverson estimated the cost of the improvements to be between \$10,000.00 and \$20,000.00. (Tr., p. 24) Halverson also plans to have radon remediation done on the home to keep it safe. (Tr., p. 66)

Halverson does not own a car and she would like to purchase a used vehicle for \$15,000.00. (Tr., p. 25) When she has to drive, Halverson borrows a car from her daughter, brother, or her parents. (Tr., p. 69) Halverson has consulted with a financial advisor and she would like to invest the remaining funds she would receive to live on. (Tr., pp. 25-26) Halverson intends to have her daughter be the beneficiary of any investment accounts. (Tr., p. 28)

Prior to the hearing, Dyersville Food Bank and LeMars did not file a motion to compel Halverson to attend an independent medical examination with Dr. Chen under Iowa Code section 85.39, or under Iowa Rule of Civil Procedure 1.515 with the Division of Workers' Compensation. (Tr., p. 22)

CONCLUSIONS OF LAW

I. Review-Reopening

Dyersville Food Bank and LeMars filed a review-reopening petition contending they properly suspended Halverson's permanent total disability benefits and alleging Halverson's benefits should be suspended or forfeited under Iowa Code sections 85.27 and 85.39. Halverson contends a review-reopening action is not the proper proceeding to bring such an allegation.

A. Scope of a Review-Reopening Proceeding

Iowa Code section 86.14 governs review-reopening proceedings. When considering a review-reopening petition, the inquiry "shall be into whether or not the condition of the employee warrants an end to, diminishment of, or increase of compensation so awarded." Iowa Code § 86.14(2). The deputy commissioner does not re-determine the condition of the employee adjudicated by the former award. Kohlhaas v. Hog Slat, Inc., 777 N.W.2d 387, 391 (Iowa 2009). The deputy commissioner must determine "the condition of the employee, which is found to exist subsequent to the date of the award being reviewed." Id. (quoting Stice v. Consol. Ind. Coal Co., 228 Iowa 1031, 1038, 291 N.W. 452, 456 (1940)). In a review-reopening proceeding, the deputy commissioner should not reevaluate the claimant's level of physical impairment or earning capacity "if all of the facts and circumstances were known or knowable at the time of the original action." Id. at 393.

Dyersville Food Bank and LeMars stipulated on the record they are not alleging a change of "[p]hysical condition or employment condition." (Tr., p. 12) The statute expressly limits the inquiry to whether or not the condition of the employee warrants an end to, diminishment of, or increase in compensation. Iowa Code § 86.14; Kohlhaas,

777 N.W.2d at 391-93. It is unclear how a defendant could bring an action challenging an alleged refusal to submit to treatment under Iowa Code section 85.27, or an independent medical examination under Iowa Code section 85.39 following an arbitration decision, but through a review-reopening proceeding. Dyersville Food Bank and LeMars could have asserted they believed Halverson had a change in physical condition, and that was why they wanted her to attend an appointment with Dr. Chen to confirm their contention; they did not. Dyersville Food Bank and LeMars have not tailored their argument to fit within the express limits of the statute. The review reopening petition should be denied because Dyersville Food Bank and LeMars stipulated they are not alleging a change of physical condition or employment condition in this case.

Even assuming Dyersville Food Bank and LeMars followed the express wording of the statute and asserted a change of physical condition, Dyersville Food Bank and LeMars have not met their burden of proof Halverson's refusals to attend the additional appointments with Dr. Chen were unreasonable.

B. Iowa Code section 85.39

Dyersville Food Bank and LeMars contend the award of permanent total disability benefits ordered by the deputy workers' compensation commissioner on December 1, 2015, and by Workers' Compensation Commissioners Joseph Cortese, II, on June 29, 2017, are properly suspended and properly terminated or forfeited based on her refusal to submit to examinations under Iowa Code section 85.39, and for her failure to attend treatment under Iowa Code section 85.27. Dyersville Food Bank and LeMars appear to be improperly relying on language from the statutory changes to Iowa Code section 85.39 that became law on July 1, 2017.

1. Applicability of Statutory Change in 2017

In March 2017, the legislature enacted changes (hereinafter "Act") relating to workers' compensation in Iowa, including Iowa Code section 85.34. 2017 Iowa Acts chapter 23 (amending Iowa Code sections 85.16, 85.18, 85.23, 85.26, 85.33, 85.34, 85.39, 85.45, 85.70, 85.71, 86.26, 86.39, 86.42, and 535.3). Iowa Code section 85.39(1), now provides:

1. After an injury, the employee, if requested by the employer, shall submit for examination at some reasonable time and place and as often as reasonably requested, to a physician or physicians authorized to practice under the laws of this state or another state, without cost to the employee; but if the employee requests, the employee, at the employee's own cost, is entitled to have a physician or physicians of the employee's own selection present to participate in the examination. If an employee is required to leave work for which the employee is being paid wages to attend the requested examination, the employee shall be compensated at the employee's regular rate for the time the employee is required to leave

work, and the employee shall be furnished transportation to and from the place of examination, or the employer may elect to pay the employee the reasonable cost of the transportation. The refusal of the employee to submit to the examination shall forfeit the employee's right to any compensation for the period of the refusal. Compensation shall not be payable for the period of refusal.

2017 Iowa Acts chapter 23 contains an applicability section as follows:

Section 24. APPLICABILITY

1. The sections of this Act amending sections 85.16, 85.18, 85.23, 85.26, 85.33, 85.34, 85.39, 85.71, 86.26, and 86.42 apply to injuries occurring on or after the effective date of this Act.

2. The sections of this Act amending section 85.45 apply to commutations for which applications are filed on or after the effective date of this act.

This case involves injuries occurring before July 1, 2017. Dyersville Food Bank and LeMars's reliance on the forfeiture provision contained in the statute effective July 1, 2017, is misplaced and contrary to the law controlling this case.

2. Defendants' Suspension of Benefits Effective January 9, 2017

Dyersville Food Bank and LeMars assert they properly suspended Halverson's permanent total disability benefits on January 9, 2017, based on Halverson's refusal to attend appointments with Dr. Chen. Dyersville Food Bank and LeMars comingle Iowa Code section 85.27, and Iowa Code section 85.39, and assert Halverson's benefits should be suspended or forfeited for failing to attend treatment and for failing to attend an independent medical examination. Halverson rejects their assertion.

This case involves an injury occurring on June 1, 2013. At that time Iowa Code section 85.39 provided:

[a]fter an injury, the employee, if requested by the employer, shall submit for examination at some reasonable time and place and as often as reasonably requested, to a physician or physicians authorized to practice under the laws of this state or another state, without cost to the employee. . . . The refusal of the employee to submit to the examination shall suspend the employee's right to any compensation for the period of the refusal. Compensation shall not be payable for the period of suspension.

Iowa Code § 85.39 (2013).

Dyersville Food Bank and LeMars scheduled appointments for Halverson with Dr. Chen in October 2016, November 2016, and January 2017. The Commissioner issued the appeal decision on June 29, 2017, affirming the award of permanent total

disability benefits in this case. Before the appeal decision, Dyersville Food Bank and LeMars denied compensability of Halverson's claim. Dyersville Food Bank and LeMars issued a check for \$23,234.53 on July 20, 2017, for permanent total disability benefits for the period of June 1, 2013 through January 8, 2017. Dyersville Food Bank and LeMars did not schedule the next appointment with Dr. Chen until August 25, 2017.

The notice sent to Halverson in October 2016, scheduling an appointment with Dr. Chen in October 2016, did not provide whether the appointment was being made pursuant to Iowa Code section 85.27, for treatment, or Iowa Code section 85.39, for an independent medical examination. At that time Dyersville Food Bank and LeMars had denied Halverson had sustained a compensable claim. Thus, Dyersville Food Bank and LeMars had no right to direct Halverson's care. Brewer Strong v. HNI Corp., 913 N.W.2d 235, 244-45 (Iowa 2018); Bell Bros Heating & Air Conditioning v. Gwinn, 778 N.W.2d 193, 207 (Iowa 2010). Dyersville Food Bank and LeMars have not established Halverson violated Iowa Code section 85.39 by refusing to attend the appointment in October 2016.

The notice sent to Halverson scheduling the August 25, 2017, appointment with Dr. Chen states it is being sent pursuant to Iowa Code section 85.27, for treatment. The notice does not provide the appointment was for an independent medical examination under Iowa Code section 85.39. Dyersville Food Bank and LeMars have not established Halverson's refusal to attend the appointment violated Iowa Code section 85.39.

Dyersville Food Bank and LeMars contend Halverson's refusal to attend scheduled independent medical examinations with Dr. Chen on November 28, 2016, and January 7, 2017, warrants forfeiture or suspension of the permanent total disability benefits awarded by the deputy workers' compensation commissioner in the arbitration decision and affirmed by the Commissioner on appeal. Halverson avers the defendants' are alleging she has failed to mitigate damages, which is not a valid defense in workers' compensation cases, failure to mitigate is not the proper subject of a review-reopening action where a change of condition is not alleged, the defendants have not established any recommended specific treatment for Halverson's disability, and her refusal was not arbitrary or unreasonable, given she previously attended the Spine Rehabilitation Program in 2014 and Dr. Chen released her without recommending any additional treatment.

In support of their argument, Dyersville Food Bank and LeMars rely on the case of Stufflebean v. City of Fort Dodge, 9 N.W.2d 281, 233 Iowa 438 (1943). Stufflebean involves a refusal of treatment, not a refusal to attend an independent medical examination. 9 N.W.2d at 283, 233 Iowa at 440 (affirming the industrial commissioner's finding the claimant's refusal to submit to treatment for a hernia consisting of an operation and injection "was not so unreasonable as to forfeit his right to compensation and fixed the amount of disability at 7% of total permanent disability.") I do not find Stufflebean controlling with respect to Iowa Code section 85.39.

The case of McCormick v. North Star Foods, 533 N.W.2d 196 (Iowa 1995) involves a refusal to attend an independent medical examination. McCormick refused to attend an independent medical examination and her employer suspended benefits pursuant to Iowa Code section 85.39. The deputy industrial commissioner found McCormick had unreasonably refused to submit to an independent medical examination and denied permanent partial disability benefits pursuant to Iowa Code section 85.39. The industrial commissioner reversed the deputy commissioner's determination McCormick had forfeited her permanent partial disability benefits, and found her benefits were only suspended because of her failure to submit to an independent medical examination under Iowa Code section 85.39.

This agency has examined the reasonableness of the refusal to attend an independent medical examination for many years. See, e.g., Jones v. The Forfilli Corp., File No. 5013001 (Arb. Feb. 19, 2007) (claimant's refusal to attend independent medical examination was not unreasonable given the travel distance); Ball v. Fleetguard, File Nos. 1281646-47 (Arb. Feb. 21, 2002) (finding the claimant's refusal to attend because the claimant failed to receive travel instructions to be unreasonable); Ehteshamfar v. UTA Engineered Sys. Div., File No. 989116 (App. Oct. 1994) (holding the claimant admitted to refusing to submit to the examination from July 29, 1993 until September 29, 1993 and provided no valid excuse, warranting suspension of the claimant's weekly benefits during the period of refusal). See also Ruling on Petition for Declaratory Order Concerning Iowa Code § 85.39, File Nos. 5026716-18 (June 14, 2010) (noting "in the unlikely event that a claim goes to hearing during a period of refusal and this agency finds that the refusal was not justified, then this agency could only decide that the employee is not entitled to benefits at that time"). Examining the reasonableness of the refusal is in accord with the express language of the statute. Iowa Code § 85.39 (the employee "shall submit for examination at some reasonable time and place and as often as reasonably requested, to a physician or physicians authorized to practice under the laws of this state or another state").

I find Halverson's refusal to attend the appointments with Dr. Chen for independent medical examinations on November 28, 2016, and January 7, 2017 reasonable and justified. It is Dyersville Food Bank and LeMars who have acted unreasonably in this case by refusing to pay permanent total disability benefits awarded by the deputy workers' compensation commissioner and by Commissioner Cortese.

On November 18, 2016, Dyersville Food Bank and LeMars notified Halverson an appointment had been scheduled ten days later with Dr. Chen on November 28, 2016, shortly after the Thanksgiving holiday. The notice provided was not reasonable under the circumstances given the holiday. In addition, Halverson's refusals to attend the independent medical examinations on November 28, 2016, and January 7, 2017 were also reasonable given she had previously been evaluated and treated by Dr. Chen, who released her without providing any additional treatment recommendations.

Halverson attended Dr. Chen's two-week Spine Rehabilitation Program in February 2014, while she was living in North Liberty, Iowa. (Tr., p. 31) Dr. Chen discharged Halverson in April 2014, and recommended she continue with the exercises she learned during the program. (Tr., p. 32; Ex. R, p. 2) When she returned to Dr. Chen in September 2014, he had no further treatment recommendations for her. (Tr., p. 33) Halverson testified she has continued to perform the exercises with the DVD she received from Dr. Chen thirty to forty minutes per day, three to five days per week. (Tr., p. 42)

In September 2017, Dr. Chen prepared a letter discussing the benefits of the Spine Rehabilitation Program. (Ex. R) Dr. Chen's letter does not indicate he received or reviewed any additional medical records sent by Dyersville Food Bank and LeMars, whether he was recommending any additional evaluation of or treatment for Halverson, or whether he believes Halverson, or any other patient could benefit from attending the Spine Rehabilitation Program a second time. (Ex. R) Halverson's refusals to attend the November 28, 2016 and January 9, 2017 independent medical examinations were reasonable. The remaining appointments with Dr. Chen for October 2016 and August 25, 2017 were not expressly for independent medical examinations. Even assuming the appointments were for independent medical examinations, for the reasons stated above, Halverson's refusals to attend the appointments were reasonable.

C. Iowa Code section 85.27

In their post-hearing brief, Dyersville Food Bank and LeMars allege Halverson's benefits should be "terminated completely for refusal to seek medical treatment." Halverson avers the defendants' are alleging she has failed to mitigate damages, which is not a valid defense in workers' compensation cases, failure to mitigate is not the proper subject of a review-reopening action where a change of condition is not alleged, the defendants have not established any recommended specific treatment for Halverson's disability, and her refusal was not arbitrary or unreasonable, given she previously attended the Spine Rehabilitation Program in 2014 and Dr. Chen released her without recommending any additional treatment.

As analyzed above, Dyersville Food Bank and LeMars stipulated on the record, they are not alleging a change of "[p]hysical condition or employment condition." (Tr., p. 12) The statute expressly limits the inquiry of a review-reopening action to whether or not the condition of the employee warrants an end to, diminishment of, or increase in compensation. Iowa Code § 86.14; Kohlhaas, 777 N.W.2d at 391-93. Dyersville Food Bank and LeMars could have asserted they believed Halverson had a change in physical condition, and that was why they wanted her to attend an appointment with Dr. Chen and the unnamed orthopedic surgeon for treatment; they did not. Dyersville Food Bank and LeMars have not tailored their argument to fit within the express limits of the statute. The review-reopening petition should be denied based on Dyersville Food Bank and LeMars stipulated they are not alleging a change of physical condition or employment condition in this case.

Iowa Code section 85.27 was not amended in 2017. The statute directs the employer to provide treatment for compensable injuries, as follows:

1. The employer, for all injuries compensable under this chapter or chapter 85A, shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance and hospital services and supplies therefor and shall allow reasonably necessary transportation expenses incurred for such services. The employer shall also furnish reasonable and necessary crutches, artificial members and appliances but shall not be required to furnish more than one set of permanent prosthetic devices. . . .

4. For purposes of this section, the employer is obliged to furnish reasonable services and supplies to treat an injured employee, and has the right to choose the care. If the employer chooses the care, the employer shall hold the employee harmless for the cost of care until the employer notifies the employee that the employer is no longer authorizing all or any part of the care and the reason for the change in authorization. An employer is not liable for the cost of care that the employer arranges in response to a sudden emergency if the employee's condition, for which care was arranged, is not related to the employment. The treatment must be offered promptly and be reasonably suited to treat the injury without undue inconvenience to the employee. If the employee has reason to be dissatisfied with the care offered, the employee should communicate the basis of such dissatisfaction to the employer, in writing if requested, following which the employer and the employee may agree to alternate care reasonably suited to treat the injury. If the employer and employee cannot agree on such alternate care, the commissioner may, upon application and reasonable proofs of the necessity therefor, allow and order other care. In an emergency, the employee may choose the employee's care at the employer's expense, provided the employer or the employer's agent cannot be reached immediately. . . .

Iowa Code § 85.27.

An independent medical examination is not treatment. Assuming *arguendo* all of the appointments with Dr. Chen were for treatment, Dyersville Food Bank and LeMars did not have the right to direct treatment in October 2016, and November 2016, when they had denied Halverson had sustained a compensable claim. Brewer Strong, 913 N.W.2d at 244-45; Bell Bros Heating & Air Conditioning, 778 N.W.2d at 207. Likewise, the appointment with the unnamed orthopedic surgeon for treatment was during the pendency of the appeal. At that time given the denial of liability, Dyersville Food Bank and LeMars did not have the right to direct Halverson's treatment.

In Stufflebean the court affirmed the industrial commissioner's finding the claimant's refusal to submit to treatment for a hernia consisting of an operation and

injection “was not so unreasonable as to forfeit his right to compensation and fixed the amount of disability at 7% of total permanent disability.” 9 N.W.2d at 283, 233 Iowa at 440. The express language used by the industrial commissioner and the Iowa Supreme Court recognizes potentially benefits could be forfeited for failure to submit to treatment.

At the time of Stufflebean, the Workers’ Compensation Act was found in Iowa Code chapter 70 (1939). Iowa Code section 1387 (1939) provided:

1387. Professional and hospital services. In addition to other compensation hereinafter provided, the employer, with notice or knowledge of injury, shall furnish reasonable surgical, medical, osteopathic, chiropractic, nursing and hospital services and supplies therefor. Provided, however, that in exceptional cases the industrial commissioner shall fix the amount, which in no event shall exceed six hundred dollars, to be expended for medical, surgical and hospital services and supplies. Charges believed to be excessive may be referred to the industrial commissioner for adjustment under authority of section 1462.

The controlling statute at the time of Stufflebean, did not contain any express language indicating a refusal to receive treatment could result in a suspension, termination, or forfeiture of benefits, as with the current version of the statute. Both versions of the statute discuss “reasonable” services and supplies. Neither version contains any wording providing for a suspension, termination, or forfeiture of any benefits.

For the reasons discussed above involving Halverson’s refusal to attend independent medical examinations with Dr. Chen, I find the evidence presented at hearing does not support Halverson’s refusal to attend treatment with Dr. Chen or the unnamed orthopedic surgeon unreasonable. Halverson attended Dr. Chen’s two-week Spine Rehabilitation Program in February 2014, while she was living in North Liberty, Iowa. (Tr., p. 31) Dr. Chen discharged Halverson in April 2014, and recommended she continue with the exercises she learned during the program. (Tr., p. 32; Ex. R, p. 2) When she returned to Dr. Chen in September 2014, he had no further treatment recommendations for her. (Tr., p. 33) Halverson testified she has continued to perform the exercises with the DVD she received from Dr. Chen thirty to forty minutes per day, three to five days per week. (Tr., p. 42)

Dyersville Food Bank and LeMars have presented no evidence Dr. Chen, the unnamed orthopedic surgeon, or any other provider have reviewed any of Halverson’s recent medical records or recommended any additional treatment for Halverson. Dr. Chen has not indicated whether Halverson or any patient would benefit from participating in the Spine Rehabilitation Program a second time.

After Dyersville Food Bank and LeMars accepted liability for Halverson’s mental health condition, Halverson attended an appointment with Dr. Rahim, a psychiatrist selected by Dyersville Food Bank and LeMars in August 2016. (Ex. F, pp. 1-5) Dr.

Rahim examined Halverson and diagnosed her with major depression, recurrent, moderate, nonpsychotic general anxiety disorder, and post-traumatic stress disorder, and recommended she continue to treat with King, her psychiatric provider. (Ex. F, p. 4) Dr. Rahim did not recommend Halverson be examined by a physiatrist, orthopedist, or any other specialist. Halverson has continued to treat with King. (Ex. G, pp. 1-4) Dyersville Food Bank and LeMars have not paid for any treatment with King since Dr. Rahim examined her and recommended she continue treating with King. (Tr., p. 31) Again, it is Dyersville Food Bank and LeMars who have acted unreasonably, by failing to provide treatment recommended by their treating physician, Dr. Rahim. Halverson has also continued to receive treatment from her personal physician. Dyersville Food Bank and LeMars have failed to establish Halverson's refusals to attend appointments with Dr. Chen and the unnamed orthopedic surgeon are unreasonable.

Halverson has moved for a protective order to prevent Dyersville Food Bank and LeMars from scheduling additional treatment and independent medical examinations. Dyersville Food Bank and LeMars did not appeal the Commissioner's June 29, 2017 appeal decision. That decision affirmed the deputy workers' compensation commissioner's finding Halverson sustained an injury arising out of and in the course of her employment with Dyersville Food Bank, and award of permanent total disability benefits, modifying the commencement date for permanency. Pursuant to the final decision Dyersville Food Bank and LeMars are responsible for all medical expenses causally related to the work injury. Halverson has not filed a petition for alternate medical care. Dyersville Food Bank and LeMars retain control over her medical care. No additional independent medical examination has been scheduled since August 2017. The motion for protective order is denied.

II. Partial Commutation

This case involves a petition for partial commutation filed before July 1, 2017. Thus, the changes to the commutation provision on July 1, 2017 do not apply to this case.

At the time of the filing of the petition for partial commutation, Iowa Code section 85.45(1) provided,

[f]uture payments of compensation may be commuted to a present worth lump sum payment on the following conditions:

- a. When the period during which compensation is payable can be definitely determined.
- b. When it shall be shown to the satisfaction of the workers' compensation commissioner that such commutation will be for the best interest of the person or persons entitled to compensation.

Halverson has requested a partial commutation of all but the last week of benefits owed pursuant to the life expectancy table adopted by the Division of Workers'

Compensation in rule 876 Iowa Administrative Code 6.3. Iowa Code section 85.48 provides,

[w]hen partial commutation is ordered, the workers' compensation commissioner shall fix the lump sum to be paid at an amount which will equal the future payments for the period commuted, capitalized at their present value upon the basis of interest at the rate provided in section 535.3 for court judgments and decrees. Provisions shall be made for the payment of weekly compensation not included in the commutation with all remaining payments to be paid over the same period of time as though the commutation had not been made by either eliminating weekly payments from the first or last part of the payment period or by a pro rata reduction in the weekly benefit amount over the entire payment period.

Rule 876 IAC 6.3 contains a life expectancy table to be used in determining the amount to be paid to claimants in commutation proceedings. The rule provides, "[t]he life expectancy is determined by taking the age of the person, set forth in the 'age' column and comparing it to the 'weeks' column, which indicates the weeks an individual at the age indicated will be expected to continue to live." 876 IAC 6.3. The rule provides a presumption of life expectancy and makes the number of weeks owed to a claimant under a permanent total disability award definitely determinable.

When assessing whether a commutation should be granted, the reviewing body determines whether granting a commutation is in the claimant's best interests.

Dameron v. Neumann Bros., Inc., 339 N.W.2d 160, 164-65 (1983); Diamond v. Parsons Co., 256 Iowa 915, 928, 129 N.W.2d 608, 616 (1964). The Iowa Supreme Court has identified factors to consider in determining whether a commutation is in the claimant's best interest, as follows:

1. The worker's age, education, mental and physical condition, and actual life expectancy (as contrasted with information provided by actuarial tables).
2. The worker's family circumstances, living arrangements, and responsibilities to dependents.
3. The worker's financial condition, including sources of income, debts and living expenses.
4. The reasonableness of the worker's plan for investing the lump sum proceeds and the worker's ability to manage invested funds or arrange for management by others (for example, by a trustee or conservator).

Dameron, 339 N.W.2d at 164. The court further noted, request for a commutation should be approved using the best-interest balancing test "unless the potential

detriments to the worker outweigh the worker's expressed preference and the demonstrated benefits of commutation." Id.

Halverson is not married. At the time of the hearing Halverson was fifty-two. (Tr., p. 17). There is no evidence that Halverson is suffering from a psychological or physical condition that would adversely affect her life expectancy.

Halverson lives with her adult daughter and her parents. Halverson's daughter owns her home and has offered Halverson the opportunity to live with her permanently. (Tr., p. 24) Halverson's daughter is a traveling nurse and she is not home much of the time. (Tr., p. 17)

At hearing Halverson testified she would receive her first \$777.00 SSDI check in May 2018. (Ex. 2; Tr., p. 18) Halverson testified the Social Security Administration has reduced her monthly payments from \$809.00 to \$777.00 because the Social Security Administration believes she is receiving permanent total disability benefits from Dyersville Food Bank and LeMars. (Tr., p. 18) Halverson testified at hearing she will pay her daughter \$400.00 for rent per month when she receives her first SSDI check. (Tr., p. 22) In the past Halverson paid her daughter as much as she could. (Tr., p. 22)

Halverson does not have a car payment or any recurring bills, other than a monthly telephone bill of \$32.61. (Tr., p. 22) Halverson has a student loan that is being forgiven. (Tr., p. 65) Halverson does not have any credit cards or credit card debt. (Tr., pp. 22-23) Halverson will be able to pay her recurring monthly expenses of \$432.61 per month, and \$192.00 for food, if her food assistance is discontinued after she begins receiving SSDI.

Halverson does not have a substance abuse problem or any problems or addictions related to gambling. (Tr., p. 29) She does not have any credit card debt. While Halverson has no training or experience in finance or investing, there was no evidence presented at hearing Halverson has had past financial difficulties or spent money unwisely.

Halverson is seeking a partial commutation to make her daughter's home more accessible so Halverson can be more independent and live with her daughter permanently. (Tr., pp. 17-18, 24) Halverson would like to move the laundry upstairs, install a dishwasher, install ramps on the front and back of the home, install railings on the front and back decks, widen some door structures, and install a walk-in tub with safety bars, to make it safer for her to get around. (Tr., p. 24) Halverson estimated the cost of the improvements to be between \$10,000.00 and \$20,000.00. (Tr., p. 24) Halverson also plans to have radon remediation done on the home to keep it safe. (Tr., p. 66)

Halverson does not own a car and she would like to purchase a used vehicle for \$15,000.00. (Tr., p. 25) When she has to drive Halverson borrows a car from her daughter, brother, or her parents. (Tr., p. 69) Halverson has consulted with a financial

advisor and she would like to invest the remaining funds she would receive. (Tr., pp. 25-26) Halverson intends to have her daughter be the beneficiary of any investment accounts. (Tr., p. 28) While estate planning is not a factor for considering whether or not to grant a partial communication, under the circumstances of this case, I find the benefits of the proposed partial commutation outweigh the detriments Halverson may face in the future.

III. Costs

Halverson seeks to recover the \$100.00 filing fee, \$13.26 for service costs, \$60.80 for a deposition transcript, and the \$1,300.00 cost of Murphy's report. (Ex. 5, pp. 4-8) Iowa Code section 86.40, provides, "[a]ll costs incurred in the hearing before the commissioner shall be taxed in the discretion of the commissioner." Rule 876 IAC 4.33(6), provides

[c]osts taxed by the workers' compensation commissioner or a deputy commissioner shall be (1) attendance of a certified shorthand reporter or presence of mechanical means at hearings and evidential depositions, (2) transcription costs when appropriate, (3) costs of service of the original notice and subpoenas, (4) witness fees and expenses as provided by Iowa Code sections 622.69 and 622.72, (5) the costs of doctors' and practitioners' deposition testimony, provided that said costs do not exceed the amounts provided by Iowa Code sections 622.69 and 622.72, (6) the reasonable costs of obtaining no more than two doctors' or practitioners' reports, (7) filing fees when appropriate, (8) costs of persons reviewing health service disputes.

The administrative rule expressly allows for the recovery of the costs requested by Halverson. Using my discretion, I find the \$100.00 filing fee, \$13.26 in service costs, \$60.80 cost of the deposition transcript, and the \$1,300.00 cost of Murphy's report should be assessed to Dyersville Food Bank and LeMars.

ORDER

IT IS HEREBY ORDERED THAT:

Defendants' review-reopening petition is denied.

Claimant's petition for partial commutation is granted.

Claimant's motion for protective order is denied.

Defendants shall pay the claimant a lump sum payment of future weekly benefits, except for the final week of permanent total disability benefits awarded in the December 1, 2015 arbitration decision, as modified in the June 29, 2017 appeal decision, as set forth in the claimant's petition for commutation, discounted to the

present value based on the number of weeks to be commuted and the interest rate for determining the discount as of the date of this decision.

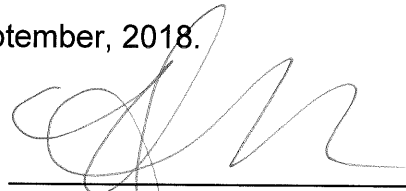
Defendants shall receive a credit for all benefits paid from the date of the filing of the petition until the date the partial commutation is paid.

Claimant's right to medical benefits under Iowa Code section 85.27 shall remain unaffected by this decision.

Defendants are assessed one hundred and 00/100 dollars (\$100.00) for the filing fee, thirteen and 26/100 dollars (\$13.26) for service costs, sixty and 80/100 dollars (\$60.80) for the deposition transcript, and one thousand three hundred and 00/100 dollars (\$1,300.00) for the cost of Murphy's report.

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

Signed and filed this 25th day of September, 2018.



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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.