BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

AMBER HALL,

Claimant,

vs.

APPLE CREEK KENNEL,

Employer,

and

TRAVELERS PROPERTY CASUALTY COMPANY OF AMERICA,

Insurance Carrier,
Defendants.

File No. 5044786

A P P E A L

D E C I S I O N

Head Note Nos.: 1803, 2500, 2502

Defendants Apple Creek Kennel, employer, and its insurer, Travelers Property Casualty Co. of America, appeal from an arbitration decision filed on December 18, 2014. Claimant Amber Hall responds to the appeal. The case was heard on August 26, 2014, and it was considered fully submitted in front of the deputy workers' compensation commissioner at the conclusion of the arbitration hearing.

The deputy commissioner awarded permanent total disability benefits for the stipulated work injury which occurred on or about April 21, 2013. The deputy commissioner also awarded past medical expenses submitted by claimant as well as ongoing medical treatment. The deputy commissioner also awarded the disputed balance in the amount of $995.00 for the cost of the independent medical evaluation (IME) performed by Sunil Bansal, M.D.

Defendants assert on appeal that the deputy commissioner erred in awarding permanent total disability benefits. Defendants also assert the deputy commissioner erred in awarding past medical expenses submitted by claimant as well as ongoing medical treatment. Defendants also assert the deputy commissioner erred in awarding the disputed balance for the cost of Dr. Bansal's IME.

Claimant asserts on appeal that the arbitration decision should be affirmed in its entirety.

Those portions of the proposed agency decision pertaining to issues not raised on appeal are adopted as a part of this appeal decision.

Having performed a de novo review of the evidentiary record and the detailed arguments of the parties, I reach the same analysis, findings, and conclusions as those reached by the deputy commissioner.

Pursuant to Iowa Code sections 17A.5 and 86.24, I affirm and adopt as the final agency decision those portions of the proposed arbitration decision filed on December 18, 2014, which relate to the issues properly raised on intra-agency appeal. I affirm the deputy commissioner's findings in the arbitration decision with the following analysis:

ISSUES ON APPEAL

I. The extent of claimant's entitlement to permanent disability benefits;

II. The extent of claimant's entitlement to medical benefits; and,

III. The extent of claimant's entitlement to full reimbursement for the cost of Dr. Bansal's IME.

STIPULATIONS AT HEARING

The parties agreed to the following matters in a written hearing report submitted at hearing:

1. On April 21, 2013, claimant sustained an injury arising out of and in the course of her employment with defendant-employer.

2. Claimant is not seeking additional temporary total or healing period benefits.

3. At the time of the stipulated injury, claimant's gross rate of weekly compensation was $419.00. Also, at that time, claimant was single and entitled to 2 exemptions for income tax purposes. Therefore, claimant's weekly rate of compensation is $286.32 according to the workers' compensation commissioner's published rate book for the date of injury.

4. The only dispute concerning Dr. Bansal's IME is the reasonableness of his fee.

5. Prior to hearing, defendants voluntarily paid 12 and 2/7 weeks of permanent disability benefits for claimant's work injury.

FINDINGS OF FACT

Claimant testified she is 32 years old. She graduated from high school, and later received an associate of arts (AA) degree in business as well as an art degree. Her AA degree came from Kaplan University around 2010. Her art degree was in 1996, before she graduated from high school. This was an online college degree from the University of Minnesota. It involved months of drawing and taking basic art classes, after which she received a certificate. She took classes at Kirkwood in veterinary assisting, but did not receive a degree as a veterinary technician. She stopped attending in 2007 or 2008 due to transportation problems. (Tr. pp. 6-8)

Claimant worked at Cedar Valley Humane Society while still in high school. After that she worked at various veterinary clinics, some horse stables, and some kennels. She most recently worked for defendant-employer Apple Creek Kennel. She also has her own seasonal business, Friendly Critters, LLC. She has earned less than $400.00 from that business in 2014, and in 2013 she earned from $500.00 to $700.00. In her business, she drives to homes and feeds, waters, and lets out customer's pets while the owners are absent. She charges her customers about $20.00 to $25.00 per day. Her income has been limited because her normal dogs for which she pet sits are hyper and energetic and need a lot of attention. She testified that she has passed up on many of these due to her injury in this case. (Tr. pp. 8-9)

On April 21, 2013, the date of the stipulated injury, claimant was coming out of a doorway at Apple Creek Kennel with a dog attached to a leash in her left hand. The owner opened the door, the dog became excited and jerked her arm with the leash. Claimant noticed immediate pain in the left hand and arm, which was witnessed by a co-worker. Claimant dropped the leash and some bedding she was carrying. The dog was a Newfoundland, which weighed over 100 pounds. (Tr. pp. 10-11)

Claimant reported the injury to the owner, Mary, who told her the dog had done that before. (Tr. pp. 11) Claimant testified she did not seek medical treatment that day because Mary, her employer, told her if she had another big workers' compensation claim, she would not be able to afford the insurance increase. (Tr. p. 12) Initially, the owner denied she had this conversation with claimant, but later admitted to it. (Tr. pp. 75, 80-81)

Claimant testified she continued to have pain over the next few days after the injury and had difficulty doing her job, which included feeding dogs, playing with dogs, walking dogs, and lifting dogs and kennel crates. (Tr. p. 13) She stated that when she told Mary about the continued problems, the owner "blew her off." The manager, Susan, simply directed her back to work. (Tr. pp. 13-14) The owner denied this as well. (Tr. p. 75).

Claimant testified that on April 24, 2013, while waiting for authorized treatment, she was compelled by her pain to seek care on her own from her family doctor, Todd Walker, PAC, a provider at a Mercy Care Clinic in Mount Vernon, Iowa. (Tr. p. 14) PAC Walker's assessment was left shoulder sprain and he prescribed medication and physical therapy. (Ex. 1, pp. 1-2) That evening, claimant also sought treatment from the emergency department of the Mercy Medical Center in Cedar Rapids. The complaints were increased swelling and numbness of the left hand and she wondered if this was related to the dog incident. An X-ray of the hand was performed. The ER physicians thought this may be a cervical radiculopathy and prescribed an NSAID. (Ex. 2, pp. 1-12)

When claimant returned to work, she told the owner and manager she had seen PAC Walker, and provided them a copy of the paperwork showing the appointment. The manager was upset with claimant for not sending it through workers' compensation. (Tr. p. 14-15) Claimant said the owner then sent her to Mercy Urgent Care in Marion, Iowa, who then referred her to Ignatius (Nate) Brady, M.D., a doctor at the same clinic as PAC Walker. (Tr. p. 15) There are no records from Mercy Urgent Care in evidence.

Claimant eventually saw Dr. Brady on May 29, 2013, a little over a month after the injury. By that time, claimant had received the physical therapy ordered by PAC Walker. (Ex. 3) Dr. Brady suspected claimant had suffered a rotator cuff tear or a labral tear and he ordered additional imaging. Dr. Brady then imposed a work restriction of no overhead or forceful use of the left arm. (Ex. 1, pp. 6-7) Because an MRI indicated a SLAP tear which correlated well with claimant's symptoms, Dr. Brady referred claimant to David Tearse, M.D., an orthopedic surgeon. (Ex. 1, pp. 9-10)

When Dr. Tearse first evaluated claimant on June 28, 2013, and reviewed the MRI results, he immediately recommended a surgical procedure: a left shoulder arthroscopy with probable SLAP repair. (Ex. 5 p. 3) This was performed on August 22, 2013, at Mercy Medical Center. (Ex. 2, pp 38-40) The post-operative diagnosis was shoulder impingement with partial-thickness tear of the subscapularis and grade II chondral damage to the superior glenoid. (Id.)

After surgery, Dr. Tearse re-started physical therapy. (Ex. 5, p. 11) Claimant underwent six months of physical therapy. (Ex. 5, pp. 11-13; Ex. 6; Ex. 7) She had problems with lifting her arm. She could not lift any weight, and she had problems with her home exercises. It was recommended that claimant try water therapy, which seemed to make her symptoms worse. For a time she was doing physical therapy, water therapy, and home exercises at the same time. (Id) Claimant testified that neither the surgery, nor the physical therapy, improved her condition. (Tr. pp. 17-19)

Dr. Tearse explained the course of his treatment of claimant's shoulder condition as follows:

> Well, very slowly. She certainly had significant limitations of motion more than most people that have, you know, huge structural problems or rotator cuff problems, but—and my conclusion was that her limitation was not based on structural problems but was primarily pain limiting her.

(Ex. 5, p. 27 - Dep. Tr. p. 12)

Given claimant's lack of progress and persistent pain, Dr. Tearse referred her to Sunny Kim, M.D., pain management specialist, on December 20, 2013. (Ex. 5, p. 13)

Claimant saw Dr. Kim on January 15, 2014. (Ex. 8, pp. 1-3) This was the first appointment available for claimant. (Tr. p. 19) Dr. Kim noted claimant's pain level as 7 out of 10 (7/10) with 10 being the highest level and he noted claimant's pain was impacting activities of daily living (ADL). (Ex. 8, p. 1) Dr. Kim's assessment was complex regional pain syndrome left shoulder post arthroscopic surgery, left cubital tunnel syndrome and situational depression. (Ex. 8, p. 2) He then performed a trigger point needling procedure, which claimant said was a dry needle process unique to Dr. Kim. (Tr. pp. 19-20) A follow-up appointment was scheduled but it did not take place because claimant learned after the appointment that defendants refused to authorize further treatment by Dr. Kim and gave no reason for doing so. (Tr. p. 20)

Defendants then referred claimant to Douglas Sedlacek, M.D., another pain management physician. He saw claimant on January 22, 2014. Dr. Sedlacek noted claimant's pain level was 7/10, which can vary from 6/10 to 10/10. (Ex. E, p. 6) Following his examination, Dr. Sedlacek stated claimant had pseudomotor changes with swelling and temperature differences and he thought claimant may have a sympathetic component or the complex regional pain syndrome diagnosed by Dr. Kim. (Ex. E, p. 5) Dr. Sedlacek administered a stellate ganglion block or sympathetic block and he also continued physical therapy. (Ex. E, pp. 2, 5)

In his clinical note for his final evaluation of claimant on February 7, 2014, Dr. Sedlacek stated with claimant's failure to improve after receiving the sympathetic block, and with her failure to meet all of the criteria for complex regional pain syndrome, he ruled out a sympathetic component for her pain and he had no further interventions to offer. (Ex. F, p. 13) Dr. Sedlacek then stated a reasonable approach to claimant's situation was a referral to Dr. Kim to re-evaluate claimant in that Dr. Kim wanted to perform a nerve conduction study given claimant's hand numbness and tingling. (Id) Dr. Sedlacek also stated claimant should continue with physical therapy and he gave clamant a restriction for essentially one-arm work, although Dr. Sedlacek felt claimant could probably do some "very light work" with her left arm. (Id)

Claimant testified she did not return to Dr. Kim because defendants again did not authorize her to return to him and defendants did not provide a reason for doing so. (Tr. p. 22) Claimant then returned to Dr. Tearse on February 14, 2014. Dr. Tearse again

stated he did not find any evidence for structural damage, he stated claimant should remain on the medications and the physical therapy prescribed by Dr. Sedlacek while awaiting re-evaluation by Dr. Kim, and Dr. Tearse stated claimant should continue the work restrictions provided by Dr. Sedlacek. (Ex. 5 p. 15) Defendant, however, continued to not authorize further treatment by Dr. Kim.

At the request of defendants, claimant was seen and evaluated by Kenneth McMains, M.D., an occupational medicine physician, on April 2, 2014. In his report dated April 3, 2014, Dr. McMains responded to various questions posed by defense counsel following his examination of claimant and his review of the medical records. In his responses, Dr. McMains opined that claimant reached maximum medical improvement (MMI) on April 21, 2014, with the only additional treatment recommended being a home exercise program. Dr. McMains found no problem with claimant's right shoulder. Dr. McMains felt the grade II fissuring and the bursal thickening in claimant's left shoulder were not related to the work injury of April 21, 2013. Dr. McMains noted there was no improvement from over 50 physical therapy visits with inconsistent findings, with no medical explanation for claimant's limitations or lost range of motion; and Dr. McMains felt claimant exhibited pain behavior. Based on the lack of any objective evidence of injury or disease, Dr. McMains opined that claimant has no permanent impairment under the AMA Guides and she has an excellent prognosis of being able to perform any and all activities based on the home exercises she has been taught to perform. (Ex. H, pp. 19-20)

At the request of her attorney, claimant was evaluated by Sunil Bansal, M.D., another occupational medicine physician, on May 23, 2014. From his examination of claimant and his review of the medical records, Dr. Bansal responded to questions from claimant's counsel. In his responses, Dr. Bansal opined based on the post-operative report, claimant had a left shoulder arthroscopy, debridement of the subscapularis and a subacromial decompression, and she reached MMI on February 15, 2014, at her last appointment with Dr. Tearse. Dr. Bansal stated claimant may require additional treatment consisting of cortisone injections, NSAIDS, trigger point injections and home exercise stretching program. Dr. Bansal determined claimant suffered an acute left subscapularis tendon tear as a result of the April 21, 2013, injury. (Ex. 12, pp. 13-14) Dr. Bansal further opines claimant has suffered a four percent permanent partial impairment of the whole person under the AMA Guides, fifth edition. Dr. Bansal recommends permanent work restrictions of no lifting greater than 10 pounds occasionally with the left arm, along with no lifting greater than five pounds over shoulder level and no frequent over shoulder lifting with the left arm. (Ex. 12, p. 15)

Claimant testified that all authorized treatment, including physical therapy, was ended by defendants after she saw Dr. McMains. (Tr. p. 23-24) Claimant states her left shoulder today feels worse than it did before the surgery. (Tr. p. 19)

Claimant testified she cannot lift anything more than three pounds. She stated when she tries to bend her forearm to pick up a sack of groceries, she drops it. When she tries to gently grasp a broom with her right hand and tries to sweep with one hand, it does not work well. Claimant's pain is in her left shoulder. She cannot sit for a long period of time. It is painful, and she cannot find a comfortable position. Taking a shower becomes a chore. Preparing food requires the assistance of her ten-year-old son. Driving a car is also a problem. She can only lay her left arm on her lap. She cannot use it to move the steering wheel to turn. Claimant drove to the hearing, which was painful for her whenever she hit a bump in the road, which resulted in pain to her shoulder. Any movement to the right or left, such as on a turn or curve, causes her pain so she goes slowly. Claimant stated she has difficulty getting dressed, requiring her son to help putting her bra on, which is embarrassing for her. She has to wear larger shirts so she can get them on, and she uses ones that do not have buttons. She has problems using deodorant, and has to prop her left arm onto something to apply it. She has learned to apply deodorant to her right arm one-handed. Her son helps her tie her hair back. Her son laces her shoes for her so she can slip them on and off, as she cannot tie shoes. (Tr. pp. 28-33)

Claimant does not believe she could return to her work at Apple Creek Kennel or to any similar work. She stated she could not walk a dog or move a kennel, or pick up water or food bowls. While she might be able to do these things one-handed, she stated it would take longer. She stated she cannot do the full scope of her duties there one-handed. She stated answering the phone would require holding the phone against her shoulder. She stated it would take longer to fold blankets. She stated trying to open a door while holding a leash in her hand would be difficult. She stated she would not be able to lock a gate while holding a dog on a leash. (Tr. pp. 29-30)

Claimant's prior jobs working in veterinarian clinics, stables, etc. were similar to her work for defendant-employer. At the vet clinic, claimant helped with vaccinations, cleaning, etc. At the stable, she operated a "Bobcat". That work involved a lot of bouncing, and required two hands to operate, which she states she could not do today. She does not feel she could do any of those prior jobs now because of her left arm and shoulder. (Id)

Claimant also worked at Subway in the past. That work involved lifting heavy containers of food items, cutting bread and meat or vegetables, etc. She stated she cannot cut food at home with her left hand without pain, so she could not do that for work either. Claimant stated speed is important at a Subway restaurant and she does not feel she could work at the required pace. (Id)

Claimant continued to work for defendant-employer prior to Dr. Tearse's surgery and she was given light duty office work. (Tr. pp. 69, 76) Claimant has not been employed since Dr. Tearse's surgery, except for her home based dog business which

provides very little income. She stated she cannot continue this business without the help of her son who does the more physical aspects of the work. Apparently, there were no accommodations offered by defendant-employer for Dr. Tearse's restrictions after surgery.

Claimant was terminated by defendant-employer for insubordination in April 2014. The owner testified that a fellow worker reported that claimant had broken into a file cabinet where personnel files are located. (Tr. p. 78) The owner said claimant had a record of fighting with other employees and claimant accessed a computer system using another person's passwords to change her time clock record. (Tr. p. 83) The owner had no explanation why she waited eight months to terminate claimant and admitted she never discussed the grounds for the termination with claimant before the termination. (Tr. p. 82)

Claimant testified she has applied for work with the Iowa Department of Workforce Development. (Tr. p. 41) She stated she completed the required applications for the jobs with other employers while receiving unemployment which was two per week at first and later six per week. (Tr. p. 42) She stated she is continuing to apply for anything and she stated she applied at five locations over the last two weeks before the hearing. (Id) Claimant stated she has not had a job interview, likely because she informs prospective employers about her restrictions which she says consist of working only four hours per day and not being able to lift anything. (Tr. p. 62) She stated an employer who would have hired her before her injury declined to do so until her shoulder issues are resolved. (Tr. p. 43)

Defendants assert claimant has no work-related functional impairment due to the lack of objective evidence for the cause of claimant's pain based on Dr. McMains' views. Defendants assert Dr. Tearse agrees with Dr. McMain that there is no structural cause for the pain and there is no medical reason for claimant's physical limitations or lost range of motion. However, that is not an accurate representation of Dr. Tearse's views. Dr. Tearse's medical diagnosis is chronic left shoulder impingement with partial thickness tear of the subscapularis which he relates to the work injury. (Dep. Tr. p. 7) Dr. Tearse agrees with Dr. McMains that the grade II chondral changes are not related to the injury, but he disagrees that the bursa thickening is unrelated. (Ex. 5, p. 26-27 - Dep. Tr. pp. 8-10) Dr. Tearse also disagrees with Dr. McMains that the physical therapy was of no benefit to claimant, stating as follows:

> No. I think that she did benefit. Looking back from the time right after surgery to the last time I saw her, she had made some improvements. But she certainly still was symptomatic and functionally limited.

(Ex. 5, p. 27 - Dep. Tr. p. 11)

When asked if he has a medical reason for claimant's lack of progress and her physical limitations, Dr. Tearse replied that the medical reason is "pain." (Dep. Tr. pp. 14, 21) When asked whether he expected claimant's situation to have the sort of pain she complains about, Dr. Tearse replied as follows:

> Well, sometimes people do. And fortunately, it's not a perfect science. Sometimes people have a lot of pain that's limiting for them, and we have to work through that. A painful, stiff shoulder is a difficult problem. And I have patients—other patients similar to this where we have to gradually work through that. But they typically improve. And she really didn't improve much.

(Ex. 5, p. 27 - Dep. Tr. p. 13)

Dr Tearse describes claimant's injury as strained shoulder, a partial tear of her subscapularis tendon, and the development of impingement or a painful stiff shoulder. (Ex. 5, pp. 27-28 - Dep. Tr. pp. 10, 14)

On the issue of claimant's alleged disabling pain, Dr. Tearse stated as follows:

> Pain is sometimes pretty hard to put your finger on. A lot of people that have headaches, for example, there's no anatomic or structural reason for them, but they're debilitating and incapacitating. And I would put this shoulder problem in that category. That she had pain that was debilitating and incapacitating for her that we have no good structural reason for. And there's a spectrum of problems, pain syndromes that people get after injuries to the shoulder, to the foot, to other areas that sometimes you just have to work through. And I think this falls into that category.
>
> Sometimes there –there are certainly patient-generated reasons for this. Some people have a high threshold of pain than others and are able to work through this easier than others. I certainly would not like to say how much pain, you, is too much and can't judge how much her pain was. But, she is certainly in the spectrum of people who had-were incapacitated and disabled by pain that does not have a good objective measure for.

(Ex. 5, p. 28 - Dep. Tr. pp. 15-16)

Claimant submitted various photos (Ex. 14) to show the physical changes in her body, but Dr. Tearse stated it is difficult to observe atrophy in a younger person with high body fat content. Finally, Dr. Tearse agreed that if there is limited range of motion due to pain, there is permanent impairment under the AMA Guides. (Ex. 5, p. 30 - Dep. Tr. pp. 23-24)

Based on the views of the treating physician, Dr. Tearse, and the impairment rating of Dr. Bansal, I find the work injury is a cause of a four percent permanent partial impairment to the whole person under the AMA Guides, fifth edition due to lost range of motion. Dr. Tearse's opinion that, if the patient is credible, pain without objective evidence of a structural problem, can be as disabling as pain with objective evidence of structural problems, is more convincing that the opinions of Dr. McMains. Dr. Tearse is a specialist in orthopedic surgery. Dr. McMains was not shown to possess the same knowledge or experience in orthopedics as a specialist in that area of medicine. Also, Dr. Tearse had more experience with claimant's clinical presentations over many months and he actually observed the condition of claimant's shoulder during surgery.

I find the work injury to be a cause of permanent restrictions consisting of essentially one-arm work, with use of the left hand and arm limited to very light work. This is the restriction recommended by Dr. Sedlacek and later adopted by Dr. Tearse. This restriction has not been lifted.

I find claimant's permanent restrictions caused by the work injury prevent her from returning to any of her past jobs at the dog kennels, veterinary clinics or Subway food shops because those jobs require full use of both hands and arms. Given claimant's chronic pain and current inability to address that pain with pain management treatment, she has shown she is unable to return to gainful employment even in a clerical or administrative position using her Kaplan education. I don't believe it is possible to get a college level degree in art while still in high school, so this must have been an on-line certificate course of some kind. Although I question the motives behind claimant's termination by the employer in this case for alleged conduct occurring many months earlier, the issue is irrelevant because claimant is not physically able to return to that job.

The deputy commissioner found claimant's pain complaints credible. I defer to the credibility finding by the deputy commissioner as he was in the best position to observe claimant's demeanor at hearing. Furthermore, among all of the doctors involved in this, Dr. Tearse, Dr. Kim, Dr. Sedlacek and Dr. Bansal, only Dr. McMains questioned the validity of claimant's disabling pain, and then only because he apparently does not believe anyone should have pain if it cannot be verified by objective evidence. I cannot agree.

Claimant made an unsuccessful job search, but according to her testimony at hearing, she has been telling prospective employers she can only work four hours a day and can't lifting anything. Her actual restriction is essentially one arm duty with only very light work for the left hand and arm. However, this is still a very significant restriction and likely would not have made much difference, especially if claimant presents herself in the same manner as at hearing with total avoidance of the use of the left arm to prevent the onset of pain.

It should be noted claimant believes she has not benefited from medical treatment because defendants have refused to allow her to complete the treatment of her pain condition with Dr. Kim, and because defendants have refused to allow claimant to continue with physical therapy as recommended by her authorized treating physician, Dr. Tearse. (Tr. pp. 94-95) Although claimant at hearing indicated she is not asking for alternate care in this proceeding (Tr. p. 94), if defendants ever wish to try to further improve claimant's function and if defendants decide to try to return claimant to work, they can have Dr. Kim or others to address claimant's chronic pain condition. Vocational assistance could also be explored to see whether accommodated employment is possible.

Based on the above and foregoing, I affirm the deputy commissioner's finding the work injury of April 21, 2013, is the cause of permanent total disability.

In the hearing report, the parties indicated a dispute over some of the medical bills. Claimant submitted Exhibit 15 containing various billings from five providers for which she is seeking payment. During oral argument at the close of the hearing, the parties discussed an authorization dispute over the billing from Dr. Kim and hospital admissions and some imaging bills. Defendants' counsel agreed that the deputy commissioner should order the payment of the physical therapy bills as they were authorized. Defense counsel asserted that all authorized bills were paid.

However, the parties did not provide a specific itemized listing of disputed medical expenses that is required to properly complete the hearing report. The deputy commissioner erred in approving the hearing report without such a listing. The parties also failed in oral argument to specifically address the nature of the dispute for each of the bills submitted in Exhibit 15. Consequently, considerable time has been devoted to determining which bills were authorized and which were not. I find as follows with regard to the bills set forth in Exhibit 15:

1. Mercy Medical Center – Charges for services on April 24, 2013, appearing on page 2 were not authorized, but were incurred prior to defendants' delayed authorization for any treatment. I find these charges to be reasonable and necessary treatment of the work injury and they should be paid by defendants The charges for imaging on May 29, 2013, June 14, 2013, and July 5, 2013, appearing on pages 3-5 were for imaging ordered by either Dr. Brady or Dr. Tearse, both being authorized physicians, and those charges should be paid by defendants. I am unable to find the remaining charges on January 24, 2014, and March 30, 2014, to have been authorized. I am unable to find that they relate to claimant's shoulder injury because there is no evidence in this record to support such a finding. Therefore, those charges should not be paid by defendants.

2. Radiology Consultants – The charges for imaging on April 24, 2013, at page 8 are again not an authorized expense, but again those charges were incurred prior to defendants' delayed authorization for any treatment. I find those charge reasonable and necessary treatment of the work injury and they should be paid by defendants I find that charges from May 29, 2013, through July 5, 2013, appearing on pages 8-9 were for imaging ordered by either Dr. Brady or Dr. Tearse, both being authorized physicians and those charges should be paid by defendants. I am unable to find that the charges on August 21, 2013, January 21, 2014, and May 17, 2014, appearing on page 9 for imaging of the chest, cervical spine and pelvis relate to claimant's shoulder injury because there is no evidence in this record to support such a finding. Those charges should not be paid by defendants.

3. Dr. Kim – I find the charge for the single visit appearing at page 10 to be an authorized charge because claimant was not notified that Dr. Kim was authorized only after this initial visit and defendants have not presented evidence which would indicate claimant should have understood, as a reasonable person, such a visit would not have been authorized due to her referral to Dr. Kim by the authorized physician, Dr. Tearse. This charge should be paid by defendants.

4. Linn County Emergency Medicine, Inc. – The charges for April 24, 2013, at page 11 again are not authorized expenses, but again those charges were incurred prior to defendants' delayed authorization for any treatment. I find these charges to be reasonable and necessary treatment of the work injury and they should be paid by defendants. I find that charges for services from June 14, 2013, through August 21, 2013, appearing at pages 12-15 were for services ordered by either Dr. Brady or Dr. Tearse, both authorized physicians, and those charges should be paid. I am unable to find that the charges on April 21, 2014, and May 17, 2014, appearing on pages 16-17 relate to claimant's shoulder injury because there is no evidence in this record to support such a finding, so those charges should not be paid by defendants

5. Iowa Physical Therapy – Defense counsel stipulated in oral argument at hearing that the charges appearing at pages 18-21 were authorized. Those charges should be paid by defendants.

Finally, the parties disagree over claimant's entitlement to reimbursement for the full cost of Dr. Bansal's IME of claimant. Defendants do not dispute claimant's entitlement to reimbursement under Iowa Code section 85.39. Defendants only dispute the reasonableness of the $2,495.00 fee. Defendants assert that Dr. McMains only charged $1,200.00 for his examination of claimant and defendants assert Dr. McMains' report is more detailed and thorough. Therefore, defendants reimbursed claimant $1,500.00 for the Bansal IME. (Tr. p. 89) Claimant responds that prior decisions from this agency establish Dr. McMains' orientation and his low fee is an indication of that.

Claimant also asks this agency to use its experience to determine the reasonableness of Dr. Bansal's fee.

Dr. Bansal's invoice, which was attached to the hearing report does not provide an itemization of the time spent. The evidence in this record does not show what the customary fees for examinations should be. However, what one doctor may have charged is not evidence of the customary amount.

I find the entire fee of $2,495.00 reasonable primarily because this agency has many times in the past approved similar fee amounts for IMEs by Dr. Bansal. However, it would be wise for counsel to obtain more detailed statements from Dr. Bansal in the future showing his customary hourly fee and the amount of time spent to perform the examination and the amount of time spent preparing his report.

CONCLUSIONS OF LAW

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

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).

A treating physician's opinions are not to be given more weight than a physician who examines the claimant in anticipation of litigation as a matter of law. Gilleland v. Armstrong Rubber Co., 524 N.W.2d 404.408 (Iowa 1994); Rockwell Graphic Systems, Inc. v. Prince, 366 N.W.2d 187, 192 (Iowa 1985).

The extent of claimant's entitlement to permanent disability benefits is determined by one of two methods. If it is found that the permanent physical impairment or loss of use is limited to a body member specifically listed in schedules set forth in one of the subsections of Iowa Code section 85.34(2)(a-t), the disability is considered a scheduled member disability and measured functionally. If it is found that the permanent physical impairment or loss of use is to the body as a whole, the disability is unscheduled and measured industrially under Code subsection 85.34(2)(u). Graves v. Eagle Iron Works, 331 N.W.2d 116 (Iowa 1983); Simbro v. Delong's Sportswear, 332 N.W.2d 886, 887 (Iowa 1983); Martin v. Skelly Oil Co., 252 Iowa 128, 133, 106 N.W.2d 95, 98 (1960).

Industrial disability was defined in Diederich v. Tri-City Ry. Co., 219 Iowa 587, 258 N.W.2d 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. However, consideration must also be given to the injured workers' medical condition before the injury, immediately after the injury and presently; the situs of the injury, its severity, and the length of healing period; the work experience of the injured worker prior to the injury, after the injury, and potential for rehabilitation; the injured worker's qualifications intellectually, emotionally and physically; the worker's earnings before and after the injury; the willingness of the employer to re-employ the injured worker after the injury; the worker's age, education, and motivation; and, finally the inability because of the injury to engage in employment for which the worker is best fitted; Thilges v. Snap-On Tools Corp., 528 N.W.2d 614, 616, (Iowa 1995); 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).

I find in this case that the work injury is the cause of permanent impairment to the body as a whole, a nonscheduled loss of use. Consequently, this agency must measure claimant's loss of earning capacity as a result of this impairment.

Defendants suggest that subjective pain without objective evidence of the cause is not compensable, but cite no authority for that proposition. Iowa's case law is otherwise. Pain, or other subjective complaints, even without objective findings, can establish permanent impairment or permanent disability. Suljevic v. Tyson Fresh Meats, Inc., File 5017829, (App. March 27, 2008). McGregor v. Jet Company, File No. 5011648 (App. August 30, 2006) When an injury causes severe pain requiring medical treatment and there is sufficient evidence to find that the pain is disabling, the disabling pain is compensable and treated as an unscheduled injury and this includes phantom pain from loss of a limb. Dowell v. Wagler, 509 N.W. 2d 134 (Iowa App. 1993).

I find claimant suffered a total loss of her earning capacity as a result of the work injury of April 21, 2013. Such a finding entitles claimant to permanent total disability benefits as a matter of law under Iowa Code section 85.34(3), which entitles claimant to weekly benefits beginning on February 14, 2014, and continuing indefinitely thereafter. Absent a change of condition, such benefits last a lifetime.

II. The extent of claimant's entitlement to medical benefits

Pursuant to Iowa Code section 85.27, claimant is entitled to payment of reasonable medical expenses incurred for treatment of a work injury. Claimant is entitled to an order of reimbursement if she has paid those expenses. Otherwise, claimant is entitled only to an order directing the responsible defendants to make such payments directly to the provider. See Krohn v. State, 420 N.W.2d 463 (Iowa 1988)

In this case, defendants assert claimant is not entitled to reimbursement for unauthorized medical expenses because she admitted in her deposition and at hearing that none of the treatment she received, including the treatment which was not authorized, was beneficial. Defendants cite the Iowa Supreme Court's opinion in Bell Bros. Heating v. Gwinn, 779 N.W.2d 193, 206 (Iowa 2010) as authority for the proposition that the expenses of unauthorized medical treatment can be awarded only upon a showing that the treatment was reasonable and beneficial.

However, the Bell Bros. holding is not applicable to all unauthorized medical expenses. Whether Bell Bros. applies depends on the reason the authorization was withheld by the employer or insurer. If authorization was withheld because the employer or insurer was exercising its right to choose the care, then Bell Bros. would apply. However, if authorization is withheld because the employer denied liability for the condition treated, then the employer loses the right to choose the care and the right to assert an authorization defense. Ramirez-Trujillo v. Quality Egg, L.L.C., Supreme Court Decision, No. 14-0640, Filed April 15, 2016; R.R. Donnelly & Sons v. Barnett, 670 N.W.2d 190 (Iowa 2003); Trade Professionals, Inc. v. Shriver, 661 N.W.2d 119 (Iowa 2003); West Side Transport v. Cordell, 601 N.W.2d 691 (Iowa 1999); Haack v. Von Hoffman Graphics, File No. 1268172 (App. July 31, 2002); Kindhart v. Fort Des Moines Hotel, Vol. I, No. 3, Industrial Commissioner Decisions, 611 (March 27, 1985); Barnhart v. MAQ Incorporated, I Iowa Industrial Comm'r Report 16 (App. March 9, 1981).

Employers must pay for the care they authorize and direct. Becker v. Clinton Engineering, Inc., No. 1205139 (App. July 3, 2001); Janssen v. U.P.S., No. 1019753 (App. April 29, 1994). Employers must pay for the treatment by an authorized provider until they notify claimant that the provider is not authorized. Iowa Code section 85.27(4). Treatment received by a provider referred by an authorized provider generally constitutes authorized treatment provided no notice was given to clamant that they will

not pay for such care. Workers' Compensation, Iowa Practice 15, (2014-2015), section 15-2, p. 199.

In this case, defendant-employer denied the injury and delayed referring this matter to the insurer and claimant was compelled by her pain to obtain treatment on her own. As detailed above on pages 11 and 12, here is no valid lack of authorization defense for some of the medical bills related to claimant's medical treatment. Defendants are ordered to pay the specific bills indicated above on pages 11 and 12.

III. The extent of claimant's entitlement to full reimbursement for the cost of Dr. Bansal's IME

As discussed above, defendants shall reimburse claimant for the remaining balance of $995.00 for Dr. Bansal's IME charge.

ORDER

IT IS THEREFORE ORDERED that the arbitration decision of December 18, 2014, is AFFIRMED in its entirety.

1. Defendants shall pay claimant permanent total disability benefits at the stipulated rate of $286.32 per week from February 14, 2014.

2. Defendants shall pay accrued weekly benefits in a lump sum and defendants shall receive credit against this award for all benefits previously paid.

3. Defendants shall reimburse claimant for her out-of-pocket medical expenses and defendants shall also hold claimant harmless for past medical expenses itemized in Exhibit 15 as detailed above on pages 11 and 12.

4. Defendants shall pay for claimant's future medical expenses necessitated by the work injury of April 21, 2013.

5. Defendants shall pay claimant the sum of $995.00 for the remaining balance of Dr. Bansal's fee.

6. Defendants shall pay interest on unpaid weekly benefits awarded herein pursuant to Iowa Code section 85.30.

7. Defendants shall file subsequent reports of injury (SROI) as required by administrative rule 876 IAC 3.1(2).

8. Pursuant to rule 876 IAC 4.33, defendant shall pay the costs of the arbitration proceeding and defendant shall also pay the costs of the appeal, including the cost of the hearing transcript.

Signed and filed this 12th day of May, 2016.

Joseph S. Cortese II

JOSEPH S. CORTESE II
WORKERS' COMPENSATION
COMMISSIONER

Copies To:

Peter J. Leehey
Graig Turson
Attorneys at Law
PO Box 547
Cedar Rapids, IA 52406-0547
pleehey@leeheylaw.com
Graig@IowaBikeLawyers.com

James W. Bryan
Attorney at Law
7131 Vista Dr.
West Des Moines, IA 50266
jbryan@travelers.com