BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

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| STACEY D. TIERNEY,<br><br>Claimant,<br><br>vs.<br><br>LINK SNACKS, INC.,<br><br>Employer,<br><br>and<br><br>THE HARTFORD,<br><br>Insurance Carrier,<br>Defendants. | File No. 5066578<br><br>A R B I T R A T I O N<br><br>D E C I S I O N<br><br>Head Note Nos.: 1402.40, 2502, 2907 |

## STATEMENT OF THE CASE

Claimant, Stacey Tierney, filed a petition in arbitration for workers' compensation benefits against Link Snacks, Inc., as employer, and The Hartford, as insurance carrier. The undersigned heard this case on September 23, 2019, in Council Bluffs, Iowa.

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 5, Claimant's Exhibits 1 through 3, and Defendants' Exhibits A through E. Claimant testified on her own behalf. Defendants called no witnesses. The evidentiary record closed at the conclusion of the arbitration hearing.

Counsel for the parties requested the opportunity to file post-hearing briefs. Their request was granted. All parties filed their post-hearing briefs on October 14, 2019, at which time the case was deemed fully submitted to the undersigned.

## ISSUES

The parties submitted the following disputed issues for resolution:

1. Whether the alleged injury caused temporary disability and, if so, the extent of claimant's entitlement to temporary disability benefits, if any;

2. Whether the alleged injury caused permanent disability and, if so, the extent of claimant's entitlement to permanent disability benefits, if any;

3. The nature and extent of disability;

4. Rate;

5. Whether claimant is entitled to reimbursement for an independent medical evaluation (IME) under Iowa Code section 85.39; and

6. Whether claimant is entitled to alternate care under Iowa Code section 85.27.

## FINDINGS OF FACT

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

Stacey Tierney was born on July 11, 1972, making her 47 years old at the time of the evidentiary hearing. (Hearing Transcript, page 9). She resides in Underwood, Iowa with her boyfriend and three children. (Id.). Tierney started working for the defendant employer in the inventory department on March 27, 2012. (Hr. Tr., p. 15). She continued working in this capacity until she was terminated on July 30, 2018. (See Hr. Tr., p. 20). Tierney's position primarily involved the use of a hand-held scanner to keep track of and record inventory. She held the scanner in her right hand, so her dominant, left hand would be free to write or complete other tasks as necessary. (Hr. Tr., p. 21). On the date of injury, claimant was earning $13.21 per hour. (Hr. Tr., pp. 16-17).

Tierney asserts she began to experience pain in her right elbow between the months of April 2016 and July 2016. (Hr. Tr., pp. 18-19). According to claimant, her pain progressively worsened as she continued to work for the defendant employer. (Id.). Then, on November 16, 2016, claimant's right elbow locked up while using a scanner in the course of her employment. Shortly thereafter, claimant reported her injury to the manager on-duty. (Hr. Tr., p. 19).

Defendants acknowledge and stipulate that claimant sustained a work-related injury to her right elbow on November 16, 2016. However, defendants dispute whether claimant sustained permanent disability related to the November 16, 2016, work injury.

Claimant's medical history is relevant for a pre-existing injury to the right elbow. (Hr. Tr., p. 9). At the age of 12, claimant fell over while riding her bicycle and chipped a bone in her right elbow. (Hr. Tr., p. 10). Claimant's arm was placed in a cast and healed without issue. (Id.). She received no additional treatment on her right elbow until the date of injury. (Hr. Tr., p. 11).

After claimant reported the injury to her manager, defendants authorized treatment with Concentra Medical Centers. (See JE1, p. 1). Claimant presented to Art

West, M.D. on November 16, 2016, and reported moderate pain in the radial aspect of the right elbow. (JE1, p. 1). Dr. West diagnosed a strain of the right elbow and referred claimant on to physical therapy. (JE1, p. 2).

Tierney presented to five sessions of physical therapy between November 17, 2016, and November 28, 2016. (See JE1, pp. 4-10, 14-19, 22-24). At her initial appointment, Tierney complained of sharp, severe pain on the outside of her right elbow with a "snap, pop, crack." (JE1, p. 4). She reported improvement, with less sharp pain on November 18, 2016. (JE1, p. 8). Tierney experienced full relief of symptoms and full elbow extension following manual therapy. (JE1, p. 9).

On November 23, 2017, Tierney demonstrated full, pain-free range of motion in her elbow and wrist following manual therapy. She also demonstrated good strength of the wrist and hand on examination. (JE1, p. 18).

At her final visit, on November 28, 2016, claimant felt 90 percent better. (JE1, p. 22). Nevertheless, she presented with some stiffness in the right elbow. (See JE1, p. 23). She reported pain levels between 0-1/10. (JE1, p. 22). The physical therapy record provides Tierney had not worn her tendon redistribution strap at all over the prior weekend. It is also noted that Tierney had met all of her physical therapy goals. (Id.). As such, she was discharged from physical therapy. (JE1, p. 23).

On November 28, 2016, Tierney reported to Dr. West that her right elbow pain had resolved. (JE1, p. 20). Following examination, Dr. West placed Tierney at maximum medical improvement (MMI) and returned her to full-duty work. (JE1, p. 21).

After her release to return to work without restrictions from Dr. West, claimant returned to work for the defendant employer. She remained employed in her pre-injury position for more than a year and a half after the date of injury. (Hr. Tr., p. 30).

Although Tierney testified she continued to experience right elbow pain after Dr. West placed her at MMI, she sought no further treatment, for her right elbow, from Dr. West or from any other physician in 2016, 2017, or 2018. Claimant did not obtain any additional treatment for her right elbow until January 23, 2019. (JE1, p. 25).

Claimant did, however, receive treatment for unrelated medical conditions between December 2016 and January 2019. Tierney was diagnosed with fibromyalgia on April 5, 2017. (JE3, p. 29). The condition presented itself in the form of pain all over her body. At deposition, claimant testified the weakness she experienced as a result of her fibromyalgia was similar to having the flu all day, every day. (Ex. E, Deposition Tr. p. 14). Claimant's fibromyalgia regularly limited her ability to work on a full-time basis.

In April 2017, claimant requested FMLA paperwork from her primary care physician as she did not believe she could perform her job duties when her symptoms flared up. (JE3, p. 31). She estimated that she experienced flare-ups 1-2 times per

month, with each episode lasting 2-3 days. (Id.). Employment records reveal claimant made a reasonable accommodation request from her employer on April 10, 2017. (Ex. B, pp. 38-39).

Claimant had exhausted all available FMLA by January 4, 2018. (Ex. B, p. 43). Claimant subsequently applied for short term disability. The defendant employer granted claimant a personal leave of absence through January 30, 3018. (Id.). Employment records further reveal claimant requested additional accommodations in March 2018. (Ex. B, p. 46). According to the accommodations application, claimant's flare-ups had increased from 1-2 times per month to 4-6 times per month. (Ex. B, p. 48). For job-related limitations, claimant provided, "Inability to walk/stand and lift heavy items due to pain and fatigue – during flare-ups." (Ex. B, p. 46). It is noted claimant was able to handle all job duties when she was not experiencing flare-ups. (Ex. B, p. 49).

On August 16, 2017, claimant reported she was experiencing pain all over her body and missing a significant amount of work. (JE3, p. 33). Claimant's primary care physician opined her fibromyalgia was "out of control." (Id.). It is noted claimant was referred to aquatic therapy, but she had stopped presenting to the same because it was difficult for her to make it to her appointments during the workweek. (Id.).

Claimant continued to experience increased symptoms of fibromyalgia and anxiety throughout 2017 and 2018. (See JE3).

Tierney presented to Takashi Kawamitsu, M.D. on June 14, 2018, to establish care for her fibromyalgia. (JE4, p. 43). Claimant complained of generalized muscle aches and tender spots between her neck, upper back, midback, low back, hips, knees, and bilateral ankles. (Id.). Claimant did not complain of pain in her right elbow. (See Id.). Dr. Kawamitsu diagnosed claimant with fibromyalgia, mild major depression, anxiety, and low back pain. (JE4, p. 45).

On July 12, 2018, claimant requested work accommodations for her fibromyalgia from Dr. Kawamitsu. (JE4, p. 46). Claimant felt she could keep up with her work if she was able to take 10 minute breaks after each hour. She also requested a modified work schedule of five, eight-hour shifts as opposed to four, 10-hour shifts. (Id.). Dr. Kawamitsu obliged claimant's request. (See Ex. B, pp. 50-52). Dr. Kawamitsu provided claimant's fibromyalgia did not preclude her from working on a continuous or intermittent basis. (Ex. B, p. 50).

As a result of her attendance issues, claimant was terminated by the defendant employer on July 30, 2018. (Ex. B, pp. 32-33). She subsequently applied for and received unemployment benefits. (Ex. B, p. 35). Once she had exhausted her unemployment benefits, claimant applied for employment with Learning Journey, a daycare center. (Ex. C, p. 1).

Tierney presented to Dr. Kawamitsu on November 2, 2018, for a pre-employment physical. (JE4, p. 48). Claimant complained of recurrent low back pain. She did not complain of pain in her right elbow. (See Id.). It is noted claimant's fibromyalgia and depression were well controlled with medications. (JE4, p. 49). The medical record reflects claimant demonstrated normal strength in her upper and lower extremities. (Id.).

In addition to the pre-employment physical, claimant completed a medical questionnaire for Learning Journey. Claimant provided she did not require special accommodations, and she considered herself healthy and able to participate in all activities. (Ex. C, p. 2).

According to employment records, claimant started working for Learning Journey on November 5, 2018. She was subsequently terminated on November 14, 2018, for falling asleep/having her eyes closed while in charge of supervising and handling infants. (Ex. C, p. 3). Claimant asserts she was unfairly targeted by her co-workers after making complaints that they were not properly training her. (Hr. Tr., p. 14).

In June 2019, claimant obtained employment with Mercy Hospital in their inventory department. (Ex. D, p. 6). Claimant remained employed on a full-time basis with Mercy at the time of the evidentiary hearing. (Hr. Tr., p. 32). Prior to working for Mercy, claimant was required to present for a physical. On her medical history questionnaire, claimant provided that she would occasionally experience right elbow pain with overuse. (Ex. D, p. 8). Nevertheless, it was determined claimant was physically able to perform the essential functions of her job in the inventory department. (Ex. D, p. 7). Claimant's job duties include taking calls, counting supplies, carrying supplies, and walking back and forth between departments. Claimant's job description requires the ability to lift up to 50 pounds on a continuous basis. (Ex. D, p. 3).

Two physicians have offered opinions pertaining to claimant's current right elbow symptoms.

As previously stated, claimant returned to Dr. West of Concentra Medical Center on January 23, 2019, nearly six months after her date of termination. (JE1, p. 25). Dr. West's medical record notes that claimant had not presented for any treatment for her right elbow in over 26 months. (JE1, p. 26). Claimant reported popping in her elbow with resulting weakness. Dr. West, based on his examination and information obtained regarding claimant's job duties and mechanism of injury, opined claimant's symptoms were not causally related to the November 2016 injury. (Id.). As claimant's authorized treating physician, and given the fact he examined claimant on a number of occasions in close temporal proximity to the date of injury, Dr. West's opinions carry a significant amount of weight.

In support of her claim against the defendant employer, claimant retained Lee Merritt, M.D. to perform an independent medical examination (IME). Dr. Merritt

evaluated claimant on June 19, 2019. (JE5, p. 52). There are no medical records in the evidentiary record to suggest claimant sought additional treatment for her right elbow condition between January 23, 2019, and June 19, 2019. Dr. Merritt opined claimant's work activities likely aggravated an underlying condition in claimant's right elbow; however, he provided no final diagnosis could be rendered without basic radiographic evaluation. (Id.; JE5, p. 54).

When comparing the opinions of the two physicians that rendered opinions, I find the opinions of Dr. West to be the most informed, complete, and well-reasoned. Dr. West's opinions are supported by claimant's actions and lack of medical treatment following her release to full-duty work. Following her release, claimant returned to work for the defendant employer in a full-duty capacity. She continued in this position until July 30, 2018. At no point did claimant complain of ongoing right elbow pain or request additional treatment from the defendant employer. Between November 2016 and January 2019, claimant frequently presented to her primary care physicians. At no point did she report ongoing pain in her right elbow. Claimant did not present for any medical treatment related to her right elbow until January 2019, nearly six months after she had been terminated by the defendant employer.

It is difficult to afford the opinions of Dr. Merritt a significant amount of weight. I reach this conclusion for a number of reasons.

First, Dr. Merritt's history indicates claimant began noticing pain in her right elbow in November 2016. (JE5, p. 52). Claimant testified at her deposition and at the evidentiary hearing that she first started noticing pain in her right elbow sometime between April and July 2016. (See Ex. E, Depo. pp. 16-17; Hr. Tr., pp. 18-19). Further, Dr. Merritt's report provides claimant's pain did not keep her from working until November 16, 2016. (JE5, p. 52). Aside from attending physical therapy appointments that were scheduled during her workday, claimant did not miss any work because of her right elbow injury. (Hr. Tr., p. 29). Dr. Merritt's initial history is inaccurate.

In addition, while likely inconsequential to his ultimate opinion, Dr. Merritt was operating under the mistaken belief that treatment for claimant's right elbow condition has included medications such as Meloxicam and Nabumetone. (JE5, p. 52). While it is accurate to state claimant has taken these medications in the past, it is not accurate to say claimant was prescribed said medications for the right elbow condition. (See JE1, pp. 1-27; JE3, pp. 29-42; JE4, pp. 43-51).

Next, Dr. Merritt's report does not provide a summary of claimant's medical records. It is noted that Dr. Merritt was unable to review medical records from claimant's initial appointment with Dr. West. Dr. Merritt's report indicates he reviewed some medical records prior to drafting his report, "Assuming the history to be correct, and after review of records and physical examination [. . .]." (JE5, p. 53). There is no indication in Dr. Merritt's report which medical records he was able to review. There is no indication Dr. Merritt reviewed the nearly two years of medical records wherein

claimant does not report right elbow pain. There is no indication Dr. Merritt was provided with Dr. West's January 2019 medical record. This is concerning and damages the credibility of Dr. Merritt's opinions in this case.

Perhaps most significantly, Dr. Merritt's report does not provide an analysis of or even reference the significant gap in claimant's treatment or the fact claimant was able to return to work full-duty, seemingly without issue, for over 18 months following her release from Dr. West. Instead, Dr. Merritt's report jumps from, "She was released back to full work status[,]" to "Subsequently, the patient was terminated from this job for unrelated reasons." (JE5, p. 52). Dr. Merritt's report does not provide the date in which claimant's employment was terminated. Dr. Merritt's report does not discuss any medical records between the date of claimant's release and the date she was terminated. Dr. Merritt appears to have relied upon an inaccurate or incomplete medical history in formulating his opinions.

In closing, Dr. Merritt recommends against claimant returning to any manual labor using the right arm until further evaluations can be completed. (JE5, p. 54). It does not appear as though Dr. Merritt was aware claimant was in the beginning stages of obtaining an inventory position with Mercy Hospitals when she presented for examination. (See Ex. D, p. 10). In fact, it appears as though claimant presented for and passed a pre-employment physical the morning of Dr. Merritt's IME. (Ex. D, p. 10). The weight afforded to Dr. Merritt's recommendation to avoid any manual labor with the right arm is significantly diminished by the fact claimant accepted a full-time position in Mercy's inventory department and continued to work in said position through the date of the evidentiary hearing.

Lastly, Dr. Merritt's ultimate conclusion is less than definitive, and the majority of his opinion is purely speculative. Dr. Merritt opines claimant's work aggravated an underlying condition, but does not diagnose said pre-existing condition. He provides there is no evidence of a muscular strain, ligamentous sprain, or lateral epicondylitis. Such a finding supports defendants' position that claimant's current condition is unrelated to the November 16, 2016, work injury as claimant was originally diagnosed with a strain of the right elbow which subsequently resolved through conservative treatment. While it is certainly possible the November 2016 incident caused intra-articular elbow damage, claimant presented insufficient evidence to support such a finding.

Given that Dr. Merritt makes no reference to this significant gap in treatment, provides little to no analysis of claimant's medical records, and offers no explanation as to how claimant was able to go 18 months without requesting additional treatment or mentioning ongoing right elbow pain in any medical record, I do not find Dr. Merritt's report to be convincing. I do not afford Dr. Merritt's opinion significant credibility or weight in this case given these deficiencies. Instead, I accept the opinions of Dr. West as the most credible and convincing opinions in the record.

I therefore accept Dr. West's assessment that claimant reached maximum medical improvement on November 28, 2016, and I adopt his opinion that claimant's January 2019 complaints are not related to the original work injury.

Claimant was diagnosed with a strain of the right elbow and referred to physical therapy on November 16, 2016. She attended five sessions of physical therapy and was subsequently discharged as she had met all of her goals. At her final appointment with Dr. West on November 28, 2016, she exhibited full range of motion and full strength. When claimant was released from Dr. West's care on November 28, 2016, claimant's elbow pain had resolved and she reported no associated symptoms. (JE1, p. 20). She reported feeling "90% better" to her physical therapist. (JE1, p. 22). Thereafter, claimant returned to work and continued in her full-duty position for more than 16 months. She did not report ongoing pain to the defendant employer or to her primary care physicians during this time period. She did not request additional treatment or accommodations for the right elbow condition during this time period. Claimant did not seek additional medical treatment until several months after she had been terminated by the defendant employer. Between the date of termination and her seeking additional medical treatment, claimant passed a pre-employment physical and obtained subsequent employment. For these reasons, I find insufficient evidence exists to support claimant's assertion that her current alleged symptoms are causally related to the November 16, 2016, work injury. I find claimant failed to prove she sustained any permanent disability as a direct result of the November 16, 2016, work injury.

Tierney asserts entitlement to temporary disability, or healing period, benefits from July 30, 2018, to the present and a running healing period into the future. Claimant offered no evidence in support of this assertion. It has been established that claimant did not miss any work as a result of her right elbow injury. Claimant was placed at MMI, returned to work, and obtained substantially similar employment through Mercy following her termination – for unrelated reasons – from the defendant employer. She continues to work in this position on a full-time basis. Having found claimant achieved maximum medical improvement on November 28, 2016, I find claimant failed to prove entitlement to temporary disability benefits. I similarly find claimant failed to prove entitlement to a running award of healing period benefits.

Claimant requests additional medical treatment to further determine the extent of her work-related injury. Having found claimant provided insufficient evidence to prove that her current condition is causally related to the November 16, 2016, work injury, claimant's request is denied.

Claimant asserts a claim for reimbursement of her independent medical examination fee with Dr. Merritt. No employer-retained physician specifically evaluated the extent of claimant's permanent disability before Dr. Merritt's IME took place on June 19, 2019. Therefore, I conclude that claimant failed to establish entitlement to reimbursement of Dr. Merritt's independent medical examination fees.

## 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).

Having found the medical opinions of Dr. West most convincing in this evidentiary record, I also found that claimant did not prove she sustained any temporary or permanent disability as a result of the November 16, 2016, work injury. Having found that claimant did not prove she sustained any temporary or permanent disability, I conclude claimant failed to prove entitlement to either temporary disability (healing period) or permanent partial disability benefits. As a result of this finding, the issue of the claimant’s workers’ compensation rate is moot.

Tierney seeks an order requiring defendants to reimburse her independent medical examination fees pursuant to Iowa Code section 85.39. 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 (Appeal 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).

The Iowa Workers' Compensation Commissioner has noted that the Iowa Supreme Court adopted a strict and literal interpretation of Iowa Code section 85.39 in Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839 (Iowa 2015). See Cortez v. Tyson Fresh Meats. Inc., File No. 5044716 (Appeal December 2015). The Commissioner has taken a similar strict interpretation of the pre-requisites set forth in Iowa Code section 85.39. See Reh v. Tyson Foods, Inc., File No. 5053428 (Appeal March 2018). The Iowa Supreme Court explained,

> Our legislature established a statutory process to govern examinations of an injured worker in order to obtain a disability rating to determine the amount of benefits required to be paid by the employer. Neither courts, the commissioner, nor attorneys can alter that process by adopting contrary practices. If the injured worker wants to be reimbursed for the expenses associated with a disability evaluation by a physician selected by the worker, the process established by the legislature must be followed. This process permits the employer, who must pay the benefits, to make the initial arrangements for the evaluation and only allows the employee to obtain an independent evaluation at the employer's expense if dissatisfied with the evaluation arranged by the employer. Iowa Code § 85.39.

Young, 867 N.W.2d 839, 847 (Iowa 2015).

Prior to the court's decision in Young, this agency had held that a release to full-duty work coupled with the failure to expressly opine as to impairment produces an inference that the employer-retained physician did not believe the injured worker sustained permanent impairment related to the injury. Countryman v. Des Moines Metro Transit Authority, File No. 5009718 (App. March 16, 2006); Kuntz v. Clear Lake Bakery, File No. 1283423 (Rehearing July 13, 2004).

The supreme court's decision in Young, as well as several recent appeal decisions, support a finding that said inference is no longer applicable to open the door for injured workers to obtain a section 85.39 examination. Instead, there must be a definitive permanent impairment rating rendered by a physician selected by the

defendants before the injured worker qualifies for an independent medical evaluation pursuant to Iowa Code section 85.39.

In cases where defendants have denied liability, the commissioner has concluded that medical opinions or reports obtained for the purposes of determining causation, regardless of whether they are obtained from a treating or expert physician, are not the equivalent of an impairment rating for purposes of Iowa Code section 85.39. See Reh, File No. 5053428 (App. March 2018); Soliz v. Farmland Foods, Inc., File No. 5047856 (App. March 2018).

In cases where defendants have accepted liability but have not obtained an impairment rating, the commissioner has concluded that a release to full-duty work and placement at MMI, coupled with the failure to expressly opine as to impairment, is not the equivalent of an impairment rating for purposes of Iowa Code section 85.39. Sainz v. Tyson Fresh Meats, Inc., File No. 5053964 (App. September 2018).

Defendants still have an obligation, in the course of their ongoing duty to investigate an injured worker's claim, to inquire into the extent of permanent impairment following the end of a healing period. See Moffitt v. Estherville Foods, Inc., File Nos. 5029474, 5029475, and 5029476 (App. September 21, 2011). Failure to make such an inquiry can result in the assessment of penalty benefits. See Stroud v. Square D, File No. 5013498 (App. June 21, 2006).

If defendants unduly delay in seeking an examination under section 85.39, or fail to obtain an evaluation of permanent impairment altogether, the supreme court has held that the injured worker's recourse is a request to the commissioner to appoint an independent physician to examine the injured worker and make a report. See Young, 867 N.W.2d 839, 845 (Iowa 2015); Iowa Code section 86.38. In practice, the looming threat of penalty benefits for failure to investigate the extent of permanent impairment, once communicated, should encourage timely action.

In this case, no employer-retained physician specifically evaluated the extent of claimant's permanent disability before Dr. Merritt's IME took place on June 19, 2019. There is no indication claimant sought authorization from defendants for an 85.39 examination. There is no indication claimant requested the commissioner to appoint an independent physician to examine claimant and draft a report. There is no indication claimant notified defendants she would be seeking penalty benefits for failure to investigate the extent of claimant's permanent impairment, if any. Therefore, I conclude that claimant failed to establish entitlement to reimbursement of Dr. Merritt's independent medical examination fees pursuant to Iowa Code section 85.39.

The cost of Dr. Merritt's IME is also not recoverable from defendants as a taxable cost under rule 876-4.33. Only the cost associated with the preparation of the written report can be reimbursed as a cost at hearing under rule 876-4.33. Young, 867 N.W.2d, at 846-847. The charge on the invoice submitted in Exhibit 3 provides, "EXAM AND REPORT $800.00." (Ex. 3, p. 2). The invoice does not break down how much

Dr. Merritt charged to examine claimant and how much Dr. Merritt charged to draft his report. Because Dr. Merritt did not separate out how much was charged for the examination and how much was charged for preparation of the report itself, no portion of Dr. Merritt's IME charge can be taxed as a cost under rule 876-4.33.

The final issue for determination is a specific taxation of costs pursuant to Iowa Code section 86.40 and rule 876 IAC 4.33. In her post-hearing brief, claimant requests taxation of the cost of the filing fee ($100.00) and the cost of the deposition transcript ($60.55). Claimant failed to establish entitlement to weekly or medical benefits. She failed to establish entitlement to reimbursement of her independent medical examination. Claimant will take no award of benefits from this proceeding. Therefore, I conclude it would not be appropriate to assess her costs to defendants in this case.

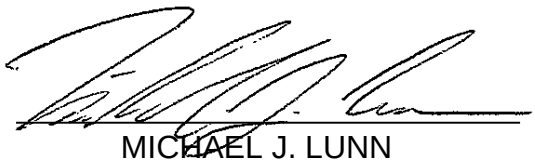
## ORDER

THEREFORE, IT IS ORDERED:

Claimant shall take nothing further.

All parties shall pay their own costs.

Signed and filed this 17th day of February, 2020.



MICHAEL J. LUNN
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Jordan Glaser (via WCES)

Abigail A. Wenninghoff (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.