BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

NANCY WILCOX,

Claimant,

vs.

MARRIOTT HOTEL & CONFERENCE CENTER,

Employer,
Self-Insured,
Defendant.

File Nos. 5056550, 5058024

ARBITRATION

DECISION

Head Notes: 1101, 1106, 1108, 1400, 2206, 2601.20

STATEMENT OF THE CASE

Nancy Wilcox, claimant, filed petitions in arbitration seeking workers' compensation benefits against Marriott Hotel & Conference Center, self-insured employer, for a disputed work injury.

This case was heard on November 2, 2017, in Des Moines, Iowa. The case was considered fully submitted on December 7, 2017 upon the simultaneous filing of briefs.

The record consists of joint exhibits 1-9, claimant's exhibit 1, and defendant's exhibits A-C and testimony of the claimant.

ISSUES

File No. 5056550. Date of Injury: October 1, 2014.

1. Whether claimant sustained an injury on October 1, 2014, which arose out of and in the course of employment;
2. Whether the alleged injury is a cause of temporary disability and, if so, the extent;
3. Whether the alleged injury is a cause of permanent disability and, if so,;
4. The appropriate commencement date of permanent disability benefits;
5. Whether the alleged disability is a scheduled member disability or an unscheduled disability;

6. The extent of claimant's scheduled member/industrial disability;

7. Whether there is a causal connection between claimant's injury and the medical expenses claimed by claimant;

File No. 5058024. Date of Injury: November 7, 2016.

1. Whether an employer-employee relationship existed at the time of the alleged injury;

2. Whether claimant sustained an injury on November 7, 2016, which arose out of and in the course of employment;

3. Whether the alleged injury is a cause of temporary disability and, if so, the extent;

4. Whether the alleged injury is a cause of permanent disability and, if so,;

5. The appropriate commencement date of permanent disability benefits;

6. Whether the alleged disability is a scheduled member disability or an unscheduled disability;

7. The extent of claimant's scheduled member/industrial disability;

8. Whether there is a causal connection between claimant's injury and the medical expenses claimed by claimant;

9. Whether claimant is entitled to reimbursement of an independent medical examination (IME) according to Iowa Code § 85.39.[1]

STIPULATIONS

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.

The parties stipulate that claimant was off work from October 1, 2014, through November 3, 2014, returning to work on November 4, 2014. She was then off of work again from February 2, 2017 through her return to work.

[1] Claimant asserts a penalty claim in her brief, but no penalty claim was identified on either hearing report and is therefore not considered.

At the time of her October 1, 2014, alleged injury, her gross weekly wages were $425.00. On November 7, 2016, her gross weekly wages were $471.00. At all times material hereto, claimant was single and entitled to one exemption.

The parties agree claimant's weekly benefit rates are as follows:

October 1, 2014: $272.78

November 7, 2016: $299.63

FINDINGS OF FACT

Claimant was a 65-year-old person at the time of the hearing. At all times material hereto, claimant was single with no dependents.

Her educational background includes high school, graduating in 1970.

Since high school, claimant's work history includes work in a microbiology lab as a quality control inspector for Rogers Corporation in Arizona performing tests on items and conducting lab experiments to ensure that the standards were met.

She returned to Iowa in 1976 and began work at a medical facility delivering medications needed for anesthesia. At the same time she worked nights waitressing at the Lark Supper Club.

She was one of the first employees of Rockwell working until 1989 as a quality control expert for GPS boxes. She helped to open the Dillard's store in 1998 and was a sales representative for pre-paid legal services making presentations to corporations. Claimant has factory, retail, sales, and some clerking experience both in the recent and remote past.

At the time of her injury, she was employed by the defendant as a concierge and by Walmart sixteen hours per week in the garden center lifting plants and bags of plant material. She began working for defendant employer in the 2000s.

As a concierge for the defendant employer, claimant used the telephone and keyboard. She pushed a cart with food items and performed light stocking duties.

After her November 2016 injury, claimant was not able to meet the physical requirements of her position at Walmart. She was let go and will not be able to return to Walmart until she can lift fifty pounds. At the time of her injury, she was paid $14.75 an hour for her work at Walmart.

Presently, she is working forty hours per week for defendant employer. She is paid $11.88 an hour.

On October 1, 2014, claimant was walking down a hall at work when she fell. She remembers her foot sticking and her leg going out beneath her. She fell forward, tried to stop herself from falling with the left hand, rolled and hit her shoulder.

Betty Wilks, a temporary worker, came to assist her. After claimant was helped to her feet, she returned to loss prevention and reported her injury to Barb Collins. She was then escorted to HR where the manager from the front desk was called.

Three statements were taken shortly after the fall. The first was of Katie Yanda, taken on October 2, 2014, who was the operations manager at the same Marriott location as the claimant. (Ex. C:11) Ms. Yanda was present in the office when claimant reported the injury. She retrieved ice for the claimant's knee and went to inspect the area. Ms. Yanda stated that the floor was dry and not sticky. (Ex. C:13)

The second was of Betty Wilks, a temporary worker employed by Labor Finders. She was present at the time of the injury, but her back was turned when claimant fell. She stated that she did not know if the floor was sticky, wet, or otherwise damaged. She helped claimant off the floor and proceeded to her break. (Ex C:16) Ms. Wilks had walked on the same area, did not feel any impediments and did not have any problems walking in the area. (Ex C:16)

Several months later, a statement of Michelle Couch was taken. (Ex. C:18) Ms. Couch was an employee at the time that the fall occurred. She stated that the floor was mopped nightly or as needed. She visually inspected the floor but did not see anything that would indicate it was dirty or sticky. She did not touch the floor with her hand. (Ex. C:20)

Claimant's claim was denied on October 6, 2014, on the basis that "in order for an incident to be considered compensable, one must be at a higher risk than the general public." (EX. A: 4)[2] Her shoulder claim was denied on December 21, 2016, based on the medical records of Daniel C. Fabiano, M.D. (Def. Ex. A:5)

On October 1, 2014, claimant was seen by Greg Michael Singer, D.O. for knee and hip pain following the trip and fall at work. (JE 1) She told Dr. Singer that "she was walking and turned to look around when her fit [sic] did not move." (JE 1:2) She was put in a knee immobilizer for a fractured patella and referred to Steindler Orthopedics where she was seen by Michael M. Durkee, M.D. on October 6, 2014. (JE 1:2; JE 2:1) She described falling and landing directly on her knee, hitting her hip and wrist. (JE 2:1) Dr. Durkee applied a cast and claimant was given a wheeled walker to help with ambulation. (JE 2:2) Claimant returned to work November 20, 2014, and was placed on light duty work answering telephones. She was not able to return to her work at Walmart

[2] This is an incorrect legal standard. The "higher risk" doctrine was explicitly rejected in 2002 in *Floyd v. Quaker Oats*, 646 N.W.2d 105, 108 (Iowa 2002) and the rejection was re-affirmed in 2009 in *Lakeside Casino v. Blue*, 743 N.W.2d 169 – (Iowa 2007).

until December 23, 2014[3]. She continued to work at Walmart until November 7, 2016, when a refrigerator shelf in the concierge lounge fell. She reached for the shelf and felt pain in her shoulder. Her condition improved by the December 8, 2014, visit although she still had pain at night and became fatigued after walking without a brace. (JE 2:4)

In physical therapy notes, she had been deemed to have "met all goals" and was pain free. (JE 3:4) She was released to return to work at Walmart on December 15, 2014. (JE 3:4)

She was seen at the University of Iowa Hospitals and Clinics by Rachael R. Dirksen, M.D. for a history of back pain. (JE 4) She described pain in her left knee but mentioned no shoulder issues. (JE 4)

Dr. Durkee's plan was to release claimant without restrictions on January 1, 2015. (JE 2:6) In a medical record from the UIHC, claimant reported working 56 hours per week, working two jobs. (JE 4:2) Her active problem list included low back pain, hearing loss, and right knee pain. (JE 4:2)

She returned to Dr. Durkee's office on April 6, 2015, for a follow-up of her knee pain. She described her knee as tender and swollen. She was having difficulty performing tasks of her job that required squatting, kneeling or climbing a ladder. (JE 2:7) On examination, she exhibited pain and crepitus on the left, but not the right. (JE 2:8) He imposed new restrictions of no lifting greater than 20 pounds for the next six months as well as no kneeling, squatting and limited use of ladders. (JE 2:8) He determined she was at maximum medical improvement (MMI).

On November 17, 2015, she returned to Steindler Orthopedic Clinic and was seen by Mark C. Mysnyk, M.D. (JE 2:9) She reported hip pain as a result of overcompensation. On examination, she had slightly reduced range of motion on the left knee and some tenderness on the left greater trochanter. (JE 2:10) Dr. Mysnyk believed the knee pain was related to articular cartilage damage and that there were additional modalities that could be prescribed to help alleviate claimant's pain such as therapy, a higher dose of naproxen, and the use of a brace. (JE 2:10) She refused the brace because of cost. (JE 2:11)

She returned with continued complaints of left knee pain on January 8, 2016. (JE 2:12) Dr. Mysnyk suggested injections and a possible exploratory arthroscopy. Claimant was not interested and thus, Dr. Mysnyk found her at MMI. (JE 2:13)

He could not say whether the hip pain was connected with the knee injury. (JE 2:13)

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[3] Some records indicate she returned to full-time duty at Walmart on January 1, 2015, per Dr. Durkee's orders. (JE 2:7)

On February 3, 2016, Dr. Mysnyk authored an opinion letter regarding claimant's left knee injury. (JE 2: 15) He concluded that claimant sustained a displaced fracture of her left patella on October 1, 2014. He ascribed her MMI date "somewhat arbitrarily" as January 8, 2016, the last date he saw her and assigned a 7 percent lower extremity rating. (JE 2:15) He reiterated he could not find a connection, to a reasonable degree of medical certainty, between the fall and her hip pain. (JE 2:15) As for restriction, Dr. Mysnyk recommended that she limit her bent knee activities such as squatting or kneeling.

Before claimant's alleged injury on November 7, 2016, however, she had complaints of right shoulder pain. In July of 2016, claimant was seen at University of Iowa Hospitals and Clinics for shoulder pain which she attributed to the fall in October 2014. (JE 4:3) An x-ray of claimant's shoulder revealed mild degenerative changes. (JE 1:12) Claimant also established new care with Meghan M. Cooley, ARNP for her shoulder pain. Claimant attributed the pain to the October 2014 fall. (JE 5)

On September 23, 2016, she returned to Steindler Orthopedic Clinic and was seen by David J. Steinbronn, M.D. for right shoulder pain. (JE 2:17) She thought that she may have struck her right shoulder during the same fall in October 2014, but did not feel the pain until 2016. (JE 2:17) An MRI conducted on September 8, 2016, showed a full-thickness supraspinatus tear. (JE 2:18; JE6) She was diagnosed with a complete rotator cuff tear of the right shoulder. (JE 2:18) Dr. Steinbronn recommended conservative options such as medications, physical therapy, and steroid injections. (JE 2:18)

On October 7, 2016, she was seen by Dr. Fabiano for pain in the right shoulder. (JE 7:2) She stated that the pain started gradually and not as a result of trauma. (JE 7:1) A reverse TSA was discussed. (JE 7:4)

On November 7, 2016, claimant was seen by Michael H. Wallace, M.D. for history of a torn rotator cuff. (JE 1:4) The history given was that claimant was injured at work after she caught a shelf that had collapsed. (JE 1:4) She had a history of a torn rotator cuff and chronic right shoulder pain.

"She denies any direct trauma or injury to the shoulder, more a jarring from catching the shelf in her right hand," Dr. Wallace wrote. (JE 1:4)

She rated her pain a 10 on a 10 scale. (JE 1:4) On examination, she exhibited tenderness to palpation over the lateral shoulder and right upper trapezius. She had reduced range of motion when trying to elevate her arm along with right shoulder pain. (JE 1:5) Dr. Wallace diagnosed her with an exacerbation of chronic right shoulder/rotator cuff pain. (JE 1:5)

Claimant was sent to Ernest M. Perea, M.D. (JE 1:7) Dr. Perea noted that the claimant's right shoulder had not been the same since the 2014 fall. Claimant described numbness down her right arm from the right proximal humerus and anterolateral right

shoulder along with weakness in the right arm and reduced range of motion. (JE 1:10) Her grip was normal during testing.

On examination, she had pain on palpation and reduced range of motion. There was evidence of crepitus and severe pain with passive range of motion. (JE 1:10) Dr. Perea recommended an MRI as soon as possible. He allowed her to return to work with restrictions. (JE 1:11)

Dr. Fabiano diagnosed claimant as exacerbating a chronic pain in her right shoulder. (JE 1:5) She was fitted with a sling, given a set of home exercises, and instructed to continue with her existing prescriptions of pain killers and anti-inflammatories.

She was then seen on October 10, 2016, at Mercy Occupational Health by Dr. Perea. (JE 1:9) Dr. Perea's examination revealed decreased range of motion, pain with range of motion and palpation, and crepitus. (JE 1:10) She was returned to work with restrictions. (JE 1:8)

Claimant returned to Dr. Fabiano's office on December 6, 2016. They again discussed a TSA as a possible solution to her pain.[4] (JE 7:8) When Dr. Fabiano was asked about causation, he wrote that he saw her two years after the alleged work injury and therefore did not know the answer. (JE 7:10)

On January 13, 2017, claimant was seen again by Dr. Steinbronn, as the injections had done little to alleviate her pain. (JE 2:20) His reading of the second MRI, dated November 14, 2016, was that she had a mild atrophy of the muscle belly along with the previous tear. (JE 2:20; 6:2) He recommended that she undergo a surgical repair. (JE 2:21)

Claimant went ahead and underwent surgery on February 2, 2017. (JE 8)

Post-surgery, she reported improvement. Her pain was mild with a rating of 1 on a 10 scale. Her motion was improving as well. Dr. Steinbronn recommended additional physical therapy. (JE 2:25) On May 29, 2017, Dr. Steinbronn found that claimant had improved range of motion, good strength, and minimal pain. (JE 2:28) He returned her to activities as tolerated on July 28, 2017. (JE 2:30)

In a letter dated February 28, 2017, Dr. Steinbronn agreed to the following:

> As it relates to her workers' compensation claim, you stated that it is your opinion, based upon a reasonable degree of medical certainty that the job requirements that Ms. Wilcox performed over the years at Marriott represents a substantial causal, aggravating or accelerating factor in the

[4] TSA was also previously discussed on October 7, 2016 with Dr. Fabiano. (JE 7:4)

> symptoms, that caused her to seek medical care and treatment, which eventually resulted in the 2/2/2017 surgery that you performed.

(JE 2:31)

Dr. Perea visited claimant's work site. He concluded that the height of the shelf that claimant complained of did not require her to extend fully and that her garden associate work at Walmart required more extensive overhead lifting and a greater risk factor for shoulder strain than her employment with Marriott. (JE 1:19) He found that claimant's description of catching a refrigerator shelf above her shoulder was not consistent with the work conditions. (JE 1: 21) "If the shelf were to fall," Dr. Perea wrote, "Ms. Wilcox would have had partially flexed elbows (due to space constraint) and her elbows would have been in a close to torso position and palms supinated, actually stabilizing her shoulders." (JE 1:21)

In a letter dated June 12, 2017, Dr. Perea opined that claimant did not have any subjective reports of pain regarding her right shoulder in her initial treatment following the October 1, 2014, injury. Further, he concluded that "the insidious onset of right shoulder pain follows a degenerative pattern, not a traumatic pattern." (JE 1: 18)

Brian Crites, M.D. performed an IME on May 3, 2017. (JE 9) He described her examination as follows:

> **Left Knee:** Examination of the left knee shows normal overlying skin with no lesions, rash, or break. She has no visible evidence of muscular atrophy in the left lower extremity. Ligamentous exam of the left knee reveals a firm endpoint on Lachman without anterior translation. She has a firm endpoint on posterior drawer testing without increased posterior translation. She is stable to varus and valgus stress in full extension and 30 degrees of flexion. The patellofemoral joint is tender to palpation with minimal amount of crepitus. Range of motion of the joint measures 0-0-135.
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> **Right Shoulder:** Examination of the right shoulder reveals full range of motion of her cervical spine without spinous process tenderness. She has normal sensation to light touch over the C5 through T1 distributions in the right upper extremity. She has 4/5 rotator cuff strength in abduction and external rotation. Examination of her shoulder reveals mild tenderness to palpation over the AC joint of the right shoulder with positive impingement signs. She has forward flexion to 150 degrees and extension to 60 degrees. She has abduction of 110 degrees and adduction to 60 degrees. She has external rotation to 80 degrees with the arm abducted and internal rotation to 70 degrees with the arm abducted.

(JE 9:4) He did not find her to be at MMI for her shoulder, but assigned a 4 percent whole body impairment for the injury and a 3 percent whole body (or 7 percent lower

extremity) impairment for the left knee. (Ex. 9:4) He concluded that the left knee was directly related to the fall at work but that there was insufficient evidence that the October 2014 incident caused right shoulder injury but that the November 2016 incident "clearly exacerbated a pre-existing rotator cuff tear/condition." (JE 9:5) He recommended no additional treatment for the left knee and home exercises to maximize her range of motion. (JE 9:5)

For restrictions, he agreed with those suggested by Dr. Mysnyk of no more than rare kneeling or squatting, and for her shoulder, no repetitive overhead lifting and no lifting greater than 20 pounds above shoulder height. (JE 9:6) Despite a brief reference to her employment with Walmart, Dr. Crites does not discuss what, if any, impact her work at Walmart would have on claimant's physical status.

Claimant testified she had no accidents or falls outside of her work. She intends to look for another job. Currently, she takes Aleve and some prescription pain medication.

She has grandkids but cannot participate in sporting events with them. She has difficulty sleeping due to the pain in her right shoulder and knee. When her knee swells, she is forced to ice or elevate it.

Defendant argues that claimant returned to her job, full-time with no change of responsibilities.

Conversely, claimant testified that she does her job within her restrictions although she sometimes asks for help from co-workers and that her employer has moved a number of things lower so that she does not have a difficult time reaching. Claimant also testified that cashiering at Walmart has caused pain in her knee.

CONCLUSIONS OF LAW

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

The claimant has the burden of proving by a preponderance of the evidence that the injury is a proximate cause of the disability on which the claim is based. A cause is proximate if it is a substantial factor in bringing about the result; it need not be the only cause. A preponderance of the evidence exists when the causal connection is probable rather than merely possible. George A. Hormel & Co. v. Jordan, 569 N.W.2d 148 (Iowa 1997); Frye v. Smith-Doyle Contractors, 569 N.W.2d 154 (Iowa App. 1997); Sanchez v. Blue Bird Midwest, 554 N.W.2d 283 (Iowa App. 1996).

A personal injury contemplated by the workers' compensation law means an injury, the impairment of health or a disease resulting from an injury which comes about, not through the natural building up and tearing down of the human body, but because of trauma. The injury must be something that acts extraneously to the natural processes of nature and thereby impairs the health, interrupts or otherwise destroys or damages a

part or all of the body. Although many injuries have a traumatic onset, there is no requirement for a special incident or an unusual occurrence. Injuries which result from cumulative trauma are compensable. Increased disability from a prior injury, even if brought about by further work, does not constitute a new injury, however. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); Ellingson v. Fleetguard, Inc., 599 N.W.2d 440 (Iowa 1999); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995); McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985). An occupational disease covered by chapter 85A is specifically excluded from the definition of personal injury. Iowa Code section 85.61(4) (b); Iowa Code section 85A.8; Iowa Code section 85A.14.

As it relates to the October 2014 alleged injury, File No. 5056550, the defendant asserts that claimant's fall is idiopathic and therefore not compensable. Claimant appears to be arguing that an idiopathic injury defense is an affirmative one with the burden borne by the defendants. However, the Supreme Court has identified these idiopathic arguments as part of the "arising out of" clause. See Miedema v. Dial Corp., 551 N.W.2d 309, 311 (Iowa 1996) (finding that "[i]njuries that occur in the course of employment or on the employer's premises do not necessarily arise out of that employment.")

In order for an injury to be compensable in Iowa, there must be "a connection between the injury and the work." Meyer, 710 N.W.2d at 221. That connection is established by showing the injury arose out of and in the course of the worker's employment. Iowa Code § 85.31(1) (2001); Meyer, 710 N.W.2d at 220.

The Supreme Court further clarified in Lakeside Casino v. Blue, that the element of "arising out of" requires proof of a causal connection between the conditions of employment and the injury.

> "In other words, the injury must not have coincidentally occurred while at work, but must in some way be caused by or related to the working environment or the conditions of [the] employment." Id.; accord McIlravy v. N. River Ins. Co., 653 N.W.2d 323, 331 (Iowa 2002) (stating injury "must be related to the working environment or the conditions of employment"); Griffith v. Norwood White Coal Co., 229 Iowa 496, 502, 294 N.W. 741, 744 (1940) (stating "injury arises out of the employment if it can reasonably be said to result from a hazard of the employment").
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> ...
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> Applying these principles, this court has held the following injuries were not compensable or, in the penalty-benefits/bad-faith context, arguably not compensable, because they did not arise out of the employee's employment: (1) a knee injury that occurred as the employee was walking across a level floor, McIlravy, 653 N.W.2d at 331;[4] (2) a neck injury that happened when the employee straightened up after bending over to sign an invoice, Gilbert v. USF

Holland, Inc., 637 N.W.2d 194, 200 (Iowa 2001);[5] (3) a back injury that occurred 176*176 when an employee twisted to flush the toilet, Miedema, 551 N.W.2d at 312; and (4) a back injury that occurred when the employee was leaning against a wall for balance while putting on an overshoe, Musselman v. Cent. Tel. Co., 261 Iowa 352, 361, 154 N.W.2d 128, 133 (1967). We concluded or suggested there was nothing in the conditions of the work environment that caused or was related to the employees' injuries. See McIlravy, 653 N.W.2d at 331; Gilbert, 637 N.W.2d at 200; Miedema, 551 N.W.2d at 311; Musselman, 261 Iowa at 359-60, 154 N.W.2d at 132.

Lakeside Casino v. Blue, 743 N.W.2d 169, 175-176 (Iowa 2007)

The claimant's argument is more akin to a positional risk theory in that because she was at work and because she was injured, her injury is compensable. This has been rejected by the Supreme Court. Id at 176 (rejecting the Commissioner's application "causal connection is sufficiently established whenever [the employment] brings claimant to the position where he or she is injured.") This case is more aligned with *McIlravy* wherein the worker fell on a flat surface. *McIlravy v. North River Ins. Co.*, 653 N.W.2d 323, 327 (Iowa 2002). There is no inherent risk in walking on a flat surface.

In *McIlravy*, the employee "descended from a ladder and was walking across a level cement floor to pick up some items some distance away. While walking, he felt and heard a pop in his knee. He was not wearing his tool belt at the time, and was not carrying anything. He had experienced no prior problems with his knee." *Id.* at 326.

This agency has also rejected the argument that an idiopathic fall which occurs on a hard surface such as cement or tile would give rise to liability for the employer. *See Jason Blum*, File No. 5047125a, July 20, 2017.

As in McIlravy, the evidence in the present case shows the claimant walking down a hallway that is empty. The floor is flat. There are no obstructions, stairs or other impediments. No one else was present. Claimant fell to the ground.

While claimant did testify that she heard from some unnamed employee that there were chemicals that were used on the floor that made it sticky, there was no other corroborating evidence of this. The chemical was not named. The employee who related this information was not identified. This second or third-hand information is not sufficient for claimant to carry her burden.

It is found that claimant sustained an idiopathic fall consistent with McIlravy, and therefore this injury is not compensable. The remaining issues as it relates to this injury are moot but for the issue regarding the IME.[5]

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[5] Claimant raised penalty as an issue in her brief. Claimant points out that the issue was pled; however, penalty was not an issue raised during the hearing. The Fourteenth Amendment requires that a party to an agency proceeding have notice and an opportunity to defend. Carr v. Iowa Employment Sec. Comm'n, 256 N.W.2d 211, 214 (Iowa

Iowa Code section 85.39 allows an injured worker to obtain an IME.

> After an injury, the employee, if requested by the employer, shall submit for examination at some reasonable time and place and as often as reasonably requested, to a physician or physicians authorized to practice under the laws of this state or another state, without cost to the employee; but if the employee requests, the employee, at the employee's own cost, is entitled to have a physician or physicians of the employee's own selection present to participate in the examination.
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> If an evaluation of permanent disability has been made by a physician retained by the employer and the employee believes this evaluation to be too low, the employee shall, upon application to the commissioner and upon delivery of a copy of the application to the employer and its insurance carrier, be reimbursed by the employer the reasonable fee for a subsequent examination by a physician of the employee's own choice, and reasonably necessary transportation expenses incurred for the examination.

The Supreme Court has held that reimbursement for a medical examination under Iowa Code section 85.39 cannot be ordered until liability for an injury has been established. *McSpadden v. Big Ben Coal Co.*, 288 N.W.2d 181, 194 (Iowa 1980) However in a subsequent case, the Supreme Court noted that one of the purposes of an IME is to determine causation. "In fact, if the purpose of the IME is to assist in determining causation, an admission of liability should not be a prerequisite to such an examination." *City of Davenport v. Newcomb*, 820 N.W.2d 882 (Iowa App. 2012); *see also Dodd v. Fleetguard*, 759 N.W.2d 133 (Iowa App. 2008). One prerequisite, however, is that the defendant obtain an evaluation of permanent disability by a physician retained by the defendant employer that is deemed too low by the claimant. Iowa Code §85.39. In this case, claimant's IME from Dr. Crites was issued on June 11, 2017. The exam took place on May 3, 2017. Dr. Mysnyk's opinion was issued on February 3, 2016, assessing a 7 percent lower extremity rating for the left knee but not finding a connection between the fall and claimant's hip pain. Claimant's care with Steindler was at a referral from Dr. Singer's office and therefore the opinion of Dr. Mysnyk was from "an employer-retained physician."

This adverse opinion triggered the claimant's right to an examination under Iowa code section 85.39. Under Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839, 847 (Iowa 2015), only the examination is reimbursable. The case of City of Davenport v. Newcomb is not binding precedent in light of the 2015 Young ruling. The bill submitted by the claimant is not itemized. The claimant is awarded two-thirds of

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1977). Failure to raise the issue at hearing precludes a finding made on that issue. While defendant may have had notice prior to the hearing, penalty was not an issue raised during the hearing and thus defendant was given no opportunity to defend.

the IME bill of $3000.00 fee charged, which is $2000.00. (Claimant's Statement of Costs)

The remaining issues are moot.

Turning to File No. 5058024, claimant seeks a finding she sustained a work injury to her shoulder. Claimant appears to argue that she sustained a work injury either on her fall on November 4, 2014, or when she reached out to prevent a shelf from falling on November 6, 2016.

Claimant did not raise right shoulder pain until sometime in 2016, nearly two years after the 2014 injury. During her visit with Dr. Wallace on November 7, 2016, she denied any direct trauma or injury to the shoulder. The October 2016 MRI revealed a complete tear of the right supraspinatus tendon. Dr. Crites, claimant's IME expert, did not find that there was sufficient evidence to connect the October 2014 fall to her right shoulder injury but did opine that the November 2016 clearly exacerbated a pre-existing cuff tear.

It is specifically found that the 2014 fall did not cause the shoulder pain she experienced in 2016 and for which she ultimately underwent surgery.

The surgical treatment that claimant underwent was the same procedure that Dr. Wallace recommended in October, a month prior to the shelf occurrence in November 2016. Dr. Crites, the expert who connects the shoulder pain to claimant's work, did not address what impact, if any, claimant's work at Walmart may have had. Claimant's work at the garden center required heavy lifting and reaching.

She had suffered a complete tear of the right supraspinatus tendon a month prior to her alleged work injury date. Her work at the defendant employer was primarily light duty with no heavy lifting whereas her work at Walmart required heavy lifting of at least fifty pounds.

It is determined that claimant's evidence was not sufficient to carry her burden to prove that her shoulder injury arose out of and in the course of her employment with defendant employer.

The remaining issues are moot.

ORDER

THEREFORE, it is ordered:

File No. 5056550. Date of Injury: October 1, 2014.

Claimant shall take nothing but for the reimbursement of two-thirds of the IME fee of Dr. Crites.

That each party shall pay their own costs

File No. 5058024. Date of Injury: November 7, 2016.

Claimant shall take nothing.

That each party shall pay their own costs

Signed and filed this 30th day of January, 2018.

JENNIFER S. GERRISH-LAMPE
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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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.