BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

ABBEY K. BOWMAN, Claimant, vs. HY-VEE, INC., Employer, and EMC RISK SERVICES, L.L.C., Insurance Carrier, Defendants.	:	File No. 5066083.01 A R B I T R A T I O N D E C I S I O N Head Notes: 1703, 1802, 1803, 2501, 2502, 2907, 4000.2

STATEMENT OF THE CASE

Abbey Bowman, claimant, filed a petition for arbitration against Hy-Vee, Inc., as the employer and EMC Risk Services, L.L.C., as the insurance carrier. This case came before the undersigned for an arbitration hearing on July 31, 2020.

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

The evidentiary record includes Joint Exhibits 1 through 14, Claimant's Exhibits 1 through 10, and Defendants' Exhibits A through G. Claimant testified on her own behalf. No other witnesses testified at trial. The evidentiary record was suspended at the conclusion of the arbitration hearing pending receipt of Joint Exhibit 14 and Claimant's Exhibit 10, both of which were timely filed and received into the evidentiary record.

However, counsel for the parties requested an opportunity to file post-hearing briefs. This request was granted and both parties filed briefs simultaneously on August 31, 2020. The case was considered fully submitted to the undersigned on that date.

ISSUES

The parties submitted the following disputed issues for resolution:

1. The extent of claimant's entitlement to temporary total, temporary partial, or healing period, benefits, if any.

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

3. The proper commencement date for permanent disability benefits, if any.

4. Whether claimant is entitled to payment, reimbursement, or satisfaction of past medical expenses, including medical mileage.

5. Whether claimant is entitled to reimbursement for an independent medical evaluation pursuant to Iowa Code section 85.39.

6. Whether defendants are entitled to a credit for permanent partial disability benefits paid to claimant.

7. Whether defendants should be ordered to pay penalty benefits to claimant for alleged unreasonable denial or delay in payment of benefits.

8. Whether costs should be assessed and, if so, in what amount.

FINDINGS OF FACT

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

Abbey Bowman, claimant, is a 45-year-old woman, who sustained an admitted work injury on March 8, 2017. On that date, Ms. Bowman worked for Hy-Vee as a Chinese Express Supervisor. As part of her duties, Ms. Bowman pulled on a grease pan that weighed approximately 100 pounds. Unfortunately, the pan was stuck and when claimant pulled on it she experienced immediate symptoms, which included burning in the back of her right arm. She testified that the symptoms also ran up the back of her arm into the right shoulder and, by the end of her shift, also radiated down into her right forearm. (Claimant's testimony)

Hy-Vee sent claimant to an occupational medicine physician and claimant was placed on temporary work restrictions. Claimant testified that the medical providers initially thought perhaps she had simply pulled a muscle in her right arm. (Claimant's testimony) She was later referred to an orthopaedic surgeon, Thomas S. Gorsche, M.D. (Joint Exhibit 6)

Dr. Gorsche initially evaluated claimant on March 20, 2017. He diagnosed claimant with tendinitis in the right triceps as well as traumatic irritation of the ulnar nerve with possible cubital tunnel syndrome of the right elbow. (Joint Ex. 6, page 35) On return

evaluation on April 3, 2017, Dr. Gorsche noted continued ulnar nerve irritation and possible triceps insertional tendinitis. He kept claimant off work and recommended electrical studies of claimant's right arm. (Joint Ex. 6, p. 36)

The nerve conduction studies were negative. Nevertheless, claimant's elbow pain continued. Dr. Gorsche recommended a diagnostic injection and maintained claimant on a restriction against working with the right arm. (Joint Ex. 6, p. 37)

Dr. Gorsche also obtained an MRI of claimant's right elbow. On May 15, 2017, he discussed the MRI results with claimant and explained that it was "totally normal." Dr. Gorsche was unclear what was causing claimant's ongoing symptoms in the right elbow. He recommended a second opinion. (Joint Ex. 6, p. 38) The occupational medicine physician concurred and defendants authorized a second orthopaedic evaluation with Todd Johnston, M.D.

Dr. Johnston first evaluated claimant on July 19, 2017. Dr. Johnston documented that claimant's chief complaint at that time was right elbow pain. He diagnosed her with an ulnar collateral ligament tear, mild tennis elbow, possible posterolateral plica syndrome as well as valgus extension overload. (Joint Ex. 9, p. 61) Dr. Johnston noted objective findings, including clicking and popping in the right elbow and recommended injections into the right elbow to relieve symptoms. (Joint Ex. 9, p. 61)

Unfortunately, symptoms did not resolve with an injection. Dr. Johnston diagnosed claimant with right elbow instability and recommended surgical intervention. On August 11, 2017, Dr. Johnston performed a right elbow posterior arthrotomy with synovectomy. His operative note indicates that he also performed an excision of an olecranon spur, a lateral epicondylar release, as well as an ulnar collateral ligament reconstruction with autograft and an ulnar nerve transposition. (Joint Ex. 8, p. 52)

Unfortunately, in September 2017, Ms. Bowman reported residual numbness in the ulnar distribution after surgery. (Joint Ex. 9, p. 64) At a follow-up in December 2017, Ms. Bowman continued to report to Dr. Johnston that she had ongoing discomfort in her right elbow and that the outside of her right elbow discolored. However, she was working full-duty at that point in time. Dr. Johnston noted, "persistent pain in the posterior compartment" and that "surgery has failed to address it." (Joint Ex. 9, p. 66) That pain worsened with attempts to perform heavy lifting, pushing, or pulling. (Joint Ex. 9, p. 65) Dr. Johnston diagnosed tendinitis of the right triceps, ongoing right elbow pain, and neuritis of the right ulnar nerve at that evaluation and recommended a second surgical procedure. (Joint Ex. 9, pp. 66-67)

Ms. Bowman returned to surgery with Dr. Johnston on February 5, 2018. Dr. Johnston performed a right elbow arthroscopy, debridement, ulnar nerve neurolysis and repair and reattachment of the right triceps tendon. (Joint Ex. 8, p. 54) At a follow-up visit with Dr. Johnston on April 25, 2018, Ms. Bowman reported continued pain and tenderness at the elbow, as well as numbness on the medial aspect of the elbow and some swelling. (Joint Ex. 9, p. 71) Dr. Johnston discontinued physical therapy and

released claimant to return to full duty work without permanent work restrictions on April 25, 2018. (Joint Ex. 9, p. 72)

However, claimant later returned for further evaluation by Dr. Johnston. Dr. Johnston determined that claimant was experiencing symptoms because some of her right elbow hardware was backing out. Once again, he recommended surgical intervention for claimant's right elbow. On May 22, 2018, Dr. Johnston took claimant to surgery for the third time to remove the painful hardware in claimant's right elbow. (Joint Ex. 8, p. 56)

Claimant continued to complain of symptoms and returned for further care with Dr. Johnston. On July 2, 2018, Dr. Johnston noted claimant had a positive Spurling's maneuver and recommended a cervical spine MRI to determine whether claimant had a herniated disc in her neck. (Joint Ex. 9, p. 76) On July 17, 2018, Dr. Johnston reviewed claimant's cervical MRI and recommended referral to a pain clinic for treatment of the neck. When asked about causation of the neck symptoms, Dr. Johnston noted that he was "unsure," stating, "The causation is unclear." (Joint Ex. 9, p. 77) Defendants denied liability at this point and challenge whether claimant's neck symptoms or treatment are causally related to the work injury. In an October 25, 2018 report, Dr. Johnston offered an opinion that claimant sustained a three percent permanent functional impairment of her right upper extremity as a result of her March 8, 2017 work injury. (Joint Ex. 9, p. 80)

Ultimately, claimant sought medical care for her neck through a pain clinic, was referred to a neurosurgeon, and submitted to neck surgery. Claimant asserts all of the pain clinic treatment and neck surgery are causally related to the work injury. Defendants contest this and challenge causation of the neck condition and resulting treatment. Instead, defendants point out pre-existing medical care of the neck, including treatment after a motor vehicle accident in 2016.

Therefore, the primary and initial dispute in this case is whether the March 8, 2017 work injury caused or materially aggravated Ms. Bowman's neck condition. The evidentiary record contains significant disagreement on this issue between the various medical professionals. Not surprisingly, each party obtained an independent medical evaluation and each independent evaluator sided with the party that hired him to perform his evaluation. Farid Manshadi, M.D. performed an evaluation on March 11, 2020 and authored a report dated April 27, 2020. (Claimant's Exhibit 2) Dr. Manshadi opined that the work injury caused ulnar neuropathy in claimant's right arm. He also opined that the work injury caused a significant aggravation of a pre-existing lateral epicondylitis in claimant's right elbow. (Claimant's Ex. 2, p. 14)

Additionally, with respect to the neck condition, Dr. Manshadi opined:

> Ms. Bowman sustained a neck injury as a result of the 03/08/17 work injury. Again, I believe she has had issues with her neck prior to the work injury mentioned above. However, I believe the accident at work on 03/08/17 caused significant aggravation and eventually necessitated the neck

surgery by Dr. Buchanan which required a 3-level fusion at C5-6 and C6-7.

(Claimant's Ex. 2, p. 14)

Defendants obtained an independent medical evaluation performed by Charles Mooney, M.D. on June 22, 2020. (Defendants' Ex. A) Dr. Mooney concurred that claimant sustained an aggravation of her extensor tendinitis at the elbow and wrist as a result of the March 2017 work injury. He also concurs that claimant experienced an increase in ulnar neuropathy as a result of the work injury, which resulted in surgical intervention on the right elbow. (Defendants' Ex. A, p. 8)

However, Dr. Mooney diverges from Dr. Manshadi regarding the cause of Ms. Bowman's neck symptoms. Dr. Mooney diagnosed claimant with two prior neck injuries and opines that she had "advancing degenerative disc disease" prior to the March 8, 2017 work injury. (Defendants' Ex. A, p. 9) Dr. Mooney opines:

> [T]he medical record does not support that an injury occurred to her cervical spine related to the incident of 3/8/2017. It is my opinion that the medical record clearly shows that Ms. Bowman was under the treatment of Dr. Afzal and receiving epidural injections prior to the incident of 3/8/2017, and it is my opinion that the incident would not cause objective advancement of the cervical spine condition, as is documented by the MRI performed on 7/17/2018, and compared to the MRI prior to injury of 1/8/2016.

(Defendants' Ex. A, p. 10) Dr. Mooney further opines that "based on Bradford Hill Causality Criteria of temporality, specificity and strength of association, that the incident of 3/8/2017 did neither materially aggravate nor objectively advance her underlying degenerative cervical condition." (Defendants' Ex. A, p. 10)

Dr. Manshadi is a board-certified physical medicine and rehabilitation physician. He does not appear to be a certified independent medical evaluator according to his curriculum vitae. (Claimant's Ex. 3) Dr. Mooney is a board certified occupational medicine physician. He is a member of the American Board of Independent Medical Examiners. (Defendants' Ex. B) Neither carries credentials that are so superior to the other that their opinion necessarily carries greater weight.

Claimant's testimony tends to bolster the opinions of Dr. Manshadi. Ms. Bowman testified that the pain she experienced in the back of her right arm improved after neck surgery. (Tr., p. 35) Medical records document that the numbness in her right pinky finger also improved after her neck surgery. (Joint Ex. 13, pp. 104, 106) The medical records after claimant's surgery also document increase in her right triceps strength. (Joint Ex. 13, p. 102) While claimant's testimony was generally reasonable, it did not convince me that Dr. Manshadi's opinions were clearly more reliable and accurate than those offered by Dr. Mooney.

Ultimately, my analysis turns to the opinions of the treating physicians. Unfortunately, neither claimant nor defendants asked the treating surgeon, Russell I. Buchanan, M.D., to offer an opinion on whether the March 2017 work injury caused or

materially aggravated Ms. Bowman's neck condition. However, several other treating physicians did offer causation opinions.

Dr. Gorsche, is an orthopaedic surgeon and was the initial surgeon to treat Ms. Bowman's right arm. Dr. Gorsche offered a report dated August 18, 2018 in which he notes that he reviewed his office notes and that Ms. Bowman "never complained of any neck pain." (Defendants' Ex. D, p. 16) Dr. Gorsche further explained that the medical history claimant completed upon presenting to his office did not mention any complaints of neck pain. Dr. Gorsche further confirmed that he did not recall any complaints of neck pain being expressed by claimant.

Dr. Gorsche also reviewed the MRI report of claimant's neck dated July 13, 2018. He noted that claimant did have complaints of paresthesias of her fourth and fifth fingers on her right hand. However, he noted that the MRI report did not suggest those symptoms were related to a neck injury or that "there was any pressure on the C7-C8 nerve, which controls the sensation of those digits." (Defendants' Ex. D, p. 16) Dr. Gorsche acknowledged that he is not a neck surgeon but still opined, "there is no documentation of her having any cervical issues while I treated her." (Defendants' Ex. D, p. 16)

Orthopaedic care was later transferred from Dr. Gorsche to Dr. Johnston. Dr. Johnston opined, if claimant's right triceps pain was determined to be related to a neck injury then it is likely related to her neck condition and aggravated by the work injury. (Claimant's Ex. 1, p. 1) Defendants challenge this opinion, asserting that claimant did not provide Dr. Johnston accurate information. Specifically, defendants point to Dr. Johnston's July 17, 2018 office note. In that note, Dr. Johnston records that claimant told him, "she didn't have neck problems until the elbow injury." (Joint Ex. 9, p. 77) On that date, Dr. Johnston stated that he was "unsure" and that "causation is unclear whether claimant's neck condition is related to the work injury." (Joint Ex. 9, p. 77)

Like Dr. Gorsche, it is apparent that Dr. Johnston does not treat neck injuries and did not attempt to treat claimant's neck. Instead, Dr. Johnston recommended and referred claimant to a pain specialist, Ashar Afzal, M.D., for evaluation and, if necessary, treatment of her neck. (Joint Ex. 9, p. 77)

Dr. Afzal actually treated claimant for neck pain prior to the work injury. In August 2016, Dr. Afzal evaluated claimant for a chief complaint of neck pain. At that time, Dr. Afzal recorded that claimant's neck pain had been ongoing for one year and noted that her chronic neck pain was aggravated by a motor vehicle accident occurring on June 14, 2016. (Joint Ex. 11, p. 84)

At Dr. Afzal's August 11, 2016 evaluation, Ms. Bowman reported 7 out of 10 pain levels associated with her neck. She also reported prior treatments for her neck including physical therapy, chiropractic manipulation and massage, as well as medication usage. (Joint Ex. 11, p. 84) Dr. Afzal reviewed an MRI of the neck, which had been performed on August 1, 2016. He diagnosed claimant with cervical radicular symptoms. Dr. Afzal recommended and performed an epidural steroid injection into claimant's neck. (Joint

Ex. 11, p. 85) Dr. Afzal's treatment in 2016 clearly refutes the medical history claimant gave to Dr. Johnston in July 2018. (Joint Ex. 9, p. 77)

Dr. Afzal evaluated claimant again on September 1, 2016 and repeated the epidural steroid injection. (Joint Ex. 11, p. 90) Ms. Bowman did not return to Dr. Afzal's clinic again until August 16, 2018, when she was evaluated by Daniel G. Glascock, M.D. Dr. Glascock recorded that claimant reported "decent relief" from the 2016 injections. At the time of his August 2018 evaluation, Dr. Glascock recorded that claimant sustained a work related injury to her right elbow, submitted to three elbow surgeries, but continued to experience pain in the right shoulder blade, extending towards the neck and also radiating down the right shoulder and into the forearm. Dr. Glascock recorded developing weakness and numbness. Dr. Glascock diagnosed claimant with cervical degenerative spondylosis with cervical radicular symptoms. (Joint Ex. 11, p. 93) Dr. Glascock performed an epidural injection at the C6-C7 level on August 16, 2018. (Joint Ex. 11, p. 94)

Ms. Bowman returned to see Dr. Glascock on May 7, 2019. He offered claimant a surgical consultation at that time and records that claimant "absolutely declines." (Joint Ex. 11, p. 95) Upon claimant returning to the pain clinic on May 29, 2019, Dr. Afzal evaluated her again. Dr. Afzal recommended referral for a surgical evaluation with Dr. Buchanan. (Joint Ex. 11, p. 96) Dr. Buchanan subsequently evaluated claimant, recommended, and performed surgical intervention on claimant's neck.

Having evaluated and treated claimant both before and after the work injury, Dr. Afzal holds a unique perspective that no other physician offering a causation opinion holds. Defendants inquired of Dr. Afzal about his opinion regarding claimant's neck injury. On December 9, 2019, Dr. Afzal opined that he "cannot state within a reasonable degree of medical certainly that Claimant's May 8, 2017 right elbow injury aggravated Claimant's cervical condition." (Defendants Ex. C, p. 15) Dr. Afzal's opinion is offered as a "check the box" opinion letter, rather than as a narrative prepared by Dr. Afzal. Nevertheless, the fact that Dr. Afzal evaluated claimant in 2016 and again after the 2018 work injury leaves Dr. Afzal in a unique position.

Dr. Johnston suggested that the right triceps pain would be related to the work injury and opined that the neck would be related if it were the cause of the right triceps pain. As noted, however, Dr. Johnston believed claimant had no prior neck condition before he treated claimant. This is inaccurate. I am not confident that Dr. Johnston had an accurate understanding of claimant's medical history related to her neck. Dr. Johnston also acknowledged he is not a spine surgeon and referred claimant back to Dr. Afzal's clinic. For these reasons, I do not give Dr. Johnston's causation opinion significant weight in this case.

Dr. Gorsche is also not a neck or spine specialist. However, his comments that the patient intake form and his medical notes demonstrate no complaints of neck problems is somewhat instructive. Dr. Gorsche also opined that there was no evidence of pressure on the C7-C8 nerve root in claimant's neck to explain claimant's symptoms

into the fourth and fifth fingers of her right hand. Dr. Glascock offered no opinion regarding causation.

Considering all of the medical opinions in this record, I find the opinions of Dr. Afzal to be the most informed and credible. Dr. Afzal treated claimant before and after the work injury. He clearly understood that claimant had a prior neck injury, the significance of that injury, and also knew about the work injury in this case. Possessing all of the relevant knowledge, Dr. Afzal opined that he cannot state within a reasonable degree of medical certainty that the right elbow work injury materially aggravated claimant's pre-existing neck condition. To the extent that Dr. Mooney's opinions support and concur with Dr. Afzal, I also adopt and accept those as accurate. Ultimately, I find that claimant failed to prove that the work injury caused or materially aggravated her neck condition or caused the need for her neck surgery.

With respect to claimant's right elbow injury, it appears that Dr. Johnston, Dr. Mooney, and Dr. Manshadi all concur that claimant has achieved maximum medical improvement. I accept those opinions and find that Ms. Bowman's right elbow injury achieved maximum medical improvement prior to trial.

I previously noted Dr. Johnston's three percent permanent impairment rating. (Joint Ex. 7, p. 45) Defendants also asked Dr. Mooney to comment on claimant's right arm impairment. Dr. Mooney identified loss of extension in the right elbow, loss of two-point discrimination due to the ulnar nerve issues, and combined those impairments to opine that Ms. Bowman sustained a total of 12 percent permanent functional impairment of the right upper extremity. (Defendants' Ex. A, p. 9)

Claimant also requested an opinion from Dr. Manshadi pertaining to his right elbow injury. Dr. Manshadi identified a slightly worse extension measurement in claimant's right elbow than was identified by Dr. Mooney. He concurred that claimant sustained reduced sensation as a result of the ulnar nerve injury. In total, Dr. Manshadi opined that Ms. Bowman sustained 13 percent permanent functional impairment of the right upper extremity as a result of the March 8, 2017 work injury. (Claimant's Ex. 2, p. 15)

Dr. Johnston's functional impairment rating seems extremely low considering the extent of the difficulties Ms. Bowman experienced in her right elbow. Additionally, Dr. Johnston's impairment rating does not offer impairment for any loss of sensation caused by the ulnar nerve injury. Both Dr. Mooney and Dr. Manshadi identified impairment related to the ulnar nerve. Therefore, I do not find the impairment rating offered by Dr. Johnston to be complete or convincing.

Noting that Dr. Mooney and Dr. Manshadi's impairment ratings are quite similar and having previously accepted Dr. Mooney's causation opinion pertaining to the neck, I find that Dr. Mooney's impairment rating of 12 percent of the right upper extremity is the most convincing and accurate assessment of claimant's permanent loss of function of the right arm. Dr. Mooney's impairment rating appears to consider claimant's ongoing complaints, including difficulties cooking, lifting heavy pans, difficulties opening jars, difficulties cutting vegetables, as well as difficulties with household chores such as

vacuuming, carrying laundry, mopping, and yard work. On the other hand, claimant has found alternate employment and is currently working full-duty without permanent medical restrictions at Lowe's. Therefore, I find that Dr. Mooney's impairment rating conforms to the difficulties expressed by claimant. Claimant has proven a 12 percent permanent functional impairment and loss of the right arm as a result of the March 8, 2017 work injury.

Ms. Bowman seeks an award of healing period benefits from September 19, 2017 through October 17, 2017 and from August 29, 2019 through November 12, 2019. The latter time period occurs after Ms. Bowman submits to neck surgery. The time period from August 28, 2019 through November 12, 2019 is found not related to the March 8, 2017 work injury.

However, September 19, 2017 through October 17, 2017 represents the period of time between Ms. Bowman's termination by Hy-Vee and her obtaining a new full-time position with Lowe's. Defendants put in very cursory evidence about claimant's termination. In Defendants' Exhibit F, page 18, defendants noted claimant's reason for separation as, "Conduct unbecoming a Hy-Vee employee."

Claimant shed some light on this during her testimony. She acknowledged that she added some fuel saver credits to her Hy-Vee Fuel Saver Card after a purchase because the system failed to add the rewards accurately. She testified that she added the credits to her card before she went for neck surgery. Upon returning after surgery, she was terminated by Hy-Vee. (Claimant's testimony)

It is reasonable and understandable why Hy-Vee would not want employees to add credits to their own Fuel Saver Card. At the very least, such conduct creates an impression of theft, favoritism to management, or other "unbecoming" conduct. While the computer system at Hy-Vee likely did error and fail to credit Ms. Bowman appropriately for her purchases toward her fuel saver credits, it is not reasonable or appropriate for a member of management to add credits to their own card for the reasons stated above.

As will be described below, based upon prior agency case law and definitions, I find Ms. Bowman's conduct was serious and that it was the type of conduct that would reasonably cause any employer to terminate any employee. For the reasons outlined below, I find that the conduct had serious adverse economic impact on the employer and was more than inconsequential misconduct that employers typically overlook or tolerate.

The parties in this case also dispute the proper date upon which permanent disability benefits should commence. Ms. Bowman was off work after elbow surgeries. However, she acknowledged that she returned to work after her August 11, 2017 surgery on September 9, 2017. I accept claimant's testimony in this regard and find that claimant returned to work for Menards on September 9, 2017.

However, reviewing the payment records produced at Defendants' Exhibit G, I note that claimant was paid healing period benefits from March 21, 2017 through April 9, 2017. Healing period was then discontinued and no further claim for healing period benefits is

made for the period between April 10, 2017 through June 18, 2017. (Defendants' Ex. G, p. 1; Hearing Report) Contemporaneous medical records for this period suggest claimant returned to work for Hy-Vee on at least light duty during that time. (Joint Ex. 5, pp. 27, 30; Joint Ex. 6, pp. 36-38) I find that Ms. Bowman initially returned to work and ended her first healing period on April 10, 2017.

Defendants also assert a credit for payment of 30 weeks of permanent partial disability at the rate of $432.19. Review of Defendants' Exhibit G discloses only three payments toward permanent disability benefits totaling $9,803.12. These benefits were also supposed to include some interest owed and represent less than 30 weeks of benefits at the weekly rate of $432.19. I find that defendants proved they paid $9,803.12 toward their obligation for permanent partial disability benefits.

CONCLUSIONS OF LAW

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).

In this case, the initial and primary dispute is whether claimant's March 8, 2017 work injury caused or materially aggravated her underlying and pre-existing neck

condition. Having reviewed the pertinent medical causation opinions, I ultimately accepted the opinions of Dr. Afzal and Dr. Mooney as the most convincing and credible in this evidentiary record. As a result, I found that claimant did not prove by a preponderance of the evidence that her current neck condition or her neck surgery were causally related to the March 8, 2017 work injury. As such, I conclude claimant is not entitled to healing period, permanent disability, or medical benefits relative to her neck condition.

However, claimant sustained an admitted right elbow injury as a result of her work activities on March 8, 2017. All parties stipulate that Ms. Bowman sustained permanent disability as a result of the right elbow injury. The dispute between the parties is the extent of claimant's entitlement to permanent disability.

Having found that the alleged neck injury is not causally related to the work injury, I conclude that claimant's injury is limited to the right elbow and triceps. Under the Iowa Workers' Compensation Act, permanent partial disability is compensated either for a loss or loss of use of a scheduled member under Iowa Code section 85.34(2)(a)-(t) or for loss of earning capacity under section 85.34(2)(u). The extent of scheduled member disability benefits to which an injured worker is entitled is determined by using the functional method. Functional disability is "limited to the loss of the physiological capacity of the body or body part." Mortimer v. Fruehauf Corp., 502 N.W.2d 12, 15 (Iowa 1993); Sherman v. Pella Corp., 576 N.W.2d 312 (Iowa 1998). The fact finder must consider both medical and lay evidence relating to the extent of the functional loss in determining permanent disability resulting from an injury to a scheduled member. Terwilliger v. Snap-On Tools Corp., 529 N.W.2d 267, 272-273 (Iowa 1995); Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417, 420 (Iowa 1994).

In this instance, I found Dr. Mooney's opinions to be most credible and convincing on the issue of permanent functional impairment. Therefore, I also found that claimant proved a 12 percent permanent functional impairment of her right arm.

Pursuant to Iowa Code section 85.34(2)(m)(2016), an injury to the arm is compensated on a 250-week schedule. An injury resulting in less than total disability of a scheduled member is compensated proportionate to the maximum value of the scheduled member. Iowa Code section 85.34(2)(v) (2016). In this case, Ms. Bowman proved a 12 percent impairment, which entitles her to 30 weeks of permanent partial disability benefits.

The parties also dispute the proper date for commencement of permanent partial disability benefits. Claimant asserts that permanent disability benefits should commence on October 18, 2017 while defendants contend that permanent disability should commence on September 9, 2017. Claimant's contention essentially represents the date that she returned to work for a different employer, Lowe's, while defendants' asserted date is a date that claimant returned to work for Menards.

Having pondered both parties' arguments, I disagree with both parties' contentions. In Evenson v. Winnebago Industries, Inc., 881 N.W.2d 360 (Iowa 2016),

the Iowa Supreme Court held that permanent disability benefits commence immediately upon the termination of the initial healing period, even if claimant experienced subsequent, intermittent healing periods. The Court explained, "The date of Evenson's first return to work established the end of the healing period and the commencement of PPD benefits because it was the earliest of the three triggering events prescribed in section 85.34(1)." Id. at 372. The Court reached this conclusion stating, "the commencement date for PPD benefits is not precluded by the act that he was entitled to TPD benefits for subsequent weeks when he was medically restricted from working his regular hours." Id.

In this case, claimant returned to work on April 10, 2017. There was a distinctive gap in any payment or claim for healing period benefits into June 2017. Therefore, I conclude that claimant's initial healing period terminated and that permanent partial disability benefit entitlement commenced on April 10, 2017. Id.

Ms. Bowman also sought an award of additional healing period benefits. Her initial claim for healing period is from September 19, 2017 through October 17, 2017. Claimant contends that she was off work during this period of time because she was terminated by Hy-Vee on September 19, 2017 and did not find alternate employment with Lowe's until October 18, 2017. Defendants contend that claimant was terminated and that she was disqualified from recovering healing period benefits during this period of time due to misconduct.

For misconduct to disqualify a person from compensation, the misconduct must be tantamount to refusal to perform the offered work. The misconduct must be serious and the type of conduct that would cause any employer to terminate any employee. The misconduct must have a serious adverse impact on the employer. The misconduct must be more than the type of inconsequential misconduct that employers typically overlook or tolerate. Brodigan v. Nutri-Ject Systems, Inc., File No. 5001106 (App. April 13, 2004); Wortley v. Lowe's Home Centers, Inc., File No. 1298582 (App. December 22, 2006). An employee working with restrictions is not entitled to act with impunity toward the employer and the employer's interests. Nevertheless, not every act of misconduct justifies disqualifying an employee from workers' compensation benefits even though the employer may be justified in taking disciplinary action. Franco v. IBP, Inc., File No. 5004766 (App. February 28, 2005).

In Reynolds v. Hy-Vee, Inc., File No. 5046203 (Appeal Decision October 2017), the Iowa Workers' Compensation Commissioner held that even small acts of theft constitute conduct that would reasonably cause any employer to terminate any employee. In fact, the Commissioner found that the theft of cupcakes, a fountain drink, and a couple of packs of cigarettes was serious, had a serious adverse impact on the employer, and was more than inconsequential misconduct that employers typically overlook or tolerate.

While the conduct in this case may have been to obtain legitimate credits to which Ms. Bowman was entitled, the method she went about adding those credits to her own account is tantamount to theft. At the very least, it presents an inappropriate

appearance to other employees and the public of theft or inappropriate benefits for management of Hy-Vee. Given the Commissioner's holding in Reynolds, I found that Ms. Bowman's conduct was serious and the type of conduct that would reasonably cause any employer to terminate any employee. I also found that the conduct constituted a serious economic impact on the employer and was sufficiently consequential misconduct that employers typically would not overlook this type of conduct or tolerate it. Reynolds v. Hy-Vee, Inc., File No. 5046203 (Appeal Decision October 2017). In reliance upon the holding in Reynolds and having reached these findings and conclusions, I similarly conclude that claimant's conduct was tantamount to a refusal to perform light duty work and disqualifies claimant from receiving healing period benefits from September 19, 2017 through October 17, 2017.

Ms. Bowman asserted a claim pursuant to Iowa Code section 86.13 for penalty benefits for unreasonable delay or denial of the healing period benefits sought from September 19, 2017 through October 17, 2017. However, having concluded that claimant failed to prove entitlement to the requested healing period benefits, claimant did not establish an unreasonable delay or denial of benefits. Having awarded none of the claimed healing period benefits, I conclude that claimant's penalty benefit claim must also fail.

Claimant also sought healing period benefits for the period of time from August 28, 2019 through November 12, 2019. Claimant was off work during this period of time as a result of a neck surgery. Having found that claimant failed to prove her neck condition and neck surgery are causally related to the March 8, 2017 work injury, I conclude that claimant is not entitled to healing period benefits during the time period she was off work after her neck surgery.

Ms. Bowman sought award of past medical expenses related to treatment of her neck condition. However, I found and concluded that claimant failed to prove a causal connection or material aggravation of her neck condition as a result of the March 8, 2017 work injury. Therefore, I conclude claimant failed to prove entitlement to the past medical expenses in Claimant's Exhibit 8.

Claimant also sought award of medical mileage. All treatment and medical mileage summarized in Claimant's Exhibit 7 after the last appointment with Dr. Todd Johnston on July 2, 2018 pertains to claimant's neck condition. I conclude claimant failed to prove causal connection between any of the identified treatment after July 2, 2018 and failed to prove entitlement to medical mileage for that treatment.

However, for the treatment rendered between April 3, 2018 and July 2, 2018, that treatment was with and at the direction of an authorized provider, Dr. Todd Johnston, and included treatment for claimant's right elbow and triceps. Claimant is entitled to medical mileage, as outlined in Claimant's Exhibit 7 for the treatment provided between April 3, 2018 and July 2, 2018. In total, claimant proved entitlement to medical mileage reimbursement pursuant to Iowa Code section 85.27 totaling $58.08. (Claimant's Exhibit 7)

Ms. Bowman also asserts a claim for reimbursement of her independent medical evaluation. 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).

In this case, the authorized orthopaedic surgeon, Dr. Johnston, provided defendants an impairment rating for claimant's right arm on October 25, 2018. Claimant did not obtain her independent medical evaluation with Dr. Manshadi until March 2020. (Claimant's Ex. 2) Accordingly, I conclude that claimant established entitlement to reimbursement for an evaluation with a physician of her choosing. Iowa Code section 85.39.

Dr. Manshadi charged $2,200.00 for his independent medical evaluation (IME). This amount is found reasonable under the circumstances and consistent with charges from other providers providing reports before this agency. Therefore, I conclude claimant is entitled to reimbursement in the amount of $2,200.00. Iowa Code section 85.39.

Claimant also seeks reimbursement for medical mileage to attend the IME with Dr. Manshadi. I conclude claimant is entitled to reimbursement for her attendance at this IME. Pursuant to Claimant's Exhibit 7, claimant traveled 6.2 miles for this evaluation. Claimant is entitled to mileage reimbursement for her attendance at Dr. Manshadi's evaluation totaling $3.60. Iowa Code section 85.39.

Ms. Bowman also seeks reimbursement of medical mileage to attend the independent medical evaluation requested by defendants with Dr. Mooney. Claimant traveled 266 miles to attend this evaluation. Iowa Code section 85.39 requires the employer to furnish the employee transportation or pay the employee mileage to attend an evaluation with defendants' chosen physician. Claimant is, therefore, entitled to reimbursement of her mileage to attend the evaluation with Dr. Mooney in the amount of $154.28. Iowa Code section 85.39.

Defendants also asserted a credit for benefits paid to claimant. Specifically, defendants assert a credit for payment of 30 weeks of permanent partial disability benefits at the weekly rate of $432.19. However, I found that defendants actually paid $9,803.12 toward permanent disability benefits owed. Additionally, I note that the

commencement date precedes any of the parties' contentions and that defendants owe interest for those past due permanent partial disability benefits. Iowa Code section 85.30. Defendants are entitled to credit for the $9,803.12 in benefits paid. The parties should calculate the interest owed claimant and determine additional amounts of permanent partial disability benefits owed pursuant to this decision. If the parties cannot mutually agree on the calculations, they may file a request for rehearing.

Finally, claimant seeks assessment of her costs. Costs are assessed at the discretion of the agency. Iowa Code section 86.40. In this instance, claimant has recovered permanent disability, medical mileage, and her independent medical evaluation fees. I conclude it is reasonable to assess claimant's costs, if otherwise permissible.

Claimant initially seeks assessment for charges incurred for her attorney to participate in a conference with Dr. Johnston on August 31, 2018. (Claimant's Ex. 9, p. 60) This is not a taxable cost and is not awarded.

In her brief, claimant also asserts a request for assessment of her filing fee. This is a reasonable and permissible cost. 876 IAC 4.33(7). I assess claimant's expense for her filing fee in the amount of $100.00 against defendants.

ORDER

THEREFORE, IT IS ORDERED:

Defendants shall pay claimant thirty (30.000) weeks of permanent partial disability benefits commencing on April 10, 2017.

All weekly benefits shall be payable at the stipulated weekly rate of four hundred thirty-two and 19/100 dollars ($432.19) per week.

The employer and insurance carrier shall pay accrued weekly benefits in a lump sum together with interest at the rate of ten percent for all weekly benefits payable and not paid when due which accrued before July 1, 2017, and all interest on past due weekly compensation benefits accruing on or after July 1, 2017, shall be payable at an annual rate equal to the one-year treasury constant maturity published by the federal reserve in the most recent H15 report settled as of the date of injury, plus two percent. See Gamble v. AG Leader Technology File No. 5054686 (App. Apr. 24, 2018).

Defendants are entitled to a credit against these permanent disability benefits and interest owed thereon in the amount of nine thousand eight hundred three and 12/100 dollars ($9,803.12).

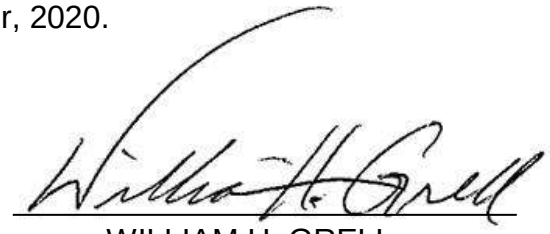
Defendants shall reimburse claimant's independent medical evaluation fees totaling two thousand two hundred and 00/100 dollars ($2,200.00).

Defendants shall reimburse claimant's medical mileage, pursuant to both Iowa Code section 85.27 and 85.39, totaling two hundred fifteen and 96/100 dollars ($215.96).

Defendants shall reimburse claimant's costs totaling one hundred and 00/100 dollars ($100.00).

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 9th day of November, 2020.



WILLIAM H. GRELL
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served as follows:

Benjamin Roth (via WCES)

Lindsey Mills (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.