

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

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SUSAN HERMANN,

Claimant,

vs.

CUMULUS MEDIA,

Employer,

and

ZURICH AMERICAN INSURANCE,

Insurance Carrier,  
Defendants.

**FILED**

MAR 21 2019

WORKERS COMPENSATION

File No. 5060452

ARBITRATION

DECISION

Head Note Nos.: 1100; 2500

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STATEMENT OF THE CASE

Susan Hermann, claimant, filed a petition in arbitration seeking workers' compensation benefits from her employer, Cumulus Media and their workers' compensation insurance carrier, Zurich American Insurance. The matter proceeded to hearing on November 27, 2018. The parties submitted post-hearing briefs and the matter was considered fully submitted on December 11, 2018.

The evidentiary record includes: Joint Exhibits JE1 through JE10; Claimant's exhibits 1 through 3 (Exhibit 3 is a separate 6 page medical bill summary); and, Defendants' Exhibits A through C. Claimant provided testimony at hearing.

The parties filed a hearing report at the commencement of the arbitration hearing. On the hearing report, the parties entered into various stipulations. All of those stipulations were accepted and are hereby incorporated into this arbitration decision and no factual or legal issues relative to the parties' stipulations will be raised or discussed in this decision. The parties are now bound by their stipulations.

**ISSUES**

The parties submitted the following disputed issues for resolution:

1. The extent of permanent partial disability regarding the right shoulder.
2. Whether the left hip injury is causally related to the work injury.

3. Whether claimant is entitled to payment of medical bills regarding the left hip.
4. Whether claimant is entitled to full reimbursement for an independent medical evaluation (IME) with Dr. Bansal.

### **FINDINGS OF FACT**

After a review of the evidence presented, I find as follows:

Susan Hermann, claimant, was 62 years old at the time of the hearing. She is right hand dominant. Claimant is not married and has no dependents.

Claimant graduated from high school in 1973. She took some college classes after high school, but did not obtain a degree or certificate. She took courses at the Radio Advertising Bureau and became a certified radio marketing and digital consultant. A digital consultant sells streaming, website, digital tracking and search engine optimization services. Claimant testified that she only sold these services, and did not program or set up the services for the client.

#### **Work History**

After high school, claimant worked in collections for Mastercard. She also worked as a waitress and bartender.

In 1978 claimant got into radio sales. She started at KGGO radio station and worked there for 26 years. She then went to work for Saga Communications (KIOA radio station) and was there for about 8 or 9 years, until 2013. (Ex. 2-22; Testimony) She then returned to work at KGGO, which was then owned by the defendant employer, Cumulus Media. (Ex. 2-22; Testimony) She earns about \$62,000 per year. (Ex. 2-22)

Her job includes helping customers plan and execute marketing campaigns. An average day might include working at a computer, being out of the office calling on clients, and meeting with ad agencies. In addition, she may work at a promotional event and assist with promotional games and live broadcasts. The events involve setting up and tearing down tents, tables and games that offer prizes. Physically, claimant would help move things around and set up and tear down events. Claimant stated that she was on her feet for long periods of time.

Claimant testified that she did not recall having any hip pain and was not taking any medication just prior to the work injury herein. However, she does not deny that she has a lengthy history of left hip issues and she has been prescribed hydrocodone in the past to address pain. Claimant stated that she had arthritis in her hip, knee and thumbs. She stated that she usually was able to deal with the pain with over-the-counter medication.

### **This Injury**

On January 15, 2016, claimant was leaving her office in the morning. She exited the building and was walking toward her car when she slipped and fell on ice. She testified that she landed on her right elbow and her backside and could not get up. She laid there for a while before she was able to get to a co-workers truck and pull herself up and get back into the building. Her hand was bleeding and she thought she broke her right arm.

### **Pre-Injury Medical**

Claimant testified that before January 15, 2016, she never had any problems with her right shoulder.

Claimant stated that concerning her left hip, before January 15, 2016, she had issues that started in the early 2000's. She testified that prior to January 15, 2016, she had received a diagnosis of bursitis and was given hydrocodone for occasional pain, which she took as needed, not daily. (Testimony) Her original hip pain started without an injury and she usually took over-the-counter meds for arthritis pain in her hip, knee and thumbs. She testified that she only occasionally took Hydrocodone for arthritis pain. (Testimony)

In 2004, claimant was seen at Mercy Beaverdale Family Practice with pain in her left hip and left buttock, although she was noted to have a normal gait and station at that time. (Ex. JE9-98) She complained again of left hip pain in June, 2004 and in June, 2008. (Ex. JE9, pp. 99, 101) In 2008, her left hip pain was described as trochanteric bursitis. (Ex. JE9-101) On May 12, 2010, claimant was noted to use Vicodin for her left hip pain. (Ex. JE9-102) On June 18, 2013, it is recorded that although claimant will occasionally take hydrocodone for left hip pain, she usually uses Aleve when it flares up, but she has had no problems recently. (Ex. JE9-103) Claimant was seen on March 24, 2015 and the left hip is mentioned along with other concerns as her chief complaint. (Ex. JE9-106)

In October, 2008, claimant was seen by Cory Drees, D.C., of Drees Chiropractic, and complained of pain in the sacroiliac area, lower lumbar, gluteal area, bilateral thighs and other locations. (Ex. A-1) Claimant continued to treat with Drees Chiropractic through June 2009. (Ex. A-13) She returned in June 2010 and again in April, 2011, with pain in the right sacroiliac, lower lumbar and gluteal area. (Ex. A-14, 15) Claimant continued to receive treatment off and on through July 2, 2014, primarily related to sacroiliac pain. (Ex. A, pp. 16-23)

In September, 2015, claimant was seen at Core Physical Therapy for her right hip, left leg and broken left foot after a fall down the stairs. (Ex. JE8-82) The records also note subjective pain in her left hip. (Ex. JE8-83) The chiropractor noted hip pain again in November, 2015. (Ex. JE8-85) Claimant also saw the chiropractor in February, 2016 after the fall at work, which is the basis of her petition in this matter.

(Ex. JE8-86) Her left hip pain is then described with an onset date of January 15, 2016, the date of the injury herein. (Ex. JE8-87) Claimant described her hip pain prior to January 15, 2016 as “mild,” not “constant” like it was after the work injury. (Testimony) She stated that before she fell, she could walk normally, but now she “walks like a penguin” due to limping from the pain. (Testimony)

### **Post-Injury Medical**

Claimant was taken by a co-worker to Mercy West Urgent Care. She was crying and in severe pain. Her right shoulder was dislocated and she was transferred by ambulance to the main Mercy Hospital Emergency Department. (Ex. JE2-5; Ex. JE1-1; Testimony) Claimant was placed under anesthesia and her shoulder was reset. (Ex. JE3-8; Testimony) Claimant was discharged home to follow up with an orthopedic physician. (Ex. JE3-8)

Claimant did not initially complain of any hip pain on January 15, 2016. (Ex. JE1-1) She testified that her dislocated shoulder caused excruciating pain and she was focused on that problem rather than her hip. (Testimony)

Claimant was seen by Steven Aviles, M.D., at Iowa Ortho on January 20, 2016, five days after her fall. (Ex. JE4-13) At that appointment, claimant filled out a patient history form, and a pain diagram that showed not only pain in her right shoulder, but also pain in her left hip. (Ex. JE4-10) Claimant testified that she told Dr. Aviles about her right shoulder and left hip pain. Dr. Aviles noted that diagnostic testing showed a “very small Bankart fracture” in claimant’s right shoulder. (Ex. JE4-13) He recommended physical therapy and an MRI to check for rotator cuff tearing. (Ex. JE4-15) He did not address the left hip.

On January 26, 2016, during her first physical therapy session, the therapist noted that claimant had “two episodes of instability/subluxation of her shoulder during therapy session when attempting to do AAROM,” and the therapist had to assist claimant with reduction of the glenohumeral joint. (Ex. JE5-38)

Claimant returned to see Dr. Aviles on January 27, 2016, who stopped PT and again requested an MRI. (Ex. JE4-17) The MRI was obtained on February 4, 2016, and claimant returned to Dr. Aviles on February 8, 2016. (Ex. JE6-62; Ex. JE4-18) The MRI did not show any evidence of a rotator cuff tear, although there was “extensive bruising of the rotator cuff with bursal fluid present.” (Ex. JE4-18) As a result of continued instability in the shoulder, Dr. Aviles recommended “surgery in the form of labral repair fracture stabilization and [a] possible Remplissage” procedure, but claimant “was not thrilled with the idea of surgery and wanted to continue to try to treat conservatively.” (Ex. JE4-19)

On March 9, 2016, claimant completed another patient history and again indicated she had pain in her right shoulder and left hip. (JE4, p. 20) Dr. Aviles specifically addresses the left hip pain and the onset of the problem as “0/15/2016.”

(Ex. JE4-22) He also stated that the “problem is worsening,” and “occurs constantly,” and “has been sore since her original accident back in January.” (Ex. JE4-22) Significantly, Dr. Aviles stated that the “[t]rauma occurred due to a fall while at work.” (Ex. JE4-22) Claimant testified that this was not the first time she reported left hip pain to Dr. Aviles, which is supported by her January 20, 2016 patient history form. (Ex. JE4-10) Dr. Aviles recommended physical therapy for her hip. (Ex. JE4-24) The patient status report dated March 9, 2016 indicates claimant’s condition is “Work Comp,” and described her condition as “[right] shoulder instability and [left] hip OA-severe.” (Ex. JE4-25)

Dr. Aviles described claimant’s left hip as “bone-on-bone osteoarthritis” and stated again that the “[t]rauma occurred due to a fall while at work.” (Ex. JE4-26) Claimant testified that she had never been told that her hip was “bone-on-bone” before.

Claimant testified that physical therapy improved her shoulder condition, but did not significantly improve her hip symptoms. (Testimony).

On June 6, 2016, claimant saw Dr. Aviles who reported that her right shoulder “was doing great until last week she felt her shoulder pop out and has had pain since then.” (Ex. JE4-29) Concerning her left hip, there was no change with pain occurring constantly. (Ex. JE4-29) Claimant testified that she had similar incidents with her shoulder since June, 2016, with the last episode in March or April, 2018. (Testimony) She stated that because of her shoulder instability, she has to be careful reaching overhead and behind her body.

In June, 2016, Dr. Aviles discussed hip replacement surgery with claimant, but she remained uninterested in surgery. He also told her that “work is not responsible for giving her a hip replacement,” but did not provide further explanation. (Ex. JE4-31) He suggested that she use over-the-counter anti-inflammatories for her hip. (Ex. JE4-31) Dr. Aviles continued the prior restrictions on the right shoulder of no lifting over 10 pounds and avoid work above shoulder height. (Ex. JE4-32)

On July 18, 2016, claimant saw Dr. Aviles for the last time and he released her from care subject to finishing physical therapy. He stated that concerning her left hip “she is doing great and may return to work without restrictions.” (Ex. JE4-35) This seems contrary to his prior recommendation for surgery the prior month. Further, claimant testified that she continued to have hip pain that was getting worse. (Testimony) Dr. Aviles assigned permanent restrictions for the right shoulder to avoid work above shoulder height. (Ex. JE4-35) Claimant stated that her shoulder condition was still painful and unstable.

On September 26, 2016, Dr. Aviles wrote a letter to the workers’ compensation insurance representative and stated that claimant reached maximum medical improvement (MMI) as of July 18, 2016, and that according the American Medical Association Guides to the Evaluation of permanent Impairment, Fifth Edition, (AMA

Guides) claimant sustained a “1% permanent impairment rating with regards to restrictions for her shoulder. She has a 0% impairment rating for her hip.” (Ex. JE4-37)

On March 27, 2017, claimant was seen by Jacqueline Stoken, D.O., for evaluation and treatment. (Ex. JE7-63) Dr. Stoken recommended physical therapy in addition to home stretching exercises. (Ex. JE7-64) Claimant received therapy at Core Physical Therapy. (Ex. JE8, pp. 87-97) Claimant reported that the therapy was temporarily helpful. (Ex. JE8-97) Dr. Stoken suggested that claimant resume normal activities as tolerated and discussed pain management techniques with claimant, and continued her medication as needed. (Ex. JE7-64) Claimant saw Dr. Stoken again on February 19, 2018, and she was noted to be overall, “much worse.” (Ex. JE7-66) Her left low back, left hip and left knee pain were now constant. (Ex. JE7-66) Dr. Stoken administered a left hip injection, and recommended a right shoe lift, having found that claimant’s left leg was approximately 1 inch longer than her right leg. (Ex. JE7, pp. 66-68)

On April 10, 2018, claimant returned to Dr. Stoken who reported that she was “much better,” although her pain was described as constant in her left low back, left hip and left knee. (Ex. JE7-73) She diagnosed claimant’s left hip condition as greater trochanteric bursitis. (Ex. JE7-74) She last saw Dr. Stoken on April 25, 2018, and her pain was described as somewhat worse. (Ex. JE7-77)

On August 28, 2018, claimant was seen by Sunil Bansal, M.D., at the request of claimant’s attorney for the purpose of an independent medical examination (IME). (Ex. 1-1) Dr. Bansal reviewed medical records, discussed the fall on January 15, 2016 and her prior medical condition including her left hip issues that started about 15 to 18 years earlier. He discussed claimant’s current condition and her job duties. (Ex. 1, pp. 1-12) Dr. Bansal conducted a physical examination of claimant including the right shoulder and left hip and recorded various test results, including range of motion measurements and sensation testing results. (Ex. 1, p. 12-14)

Dr. Bansal in his IME report, opined that claimant’s right shoulder diagnosis was: dislocation, glenoid process fracture, instability, Hill-Sachs lesion, and partial rotator cuff tear. (Ex. 1-15) There is no discussion of the basis for the diagnosis, which is generally consistent with prior diagnoses claimant received, except for the additional conclusion that claimant has a partial rotator cuff tear. Concerning claimant’s left hip, Dr. Bansal diagnosed claimant with “Aggravation of left hip osteoarthritis.” (Ex. 1-15) He found the same to be related to her fall on ice at work. (Ex. 1-16, 17) He agreed with Dr. Aviles that claimant reached MMI for her right shoulder on July 18, 2016. Regarding her left hip, he recommended a total replacement and stated that if she chose not to have surgery, she would be at MMI as of his examination on August 28, 2018. (Ex. 1, pp. 15-16) As stated below, claimant is scheduled for hip surgery after this arbitration hearing. Therefore, I find that Dr. Bansal opined that claimant is not yet at MMI for the left hip. Regarding permanent impairment, Dr. Bansal assigned 5 percent to the right upper extremity, which he converted to 3 percent to the body as a whole. (Ex. 1-19) The rating is based on reduced range of motion compared to the left shoulder and the AMA

Guides, Figures 16-40 through 16-46. Dr. Bansal assigned 8 percent whole person impairment to her left hip based on reduced range of motion and the AMA Guides, Table 17-9. However, as found above, Dr. Bansal does not believe claimant is at MMI for the hip and recommends total hip replacement. He assigned restrictions of no lifting over 10 pounds and no lifting above shoulder level for the right arm and no frequent reaching with the right arm. (Ex. 1-20) He assigned restrictions of no frequent kneeling, bending, squatting, climbing, twisting, prolonged standing or walking more than 10 minutes, and avoiding multiple steps, stairs, ladders and working on uneven terrain.

On October 16, 2018, claimant was seen by Matthew DeWall, M.D., of Des Moines Orthopedic Surgeons, P.C. (DMOS) for a second opinion concerning her left hip. (Ex. JE10) Claimant testified that she selected Dr. DeWall. (Testimony) Dr. DeWall stated that claimant had been seen by Dr. Isaacson of DMOS for her left hip pain and was diagnosed with "likely avascular necrosis." (Ex. JE10-112) Claimant reported that she cannot "do anything in terms of activity such as walking or standing without severe pain." (Ex. JE10-112) She reported that her severe pain is compelling her to have the surgery. Dr. DeWall diagnosed, "Left hip degenerative change, possible avascular necrosis," and stated that arthroplasty is reasonable with failure of conservative care. (Ex. JE10-113) He stated that in his opinion, "this would not necessarily be work related," but acknowledges that he is seeing claimant "one time nearly 2-1/2 to 3 years after such an injury." (Ex. JE10-113) He discussed with claimant, the possible causes of avascular necrosis. He stated that the "possible causes," are sometimes "completely idiopathic," but "it is not typically posttraumatic." (Ex. JE10-113) Dr. DeWall then also stated that this could be "just severe osteoarthritis," and "again, I would not expect to see such aggressive or advanced changes from posttraumatic arthritis over this time course." (Ex. JE10-113)

It appears to the undersigned that Dr. DeWall is considering the question of whether the January 15, 2016 fall caused claimant's left hip condition. It does not appear that he considered the question of whether the fall materially aggravated or lighted up claimant's underlying condition. Therefore, I give little weight to Dr. DeWall's causation opinion concerning whether the fall may have aggravated her underlying condition.

On November 1, 2018, Dr. Aviles authored a letter to defense counsel concerning claimant. (Ex. B-24) Dr. Aviles confirmed that after reviewing Dr. Bansal's IME report, that his opinion concerning causation has not changed, although he changed his opinion regarding future medical care for her shoulder, finding that claimant has "not shown any instability over the last couple years and, for that reason, I do not believe that she requires any further care regarding her shoulder." (Ex. B-25) However, Dr. Aviles also reaffirmed his diagnosis "of right shoulder instability with small Bankart fracture that is likely healed at this point." (Ex. B-25) Also, the notion that claimant's shoulder has not shown instability over the last couple years, is contrary to claimant's testimony that her last episode of her shoulder feeling significantly unstable and threatening to "pop out" was in March or April, 2018. (Testimony) Further, Dr. Aviles stated previously that claimant's decision to not have surgery means that "she

can continue to dislocate and that can have disastrous consequences.” (Ex. JE4-19) This supports claimant’s testimony of continued dislocations and instability even though claimant admitted that she has not required medical assistance to reduce or reset her shoulder due to such an incident since July, 2016. Dr. Aviles then stated that “I can remove the restriction of no overhead activity, as she has done so well.” (Ex. B-25) He stated that claimant can return to work as tolerated. Dr. Aviles opined that the work injury “has absolutely no relationship to her left hip arthritis. I do not believe it has materially or permanently aggravating [sic] her left hip arthritis. She clearly had this problem that was persistently giving her trouble every single year.” (Ex. B-25) He also stated that claimant had been taking medication for hip pain just prior to her accident. However, claimant testified that she was not taking medication and was not experiencing hip pain near the time prior to the fall. (Testimony)

Claimant is scheduled for hip surgery on December 12, 2018, a few weeks after the hearing in this matter. She testified that she tried to avoid the surgery, receiving chiropractic care, acupuncture, cortisone shots, osteopathic manipulations, exercise, getting a lift fitted for her shoe, and she lost 60 pounds trying to relieve the pain. However, claimant testified that she now cannot walk without a cane or a crutch. Claimant testified that the treatments she tried were only temporarily helpful.

Claimant testified that she continued to work during the time of her treatment with Dr. Aviles and she has not missed any work due to the injury. (Testimony) Claimant stated that she continued to work for the defendant employer at the time of the hearing and has no plans to stop working because she loves her job. (Testimony) Her condition does not prevent her from interacting with clients, which she described as the most important part of her job. (Testimony)

Claimant has changed her work office layout and now keeps supplies below shoulder level. She downsized to a smaller satchel and no longer carries a large briefcase. Her car, which she described as her second office, holds many supplies, but she cannot reach into the back seat from the driver’s seat anymore. She now has to stop the car, get out and retrieve the items through the back door. Claimant’s co-workers help her by carrying equipment to events and they help set up tables, tents and games. (Testimony) She now struggles running the promotional games because of the long periods of time on her feet.

Claimant testified that her income has gone down a bit. She stated that the highest commission is paid on acquiring new customers, and because she physically works slower, she does not generate new business like she would like to. There is no medical record or other evidence that directly relates a decreased income to “moving slower.” Nor is there any documentary evidence of a reduced income. However, claimant testified that she has been “talked to” about her lower production. (Testimony) She believes she is not making as many new outside calls as she should. She stated that her pain and decreased speed of movement make her less flexible to react to situations that come up. She did not have any particular examples of this or how it has actually caused any reduction in her income.



Claimant testified that she has trouble sleeping and sometimes feels exhausted. (Testimony)

Claimant credibly described her hip condition as “occasionally bothersome” before January 15, 2016, and that since her fall, she has “constant pain” and difficulty walking that she did not experience before.

Considering all of the medical evidence, including the expert medical opinions, claimant’s testimony, and her condition prior to and after the work injury, I find that claimant’s left hip injury was materially aggravated by the January 15, 2016 work injury. This finding is supported by the medical opinion of Dr. Bansal. It is also supported by claimant’s testimony that her left hip condition significantly deteriorated after the January 15, 2016 fall and her pain changed from bothersome to constant. Although, claimant clearly has a long history of left hip issues, she credibly testified that prior to the fall she was not experiencing pain, could walk normally, and she was not taking any medication. Within days after the fall, claimant reported increased hip pain. Dr. Aviles initially related the hip pain to the fall, and later changed his mind. Dr. Aviles recommended hip replacement surgery on June 6, 2016. (Ex. JE4-31) There is no evidence that claimant ever received a recommendation for hip replacement surgery prior to January 15, 2016.

The parties stipulated that Temporary Total Disability/Healing Period was not in dispute. (Hearing Report, p. 1)

### CONCLUSIONS OF LAW

1) Whether the left hip injury is causally related to the work injury and extent of permanent disability.

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); Dunlavy 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).

When an expert opinion is based upon an incomplete history, the opinion is not necessarily binding upon the commissioner. The commissioner as trier of fact has the duty to determine the credibility of the witnesses and to weigh the evidence, together

with the other disclosed facts and circumstances, and then to accept or reject the opinion. Dunlavey v. Economy Fire & Casualty Co., 526 N.W.2d 845 (Iowa 1995).

I have found above for the reasons there stated that claimant's left hip was materially aggravated by the fall on January 15, 2016 and her hip is therefore causally related to her work injury. I have accepted the causation opinion of Dr. Bansal as the most well supported expert opinion when considering the medical record and claimant's testimony.

Having found that the left hip is causally related to the work injury, I note that Dr. Bansal does not believe that claimant reached MMI, given claimant's plan to proceed with surgery on December 12, 2018, just a few weeks after the hearing. Therefore, I found above that Dr. Bansal would not place her at MMI. I agree and conclude that claimant is not at MMI for the left hip.

Given the fact that claimant is not yet at MMI for the left hip and therefore for the work injury of January 15, 2016, the question of extent of permanent partial disability is not ripe for determination and cannot be decided at this time. This issue is not bifurcated, but it is determined that permanent partial disability is not yet ripe and the same may be addressed by claimant through a timely filed review-reopening petition.

2) Whether claimant is entitled to payment of medical bills.

Claimant seeks payment/reimbursement of medical bills related to the left hip as contained in Exhibit 3, and titled Medical Bill Summary, which includes bills for services provided by Dr. Stoken, Core Physical Therapy and Iowa Diagnostic Imaging Lakeview.

The employer shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance, and hospital services and supplies for all conditions compensable under the workers' compensation law. The employer shall also allow reasonable and necessary transportation expenses incurred for those services. The employer has the right to choose the provider of care, except where the employer has denied liability for the injury. Section 85.27. Holbert v. Townsend Engineering Co., Thirty-second Biennial Report of the Industrial Commissioner 78 (Review-Reopening October 16, 1975).

Prudent persons customarily rely upon their physician's recommendation for medical care without expressly asking the physician if that care is reasonable. Proof of reasonableness and necessity of the treatment can be based on the injured person's testimony. Sister M. Benedict v. St. Mary's Corp., 255 Iowa 847, 124 N.W.2d 548 (1963).

It is said that "actions speak louder than words." When a licensed physician prescribes and actually provides a course of treatment, doing so manifests the physician's opinion that the treatment being provided is reasonable. A physician practices medicine under standards of professional competence and ethics. Knowingly

providing unreasonable care would likely violate those standards. Actually providing care is a nonverbal manifestation that the physician considers the care actually provided to be reasonable. A verbal expression of that professional opinion is not legally mandated in a workers' compensation proceeding to support a finding that the care provided was reasonable. The success, or lack thereof, of the care provided is evidence that can be considered when deciding the issue of reasonableness of the care. A treating physician's conduct in actually providing care is a manifestation of the physician's opinion that the care provided is reasonable and creates an inference that can support a finding of reasonableness. Jones v. United Gypsum, File No. 1254118 (App. May 2002); Kleinman v. BMS Contract Services, Ltd., File No. 1019099 (App. September 1995); McClellon v. Iowa Southern Utilities, File No. 894090 (App. January 1992). This inference also applies to the reasonableness of the fees actually charged for that treatment.

Claimant is entitled to an order of reimbursement only if he has paid treatment costs; otherwise, to an order directing the responsible defendants to make payments directly to the provider. See, Krohn v. State, 420 N.W.2d 463 (Iowa 1988). Defendants should also pay any lawful late payment fees imposed by providers. Laughlin v. IBP, Inc., File No. 1020226 (App., February 27, 1995).

The Court in Bell Bros. stated:

We do not believe the statute can be narrowly construed to foreclose all claims by an employee for unauthorized alternative medical care solely because the care was unauthorized. Instead, the duty of the employer to furnish reasonable medical care supports all claims for care by an employee that are reasonable under the totality of the circumstances, even when the employee obtains unauthorized care, upon proof by a preponderance of the evidence that such care was reasonable and beneficial. In this context, unauthorized medical care is beneficial if it provides a more favorable medical outcome than would likely have been achieved by the care authorized by the employer.

Bell Bros. Heating and Air Conditioning v. Gwinn, 779 N.W.2d 193, 206 (Iowa 2010).

I have found above that Dr. Stoken provided care related to claimant's left hip, including an injection and that said treatment was helpful, albeit temporarily. I conclude that the treatment with Dr. Stoken was reasonable and beneficial and the temporary benefit was more favorable for claimant than would likely have been achieved by authorized care alone. Therefore, applying Bell Bros., I conclude that it is appropriate to require defendant pay the medical bills in claimant's exhibit 3 regarding care provided by Dr. Stoken.

I have found above that claimant attended physical therapy at Core Physical Therapy upon a referral from Dr. Stoken. She attended therapy from April 4, 2017 through December 5, 2017. (Ex. 3, unnumbered page 26-27; Ex. JE87-97) The

records indicate that claimant had some benefit from the treatment. I conclude that the treatment with Core Physical Therapy was reasonable and beneficial and the benefit claimant received was more favorable for claimant than would likely have been achieved by authorized care alone. Therefore, applying Bell Bros., I conclude that it is appropriate to require defendant pay the medical bills in claimant's exhibit 3 regarding care provided by Core Physical Therapy.

Considering the bill from Iowa Diagnostic Imaging Lakeview in the amount of \$88.00, for date of service of May 9, 2018, the bill itself gives no indication of the service provided. Also, the undersigned can find no corresponding medical record, therefore claimant has failed to show that the bill is causally related to the work injury or that the same was reasonable and necessary. Defendants are not obligated to pay this bill.

3) Whether claimant is entitled to full reimbursement for an independent medical evaluation (IME) with Dr. Bansal.

In this case, Dr. Bansal performed an IME on August 28, 2018 and issued a report thereafter, the cost of the IME was \$3,883.00. Defendants paid \$2,589 or 2/3 of the bill. (Hearing report, p. 2)

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

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

Dr. Aviles opinion concerning permanent impairment regarding the right shoulder and left hip predated Dr. Bansal's IME and defendants agree claimant met the requisite of an employer retained physician opinion prior to claimant's IME as required in Iowa Code section 85.39. (Defendant's Post-Hearing Brief, p. 14)

However, defendants argue that Dr. Bansal also evaluated claimant's left shoulder, right elbow, left elbow, back, right hip, left knee and right knee. Dr. Bansal did examine other parts of claimant's body beyond the right shoulder and left hip alone, however, I conclude that it was appropriate for him to examine the opposite body part when evaluating an injured workers disability. For example, it was appropriate to assess range of motion of the right shoulder by considering the range of motion of the

unaffected left shoulder, per the instructions from the AMA Guides. The same applies to the hip injury. However, Dr. Bansal also assigned a permanent impairment rating for the unclaimed left knee.

I conclude that the portions of the IME that relate to the unclaimed left knee, and other unclaimed portions of the body, except for the evaluation related to the opposite shoulder and hip as discussed above, constitute approximately one third of the report and that it is appropriate that defendants reimburse two thirds of the IME expense, which they have done. The remaining portions of the examination and report are not related to the claimed injury.

4) Costs

The final issue is costs. Assessment of costs is a discretionary function of this agency. Iowa Code section 86.40. Costs are to be assessed at the discretion of the deputy commissioner or workers' compensation commissioner hearing the case. 876 IAC 4.33. I conclude that defendant shall pay costs of \$100.00 representing the filing fee.

**ORDER**

**IT IS THEREFORE ORDERED:**

Defendants shall reimburse claimant for her out-of-pocket medical expenses set forth in claimant's exhibit 3, the Medical Bill summary, with the exception of the bill from Iowa Diagnostic Imaging Lakeview in the amount of eighty-eight and no/100 dollars (\$88.00), for date of service of May 9, 2018.

Defendants shall pay costs of one hundred and no/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 21<sup>st</sup> day of March, 2019.



TOBY J. GORDON  
DEPUTY WORKERS'  
COMPENSATION COMMISSIONER

Copies to:

David D. Drake  
Attorney at Law  
1415 Grand Avenue  
West Des Moines, IA 50265  
[ddrake@lidd.net](mailto:ddrake@lidd.net)

L. Tyler Laflin  
Garrett Lutovsky  
Attorneys at Law  
1350 Woodmen Tower  
Omaha, NE 68102  
[tlaflin@ekoklaw.com](mailto:tlaflin@ekoklaw.com)  
[glutovsky@ekoklaw.com](mailto:glutovsky@ekoklaw.com)

TJG/kjw

**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 in writing and received by the commissioner's office 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 a legal holiday. The notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 1000 E. Grand Avenue, Des Moines, Iowa 50319-0209.