

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

BEATRICE GAYE,

Claimant,

vs.

HILTON WORLDWIDE, INC.,

Employer,

and

INDEMNITY INSURANCE COMPANY,

Insurance Carrier,
Defendants.

File No. 20700741.01

ARBITRATION DECISION

Head Note Nos.: 1803

STATEMENT OF THE CASE

Claimant Beatrice Gaye seeks workers' compensation benefits from the defendants, employer Hilton Worldwide, Inc. (Hilton) and insurance carrier Indemnity Insurance Company (Indemnity). The undersigned presided over an arbitration hearing on October 12, 2021, held via internet-based video by order of the Commissioner. Gaye participated personally and through attorney Nicholas Platt. The defendants participated by and through Stephanie Techau.

ISSUES

Under rule 876 IAC 4.149(3)(f), the parties jointly submitted a hearing report defining the claims, defenses, and issues submitted to the agency. The undersigned issued an order approving the hearing report because it is a correct representation of the disputed issues and stipulations in this case. The parties identified the following disputed issues in the hearing report:

- 1) Is Gaye entitled to a running award of temporary total disability (TTD) benefits?
- 2) What is the nature and extent of permanent disability, if any, caused by the alleged injury?

- 3) If Gaye is entitled to permanent partial disability (PPD) benefits, what is the commencement date?
- 4) If Gaye is entitled to workers' compensation, what is the weekly rate?
- 5) Is Gaye entitled to recover the cost of an independent medical examination (IME)?
- 6) Is Gaye entitled to a penalty?
- 7) Is Gaye entitled to taxation of costs against the defendants?

STIPULATIONS

In the hearing report, the parties entered into the following stipulations:

- 1) An employer-employee relationship existed between Gaye and Hilton at the time of the alleged injury.
- 2) Gaye sustained an injury on February 23, 2020, which arose out of and in the course of her employment with Hilton.
- 3) The alleged injury is a cause of temporary disability during a period of recovery.
- 4) At the time of the stipulated injury:
 - a) Gaye's gross earnings were four hundred ninety-four and 56/100 dollars (\$494.56) per week.
 - b) Gaye was married.
 - c) Gaye was entitled to four exemptions.

The parties' stipulations in the hearing report are accepted and incorporated into this arbitration decision. The parties are bound by their stipulations. This decision contains no discussion of any factual or legal issues relative to the parties' stipulations except as necessary for clarity.

FINDINGS OF FACTS

The evidentiary record in this case consists of the following:

- Joint Exhibits (Jt. Ex.) 1 through 10;
- Claimant's Exhibits (Cl. Ex.) 1 through 9;
- Defendants' Exhibits (Def. Ex.) A through F; and

- Hearing testimony by Gaye and Travis Smith, a human resources manager at the Hilton hotel where she worked.

After careful consideration of the evidence and the parties' post-hearing briefs, the undersigned enters the following findings of fact.

Gaye was born in Liberia, Africa. (Hrg. Tr. p. 1) Her first language is a dialect of Krahn. (Jt. Ex. 3, p. 16) Gaye has limited English proficiency but is able to communicate effectively at the workplace. (Hrg. Tr. pp. 1–2, 67–68)

In Liberia, Gaye owned and operated a restaurant. (Hrg. Tr. pp. 4–5) Since immigrating the United States, she has worked in housekeeping at hotels, in meat processing plants, in the Hy-Vee bakery, and caring for her husband after he sustained a stroke. (Hrg. Tr. pp. 16–20; Ex. B, p. 21) In September of 2019, Hilton hired Gaye to work in housekeeping at its hotel in Des Moines, Iowa. (Def. Ex. A, p. 4; Def. Ex. B, p. 21)

On February 23, 2020, Gaye slipped and fell while cleaning the bathroom of a Hilton guest room while working. (Hrg. Tr. pp. 1, 24; Def. Ex. A, p. 7) She struck her right knee when she hit the ground. (Hrg. Tr. pp. 2, 5) Gaye reported her injury to Hilton and Smith drove her to the emergency room (ER) for care. (Hrg. Tr. pp. 2, 25)

Gaye returned to work on February 29, 2020. (Def. Ex. A, p. 16) She worked that day and the next four without any restrictions and did not report any issues to Hilton management. (Def. Ex. A, p. 16) Gaye had two scheduled days off from Hilton and then worked March 7 through 9. (Def. Ex. A, p. 17) After two more scheduled days off, she worked on March 12 and 13. (Def. Ex. A, p. 17)

Smith credibly testified Gaye walked with a slight limp during this time because she was favoring her knee. (Hrg. Tr. p. 7) Gaye reported to her supervisor that she was still feeling pain in her right knee and requested a follow-up medical exam, which Hilton arranged. (Jt. Ex. 3, p. 14) Brandon Penix, D.O., saw Gaye on March 13, 2020, and noted a "small hematoma . . . near the tibial insertion of patellar tendon where patient likely struck knee." (Jt. Ex. 3, p. 16) He also stated:

Inspection reveals no significant joint effusion or asymmetry. Tenderness to palpation over kneecap and tibial plateau. Range of motion was resisted by patient; however, patient able to ambulate down clinic hallways. Stability testing unable to be performed as patient would not allow me to touch her knee with anything other than light pressure; however, strength testing would be considered normal as patient was able to resist knee flexion/extension.

(Jt. Ex. 3, p. 16)

Dr. Penix ordered x-rays and diagnosed her with tricompartmental osteoarthritis. (Jt. Ex. 3, p. 16) He informed her that her symptoms were work related. (Jt. Ex. 3, p. 16) Dr. Penix prescribed physical therapy, ibuprofen, and work restrictions. (Jt. Ex. 3, p. 16)

Shortly thereafter, COVID-19 hit the United States. Hilton laid off employees, including Gaye, because of the pandemic. She did not work from mid-March through May 19, 2020. (Hrg. Tr. pp. 8–9)

In response to the impact of COVID-19, Congress enacted the Coronavirus Aid, Relief, and Economic Security Act (CARES), which included among its provisions creation of the Paycheck Protection Program (PPP) under which businesses could receive funds to pay to workers unable to work due the effect on business operations of COVID-19 and public health measures to mitigate the spread of the virus. (Hrg. Tr. pp. 8–9) Hilton participated in PPP, which allowed it to put Gaye and other workers on its payroll despite limited operations and revenues due to the pandemic. (Hrg. Tr. p. 9)

Gaye started physical therapy at Athletico on April 1, 2020. (Jt. Ex. 4, p. 53) She complained of significant pain in her knee. (Jt. Ex. 4, p. 24) Tanner Neuberger, P.T., was her therapist at Athletico from April 3, 2020, through August 12, 2020. (Jt. Ex. 4, pp. 24–57)

Neuberger testified in a deposition as part of the litigation of this case. (Def. Ex. C) He offered additional explanation for some of the notes in records from the care he provided Gaye. For example, on April 6, 2020, Neuberger noted:

[Gaye] continues to display exaggerated pain behaviors. Hypersensitive to touch, over vocal about pain, appears to be agonizing when PT performs STM, but does not make same facial expressions and vocalizations with walking and work on NuStep Machine, indicating that pain does not match presentation.

(Jt. Ex. 4, p. 27) Neuberger testified in his deposition with respect to this note:

So that was she would kind of jump around on the table and kind of squirm, in my opinion, a little much for just barely that I touched her. So that's when that exaggerated pain behaviors come in, because it didn't match with what I was seeing during the rest of the session.

(Def. Ex. C, Depo. p. 9)

Hilton scheduled Gaye to work on May 19, 2020. (Hrg. Tr. p. 9) Her manager noticed Gaye walking with a pronounced limp and sent her home because he did not think she could physically perform her job duties. (Hrg. Tr. p. 9) This was the first time Hilton management noticed Gaye walking with such a pronounced limp or sent her home due to concerns about her physical ability to work.

Dr. Penix ordered magnetic resonance imaging (MRI) of Gaye's knee. (Jt. Ex. 3, p. 21) The MRI showed no ligament tears. (Jt. Ex. 3, p. 21) Dr. Penix diagnosed chronic regional pain syndrome and referred Gaye to a specialist for her ongoing pain complaints. (Jt. Ex. 3, p. 20)

The defendants arranged care at Iowa Ortho with Joshua Kimelman, D.O., on June 24, 2020. (Jt. Ex. 5, p. 61) Gaye complained of pain in her right knee, hip, and groin. (Jt. Ex. 6, p. 61) Dr. Kimelman noted:

When asked on a scale of 0-10, how much pain she has on an average day, she reported 10. When I described the criteria of 10 as severe pain with a stick in the eye screaming for an ambulance about to pass out from the pain, she reports it is the worst pain she has had despite the fact that she has had 7 children. She reports child birth was not as severe as the pain she has in her knee, and that she has never been hospitalized or had surgery.

(Jt. Ex. 5, p. 61)

After the exam, Dr. Kimelman prescribed physical therapy and work restrictions and ordered a bone scan. (Jt. Ex. 5, p. 62) The bone scan did not reveal the cause of her pain complaints. (Jt. Ex. 5, p. 63) Gaye returned on July 15, 2020, and Dr. Kimelman noted:

She walks with an antalgic gait. No warmth or erythema. Noted diffuse tenderness to palpation diffusely in the lower leg. She points to the knee and the groin as the area of pain. She complains of pain with rotation of the hip, as well as flexion and extension of the knee. There is no warmth, erythema or swelling of the abdomen. Do not appreciate any effusion in the knee and cannot localize tenderness to her patella.

Mrs. Gaye's son accompanied her to the appointment. I asked him to step back into the room and did discuss with him that we had no other explanation for the pain that she is complaining about. I do not see evidence of sympathetic dystrophy, I not see evidence of pathology in the RIGHT hip to explain the pain in her groin, and the bone scan and x-ray today does not show evidence of fracture or abnormality regarding her RIGHT knee. Recommend evaluation by Dr. Klein in pain medicine. Follow up in 1 month. Note given for work that she could perform sedentary-type work.

(Jt. Ex. 5, p. 64)

On September 3, 2020, Gaye saw Thomas Klein, D.O., at Iowa Ortho on referral from Dr. Kimelman for pain management. (Jt. Ex. 7, p. 75) Dr. Klein noted Gaye's

complaints of pain in her right knee, hip, pelvis, thigh, and groin. (Jt. Ex. 7, p. 75) He opined Gaye's knee pain "appear[ed] to be altering her gait to the point of causing" her hip, pelvis, thigh, and groin issues. (Jt. Ex. 7, p. 76)

Gaye returned to see Dr. Kimelman on September 24, 2020. (Jt. Ex. 5, pp. 65–66) He noted:

She walks with marked antalgic gait with her foot supinated, her knee flexed and her hip flexed with an extreme quick step on the symptomatic RIGHT side. Despite that, her knee comes to nearly full extension with passive motion and she complains of pain with even light palpation in the front of the knee around the patella as well as the back of the knee. She does seem to have fairly good rotation in the hip. I do not see trophic changes at this time, however she continues to be extremely reactive.

(Jt. Ex. 6, p. 66)

The defendants arranged for an investigator to surveille Gaye on September 24 and 29, 2020. (Def. Ex. D) The investigator's report is Defendants' Exhibit D and the video footage is Defendants' Exhibits E. Hours of surveillance resulted in several minutes of video showing Gaye walking both with and without a limp. (Def. Exs. D, E) The video shows Gaye was physically able to climb stairs, walk without a limp at times, carry what is apparently a trash bag full of clothes, and carry a container of laundry detergent. (Def. Ex. E)

Dr. Kimelman saw Gaye for a follow-up exam on October 29, 2020, and again noted an antalgic gait and complaints of significant pain. (Jt. Ex. 6, pp. 67–68) He ordered an electromyography (EMG). (Jt. Ex. 6, p. 68) The EMG came back negative. (Jt. Ex. 6, pp. 69–70)

Before Gaye's next appointment with Dr. Kimelman, the defendants showed him the video of her walking, using stairs, carrying a trash bag full of laundry while walking, and carrying detergent while walking. (Jt. Ex. 5, p. 70) Dr. Kimelman included the following note in the records from her December 18, 2020:

I asked Beatrice if she can walk better sometimes or if she could do laundry and she denied that she can do that, stating she tried to go up stairs one day and had so much pain that the leg locked up and gave out on her. I did not discuss with her the video I saw which seems to indicate that she functions at a considerably higher level at least while being videoed outside of, I believe, her home. I told her I have nothing further to offer her and that Workers' Compensation would be in touch.

(Jt. Ex. 6, p. 70)

Gaye's described waiting for an interpreter before seeing Dr. Kimelman, but the interpreter never arrived. (Cl. Ex. 6, p. 1) She believed Dr. Kimelman was upset with

her. (Cl. Ex. 6, p. 1) While Gaye could not understand some of their conversation because of the language barrier, she recalled that he asked her if she could cook and do laundry. (Cl. Ex. 6, p. 1)

Thus, the weight of the evidence shows Dr. Kimelman asked her about her ability to do laundry and she denied she was able. He also asked her if she was occasionally able to walk better at times. Dr. Kimelman felt she provided a dishonest answer, given what the video shows. This interaction undermined Gaye's credibility in his eyes with respect to her subjective complaints. Dr. Kimelman released her from his care as a result.

In response to correspondence from defense counsel, Dr. Kimelman opined in a letter dated January 5, 2021, that Gaye had reached maximum medical improvement (MMI) from the work injury on December 18, 2020, and that her pain complaints were not related to her fall at Hilton. (Def. Ex. F, p. 41) He further opined he could not evaluate functional impairment because of Waddell signs. (Def. Ex. F, p. 41) Dr. Kimelman opined Gaye did not require permanent work restrictions. (Def. Ex. F, p. 41)

The defendants refused to authorize additional treatment for Gaye's work injury after Dr. Kimelman released her from his care. Gaye sought care at the East University Broadlawns Urgent Care on January 20, 2021, complaining of pain in her right knee and low back. (Jt. Ex. 10, p. 85) There is no mention of hip, groin, or pelvis pain in the records from this exam. (Jt. Ex. 10, pp. 83–86)

Two days later, Gaye returned to the East University Broadlawns Clinic. (Jt. Ex. 10, p. 87) Lisa Klock, D.O., examined her and noted Gaye had a friend perform interpretation over the phone because she could not speak any English. (Jt. Ex. 10, p. 87) Dr. Klock recorded that Gaye, through her friend interpreting over the phone, "denie[d] any injury or fall specific that caused" her knee pain. (Jt. Ex. 10, p. 87) She further noted:

The pain is all around the knee and sharp pains down into the knee. She does not feel stable on that knee. She is unable to bend it more than a few degrees and she is having difficulty putting weight on it without feeling like it is g[oin]g to] give out and feels unstable.

The right knee is slightly swollen. She is extremely tender to push knee in any direction whether it['s] medial lateral collateral ligament stressing or Lachman's testing. She will not bend her knee in the office greater than 20 degrees. She does straighten her knee. The knee is not hot to the touch. She even has severe pain if I try to move her patella. She has no lower leg edema. She will not put full weight on her knee. She has it wrapped in multiple knee braces for compression.

(Jt. Ex. 10, p. 87–88) There is no indication Gaye complained of thigh, hip, or pelvis pain during her exam with Dr. Klock. (Jt. Ex. 10, pp. 87–89) Dr. Klock referred Gaye to a specialist. (Jt. Ex. 10, p. 88)

On January 29, 2021, Gaye saw Dr. Somisetty at the Broadlawns Ortho Clinic. (Jt. Ex. 10, p. 93) Dr. Somisetty noted:

Overall she has diffuse pain around the right knee, more so along the medial joint line where she remains very tender. She was unable to extend her knee completely because of pain. She could flex to about 90 degrees. Overall the medial and the lateral collateral ligaments are stable to examination.

(Jt. Ex. 10, p. 94)

Dr. Somisetty diagnosed Gaye with a meniscus tear based on her presentation on examination. (Jt. Ex. 10, p. 95) However, an MRI showed no tear to her meniscus. (Jt. Ex. 10, p. 97) Raviv Ramdial, M.D., interpreted the MRI to show degenerative changes in the patellofemoral compartment. (Jt. Ex. 10, p. 97) Dr. Somisetty diagnosed her with primary osteoarthritis of the right knee and patellofemoral pain syndrome of the right knee and performed an injection. (Jt. Ex. 10, p. 98–100) On June 11, 2021, Dr. Somisetty prescribed another injection. (Jt. Ex. 10, p. 112)

Defense counsel asked Dr. Kimelman to review care records from Sreedhar Somisetty, M.D. (Def. Ex. F, p. 43) Dr. Kimelman did so and opined in a letter dated July 19, 2021:

There is nothing in the notes that changes my opinion. I have not reviewed the x-rays that Dr. Somisetty has seen; however, I do not believe that degenerative arthritis of the knee is an explanation for her constellation of symptoms. I wonder if Dr. Somisetty has seen the video of her carrying laundry and climbing stairs, prior to his recommendation for treatment and opening the possibility she may require joint replacement.

(Def. Ex. F, p. 44) There is an insufficient basis in the record from which to conclude Dr. Somisetty has viewed the surveillance video of Gaye.

Claimant's counsel arranged an independent medical examination (IME) with Sunil Bansal, M.D. (Cl. Ex. 1) Dr. Bansal reviewed records relating to Gaye's work injury and medical care. (Cl. Ex. 1, pp. 1–6) He also performed a physical examination. (Cl. Ex. 1, pp. 6–7) Dr. Bansal issued an IME report dated July 29, 2021, with his opinions. (Cl. Ex. 1)

Dr. Bansal opined Gaye aggravated her patellofemoral joint disease when she fell at Hilton. (Cl. Ex. 1, p. 8) He further stated the aggravation of her patellofemoral joint disease caused an altered gait that, in turn, caused sacroiliitis, the source of her back pain. (Cl. Ex. 1, p. 9) With respect to the surveillance footage, Dr. Bansal stated:

I have reviewed the approximately minute and a half of surveillance footage of Ms. Gaye from September 2020. In that footage, Ms. Gaye, during the first portion of the footage is clearly seen walking with an altered gait, shifting her weight. In another portion comprising several seconds, she is not. This is not unexpected as any lower extremity pathology will have waxing and waning inflammation, in turn affecting the gait pattern. I do find it significant that of the many hours that usually comprises the surveillance experience, only a minute and half was captured and in that she clearly presents with an altered gait for a portion of it, consistent with her testimony and exam.

(Cl. Ex. 1, p. 10)

Dr. Bansal was not present at the time of Dr. Kimelman's examinations of Gaye. He therefore did not witness how Gaye was walking or how she reacted on examination to touching and movement of her injured leg. Dr. Bansal also was not present for the interaction between Dr. Kimelman and Gaye after he viewed the surveillance video and asked her if she was able to walk better at times or do laundry. Further, Dr. Bansal did not address Gaye's actions during physical therapy or how the video reinforces Neuberger's belief she was exaggerating her symptoms. Dr. Bansal's assessment is therefore of limited probative values with respect to how it implicates Gaye's statements and actions during the interactions Dr. Kimelman or Neuberger had with her.

Gaye returned to Dr. Somisetty on August 27, 2021. (Jt. Ex. 10, p. 107) He did not examine her knee because he believed she was undergoing surgery on it at an outside facility based on his communication with her during the exam. (Jt. Ex. 10, p. 108) Dr. Somisetty noted:

She was more concerned about recent low back pain radiating along the posterior right gluteal area to the upper thigh. Examination done in sitting position showed negative straight leg raise test, intact motor and sensory examination both lower extremities. She has diffuse tenderness over the lumbosacral junction and adjoining sacroiliac joint.

(Jt. Ex. 10, p. 108) He diagnosed her with chronic right-sided low back pain and referred her for consultation with a pain specialist. (Jt. Ex. 10, p. 108)

On September 24, 2021, Gaye saw Morgan Brown, A.R.N.P., for pain management. (Jt. Ex. 10, pp. 102–06) Brown noted:

Patient presents to clinic with her cousin who is used as an interpreter at her appointment today. Patient states that she fell last year and this caused increased pain to her right knee and a month or 2 later started causing pain in her right low back and radiating down her right leg all the way to her foot.

(Jt. Ex. 10, pp. 102) Brown further noted Gaye requested referral back to Dr. Somisetty “for her right knee pain as it continues to be excruciating and cause her a lot of pain as well as having to use crutches to walk.” (Jt. Ex. 10, p. 102) Gaye told Brown she continued “to have pain in her right low back that radiates down her right leg as well.” (Jt. Ex. 2, p. 102)

The weight of the evidence shows Gaye’s description of her symptoms to care providers is inconsistent and exaggerated. This undermines the credibility of her representations to care providers, which in turn damages the persuasiveness of their medical opinions. Consequently, there is an insufficient basis in the evidence from which to conclude the stipulated work injured caused Gaye to sustain a compensable disability.

CONCLUSIONS OF LAW

In 2017, the Iowa legislature amended the Iowa Workers’ Compensation Act. See 2017 Iowa Acts, ch. 23. The 2017 amendments apply to cases in which the date of an alleged injury is on or after July 1, 2017. Id. at § 24(1); see also Iowa Code § 3.7(1). Because the injury at issue in this case occurred after July 1, 2017, the Iowa Workers’ Compensation Act, as amended in 2017, applies. Smidt v. JKB Restaurants, LC, File No. 5067766 (App. Dec. 11, 2020).

Disputes about medical causation are typically of two types under the Iowa Workers’ Compensation Act. One is whether the injury arises out of an actual risk of the claimant’s employment. See Bluml v. Dee Jay’s Inc., 920 N.W.2d 85, 85–86 (Iowa 2018); see also Lakeside Casino v. Blue, 743 N.W.2d 169, 173–74 (Iowa 2007); Meyer v. IBP, Inc., 710 N.W.2d 213, 223 (Iowa 2006); Almquist v. Shenandoah Nurseries, 254 N.W. 35 (Iowa 1934). The other is whether the injury caused compensable disability. See Schutjer, 780 N.W.2d at 560 (quoting Grundmeyer v. Weyerhaeuser Co., 649 N.W.2d 744, 752 (Iowa 2002)).

“Medical causation presents a question of fact.” Cedar Rapids Cmty. Sch. Dist. v. Pease, 807 N.W.2d 839, 844 (Iowa 2011). The answer to this question lies “essentially within the domain of expert testimony.” Id. at 845 (quoting Dunlavey v. Econ. Fire. & Cas. Co., 526 N.W.2d 845, 853 (Iowa 1995)). The agency “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, 526 N.W.2d at 853. The agency determines the weight to give an expert opinion based on consideration of:

- 1) “[T]he accuracy of the facts relied upon by the expert,” Schutjer, 780 N.W.2d at 560 (quoting Grundmeyer, 649 N.W.2d at 752);
- 2) “[T]he completeness of the premise with which the expert is given,” Dunlavey, 526 N.W.2d at 853; and

3) “[O]ther disclosed facts and circumstances,” Id.

The agency may accept or reject an expert opinion in whole or in part. Schutjer v. Algona Manor Care Ctr., 780 N.W.2d 549, 560 (Iowa 2010) (quoting Grundmeyer, 649 N.W.2d at 752).

As found above, Gaye has failed to meet her burden of proof in this case with respect to the question of whether the stipulated work injury caused temporary total disability (TTD) or permanent partial disability (PPD). Gaye’s inconsistent and exaggerated descriptions of her symptoms undermine the accuracy of the facts on which multiple doctors have relied when treating her. She is therefore not entitled to TTD or PPD benefits, payment for additional medical expenses, or penalty under the Iowa Workers’ Compensation Act.

However, Gaye has prevailed in the dispute about whether she is entitled to reimbursement for Dr. Bansal’s IME. Under Iowa Code section 85.39, a claimant may obtain an IME with a doctor of the claimant’s choice if the claimant disagrees with the opinion of a defense-chosen doctor regarding the permanent disability caused by the work injury. Here, Gaye did so after Dr. Kimelman refused to opine on the question of permanent disability.

Before September 1, 2021, the Commissioner recognized a distinction between a medical opinion on causation and one on the nature and extent of permanent disability when determining whether the cost of an IME may be reimbursed to the claimant under Iowa Code section 85.39. Barnhart v. John Deere Dubuque Works of Deere & Company, File No. 5065851, p. 2 (App. Mar. 27, 2020) (citing Reh v. Tyson Foods, Inc., File No. 5053428 (App. Mar. 26, 2018)); see also Phillips v. Kimberley Farms, Inc., File No. 5057945, p. 15 (Arb. Apr. 24, 2019) (“The Commissioner has made it abundantly clear that a medical opinion on some other issue such as causation or restrictions is not the equivalent of an impairment rating.”). Under this agency precedent, an injured employee could only obtain reimbursement for an IME in response to an express opinion on permanent impairment by an employer-chosen doctor. Id.

On September 1, 2021, the Iowa Court of Appeals issued its opinion in Kern v. Fenchel, Doster & Buck, P.L.C., 966 N.W.2d 326 (Iowa App. 2021) (Table). The court reversed an agency decision denying IME reimbursement because the employer-chosen doctor had opined only on causation and had not addressed what, if any, disability the claimant had sustained. Id. at *2–*5. In doing so, the court determined the agency had erroneously interpreted Iowa Code section 85.39 and Iowa Supreme Court precedent construing it. See id. The court concluded that an employer-chosen doctor’s opinion finding that a workers’ alleged injury or condition did not arise out of and in the course of the workers’ employment constitutes an opinion of no disability and the cost of an IME sought due to disagreement with such an opinion is reimbursable under section 85.39. See id.

Here, Dr. Kimelman did not opine on whether Gaye's injury arose out of and in the course of her employment with Hilton. Instead, he stated that he could not opine on the question of what, if any, permanent impairment Gaye sustained from her work injury. This refusal is effectively an opinion of no impairment similar to an opinion finding no causation. The court's holding in Kern therefore governs. Gaye is entitled to reimbursement for the cost of Dr. Bansal's IME under section 85.39.

ORDER

Based on the above findings of fact and conclusions of law, it is ordered:

- 1) Gaye shall take nothing from this case with respect to her claims for reimbursement of medical expenses, penalty, or temporary, healing period, or permanent disability benefits.
- 2) The defendants shall pay to Gaye two thousand nine hundred eight-six and 00/100 (\$2,986.00) for the cost of Dr. Bansal's IME.
- 3) The parties shall be responsible for paying their own hearing costs.

Signed and filed this 11th day of May, 2022.



BEN HUMPHREY

Deputy Workers' Compensation Commissioner

The parties have been served, as follows:

Nick Platt (via WCES)

Stephanie Techau (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.