BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

MARIA ALVAREZ, Claimant, vs. DAYBREAK FOODS, INC., Employer, and ACCIDENT FUND NATIONAL INSURANCE CO., Insurance Carrier, Defendants.	File No. 19700501.01 ARBITRATION DECISION Head Notes: 1100; 1402; 1402.30; 1402.40; 1803

STATEMENT OF THE CASE

Claimant Maria Alvarez filed a petition in arbitration seeking worker's compensation benefits against Daybreak Foods, Inc., employer, and Accident Fund National Insurance Company, insurer, for an alleged work injury date of May 28, 2019. The case came before the undersigned for an arbitration hearing on November 17, 2020. This case was scheduled to be an in-person hearing occurring in Des Moines. However, due to the outbreak of a pandemic in Iowa, the Iowa Workers' Compensation Commissioner ordered all hearings to occur via video means, using CourtCall. Accordingly, this case proceeded to a live video hearing via CourtCall with all parties and the court reporter appearing remotely. The hearing proceeded without significant difficulties.

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

The evidentiary record includes Joint Exhibits 1 through 12, Claimant's Exhibits 1 through 7, and Defendants' Exhibits A through I.

Claimant testified on her own behalf. Alina Salvat provided interpretation services. William Lamarr testified on behalf of the employer. The evidentiary record was left open at the conclusion of the evidentiary hearing in order to allow claimant to seek

correction of a scrivener's error in claimant's exhibit 1. On November 18, 2020, claimant submitted exhibit 7, which clarified that error, and the evidentiary record was closed. The parties submitted post-hearing briefs on December 18, 2020, and the case was considered fully submitted on that date.

ISSUES

1. Whether claimant has sustained an injury to her neck and/or back on May 28, 2019, arising out of and in the course of her employment;

2. If so, whether those injuries were the cause of any permanent disability, and the nature and extent of same;

3. Whether the stipulated injuries to claimant's left shoulder and right hip were the cause of permanent disability;

4. If so, the nature and extent of same;

5. The proper commencement date for permanent partial disability benefits, if any are awarded;

6. Payment of certain medical expenses;

7. Payment of claimant's IME pursuant to Iowa Code section 85.39; and

8. Taxation of costs.

FINDINGS OF FACT

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

Claimant's testimony was fairly consistent as compared to the evidentiary record, although she was a somewhat poor historian. Her demeanor at the time of hearing gave the undersigned no reason to doubt her veracity. Claimant is found credible.

At the time of hearing, claimant was a 63-year-old woman. (Hearing Transcript, p. 10) She is originally from El Salvador, and speaks very little English. (Tr., p. 11) She is able to understand some English but cannot write or read English. She completed school through the 6th grade in El Salvador. (Tr., p. 11) Claimant is left hand dominant. (Tr., p. 17)

The record does not reflect when claimant came to reside in the United States. However, by at least 1998 she was employed at Tyson Foods. (Defendants' Exhibit G, p. 1) Her job at Tyson involved packaging meat, and she testified that she worked there

for about 14 years. (Tr., p. 15) Claimant testified that she did sustain work injuries while working for Tyson, involving her shoulders and her back. (Tr., p. 15)

Records the defendants obtained from the Division of Workers' Compensation indicate claimant reported work-related injuries while employed by Tyson on November 25, 1998; August 21, 2000; November 26, 2001; December 27, 2001; August 4, 2005; and February 2, 2006. (Def. Ex. G, pp. 1-6; 17) The injuries in 2000 and 2001 involved her bilateral shoulders, head, neck, back, and legs. (Def. Ex. G, pp. 2-3; 17) It is unclear what body parts were injured in 2005 and 2006. There is a medical record in evidence from La Clinica Medica Latina, dated March 27, 2006, indicating that claimant reported back pain "for a long time" that radiates around to her legs. (Joint Exhibit 3, p. 1) The record does not indicate whether the back pain is related to a work injury, but it is noted that claimant was working at Tyson and "lifts quite a bit." (Jt. Ex. 3, p. 1)

When claimant left Tyson Foods, she went to work at Rose Acre Farms. (Tr., pp. 15-16) Her job was "egg breaker." (Def. Ex. H, p. 2) She testified that she was not under any work restrictions when she started at Rose Acres. (Tr., p. 16) Again, it is unclear when claimant started working at Rose Acres, but she did sustain work injuries there as well on February 27, 2008, October 27, 2008, and October 8, 2012. (Def. Ex. G, pp. 7-9; 13) Claimant testified that the injuries at Rose Acres again involved her shoulders and back, although it appears the 2012 injury involved "cardiovascular, pulmonary, lungs." (Tr., p. 16; Def. Ex. G, p. 13) Claimant worked at Rose Acres for 5 to 6 years. (Def. Ex. H, p. 2)

Medical records indicate claimant reported back pain again on February 4, 2009, which radiated down her left leg. (Jt. Ex. 3, p. 3) On June 29, 2010, claimant had a functional capacity evaluation (FCE) related to her February 27, 2008 injury. (Jt. Ex. 1, p. 1) Physical testing indicated claimant was able to perform at the light physical demand level for floor to knuckle lifting, and the sedentary level for knuckle to shoulder lifting. (Jt. Ex. 1, p. 1) The examiner noted that claimant self-limited, and also demonstrated some inconsistencies during the evaluation according to physiological, behavioral, and validity criteria. Those inconsistencies indicated that she may have been capable of performing at greater physical capacities than exhibited. (Jt. Ex. 1, p. 1) It is also noted that claimant reported pain levels of 7-9 out of 10 with activities performed during the FCE, which is considered to be "severe pain." (Jt. Ex. 1, p 2)

Following the 2010 FCE, claimant was provided with an impairment rating by Stephen Ash, M.D. (Jt. Ex. 4, p. 1) The rating is dated August 13, 2010, and Dr. Ash assigned 1 percent right upper extremity impairment for claimant's symptoms from her glenoid cyst and probable rotator cuff strain. He also assigned permanent restrictions based on the findings of the FCE. He did not believe physical therapy would help, but encouraged claimant to continue with a home exercise program on her own. (Jt. Ex. 4, p. 1) Claimant later had an independent medical evaluation (IME) with Robin Sassman,

M.D., who provided a 5 percent whole person impairment rating for the right shoulder. (Jt. Ex. 6, p. 3) [1]

Claimant saw Dr. Ash again on September 8, 2011, this time for her left shoulder. (Jt. Ex. 4, p. 2) Dr. Ash assessed left shoulder impingement syndrome. They discussed a cortisone injection, but claimant did not find the injections in her right shoulder to be helpful, so they decided against it for her left shoulder. Dr. Ash recommended over-the-counter medications and keeping up with her home exercise program. Rather than obtaining a new FCE, he made the 2010 FCE applicable to both shoulders and placed claimant at MMI. (Jt. Ex. 4, p. 2)

On October 9, 2012, claimant was seen at La Clinica Medica Latina for bilateral neck pain radiating down both arms that had been present for the prior year. (Jt. Ex. 3, p. 5) The record indicates claimant had been at work when the pain became so bad she left work and came to the clinic. She reported receiving two pain injections with no relief. She had also been seen recently for low back pain, but the neck and arm pain was more severe at that time. It was recommended that claimant attend physical therapy, but she declined as she did not have insurance and was hoping that workers' compensation would cover it. (Jt. Ex. 3, p. 5)

Claimant then saw Jeffrey P. Davick, M.D., on December 3, 2012, for evaluation of her bilateral shoulders under workers' compensation. (Jt. Ex. 5, p. 1) She was still working at Rose Acres at that time. She reported bilateral shoulder pain and discomfort for about 18 months, which radiated into her back and down her arms. Dr. Davick noted that she had good strength, and that her examination seemed more consistent with adhesive capsulitis. He referred her to physical therapy. Interestingly, he notes that she was "working full duty now and can continue to do so." (Jt. Ex. 5, p. 1) It does not appear that he was aware of the 2010 FCE or Dr. Ash's permanent restrictions related to her bilateral shoulders at that initial appointment.

Claimant apparently then started seeing Robert Rondinelli, M.D. There is a medical record dated January 10, 2013, which indicates she was last seen December 4. (Jt. Ex. 2, p. 1) Dr. Rondinelli noted claimant had "nonspecific pain affecting her neck, shoulder, and primarily her left upper extremity since 2011." He noted claimant had seen a spine surgeon, Dr. David Hatfield, and an MRI showed diffuse multilevel degenerative changes of her cervical spine, "which are of questionable significance in this case." (Jt. Ex. 2, p. 1) Dr. Rondinelli noted that an EMG study was negative for cervical radiculopathy, and physical therapy indicated she had good cervical range of motion, but she still complained of soft tissue pain. He further noted that she "continues to work 8 hour shifts on restrictions, which I have not imposed in this situation." (Jt. Ex. 2, p. 1)

[1] Dr. Sassman's 2010 IME report is not in evidence, but the rating is referenced in her 2013 IME report, which is included as joint exhibit 6.

On physical examination, Dr. Rondinelli noted cervical range of motion was within full functional limits. (Jt. Ex. 2, p. 2) Her strength showed "submaximal effort" on grip testing, and range of motion of the shoulder also showed submaximal effort. He diagnosed a "nonspecific myofascial pain syndrome involving her neck, shoulders, and left upper extremity to a variable extent." (Jt. Ex. 2, p. 2) She also had an incidental finding of left carpal tunnel syndrome that he did not believe to be work-related. He indicated that all necessary and appropriate diagnostic testing had been completed and therapeutic options carried out, which had been "largely ineffective." As such, he placed her at MMI, and recommended she continue with over-the-counter medications. Finally, he noted that she had "excellent residual functional mobility, although some self-inhibition to movement." He did not provide any specific restrictions in the work place, and indicated she could continue with activities as tolerated. (Jt. Ex. 2, p. 2)

Claimant attended an IME, again with Dr. Sassman, on August 12, 2013. (Jt. Ex. 6) Dr. Sassman's report is dated November 25, 2013. Dr. Sassman's review of the medical records at that time makes note of several records that are not in evidence, including Dr. Rondinelli's zero percent impairment rating on March 26, 2013. (Jt. Ex. 6, p. 5) She also notes that on April 18, 2013, Dr. Davick agreed with Dr. Ash regarding permanent restrictions based on the 2010 FCE. There is another note that Jacqueline Stoken, D.O., provided an 11 percent whole person impairment rating "in the same area" of the body in 2006, but the exact body area of the rating is not provided. (Jt. Ex. 6, p. 5)

After physical examination, Dr. Sassman provided diagnoses of left shoulder impingement syndrome and adhesive capsulitis; right shoulder impingement syndrome and adhesive capsulitis; and cervical pain with radicular symptoms. (Jt. Ex. 6, p. 7) She opined that claimant's symptoms were directly causally related to her work at Rose Acre Farms. (Jt. Ex. 6, pp. 7-8) She noted that while claimant had previous injuries to her shoulders, neck, and upper extremities while working at Tyson, those injuries had "completely resolved" prior to starting her work at Rose Acres. (Jt. Ex. 6, p. 8) Dr. Sassman provided a 15 percent impairment rating related to the cervical spine; 18 percent impairment rating for the left upper extremity; and 18 percent for the right upper extremity. (Jt. Ex. 6, pp. 8-9) She recommended restrictions of lifting, pushing, pulling, and carrying no more than 20 pounds below shoulder height on an occasional basis, and avoiding over-shoulder work. (Jt. Ex. 6, p. 9)

Claimant was awarded 20 percent industrial disability by a different Deputy Commissioner for her injuries at Rose Acre Farms, and her claims were later settled in a Compromise Settlement. (Def. Ex. G, pp. 9-16) Claimant eventually resigned from Rose Acre Farms due to her injuries. (Cl. Ex. 2, p. 3)

After claimant left Rose Acres, there was a period of time that she did not work, but she could not remember how long. (Tr., pp. 16-17) She was then employed at Mary Ann's Foods for approximately 7 months. (Def. Ex. H, p. 2) Her job involved packaging bacon in an assembly line. (Def. Ex. H, p. 2) Claimant testified that she was not under any work restrictions when she went to work at Mary Ann's, which is inconsistent with

the medical records. Claimant did not sustain any additional injuries while employed at Mary Ann's. (Tr., p. 17)

Claimant started working at Daybreak Foods in January 2017. (Def. Ex. H, p. 2) She testified that she did not have any work restrictions at that time, again, inconsistent with the medical records, and that she was not receiving any treatment for her left shoulder, neck, back, or right hip. (Tr., p. 17) Likewise, William Lamarr, the area director of human resources for Daybreak, testified that claimant did not disclose any permanent restrictions when she applied for work there. (Tr., p. 38) Claimant's job is in the housekeeping department, and she is responsible for picking up and washing dirty clothes, folding clothes and putting them away, cleaning and disinfecting the showers the workers use to shower in and out of the plant, as well as general cleaning of the offices and other areas. (Tr., pp. 12-13) Claimant estimated that the heaviest weight she deals with at work involves lifting the dirty clothes, which can weigh up to 20 pounds. (Tr., p. 13)

Claimant participated in a hearing for Social Security Disability benefits on September 6, 2017. (Jt. Ex. 12, p. 1) She had actually applied for the benefits on March 9, 2015, and claimed disability beginning on February 1, 2015. (Jt. Ex. 12, p. 1) The decision is dated November 13, 2017. (Jt. Ex. 12, p. 9) It is noted in the decision that claimant alleged that her "current work was not substantial, as that (sic) she is receiving special accommodations in order for her to perform her work." (Jt. Ex. 12, p. 3) The judge found that claimant was receiving *di minimus* [*sic*], if any, accommodations for her current work at Daybreak. The decision then addressed the period during which claimant was not working, which was stated to be from February 1, 2015 until December 31, 2016. (Jt. Ex. 12, p. 4) During that time it was found that claimant did have "severe impairments" involving "degenerative disc disease (mild) and disorders of the muscle, ligament, and fascia (bilateral shoulders)." (Jt. Ex. 12, p. 4) However, there was not enough evidence to support a finding of disability. The judge determined that claimant had the "residual functional capacity" to perform work. (Jt. Ex. 12, p. 5)

In reaching this finding, the judge considered claimant's testimony and allegations that she was limited to lifting no more than 10 pounds, that she was "unable to persist at work tasks" due to her back and shoulder pain, as well as other similar issues. The judge determined that "claimant's statements concerning the intensity, persistence, and limiting effects of these symptoms are not entirely consistent with the medical evidence and other evidence in the record. . ." (Jt. Ex. 12, pp. 5-6) Ultimately, the judge determined that despite claimant's subjective complaints of disabling pain and limitations, she was able to return to full-time work, and had not received any medical treatment since 2015. (Jt. Ex. 12, pp. 6-7) As such, claimant's application for Social Security Disability benefits was denied. (Jt. Ex. 12, pp. 8-9) Claimant continued working her regular job at Daybreak Foods.

On May 28, 2019, claimant testified that she was cleaning a glass door with paper towels and Windex, when she felt a crack in her left shoulder. (Tr., pp. 17-18; 27-28) She testified that in addition to shoulder pain, she also felt pain in the back part of

her arm and her upper back area on the left side. (Tr., p. 18) Later the same day, she was mopping when she began to experience pain in her right hip. (Tr., p. 18) She reported the injuries right away, and was sent for treatment. (Tr., p. 18)

On June 10, 2019, claimant was seen by Judith D. Nelson, ARNP, at Occupational Medicine Clinic. (Joint Exhibit 8, p. 1) Claimant complained of pain in her left shoulder into the left clavicle, left side of neck, and jaw area, with the onset 13 days prior while working. She also complained of low back and right hip pain that started the same day. (Jt. Ex. 8, p. 1) On physical examination, claimant demonstrated normal range of motion with her left shoulder. (Jt. Ex. 8, p. 2) Rage of motion with her right hip was also fairly normal, although she did have pain with motion. ARNP Nelson diagnosed left shoulder tendonitis and right hip bursitis. (Jt. Ex. 8, p. 3) She provided claimant with a Toradol injection, prescribed steroids, and placed claimant on work restrictions of occasional overhead activity and no window washing. (Jt. Ex. 8, p. 3)

Claimant had a left shoulder x-ray on June 17, 2019, which showed no acute abnormalities. (Jt. Ex. 8, p. 4) She returned to ARNP Nelson on July 11, 2019. (Jt. Ex. 8, pp. 5-7) At that time she had completed 3 sessions of physical therapy, and neither her shoulder pain nor her hip pain had improved. (Jt. Ex. 8, p. 5) On physical examination of the left shoulder, it is noted that claimant was "hypersensitive to even light palpation around shoulder, anterior chest, and trapezius (physically brings herself off table)." (Jt. Ex. 8, p. 6) However, later in the appointment, during distraction, claimant had no physical response to deep pressure.

On physical examination of the right hip, claimant demonstrated "extreme point tenderness over the posterior greater trochanter." (Jt. Ex. 8, p. 6) Other than that, examination was fairly normal. ARNP Nelson offered a right hip injection, but claimant declined as she wanted to have x-rays and an MRI first. As such, ARNP Nelson referred claimant to an orthopedic specialist, put physical therapy on hold, and maintained her work restrictions. (Jt. Ex. 8, p. 6)

Claimant was seen at Capital Orthopaedics by William Jacobson, M.D., on July 25, 2019. (Jt. Ex. 10, p. 1) Dr. Jacobson noted complaints of left shoulder and right hip pain. On physical examination of the shoulder, claimant had full strength and nearly normal range of motion, although with pain. (Jt. Ex. 10, p. 2) Similarly, she had good range of motion and strength in her hip, with mild tenderness over her sacroiliac joint. Dr. Jacobson diagnosed impingement syndrome of left shoulder; pain in left shoulder, and pain in right hip. (Jt. Ex. 10, p. 2) He recommended conservative treatment, and provided a corticosteroid injection in the left shoulder. He further recommended physical therapy for both the shoulder and hip. He maintained claimant's work restrictions, and noted that she would be able to return to normal duties in 4 weeks, at which time she would likely be placed at maximum medical improvement (MMI). (Jt. Ex. 10, p. 2)

Over the course of claimant's physical therapy, there are several instances in which the therapist noted concerns regarding claimant's effort and inconsistencies in her performance when distracted. For example, on August 5, 2019, claimant is noted to

have been "[l]imited with passive hip range initially, improves when patient is distracted by conversation." (Jt. Ex. 9, p. 8) On August 12, 2019, the therapist noted there were still communication barriers even with the interpreter present, and that claimant required "constant cues to continue with exercises." (Jt. Ex. 9, p. 11) As physical therapy continued, claimant reported minimal improvement, and the therapist continued to note "questionable effort with activities, especially the arm bike . . ." (Jt. Ex. 9, p. 15)

By August 21, 2019, claimant still had complaints of shoulder and hip pain, which was worse after working. (Jt. Ex. 9, p. 18) Claimant noted that "lifting laundry overhead is bothersome." (Jt. Ex. 9, p. 18) The therapist reiterated that claimant had work restrictions that included no overhead work, and claimant understood. Again claimant was noted to put forth questionable effort with activities, especially the arm bike. (Jt. Ex. 9, p. 19)

Claimant returned to Dr. Jacobson on August 23, 2019. (Jt. Ex. 10, p. 3) She reported that physical therapy had been helping both her shoulder and hip, but she did still have pain after working. She further stated that she had "some issues with getting sick" following the shoulder injection. (Jt. Ex. 10, p. 3) As such, Dr. Jacobson did not recommend further injections. He noted overall improvement in claimant's symptoms, and recommended finishing physical therapy and transitioning to a home exercise program. (Jt. Ex. 10, p. 4)

Claimant returned to physical therapy on August 26, 2019. (Jt. Ex. 9, p. 21) Although claimant noted that physical therapy was helping, she still required cuing with all exercises in order to put forth maximal effort. The therapist also noted that she was unable to actively raise her left arm to eye level and dropped cones several times, but had enough strength to quickly catch the cone before it hit the floor. (Jt. Ex. 9, p. 21) Claimant continued to progress with therapy, however by September 4, 2019, she was reporting that she had been working alone frequently, which leaves her more tired. (Jt. Ex. 9, p. 25) She was noted to move slowly that day with all functional activities.

Claimant returned to Dr. Jacobson on September 12, 2019. (Jt. Ex. 10, p. 5) At that time, she reported the pain in both her shoulder and hip had improved. (Jt. Ex. 10, p. 6) She had only one physical therapy session left, and felt it was helping. Dr. Jacobson then noted that he had "reviewed a surveillance video of the patient that was provided to us showing her in public carrying heavy objects with her left arm and walking with no apparent distress from the left shoulder and hip. Due to this, there are no treatments that I can provide for her at this time." (Jt. Ex. 10, p. 6) Dr. Jacobson placed claimant at MMI, and stated she would be allowed to return to full duty work on September 16, 2019. (Jt. Ex. 10, pp. 6-7)

With respect to the surveillance that Dr. Jacobson reviewed, the surveillance report is in evidence. The report notes that on September 3, 2019, claimant was observed lifting a full 5-gallon container of water, which would weigh about 35-pounds. (Def. Ex. D, pp. 14-17) She was lifting the jug with her left hand and was able to lift it from her shopping cart and into the back of her vehicle. (Def. Ex. D, p. 17) She also

lifted bagged groceries into the car and carried groceries and the 5-gallon water jug from her vehicle into her house. (Def. Ex. D, pp. 14-17)

Claimant testified that at the time of the surveillance video, she was not under any lifting restrictions. (Tr., p. 24) In reviewing the medical records, it appears the only restrictions claimant was under involved no overhead work. Claimant testified that she was carrying the water jug on that date because her husband has problems with his back and was not able to carry those items. (Tr., p. 24)

Claimant continued working full duty at Daybreak. She returned to Dr. Jacobson on November 14, 2019, with complaints that she was still having pain in her right hip and left shoulder. (Jt. Ex. 10, p. 9) She also complained of right-sided low back pain going down the side of her leg to her foot. On physical examination, Dr. Jacobson noted excellent rotator cuff strength and good range of motion. (Jt. Ex. 10, p. 9) She also demonstrated good range of motion in her hip. Dr. Jacobson noted that there was a discrepancy between active and passive range of motion in her left shoulder, "and there is no obvious reason for that." (Jt. Ex. 10, p. 9) He also noted no neurologic issues for her right hip and low back pain. Dr. Jacobson explained that he had nothing further to offer from a treatment standpoint, as she had already had extensive physical therapy with little reported improvement. He felt she was at MMI and did not require restrictions. (Jt. Ex. 10, p. 9)

On December 6, 2019, Dr. Jacobson responded to a letter from the insurance carrier. (Jt. Ex. 5, p. 4) He reiterated that claimant had reached MMI on September 12, 2019. He further indicated that the work injuries resulted in no permanent impairment. (Jt. Ex. 5, p. 4)

On March 5, 2020, claimant presented to McFarland Clinic Family Medicine in Webster City in order to establish care and saw Jill R. Weideman, ARNP. (Jt. Ex. 9, p. 31) Claimant had an annual physical exam, and reported chronic low back pain and occasional aches and pain in the rest of her body. She was prescribed diclofenac for the pain. (Jt. Ex. 9, p. 33) The medical record makes no specific mention of shoulder or hip pain.

At the time of hearing, claimant was still employed at Daybreak, working her regular job with no restrictions. (Tr., pp. 11-12; 34) She testified that her job has changed somewhat in that she used to have one other person who worked with her, and a third person who worked part-time. (Tr., p. 23) Now, however, she works alone, as the other two positions have been eliminated. She testified that her injuries have resulted in her doing less outside of work, such as cooking, because she has to "take a lot of care when I'm at home so that I can do my job well at Daybreak." (Tr., p. 26)

Mr. Lamarr testified that the reason claimant currently works alone is due to a reduction in work force at the farm, which occurred in approximately November of 2019. (Tr., pp. 39-40) He said that the workforce was reduced by 50 workers, meaning there are fewer clothes to wash by 50 every day, and fewer showers taken by 100, as all

employees must shower in and shower out. As such, there is not as much clothing to wash, and the showers do not need to be cleaned as frequently. (Tr., pp. 39-40) He further testified that claimant is considered to be an employee in good standing with Daybreak. (Tr., p. 39)

Claimant had an independent medical evaluation (IME) with John D. Kuhnlein, D.O., on June 3, 2020. (Cl. Ex. 1, p. 1) His report is dated October 9, 2020. Dr. Kuhnlein reviewed claimant's prior medical history with respect to her bilateral shoulders, neck, and back. (Cl. Ex. 1, pp. 1-2) He noted that claimant denied having any neck, shoulder, low back, or right hip pain immediately prior to the date of injury and believed that she was working without restrictions at the time of the injury as well despite the prior restrictions assigned by Dr. Davick and others in 2013. (Cl. Ex. 1, p. 3) At the time of the IME, claimant was not actively treating for her neck, shoulder, low back, or right hip pain, and she told Dr. Kuhnlein that she was afraid to go to clinics because of the pandemic. (Cl. Ex. 1, p. 4) She reported taking two Tylenol at night or after working, and using heat and ice, but she was not performing any exercises. (Cl. Ex. 1, p. 4)

At the time of the IME, claimant reported constant activity-dependent left-sided neck pain radiating into the trapezius area and anterior shoulder area. (Cl. Ex. 1, p. 4) She also reported intermittent numbness and tingling in the left upper extremity, radiating to all fingers. She described constant activity-dependent anterior left shoulder area pain with a popping sensation and pointed to the sternoclavicular joint as painful and feeling out of place. (Cl. Ex. 1, p. 4) With respect to her back and hip, she reported intermittent right-sided low-back pain that moves to the left but is more prominent on the right. She indicated the pain radiates down the right leg to the knee. She further complained of numbness and tingling in the right hip, radiating to the anterior thigh. (Cl. Ex. 1, pp. 4-5) Finally, she described constant activity-dependent right hip pain that radiates into the anterior and posterior right thigh. (Cl. Ex. 1, p. 5)

On physical examination, Dr. Kuhnlein noted pain behaviors with shoulder joint range of motion testing, and like Dr. Jacobson, noted a discrepancy between the active and passive range of motion. (Cl. Ex. 1, p. 6) Dr. Kuhnlein also noted she moved about the room with a "short phase gait," and complained of right hip pain that improved as she walked. (Cl. Ex. 1, p. 7) Pain behaviors were noted with all range of motion testing in the lumbar spine. Hip range of motion was essentially normal, but she complained of pain with internal rotation and some additional movements. (Cl. Ex. 1, p. 8)

Dr. Kuhnlein's diagnoses were left shoulder area strain; low back and right hip strain; and complaints of neck pain. (Cl. Ex. 1, p. 8) He opined that it is "more reasonable than not" that claimant sustained a left shoulder area strain and low back and right hip strain when working on May 28, 2019. (Cl. Ex. 1, p. 8) With respect to future medical care, he opined that claimant would benefit from a second opinion regarding her shoulder; otherwise he recommended she continue with over-the-counter medications, perform her home exercise program, and work on core strengthening exercises for her hip and low back pain. (Cl. Ex. 1, p. 8) He placed claimant at MMI on or about November 14, 2019. (Cl. Ex. 1, p. 9)

Dr. Kuhnlein provided an impairment rating using the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition. For the left shoulder, he noted that his rating "would include impairment from any prior injury." (Cl. Ex. 1, p. 9) He assigned 17 percent impairment of the upper extremity for range of motion deficits, which converts to 10 percent of the whole person. For her hip, Dr. Kuhnlein noted that the "right hip ranges of notion were not objective for impairment rating purposes." (Cl. Ex. 1, p. 9) However, because claimant complained of pain, he provided a 3 percent lower extremity impairment, which converts to 1 percent of the whole person. Combined, Dr. Kuhnlein found claimant has 14 percent whole person impairment, and again reiterated that "shoulder area impairment outlined above may include impairment from any previous left shoulder area injury." (Cl. Ex. 1, p. 9)

Although Dr. Kuhnlein reviewed 510 pages of medical records, he did not include discussion of some of the prior ratings and reports. (Cl. Ex. 1, p. 11) While he noted that Dr. Rondinelli provided a zero percent rating in 2013 and Dr. Ash provided a 1 percent rating to the right upper extremity in 2010, he did not make mention of Dr. Stoken's or Dr. Sassman's prior ratings. (Cl. Ex. 1) He clearly had at least Dr. Stoken's reports, as they are mentioned on his list of records reviewed, and he notes in the history when claimant was examined at Medix. (Cl. Ex. 1, pp. 1-2; 11) His report contains no discussion of Dr. Sassman's prior findings, and no mention of her prior impairment ratings. Dr. Kuhnlein did note, however, that his impairment ratings related to the left shoulder "would include impairment from any prior injury." (Cl. Ex. 1, p. 9)

There are also some inconsistencies in Dr. Kuhnlein's report that cannot be overlooked. For example, he noted that claimant's ranges of motion in her right hip were "not objective for impairment rating purposes," but still assigned impairment due to claimant's subjective complaints of pain. (Cl. Ex. 1, p. 9) He also noted the same discrepancies between the active and passive range of motion with claimant's shoulder joint, but did not explain how or whether that effected his impairment rating. (Cl. Ex. 1, p. 6) Finally, it does not appear that Dr. Kuhnlein was provided with the surveillance footage or report, which showed claimant as very active, and able to lift and carry grocery bags and a 5-gallon water jug. While this surveillance may not have changed his opinions, it is relevant information that he was not able to consider when reaching his conclusions.

To the contrary, Dr. Jacobson was provided with the surveillance footage, and had several opportunities to examine claimant and provide her with treatment. As such, I find the opinions of Dr. Jacobson to be more convincing. Based on Dr. Jacobson's opinion, and viewing the evidence as a whole, I find that claimant sustained a temporary aggravation of her preexisting left shoulder and right hip conditions.

CONCLUSIONS OF LAW

Claimant has alleged permanent injuries to her left shoulder, right hip, neck, and back. Defendants have accepted liability for temporary injuries to her left shoulder and

right hip, but deny permanent disability. Defendants also deny injuries to her neck and back.

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

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

The question of causal connection is essentially within the domain of expert testimony. The expert medical evidence must be considered with all other evidence introduced bearing on the causal connection between the injury and the disability. Supportive lay testimony may be used to buttress the expert testimony and, therefore, is also relevant and material to the causation question. The weight to be given to an expert opinion is determined by the finder of fact and may be affected by the accuracy of the facts the expert relied upon as well as other surrounding circumstances. The expert opinion may be accepted or rejected, in whole or in part. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); IBP, Inc. v. Harpole, 621 N.W.2d 410 (Iowa 2001); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995). Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417 (Iowa 1994). Unrebutted expert medical testimony cannot be summarily rejected. Poula v. Siouxland Wall & Ceiling, Inc., 516 N.W.2d 910 (Iowa App. 1994).

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

Claimant has alleged injuries to her neck and back, which defendants deny. Claimant provided testimony regarding neck and upper back pain initially after the injury, and mentioned it to ARNP Nelson on June 10, 2019. (Jt. Ex. 8, p. 1) However, ARNP Nelson did not diagnose any injury to claimant's neck or back at that time. There is no medical opinion diagnosing a specific neck injury, and no medical opinion in this evidentiary record causally connecting a neck or back injury to the work activities with this employer. Claimant's independent medical evaluator, Dr. Kuhnlein, noted symptoms involving the neck and low back, but his only diagnoses were low back strain and "complaints of neck pain." However, he did not state that either of those conditions were related to claimant's job in his causation finding. (Cl. Ex. 1, p. 8) He made no recommendations for treatment of a neck or low back condition. Therefore, I conclude that claimant failed to prove by a preponderance of the evidence that she sustained an injury to her neck or back on May 28, 2019, which arose out of and in the course of her employment.

With respect to claimant's left shoulder and right hip, defendants accepted compensability of temporary injuries. Claimant argues that her left shoulder and right hip injuries resulted in permanent impairment. The main basis for claimant's argument comes from Dr. Kuhnlein's impairment rating, as well as his recommended restrictions. Claimant argues that she did not have any permanent work restrictions at the time she was hired by Daybreak, and was not complaining of any pain or receiving any treatment with respect to her left shoulder and right hip prior to May 28, 2019.

As noted above, I found Dr. Jacobson's opinions regarding permanent impairment more persuasive. Dr. Kuhnlein's report neglected to discuss all of claimant's prior impairment ratings, and there were several inconsistencies that make it less reliable than Dr. Jacobson's opinions. Additionally, Dr. Kuhnlein's rating for claimant's shoulder is slightly lower than Dr. Sassman's prior rating from 2013. Dr. Kuhnlein specifically noted that his rating was to include impairment from any prior injury. This indicates that claimant did not sustain further permanent disability related to her shoulder.

Further, claimant's argument that she had no work restrictions prior to starting at Daybreak is inaccurate. Claimant had permanent restrictions beginning in 2010, after her FCE. The restrictions were accepted by multiple physicians, and reiterated several times since then. She testified at her Social Security Disability hearing on September 6, 2017, that she was working with restrictions and limitations, and received assistance from coworkers with certain tasks. She was able to do her job at Daybreak despite those restrictions, and continues to do so today. Finally, Dr. Jacobson has opined that claimant does not require any restrictions as a result of her May 28, 2019 injuries, which further indicates she has not sustained any permanent disability.

Finally, the record supports claimant's claim that she had not sought treatment for quite some time for her shoulder or hip prior to the May 28, 2019 injury. However, this does not mean she sustained a permanent disability as a result of the injury. Defendants accepted the temporary injuries, and claimant received conservative treatment. Dr. Jacobson determined he had nothing more to offer, and claimant was

released from care with no permanent functional impairment, and no work restrictions. She has not sought any additional treatment since that time. Claimant testified that she has not sought additional treatment because despite having health insurance, she does not have the money to pay for the co-payments. (Tr., pp. 19-21) That being said, when claimant went to McFarland Clinic on March 5, 2020 for her annual physical exam, she made no mention of shoulder or hip pain, but did mention chronic back pain. (Jt. Ex. 9, pp. 31-33)

Based on Dr. Jacobson's opinion, and the testimony and other evidence in the record, I find that claimant has not met her burden to prove that the injuries to her left shoulder and right hip on May 28, 2019, caused any permanent functional impairment, the need for any additional permanent work restrictions, or caused permanent disability. Accordingly, I conclude that claimant has failed to prove she is entitled to an award of permanent partial disability benefits.

Claimant seeks reimbursement of Dr. Kuhnlein's bill for his IME, pursuant to Iowa Code section 85.39. That section permits an employee to be reimbursed for subsequent examination by a physician of the employee's choice where an employer-retained physician has previously evaluated permanent disability and the employee believes that the initial evaluation is too low. The section also permits reimbursement for reasonably necessary transportation expenses incurred and for any wage loss occasioned by the employee attending the subsequent examination.

Defendants are responsible only for reasonable fees associated with claimant's independent medical examination. Claimant has the burden of proving the reasonableness of the expenses incurred for the examination. See Schintgen v. Economy Fire & Casualty Co., File No. 855298 (App. April 26, 1991). Section 85.39 was amended to include the following language in 2017:

> A determination of the reasonableness of a fee for examination made pursuant to this subsection, shall be based on the typical fee charged by a medical provider to perform an impairment rating in the local area where the examination is conducted.

Iowa Code section 85.39(2).

Defendants do not argue that claimant is not entitled to payment of an IME, but do argue that Dr. Kuhnlein's fee is not reasonable within the meaning of section 85.39. Rather, defendants argue that claimant should be limited to recovering $360.91 in reimbursement for the IME, as they believe that is the "typical fee charged by a medical provider to perform an impairment rating in the local area where the examination was conducted." Defendants have submitted 11 invoices related to impairment ratings obtained in other workers' compensation cases to support this argument. (Def. Ex. E, pp. 1-13) Claimant submitted a letter from Dr. Kuhnlein dated October 29, 2020, explaining the basis for his fee schedule. (Cl. Ex. 1, p. 13)

In reviewing defendants' exhibit E, the invoices submitted do not appear to be for "examination made pursuant to this subsection." Rather, they are in response to requests for impairment ratings made by the insurance carrier and/or employer to the authorized treating physician. (Def. Ex. E) In other words, they are requests for "an evaluation of permanent disability . . . made by a physician retained by the employer." Section 85.39(2) provides that the claimant may then obtain his or her own evaluation, and be reimbursed by the employer for the reasonable fee associated therewith. Therefore, the reasonableness of the fee "from an examination made pursuant to this subsection" cannot be determined by looking at the typical fee charged by a treating physician to rate impairment of a patient at the conclusion of treatment.

As Dr. Kuhnlein explained in his letter, treating physicians who are familiar with a patient's history and have spent time evaluating the individual are likely spending less time and effort in providing their impairment ratings. (Cl. Ex. 1, p. 13) To the contrary, an independent medical examiner must review all available medical records, interview the claimant for a longer period of time, and spend additional time dictating and reviewing a much longer report. This requires several hours of examination, review, and drafting, as well as time spent by the physician's staff in preparing the file. (Cl. Ex. 1, p. 13) Dr. Kuhnlein indicated in his report that he reviewed 510 pages of medical records. (Cl. Ex. 1, p. 11) While the report does not indicate exactly how much time was spent on interviewing and physically examining claimant, I note there was an interpreter present, which necessarily increases the time needed, and Dr. Kuhnlein performed several physical tests. (Cl. Ex. 1, pp. 1; 6-8) Finally, his written report is 10 pages long, with an additional page listing the medical records he reviewed. (Cl. Ex. 1, pp. 1-11)

Dr. Kuhnlein's invoice reflects that he charged $700.00 for the first hour of the IME exam, and $759.00 for additional time on the exam beyond the first hour. He also charged $700.00 for the first hour of preparing the IME report, and an additional $1,056.50 for his time spent on the report beyond the first hour. His total invoice came to $3,215.50. (Cl. Ex. 1, p. 14) I find this amount is reasonable considering the time and effort needed to produce the report. As such, defendants are responsible to reimburse claimant for the entirety of Dr. Kuhnlein's fee.

Claimant seeks payment of medical bills related to care by authorized treating physician Dr. Jacobson. (Cl. Ex. 3) It does not appear that defendants contest payment of those bills, and may have already paid them. However, to the extent they have not, defendants are responsible for payment of all causally related and authorized medical treatment claimant obtained from Dr. Jacobson, including the invoices contained in claimant's exhibit 3.

Finally, claimant requests assessment of her costs related to this contested case proceeding. Costs are assessed at the discretion of the agency. Iowa Code section 86.40. In this instance, claimant has not proven entitlement to weekly benefits. Exercising the agency's discretion, I conclude that claimant's request for assessment of costs should be denied.

ORDER

THEREFORE, IT IS ORDERED:

Claimant shall take nothing with respect to permanent partial disability benefits.

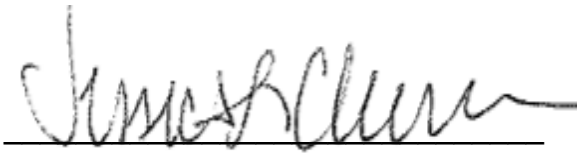
Defendants shall reimburse claimant three thousand two hundred fifteen and 50/100 dollars ($3,215.50) for payment of Dr. Kuhnlein's IME, pursuant to Iowa Code section 85.39(2).

Defendants are responsible for all medical bills related to causally related, authorized treatment, including treatment with Dr. Jacobson.

The parties shall bear their own costs.

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

Signed and filed this ___24th_____ day of September, 2021.



JESSICA L. CLEEREMAN
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Nick Platt (via WCES)

Laura Ostrander (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.