BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

SHIRLEY M. RENS, Claimant, vs. VILLAGE NORTHWEST UNLIMITED, Employer, and UNITED HEARTLAND, Insurance Carrier, Defendants.	FILED APR 17 2017 WORKERS' COMPENSATION File No. 5033410 APPEAL DECISION Head Note Nos.: 1402.30; 1804; 1807; 2501; 2502; 2907

STATEMENT OF THE CASE

Defendant, Village Northwest Unlimited (Village) employer, and United Heartland, insurer, both as defendants, filed a notice of appeal on July 31, 2015. This case was heard on December 9, 2014. An arbitration decision was filed on June 9, 2015. That decision held in part that claimant was permanently and totally disabled.

In a letter dated October 21, 2016, claimant's counsel notified this agency claimant died on October 19, 2016. This letter and attachment were made a part of the record and marked as Exhibit 24 by the undersigned for clarity of the record.

The detailed arguments of the parties have been considered and the record of the evidence has been reviewed de novo. Upon written delegation of authority by the workers' compensation commissioner under Iowa Code section 86.3, I render this decision as a final agency decision on the behalf of the Iowa Workers' Compensation Commissioner.

ISSUES

1. Whether claimant's lower back condition and dementia are causally related to the injury.

2. The extent of claimant's entitlement to permanent partial disability benefits.

3. Whether there is a causal connection between the injury and the claimed and future medical expenses.

4. Whether claimant is entitled to alternate medical care.

5. Costs.

6. Whether claimant is due reimbursement for the full amount charged for the independent medical evaluation (IME).

FINDINGS OF FACT

Claimant was 73 years old at the time of hearing. Claimant graduated from high school. Claimant worked as a checker and a stocker in a grocery store in approximately 1960. Claimant was a telephone switchboard operator from 1960 through 1965. Claimant was out of the workforce from approximately 1965 through 1979 when she raised her children. (Exhibit 19, pages 4-5)

In 1979 through 1989, 1991 through 1992, and for six months in 1993 claimant worked as a home health aide at the Village. (Transcript pages 65-68)

Claimant worked as a CNA for Metro Home Health beginning in 1989 and off and on through 1996. Claimant worked as a CNA at the Village from 1996 through 2009. For about ten years, while working at the Village, claimant also worked part-time as a CNA for Chears Home Health. (Tr. pp. 74-75) Claimant took classes to become a med aide at the Village. (Tr. p. 75) Claimant's duties as a CNA with the Village included, but were not limited to, helping assist residents with activities of daily living, dressing clients, bathing, and helping clients clean their rooms. (Tr. pp. 72-78, Ex. 19, p. 5)

Claimant's medical history is relevant. In 2000, claimant dislocated her right shoulder. (Ex. Y, pp. 187-189) In 2002, claimant was assessed as having degenerative joint changes in the right knee and was given Synvisc injections for the condition. (Ex. 2, pp. 193-199; 201-203)

In 2005, claimant had a total knee replacement on the right. (Ex. AA, p. 204) In 2005, claimant also began seeking treatment at Ruby Chiropractic for leg pain. (Ex. C, pp. 19-21)

In 2006 and 2007, claimant was treated for hip and lower back pain. (Ex. Z, pp. 199-200)

In 2007, claimant complained of memory loss. Claimant was assessed as having dementia. (Ex. K, p. 77) In 2008 claimant began taking Aricept for her issues with memory loss and dementia. (Ex. K, p. 78; Ex. J, pp. 59-61)

In 2007 and 2008, claimant continued to seek care at Ruby Chiropractic for back pain. (Ex. C, p. 23)

In June 2008, claimant had a right hip replacement. (Ex. J, p. 60) In October 2009, claimant underwent a left hip replacement. (Ex. J, pp. 57-64)

Claimant returned to work on November 27, 2009 with no restrictions. (Tr. pp. 78, 87)

On December 1, 2009, claimant was seen at Ruby Chiropractic after she pushed a couch with the left hip. Claimant returned to Ruby Chiropractic on December 4, 2009 for a weakness with her leg. (Ex. C, p. 24)

On December 11, 2009, claimant fell down a flight of stairs while carrying laundry. Defendants suggest, in their post-hearing brief, claimant's hip injury, referred to in the Ruby Chiropractic records was, in part, the reason claimant fell down stairs. (Defendants post hearing brief, p. 12) There is no evidence in the record supporting that claim.

On the same date, claimant was taken to Sanford Sheldon Medical Center. Claimant was assessed as having a concussion with loss of consciousness, a right maxillary sinus fracture, a right zygomatic arch fracture, a suspected fracture of the orbital floor, and laceration of the right eyebrow. Claimant complained of right shoulder pain. (Ex. 2, pp. 6-10)

On December 21, 2009, claimant was evaluated by Steven VanderLeest, D.O. Claimant complained of back pain radiating to the left thigh. Claimant was assessed as having a headache, a concussion with loss of consciousness, sinus fractures, and a lumbar disc disease with right radiculopathy. An MRI was recommended for the lumbar spine. (Ex. 5, p. 1)

An MRI taken on December 28, 2009 showed a disc extrusion at the L4-5 level and a mild annular disc protrusion at the L4-5 level. (Ex. 2, p. 15)

Claimant was seen for an eye exam on January 19, 2010. Claimant had some complaints of filminess on the right eye. Claimant was assessed as healing well. (Ex. 6, pp. 1-2)

Claimant was evaluated by Jeffrey Hedlund, PA, and Quentin Durward, M.D., on January 25, 2010. Claimant complained of neck pain and lower back pain radiating to the left buttock and leg. Dr. Durward believed claimant developed the L4-5 disc herniation, on top of an area of old stenosis. An epidural and physical therapy was recommended. An MRI of the neck and EMG studies were also recommended. (Ex. 7, pp. 1-7, 40)

On February 3, 2010, claimant was seen by Jon Grudem, M.D. Claimant complained of cognitive difficulties after a fall and headaches. An MRI of the brain was recommended. Claimant was told not to work in the immediate future. Claimant was also referred to Clayton Toddy, Psy.D., for cognitive assessment. (Ex. 7, pp. 10-12, 41-42)

On February 10, 2010, claimant had an EEG that was normal. Claimant had a brain MRI on February 12, 2010. There was no significant cerebral atrophy and no acute changes in the brain. (Ex. 7, pp. 43-46)

Claimant saw Frederick Fisher, M.D., on February 15, 2010 for an L4-5 epidural injection. (Ex. 8, p. 1) Claimant had a total of four epidural injections from February 15, 2010 through April 12, 2010. Records from the April 12, 2010 injection indicate a 60 percent improvement in pain. (Ex. 8, pp. 1-6)

On February 26, 2010, claimant underwent an evaluation with Dr. Toddy. Claimant denied having cognitive problems before her fall. Claimant's husband said that before the accident his wife's function was great. Since the accident claimant was found, by her husband, to have a loss of focus while talking, repeating herself, and being more anxious and depressed. Claimant was estimated to have a pre-accident average level of intellectual function. Dr. Toddy opined that claimant had a declined intellectual function following her incident. He found she had a post-concussive syndrome with a mild to moderate cognitive decline. He opined that claimant had a pain disorder and anxiety disorder with mixed anxiety and depressive symptoms. (Ex. 9, pp. 1-11)

On March 8, 2010, claimant underwent EMG's. The findings were consistent with bilateral carpal tunnel syndrome and a cervical radiculopathy. (Ex. 7, p. 48)

An MRI of the cervical spine showed degenerative changes. A central disc herniation was also found at the C5-6 and C6-7 levels. (Ex. 7, pp. 50-51) This was compared with claimant's February 2010 MRI. Based on the comparison, claimant's herniation at C5-C7 levels were found to be stable. (Ex. 7, pp. 50-51)

In a May 28, 2010 letter, written by claimant's counsel, Dr. Durward opined claimant had a material aggravation of pre-existing spinal condition from a fall on December 11, 2009. He also opined that claimant was in need of spinal surgery and needed an L3-L5 decompression and fusion. (Ex. 7, pp. 56-57)

In an October 1, 2010 report, William Samuelson, M.D., gave his opinions of claimant's condition following an independent medical evaluation (IME). The IME was requested by defendants. Dr. Samuelson recommended against treatment for the cervical spine as claimant had no neck or headache complaints. He believed claimant's fall likely caused changes in the discs and was causing radiculopathy in the lumbar spine. He recommended claimant undergo treatment at the University of Iowa Rehab

Treatment program and that claimant increase her walking. He mentioned a possible lumbar decompression at the L3-L5 levels. Dr. Samuelson recommended against the lumbar fusion. He recommended claimant undergo a neurological evaluation for her loss of memory. (Ex. 10)

On March 11, 2011, claimant underwent surgery with Dr. Durward. Surgery consisted of an L3-L5 posterior lumbar interbody fusion and L3-L5 laminectomies, and medial facetectomies. (Ex. 8, pp. 9-13) Records indicate claimant had some confusion after surgery that was related to use of pain medication. (Ex. 5, p. 7) Records indicate claimant had a good recovery from her surgery but continued to have memory issues. (Ex. 7, p. 31)

On August 20, 2011, claimant bent over to pet her dog and felt pain in her left hip and back. Claimant was evaluated as having left hip replacement dislocation. Claimant underwent a closed reduction of the left dislocated total hip replacement. (Ex. M, pp. 103-111)

In a December 16, 2011 report, Robert Jones, Ph.D., gave his opinions of claimant's cognitive condition following neuropsychological assessment. Claimant denied cognitive or psychological changes or difficulty prior to her fall. (Ex. A, pp. 1-3)

Claimant's overall intellectual function was found to be in the low average range. Claimant's testing was consistent with anxiety and depression. There was no neurological evidence to support the claimant suffered permanent deficits as a result of her concussion. Her decline was found to be consistent with a pre-existing mild dementia. (Ex. A, pp. 4-5)

Claimant testified that beginning in approximately February 2012, she applied for approximately 80 different jobs. At the time of hearing, claimant was not offered any positions. The records indicate defendants did not provide claimant with any vocational assistance. (Tr. pp. 83-84; Ex. 18, pp. 14-19)

On February 23, 2012, claimant underwent a functional capacity evaluation (FCE) as requested by defendants. (Ex. 2, pp. 19-20) The FCE was performed by Andrew Geleyense, OTR/L. Claimant was found to have given consistent effort. Claimant was found to be able to lift and carry 8.5 pounds frequently and 15 pounds occasionally. Claimant could push and pull up to 40 pounds occasionally. (Ex. 2, pp. 22-35)

In a February 29, 2012 note, Dr. Durward found claimant had a 20 percent permanent impairment to the body as a whole based on Table 15-3 of the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition. He imposed restrictions as per the FCE. (Ex. 7, p. 72)

On August 19, 2012, claimant again dislocated her left hip. On the same day, claimant underwent a second closed reduction of the left hip replacement. (Ex. N, pp. 112-115)

On November 20, 2012 and December 20, 2012, claimant underwent further neuropsychological testing of Dr. Toddy. He assessed claimant as having mild dementia disorder, anxiety, and a pain disorder. Dr. Toddy opined claimant sustained an aggravation of her mild dementia, anxiety, and depression as a result of her fall in December 2009. He opined claimant had a 15 percent permanent impairment to the body as a whole based upon her dementia based on Chapter 13 of the Guides. He found her moderately limited in her ability to remember simple instructions and to sustain simple work-related decisions. He found marked limitations in her ability to understand, remember, and carry out detailed instructions. (Ex. 11, pp. 12-28)

In an August 16, 2013 report, John Kuhnlein, D.O., gave his opinions of claimant's condition following an IME. Claimant indicated she no longer had much pain. Claimant was walking a half mile to one mile for her back pain. Claimant did exercises for her low back. Claimant complained of intermittent headaches. She had intermittent right shoulder and lower back pain. (Ex. 12, pp. 26-36)

Dr. Kuhnlein found claimant had no permanent impairment for a cervical injury. (Ex. 12, p. 40) He found claimant had a 5 percent permanent impairment to the body as a whole for the facial fractures and headaches. (Ex. 12, p. 41) He found claimant had a 3 percent permanent impairment to her right shoulder condition. (Ex. 12, p. 43) Dr. Kuhnlein found claimant had a material aggravation of a pre-existing condition to her lumbar spine due to the December 2009 fall. He found that claimant was at MMI for the lumbar spine on February 21, 2012. He agreed with Dr. Durward that claimant had a 20 percent permanent impairment to the body as a whole due to a lumbar injury and later surgery. He believed the restrictions detailed in the FCE should be claimant's permanent restrictions. Dr. Kuhnlein recommended no further treatment for claimant's back. (Ex. 12, pp. 43-46)

In an October 8, 2013 report, Rick Ostrander, LPC, CRC, gave his opinions of claimant's vocational opportunities. Based on the physical limitations alone, he found that claimant had a reduction in earning capacity of 50-74 percent. When considering claimant's neuropsychological limitations, claimant would not be employable in any capacity and claimant would be found to have 100 percent loss of earning capacity. (Ex. 14)

At hearing, Mr. Ostrander testified he believed claimant would be able to do a limited range of light-duty work. (Tr. pp. 27-28) He opined it was unlikely claimant would maintain any employment in the future. He also testified he believed that there was nothing claimant could do (e.g. retraining), that would help her return to work. (Tr. pp. 43-44)

Claimant testified that, in 2009, she had no restrictions of any kind. (Tr. p. 78) She testified she loved her job at the Village. She testified that in approximately 2012, she applied for a job at the Village, but had not been contacted by the Village. (Tr. pp. 107-111)

Claimant testified she was not taking any medication for her memory prior to the accident. (Tr. 104) She testified she had taken the drug Premarin for several years. Records indicate claimant has been prescribed Premarin since at least 2000. (Ex. 6, pp. 35-40) Premarin is an estrogen supplement. Side effects for Premarin include risk of cardiovascular disorder, stroke, ovarian cancer and dementia. (Ex. 6, pp. 41-43)

Alvin Rens testified he is claimant's husband. He testified that prior to her injury, claimant did housework and could perform all her job duties. (Tr. pp. 122-123) He said that before her injury, claimant could remember all her job duties. He said that since the injury, claimant had not been able to do housework. He said, at the time of hearing, claimant had great difficulty with memory. He said claimant's memory was so bad that he could not trust claimant to drive by herself to Sioux City. (Tr. pp. 124-126)

Julie Langfitt, testified she is the administrative assistant to the CEO for the Village. In that capacity she is familiar with workers' compensation insurance issues at the Village. Ms. Langfitt said claimant was not removed from the employment roles at the Village. She says the claimant would not have been required to fill out a second application to work at the Village. (Tr. pp. 130-131)

Gail Vonk testified she is the Director of Human Resources at the Village. She said the Village has no record claimant filed an application with the Village in 2012. She said that the Village employs approximately 375 to 380 people in the Sheldon, Iowa location. (Tr. pp. 133-134)

Claimant died on October 19, 2016.

CONCLUSIONS OF LAW

The first issue to be determined is whether the claimant's lower back condition was causally related to the injury.

The party who would suffer loss if an issue were not established has the burden of proving that issue by a preponderance of the evidence. Iowa R. App. P. 6.14(6).

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).

Regarding claimant's lower back injury, three experts have opined regarding causation of claimant's lower back condition. Dr. Durward treated claimant for an extended period of time and performed claimant's surgery. He opined claimant's back condition and the need for surgery was materially aggravated by her December 2009 fall at work. (Ex. 7, pp. 56-57)

Claimant was also evaluated by Dr. Samuelson for an IME for defendants. Dr. Samuelson recommended against surgery. He also opined claimant's fall caused changes in her lumbar spine. (Ex. 10)

Dr. Kuhnlein evaluated claimant once for an IME. Dr. Kuhnlein also opined that claimant's pre-existing lower back condition was materially aggravated by her fall at work. (Ex. 12, pp. 43-44)

Defendants suggest that records from Ruby Chiropractic indicate that claimant's back injury did not occur from the December 2009 fall (Def. Post Hearing Brief, pp. 11, 28)

Defendants had the Ruby Chiropractic records served on them on September 10, 2014. (Ex. CC) It is true that this was approximately three months before hearing. However, defendants had adequate time to have an expert opine about Ruby Chiropractic records relative to claimant's fall at work. Defendants could have moved for additional time, if needed, to seek an expert's opinion regarding the Ruby Chiropractic records. Defendants did neither. As a result, no expert has opined that claimant's minimal prior chiropractic treatment at Ruby Chiropractic had any causal connection to her December 2009 fall.

Defendants also suggest claimant fell at work because of a hip injury as documented in the Ruby Chiropractic records (Def. Post Hearing Brief, pp. 11-12) There is no evidence nor expert opinion supporting defendant's counsel's theory.

Three experts opine claimant's lower back condition was materially aggravated by her fall at work. Dr. Durward and Dr. Kuhnlein opine that claimant's surgery was medically necessary to treat her lower back condition. No expert has opined that claimant's lower back condition was not materially aggravated by her fall at work. Given this record, claimant has carried her burden of proof her lower back injury was materially aggravated by her fall at work on December 11, 2009.

Claimant also contends that she has dementia, depression, and anxiety that was either caused or materially aggravated by the December 2009 fall.

Records indicate claimant treated for depression prior to the 2009 fall. (Ex. K, L)

Records also indicate claimant was assessed as having dementia in 2007. At that time, claimant was anxious and depressed over memory issues. (Ex. K, p. 77) Claimant was taking Aricept at least by 2008. (Ex. K. p. 78; Ex. J, pp. 59-61) In early 2008, claimant was assessed as having worsening memory problems. (Ex. K, p. 78)

Claimant was evaluated by Dr. Toddy regarding her mental health in February 2010. Claimant denied any cognitive problems before her fall. Mr. Rens also said claimant was functioning great before her accident. (Ex. 9, p. 3) Obviously, this is not true.

It appears from the February 2010 report that Dr. Toddy also did not have records regarding claimant's mental health and dementia prior to the 2009 date of injury. These indicated that claimant had been treated for depression and had been assessed in 2007 with dementia. Based on incorrect information of claimant and her husband, and the absence of claimant's prior medical records, Dr. Toddy opined the injury at work caused claimant's mental health condition. (Ex. 9, p. 10)

In a subsequent report from November 2012, Dr. Toddy modified his opinion. He indicated he reviewed prior medical records concerning claimant's pre-injury mental health and knew the claimant had treated previously for depression and dementia. However, Dr. Toddy still opined that claimant had an aggravation of a pre-existing dementia, and depression. (Ex. 11, pp. 12-28)

Dr. Jones opined there was no neurological evidence that claimant sustained permanent deficit from her 2009 injury. (Ex. 8, pp. 4-5)

I have several concerns with Dr. Toddy's opinion regarding claimant's 2009 injury aggravating her mental health. First, the record is clear claimant and her husband misled Dr. Toddy in both 2010 and 2012 regarding claimant's pre-injury issues with depression and dementia. (Ex. 9, p. 3; Ex. 11, p. 9) Claimant and her husband misstated, on two occasions to Dr. Toddy, regarding claimant's pre-injury problems with memory. Given this record, I don't understand how it is possible for Dr. Toddy to believe claimant's husband's statements that claimant had a decline in memory between 2010 through 2012.

Second, Dr. Toddy opined claimant had a 15 percent permanent impairment for her mental health condition. (Ex. 11, p. 21) This impairment is assigned under Chapter 13 in the Guides. It is also apparent that the use of this chapter in the Guides was at the request of claimant's counsel.

A review of the Guides suggest that Chapter 14, and not Chapter 13, would be the proper section to determine impairment for claimant's mental health and memory issues. As noted above, use of Chapter 13 to evaluate claimant's impairment was suggested by the claimant's counsel, which leaves it to question. There is also no indication of how Dr. Toddy arrived at the 15 percent figure. Finally, the qualifications of Dr. Jones suggest that his opinions regarding claimant's cognitive issues are more convincing than those of Dr. Toddy. (Ex. A, pp. 6-11; Ex. 11, pp. 24-25)

Claimant and her husband misled Dr. Toddy on at least two occasions regarding claimant's pre-existing memory and mental health condition. There is no reliable baseline for Dr. Toddy's opinion that claimant's memory and mental health condition declined between 2010 through 2012. Dr. Toddy's permanent impairment rating is questionable at best. The qualifications of Dr. Jones suggests that he is more convincing regarding claimant's cognitive mental health issues. Given this record, claimant has failed to carry her burden of proof she sustained memory loss or any mental health problems caused or aggravated by the 2009 fall at work.

The next issue to be determined is the extent of claimant's entitlement to permanent partial disability benefits.

Since claimant has an impairment to the body as a whole, an industrial disability has been sustained. Industrial disability was defined in Diederich v. Tri-City R. Co., 219 Iowa 587, 258 N.W. 899 (1935) as follows: "It is therefore plain that the legislature intended the term 'disability' to mean 'industrial disability' or loss of earning capacity and not a mere 'functional disability' to be computed in the terms of percentages of the total physical and mental ability of a normal man."

Functional impairment is an element to be considered in determining industrial disability which is the reduction of earning capacity, but consideration must also be given to the injured employee's age, education, qualifications, experience, motivation, loss of earnings, severity and situs of the injury, work restrictions, inability to engage in employment for which the employee is fitted and the employer's offer of work or failure to so offer. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963); Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961).

Compensation for permanent partial disability shall begin at the termination of the healing period. Compensation shall be paid in relation to 500 weeks as the disability bears to the body as a whole. Section 85.34.

In Guyton v. Irving Jensen Co., 373 N.W.2d 101 (Iowa 1985), the Iowa court formally adopted the "odd-lot doctrine." Under that doctrine a worker becomes an odd-lot employee when an injury makes the worker incapable of obtaining employment in any well-known branch of the labor market. An odd-lot worker is thus totally disabled if the only services the worker can perform are "so limited in quality, dependability, or quantity that a reasonably stable market for them does not exist." Id., at 105.

Under the odd-lot doctrine, the burden of persuasion on the issue of industrial disability always remains with the worker. Nevertheless, when a worker makes a prima facie case of total disability by producing substantial evidence that the worker is not employable in the competitive labor market, the burden to produce evidence showing availability of suitable employment shifts to the employer. If the employer fails to produce such evidence and the trier of facts finds the worker does fall in the odd-lot category, the worker is entitled to a finding of total disability. Guyton, 373 N.W.2d at 106. Factors to be considered in determining whether a worker is an odd-lot employee include the worker's reasonable but unsuccessful effort to find steady employment, vocational or other expert evidence demonstrating suitable work is not available for the worker, the extent of the worker's physical impairment, intelligence, education, age, training, and potential for retraining. No factor is necessarily dispositive on the issue. Second Injury Fund of Iowa v. Nelson, 544 N.W.2d 258 (Iowa 1995). Even under the odd-lot doctrine, the trier of fact is free to determine the weight and credibility of evidence in determining whether the worker's burden of persuasion has been carried, and only in an exceptional case would evidence be sufficiently strong as to compel a finding of total disability as a matter of law. Guyton, 373 N.W.2d at 106.

Claimant was 73 years old at the time of hearing. She graduated from high school. The bulk of claimant's work life had been as a home and health aide or as a CNA for facilities like the Village.

Claimant underwent surgery consisting of a two-level fusion at the L4-L5 levels. (Ex. 8, pp. 9-13) Dr. Durward opined claimant had a 20 percent permanent impairment to the body as a whole based on the injury and the later surgery. (Ex. 7, p. 72)

Dr. Kuhnlein agreed with Dr. Durward's opinion regarding permanent impairment for back condition. (Ex. 12, p. 43) Dr. Kuhnlein also found claimant had a 5 percent permanent impairment to the facial fractures and headaches. (Ex. 12, p. 41) He found that claimant had 3 percent permanent impairment to the right shoulder condition. (Ex. 12, p. 42) The combined values of all three impairments, under the Guides, resulted in a 26 percent permanent impairment to the body. There is no expert opinion that is contrary to Dr. Kuhnlein's opinions. Based upon this, it is found claimant has a 26 percent impairment to the body as a whole due to her fall at work.

Defendant's counsel suggests claimant had a 98 percent permanent impairment from conditions other than the fall at work. (Def. Post Hearing Brief, p. 27) There is no evidence nor expert opinion to support this speculation.

An FCE found claimant could lift and carry 15 pounds occasionally, and push and pull 40 pounds occasionally. (Ex. 2, pp. 22-25)

Defendants contend the FCE is not accurate as it failed to take into consideration claimant's other non-work-related injuries. (Def. Post Hearing Brief, pp. 30-31) This criticism of the FCE, and Dr. Kuhnlein's and Dr. Durward's reliance on the FCE, is not convincing for several reasons.

First the medical records suggest that the FCE at issue was arranged and paid for by defendant insurer. (Ex. 2, p. 19) "Patient was recommended for an FCE to be completed at this time by workers' compensation..." The FCE at issue appeared to have been completed on February 2012. Hearing for this matter was held in December 2014. Clearly, defendants had sufficient opportunity to ask specific questions regarding application of the FCE. They had sufficient time to question Dr. Durward and Dr. Kuhnlein regarding claimant's non-work-related injuries in comparison to the FCE. Defendants did none of these things. Based on this record, defendants' argument the FCE is flawed is unconvincing.

Mr. Ostrander opined that based on claimant's physical limitations alone, claimant had a loss of earning capacity of 50-75 percent. (Ex. 14) At hearing, Mr. Ostrander testified that it was unlikely claimant would be able to maintain employment in the future. (Tr. pp. 43-44) Claimant testified she applied for approximately 80 jobs and has not been hired for a position. (Tr. pp. 83-84; Ex. 18, pp. 14-19)

Claimant did not return to work at the Village.

The refusal of defendant-employer to return claimant to work in any capacity is, by itself, significant evidence of a lack of employability. Pierson v. O'Bryan Brothers, File No. 951206 (App. January 20, 1995). Meeks v. Firestone Tire & Rubber Co., File No. 876894, (App. January 22, 1993); See also, 10-84 Larson's Workers' Compensation Law, section 84.01; Sunbeam Corp. v. Bates, 271 Ark. 609 S.W.2d 102 (1980); Army & Air Force Exchange Service v. Neuman, 278 F. Supp. 865 (W.D. La. 1967); Leonardo v. Uncas Manufacturing Co., 77 R.I. 245, 75 A.2d 188 (1950). An employer who chooses to preclude an injured worker's re-entry into its workforce likely demonstrates by its own action that the worker has incurred a substantial loss of earning capacity. As has previously been explained in numerous decisions of this agency, if the employer in whose employ the disability occurred is unwilling to accommodate the disability, there is no reason to expect some other employer to have more incentive to do so. Estes v. Exide Technologies, File No. 5013809 (App. December 12, 2006

Claimant was 73 years old at the time of the hearing. She had a 26 percent permanent impairment to the body as a whole. She was limited to carrying 15 pounds occasionally and pushing and pulling 40 pounds occasionally. The Village did not return claimant to work. Claimant applied to approximately 60 different employers and was not hired. The only vocational opinion in the record indicates claimant cannot maintain

employment. Given this record, claimant has carried her burden of proof, she is totally disabled.

Under Guyton, the burden to produce evidence of availability of a suitable employment shifts to the defendants. Defendants produced no evidence of suitable employment. Given this record, claimant is found to be an odd-lot employee.

Considering the factors detailed above, claimant would still be considered permanently and totally disabled under an industrial disability analysis.

The next issue to be determined is if there is a causal connection between an injury and the claimed medical expenses.

As detailed above, claimant carried her burden of proof the back surgery and the need for back surgery was causally related to the December 2009 work injury. As noted, claimant has failed to carry her burden of proof her mental health claim and her loss of memory are causally related to her December 2009 fall. Given this record, defendants are liable for any unpaid medical expenses related to treatment for claimant's back, neck, and shoulder injury. Defendants are not liable for medical expenses related to claimant's loss of memory or any mental health issues. Defendants are also not liable for medical expenses related to claimant's falls at home.

The next issue to be determined is if claimant is entitled to alternate medical care.

Iowa Code section 85.27(4) provides, in relevant part:

> 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. . . . 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.

An application for alternate medical care is not automatically sustained because claimant is dissatisfied with the care he has been receiving. Mere dissatisfaction with the medical care is not ample grounds for granting an application for alternate medical care. Rather, the claimant must show that the care was not offered promptly, was not reasonably suited to treat the injury, or that the care was unduly inconvenient for the claimant. Long v. Roberts Dairy Co., 528 N.W.2d 122 (Iowa 1995).

The record suggests that claimant seeks alternate medical care consisting of treatment recommended by Dr. Toddy, and treatment recommended by Dr. Kuhnlein for the right shoulder.

As noted above, claimant has failed to carry her burden of proof that she sustained a loss of memory or any mental health issues related to her fall at work. As a result, defendants are not liable for any mental health care or care recommended for memory loss. Claimant testified at hearing that she has no shoulder pain and did not need any further shoulder treatment. (Tr. pp. 112) As such, claimant has not proven entitlement to alternate medical care for her shoulder.

The next issue to be determined is costs. Specifically, claimant seeks payment for costs assessed by Dr. Toddy and from Mr. Ostrander.

The Iowa Supreme Court made it clear that costs under rule 4.33 (6) include only the costs of preparing the report and not the costs of the examination. (Des Moines Area Reg'l Transit Auth. v. Young, 867 N.W.2d 839, (Iowa 2015).

The costs from Dr. Toddy's report indicate he has spent two hours dictating the report at a cost of $280.00 per hour. Claimant has established entitlement to reimbursement for $560.00 regarding Dr. Toddy's report ($280.00 x 2).

Regarding Mr. Ostrander's report, his billing does not indicate what part of his charges specifically were for completing the report. As a result, claimant has failed to carry her burden of proof she is entitled to reimbursement for any of Dr. Ostrander's charges.

The final issue to be determined is if claimant is entitled to reimbursement for the full costs of Dr. Kuhnlein's IME under Iowa Code section 85.39. Defendants do not dispute that Dr. Kuhnlein's IME report is reimbursable under Iowa Code section 85.39. Defendants do dispute that the amount charged is reasonable.

Section 85.39 permits an employee to be reimbursed for subsequent examination by a physician of the employee's choice where an employer-retained physician has previously evaluated "permanent disability" and the employee believes that the initial evaluation is too low. The section also permits reimbursement for reasonably necessary transportation expenses incurred and for any wage loss occasioned by the employee attending the subsequent examination.

Defendants are responsible only for reasonable fees associated with claimant's independent medical examination. Claimant has the burden of proving the reasonableness of the expenses incurred for the examination. See Schintgen v. Economy Fire & Casualty Co., File No. 855298 (App. April 26, 1991). Claimant need not ultimately prove the injury arose out of and in the course of employment to qualify for reimbursement under section 85.39. See Dodd v. Fleetguard, Inc., 759 N.W.2d 133, 140 (Iowa App. 2008).

Dr. Kuhnlein was presented with 1,862 pages of medical records, which required his staff to spend 22 hours in abstracting. There was no showing by claimant why it was required by Dr. Kuhnlein to abstract nearly 2000 pages of medical records. (Ex. 12, pp. 26, 45) Dr. Kuhnlein was asked to opine regarding claimant's cervical spine issues even though claimant had received no cervical spine treatment or impairment rating. (Ex. 12, p. 39) Dr. Kuhnlein's cost for the IME is $5,020.00.

Claimant has the burden of proof to show that the fees involved with the IME are reasonable. Based on this record, claimant has failed to carry that burden of proof. Claimant is only due $2,510.00 for reimbursement of Dr. Kuhnlein's IME, which is half of the IME charged.

ORDER

THEREFORE, IT IS ORDERED:

That the arbitration decision of June 9, 2015 is modified.

That defendants shall pay claimant permanent and total disability benefits at the rate of two hundred ninety-nine and 43/100 dollars ($299.43) per week commencing on February 22, 2012 and ending October 19, 2016.

That defendants shall pay interest as provided in Iowa Code section 85.30.

That all accrued benefits shall be paid to the claimant in a lump sum.

That defendants are entitled to a credit for any weekly workers' compensation benefits previously paid to the claimant.

That defendants shall pay medical benefits as detailed above.

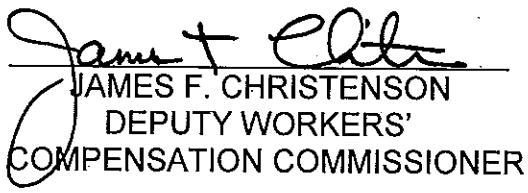
That defendants shall pay costs as detailed above.

That defendants shall reimburse the IME for Dr. Kuhnlein for two thousand five hundred ten and no/100 dollars ($2,510.00).

That defendants shall file subsequent reports of injury as required by this agency under rule 876 IAC 3.1(2).

That defendants shall pay costs of the appeal, including costs of the hearing transcript under rule 876 IAC 4.33.

Signed and filed this 17th day of April, 2017.



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