BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

RACHEL LYNN LESTER, Claimant, vs. HORMEL FOODS CORP., Employer, Self-Insured, Defendant.	:	File No. 1663612.01 ARBITRATION DECISION Head Note Nos: 1402.30, 2803

STATEMENT OF THE CASE

Claimant, Rachel Lynn Lester, filed a petition in arbitration seeking workers' compensation benefits from Hormel Foods ("Hormel"), self-insured employer. This matter was heard on August 18, 2020 with the final submission date of October 16, 2020.

The record in this case consists of Joint Exhibit 1, Claimant's Exhibits 1-2, Defendant's Exhibits A-N, and the testimony of claimant and Anthony Seebecker.

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

1. Whether claimant sustained an injury that arose out of and in the course of employment.

2. Whether claimant's claim is barred by application of Iowa Code section 85.23.

3. Whether the alleged injury is a cause of temporary disability.

4. Whether the alleged injury is a cause of permanent disability; and if so, the extent of claimant's entitlement to permanent partial disability benefits.

5. Rate.

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

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

8. Whether defendant is liable for penalty under Iowa Code section 86.13.

9. Interest.

10. Costs.

FINDINGS OF FACT

Claimant was 43 years old at the time of hearing. Claimant graduated from high school. Claimant worked as a CNA for two years. Claimant worked at McDonald's for two to four years. She worked as a telemarketer. Claimant also worked as a grocery checker.

Claimant began working for Hormel in May 2002. Claimant worked as a strip out operator. Claimant said this job required her to take a knife ring to cut the strings on pepperoni sticks. Claimant then grabbed the sticks with her right arm and threw them to her right. Claimant said there were approximately 15 sticks on a rack. Claimant said she processed between 30-50 racks a day. Claimant said that the table at which this was done was just above her chest. Claimant said she had to reach up to use the ring knife to throw the sticks. Claimant says that she is approximately 5' 2" tall. As a result of her height, claimant said that she had to often reach at shoulder level or above. Claimant testified that every 12 minutes she would trade jobs when she would stack meat.

Claimant said that in approximately September 2017 due to staffing issues, she was required to do both jobs by herself. She also said quality control issues caused casings on pepperonis to be difficult to take off.

Exhibits H, I and J are videos of claimant's job. Exhibit H shows pepperonis being dropped on a slow moving belt with ridges.

Exhibit I shows another part of the strip out job. It shows pepperonis being dropped on a table. The worker in the video shown is stepping on a platform and moving the pepperonis at belt or belt level height.

Exhibit J shows a worker cutting pepperonis with a ring knife. Work is done at approximately belt level.

Anthony Seebecker is one of the claimant's supervisors. In that capacity, he is familiar with claimant and the job she performs at Hormel.

Mr. Seebecker testified that he measured the area where claimant works. He said that he measured both tables shown in the videos. One table is 36 inches high. The other table stands approximately 26-46 inches high, depending upon the amount of pepperoni on the table. He said that claimant stands on a platform while doing the strip out job. (TR p. 61) Mr. Seebecker said that there is only minimal chest high work in this job. (TR p. 61)

Claimant testified that she first noticed problems in her right shoulder in approximately September 2017. She states she reported her shoulder problems to her supervisor and the plant nurse. She said neither the nurse nor the supervisor made any record of her complaints.

Mr. Seebecker testified that the procedure at Hormel is that if a worker has a work injury, they are reported to the supervisor. He said that if claimant reported an injury to a plant nurse, a report would have been generated. Mr. Seebecker testified there is no record of a report generated for claimant for a 2017 work injury. (TR pp.57-58)

Mr. Seebecker said it was unlikely that claimant reported a work injury and that no report was generated. He said that the first work injury reported that he is aware of occurs in November 2018. Mr. Seebecker said that when claimant went to see the nurse in November 2018 for a work injury, that triggered generation of a report. (TR pp. 56-58)

On March 9, 2018, claimant was seen by Alan Hjelle, M.D. Claimant had complaints regarding her Crohn's disease and a migraine headache. Claimant was given increased dosage of medication for the migraine. (JE 1, p. 3)

On October 23, 2018, claimant was seen by Rachel Venteicher, D.O., for a wellness check. Claimant's Crohn's disease was stable. (JE 1, p. 5)

On November 30, 2018, claimant was evaluated by Christian Grindberg, D.O., for a bump on the side of the right arm. Claimant had numbness and tingling in her right hand and finger. Claimant was assessed as having a cyst on her right arm, and an ultrasound was recommended. (JE 1, p. 7)

On December 3, 2018, claimant had an ultrasound. It showed a debris-containing 5-mm sebaceous cyst. (JE 1, p. 9)

Claimant saw Brent Owen, M.D., on December 19, 2018, for chronic right shoulder pain for about a year. Claimant recalled no specific injury. Claimant was currently on work restrictions. Claimant was assessed as having biceps tendinitis. She was given work restrictions and recommended to have physical therapy. (JE 1, p. 10)

On January 10, 2019, claimant was treated by a physical therapist. Claimant was having physical therapy on a work comp referral from Hormel. Claimant's date of injury was in December 2017. Claimant said her job duties were repetitious with most of the duties being at or above chest level. (JE 1, p. 11)

On February 13, 2019, claimant was evaluated by Dr. Owen for right shoulder pain for a work-related injury with no specific date of injury. Claimant was recommended to have an MRI and an orthopedic referral. (JE 1, p. 15)

On February 21, 2019, claimant had an MRI of the right shoulder. The MRI was unremarkable. (JE 1, pp. 49-50, 53)

Claimant saw Emile Li, M.D., on April 26, 2019, for right shoulder pain. Claimant's MRI was positive for impingement on the lateral edge of the acromion and the rest of the rotator cuff appeared to be intact. A long head biceps tenodesis was recommended. (JE 1, pp. 55-57)

On May 16, 2019, claimant had shoulder surgery consisting of right shoulder open long head biceps tenodesis and subacromial decompression. Surgery was performed by Dr. Li. (JE 1, p. 86)

Claimant saw Dr. Li on May 29, 2019, in follow-up. Claimant was wearing a sling and doing well. (JE 1, p. 62)

Claimant returned to Dr. Li on July 8, 2019. Claimant's anterior bicipital groove pain was gone and claimant was progressing well. (JE 1, p. 65)

On August 19, 2019, claimant saw Dr. Owen for pain and a frozen shoulder. On August 20, 2019, claimant underwent manipulation under anesthesia for a frozen shoulder. (JE 1, pp. 34, 70)

Claimant returned to Dr. Li on November 25, 2019. Claimant had pain in her right shoulder, but improved range of motion of the shoulder. (JE 1, p. 71)

On February 18, 2020, claimant underwent an MRI of the right shoulder. The MRI showed no significant pathology. (JE 1, p. 73)

In a March 26, 2020 letter, Dr. Li indicated claimant's diagnoses were a long head of the biceps tendinitis and adhesive capsulitis. Claimant was not at maximum medical improvement (MMI). Claimant was having a workup done regarding a low-grade infection. Claimant's temporary restrictions included no overhead activity and no lifting more than 10-15 pounds. (JE 1, p. 76)

In a July 1, 2020 report, Charles Wenzel, D.O., gave his opinions of claimant's condition following an IME. Claimant indicated she developed right-sided biceps pain some time before September 15, 2017. Claimant indicated she reported the injury on approximately September 15, 2017, to a company nurse. Claimant indicated she saw the nurse approximately two times a week for over a year with ongoing biceps pain. (Ex. D, pp. 30-31)

Claimant indicated her job as a strip out operator required 50 percent of the work from the waist to shoulder and 50 percent at or above shoulder level. (JE D, p. 30)

Claimant had a constant aching pain that increased with above chest activity. At the time of the IME, claimant was working 40 hours per week. Claimant was working modified duties involving sanitizing common areas due to COVID-19. (Ex. D, p. 34)

Dr. Wenzel assessed claimant as having right biceps tendinitis likely due to an autoimmune condition, not work related. Dr. Wenzel also viewed videos of claimant's jobs. Both videos showed work performed at or below waist level. Claimant, who is shorter than the worker in the video, would have had some work above waist level with minimal or no work performed at or above the chest level. (Ex. D, p. 38)

Dr. Wenzel found claimant's description of work at chest level and above chest level at Hormel was not consistent with the job videos he viewed. The videos Dr. Wenzel saw showed potential for right-sided triceps pain or injury, but not biceps pain or injury. He noted claimant's symptoms worsened with decreased use or no use of the right biceps, which makes a musculoskeletal cause of her injury unlikely. Dr. Wenzel also noted claimant had an autoimmune disorder, which could explain her symptoms. (Ex. D, p 38)

In a July 21, 2020 report, Robin Sassman, M.D., gave her opinions of claimant's condition following an IME. Claimant indicated she first noted symptoms in the right shoulder in September 2017. Claimant said she reported her symptoms to the plant nurse, but no documentation of her injury was made. She said she continued to report it over the next year. (Ex. 1, p. 10)

Claimant said that in the fall of 2017 she was doing the work of two people due to short staffing. She said she had to work faster and developed a dull ache in her right shoulder at that time. (Ex. 1, p. 10)

Claimant indicated that since the shoulder manipulation, she had increased range of motion, but still had pain with movement of the right shoulder. Claimant had difficulty washing and fixing her hair, putting on coats and shirts. (Ex. 1, pp. 14-15)

Claimant indicated she had to raise her shoulder to a 90-degree angle to do her job at Hormel. She said that she is approximately 5'2" tall and she had to reach up to do her work tasks. (Ex. 1, p. 16)

Dr. Sassman opined that claimant's work at Hormel was a direct and causal factor in her right shoulder bicipital tendinitis and the need for two surgical procedures. This was based on her understanding that claimant had to reach with her right shoulder at an approximately 90-degree angle and had to forcefully pull to use the ring knife. This opinion was also based, in part, due to a staff shortage that claimant had to do the job of two workers and had to work at a rapid pace. It is also based on an understanding that Hormel had quality control problems with casings on pepperonis causing claimant to pull off more casings during this time. (Ex. 1, p. 19)

Dr. Sassman opined that claimant had a 10 percent permanent impairment to the upper extremity, converting to a 6 percent body as a whole permanent

impairment. Dr. Sassman opined claimant's injury extended to the body as a whole due, in part, as the area below the acromion was involved in the injury and surgery. (Ex. 1, pp. 20-23)

Dr. Sassman limited claimant's lifting, pushing, pulling and carrying up to 25 pounds from floor to waist occasionally. Claimant should also not lift, push, pull or carry above waist level or with her arms outstretched from the body. (Ex. 1, p. 24)

Dr. Sassman recommended claimant have a second opinion from an orthopedic specialist. If that evaluation was not pursued, Dr. Sassman found claimant at MMI as of June 20, 2020. (Ex. 1, p. 24)

In a July 31, 2020 amended report, Dr. Sassman indicated she had reviewed Dr. Wenzel's report, reviewed other medical records, and saw claimant's videos of the job. Because Dr. Li's lab tests showed no evidence of rheumatological reasons for pain, and because claimant's chronic disease was in remission, she did not believe claimant's Crohn's disease was a cause of the right shoulder condition. (Ex. 1, pp. 28-29)

Dr. Sassman indicated she watched two short videos of claimant's job. Watching the videos confirmed that claimant would have to raise her arm to a 90-degree angle to cut pepperoni sticks with a ring knife. The video also indicated claimant would have to flip and stack pepperoni sticks. Dr. Sassman also noticed that at the time claimant's shoulder condition began, claimant had to do the job of two people. (Ex. 1, pp. 29-30)

Dr. Sassman opined that claimant had to reach at a 90-degree angle to do her job. She opined that claimant had to work 10 hours a day and that her shoulder problems began at a time when her area was understaffed. Based on this and other factors, Dr. Sassman again opined that claimant's shoulder symptoms began and were repeatedly aggravated by her work at Hormel. (Ex. 1, p. 31)

In a September 18, 2020 report, Dr. Wenzel gave his opinion regarding claimant's condition. Dr. Wenzel opined that the video of claimant's work area indicated pushing that required primary use of the triceps muscles. Dr. Wenzel also noted that Dr. Li's operation report showed no evidence of a rotator cuff tear or labral injury. He opined that if claimant's biceps tendinitis was due to repetitive use, fraying of the tendon would be expected. He also noted that claimant's condition did not improve with 14 weeks of light duty work. Based on this, he believed that claimant's biceps tendinitis and continued symptoms were not work related. (Ex. M)

CONCLUSION OF LAW

The first issue to be determined is whether claimant sustained an injury that arose out of and in the course of employment on September 15, 2017.

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. 6.904(3).

The claimant has the burden of proving by a preponderance of the evidence that the alleged injury actually occurred and that it both arose out of and in the course of the employment. Quaker Oats Co. v. Ciha, 552 N.W.2d 143 (Iowa 1996); Miedema v. Dial Corp., 551 N.W.2d 309 (Iowa 1996). The words "arising out of" refer to the cause or source of the injury. The words "in the course of" refer to the time, place, and circumstances of the injury. 2800 Corp. v. Fernandez, 528 N.W.2d 124 (Iowa 1995). An injury arises out of the employment when a causal relationship exists between the injury and the employment. Miedema, 551 N.W.2d 309. The injury must be a rational consequence of a hazard connected with the employment and not merely incidental to the employment. Koehler Elec. v. Wills, 608 N.W.2d 1 (Iowa 2000); Miedema, 551 N.W.2d 309. An injury occurs "in the course of" employment when it happens within a period of employment at a place where the employee reasonably may be when performing employment duties and while the employee is fulfilling those duties or doing an activity incidental to them. Ciha, 552 N.W.2d 143.

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

The question of causal connection is essentially within the domain of expert testimony. The expert medical evidence must be considered with all other evidence introduced bearing on the causal connection between the injury and the disability. Supportive lay testimony may be used to buttress the expert testimony and, therefore, is also relevant and material to the causation question. The weight to be given to an expert opinion is determined by the finder of fact and may be affected by the accuracy of the facts the expert relied upon as well as other surrounding circumstances. The expert opinion may be accepted or rejected, in whole or in part. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); IBP, Inc. v. Harpole, 621 N.W.2d 410 (Iowa 2001); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995). Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417 (Iowa 1994). Unrebutted expert medical testimony cannot be summarily rejected. Poula v. Siouxland Wall & Ceiling, Inc., 516 N.W.2d 910 (Iowa App. 1994).

When the injury develops gradually over time, the cumulative injury rule applies. The date of injury for cumulative injury purposes is the date on which the disability manifests. Manifestation is best characterized as that date on which both the fact of injury and the causal relationship of the injury to the claimant's employment would be plainly apparent to a reasonable person. The date of manifestation inherently is a fact based determination. The fact-finder is entitled to substantial latitude in making this determination and may consider a variety of factors, none of which is necessarily dispositive in establishing a manifestation date. Among others, the factors may include missing work when the condition prevents performing the job, or receiving significant medical care for the condition. For time limitation purposes, the discovery rule then becomes pertinent so the statute of limitations does not begin to run until the employee,

as a reasonable person, knows or should know, that the cumulative injury condition is serious enough to have a permanent, adverse impact on his or her employment. Herrera v. IBP, Inc., 633 N.W.2d 284 (Iowa 2001); Oscar Mayer Foods Corp. v. Tasler, 483 N.W.2d 824 (Iowa 1992); McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985).

Claimant contends her work injury was caused and/or materially aggravated by her job as a strip out operator.

In the strip out department, claimant used a ring knife to cut strings off pepperoni. She used her right arm to throw the sticks to the right. Claimant is approximately 5'2". Because of that, she had to elevate her shoulders at approximately a 90-degree angle to do her job.

Initially claimant would trade off jobs every 12 minutes to a job where she would stack the meat. Claimant testified that in approximately September 2017 her area at Hormel was understaffed. Claimant testified this resulted in her doing the jobs of two people. Claimant indicated that also during this period of time Hormel had quality control issues with casings, which required claimant to pull off casings more than usual.

Defendant did not rebut claimant's testimony regarding understaffing and quality control issues.

In brief, claimant had a highly repetitive job that required repetitive use of her right upper extremity. Because of her height, claimant had to reach at a 90-degree angle to cut and pull pepperonis off a rack. Because of staff shortages and quality control issues, claimant had to do the job of two people and had problems pulling the casings off the pepperonis.

Claimant eventually received treatment with Dr. Owen in February 2019. At that time Dr. Owen opined that claimant's injury was work related. (JE 1, p. 15)

Claimant also received extended care and treatment with Dr. Li. Dr. Li performed the claimant's shoulder surgery. In March 2019, April 2019, May 2019, August 2019 and February 2020, Dr. Li noted the claimant's shoulder problems were work related. (JE 1, pp. 54, 56, 63, 69, 71, 85)

Along with Dr. Owens and Dr. Li, two other experts have given opinions regarding causation of claimant's shoulder condition. Dr. Sassman evaluated claimant once for an IME. Dr. Sassman opined that the repetitive work at Hormel, along with the increased work at Hormel, caused and materially aggravated claimant's shoulder condition. (Ex. 1, p. 19)

Dr. Wenzel also evaluated claimant once for an IME. He opined that claimant's job did not cause claimant's right shoulder condition, and that claimant's Crohn's disease could explain claimant's current symptoms. (Ex. D, pp. 38-39) Dr. Wenzel's opinion is the only opinion in the record indicating that claimant's condition is not work related.

I respect Dr. Wenzel's opinions regarding causation. Dr. Wenzel does raise some interesting questions regarding Dr. Li's operative report regarding the lack of fraying of the biceps tendon. (Ex. M, p. 3)

However, there are some problems with Dr. Wenzel's causation opinion. First, Dr. Wenzel suggests that claimant's shoulder condition may be explained by her Crohn's disease. This is questionable. The record indicates that claimant's Crohn's disease was in remission for a number of years. The medical records also indicate that blood work performed by Dr. Li showed no signs of immunodeficiency disease. (Ex. 1, pp. 28-29)

Second, Dr. Wenzel appears to base his opinion on causation in part on two 8-second videos showing claimant's work area. While the video is helpful in understanding claimant's work duties as a strip out operator, the man in the video appears taller than 5'2". Review of the video suggests that claimant did, in fact, repetitively raise her right arm at a 90-degree angle to repeatedly cut with a ring knife. Finally, Dr. Wenzel does not adequately address the testimony of claimant that her shoulder problems began during staffing shortages and during quality control issues.

Given these issues, it is found that Dr. Wenzel's opinion regarding causation is not convincing.

Claimant performed a highly repetitive job and continually raised her arm at a 90-degree angle. Claimant's unrebutted testimony is that her shoulder began hurting during staffing shortages and quality control problems with product. Dr. Owen and Dr. Li indicated that claimant had a work-related condition. Dr. Sassman's opinion regarding causation is detailed and well founded. Her opinion corroborates the opinions of Dr. Owen and Dr. Li and claimant's testimony regarding her job. The opinions of Dr. Wenzel regarding causation are found not convincing. Given this record, claimant has carried her burden of proof that her injury arose out of and in the course of her employment on September 15, 2017.

The next issue to be determined is whether claimant's claim for benefits is barred by failure to give timely notice under Iowa Code section 85.23.

Iowa Code section 85.23 requires an employee to give notice of the occurrence of an injury to the employer within 90 days from the date of the occurrence, unless the employer has actual knowledge of the occurrence of the injury.

The purpose of the 90-day notice or actual knowledge requirement is to give the employer an opportunity to timely investigate the facts surrounding the injury. The actual knowledge alternative to notice is met when the employer, as a reasonably conscientious manager, is alerted to the possibility of a potential compensation claim through information which makes the employer aware that the injury occurred and that it

may be work related. Dillinger v. City of Sioux City, 368 N.W.2d 176 (Iowa 1985); Robinson v. Department of Transp., 296 N.W.2d 809 (Iowa 1980).

Failure to give notice is an affirmative defense which the employer must prove by a preponderance of the evidence. DeLong v. Iowa State Highway Com'n, 229 Iowa 700, 295 N.W. 91 (1940).

Claimant testified that in September 2017 she reported her shoulder injury to the plant nurse, Rhea Julius. She said Nurse Julius told her to ice the shoulder and take Aleve. Claimant testified that between one to two times a week beginning in September 2017, she reported her injury to Nurse Julius or her supervisor. (TR pp. 23-25)

There are no nurse's notes or records indicating claimant reported a right shoulder injury between September 2017 and November 2018. There are no reports from Hormel or evidence indicating claimant reported a work injury in 2017 to a supervisor. The first record that claimant reported a shoulder injury is from a nursing note dated November 12, 2018. (Ex. C, p. 29)

On cross-examination, claimant indicated she did not report the injury to her supervisor, but assumed the plant nurse would notify the supervisor of an injury. (TR p. 38)

On March 9, 2018, claimant was seen for complaints of Crohn's disease and headaches. There is no mention of a shoulder condition in that visit. (JE 1, p. 3)

On October 23, 2018, claimant was seen for a wellness exam. There is no mention of a shoulder injury in that visit. (JE 1, p. 5)

On November 30, 2018, claimant was evaluated for a bump on her right arm. Claimant complained of right shoulder pain. Claimant was assessed as having a cyst. There is no mention in this visit claimant's shoulder injury was due to work. (JE 1, pp. 7-8)

On December 19, 2018, claimant was evaluated by Dr. Owen. This is the first medical record that references the possible connection between claimant's shoulder problems and her work. (JE 1, p. 10)

Mr. Seebecker testified that if claimant gave notice of her injury to a company nurse, a report of that injury would have been generated. He said that no report of injury in 2017 was generated for claimant. Mr. Seebecker testified that records indicate that when claimant went to the nurse in November 2018 and complained of a shoulder injury, this caused a report to be generated at that time. (TR pp. 56-57)

Claimant alleges an injury to her right shoulder on September 15, 2017. Claimant testified she reported the injury to a nurse one to two times a week throughout 2017. On direct exam, claimant indicated she also reported the injury to a supervisor. On cross-examination, claimant testified she only reported the injury to a company nurse. There is no record claimant reported an injury to her shoulder to a company

nurse until November 2018. There are no records in evidence that claimant reported an injury in 2017 to a supervisor. In March and October 2018, claimant was evaluated by doctors. There is no mention of a work-related shoulder injury in these records. On November 30, 2018, claimant was also evaluated by a doctor for right shoulder pain. There is no mention in this record that claimant had a work-related shoulder injury. Mr. Seebecker testified that if claimant had reported an injury in 2017, a report would have been generated. He testified that when claimant saw a company nurse in November 2018 for a shoulder problem, a report was generated. Given this record, defendant has carried their burden of proof that claimant failed to give notice of a September 15, 2017 injury within the 90 days as required by Iowa Code section 85.23. Given this record, claimant's claim for benefits is barred by application of Iowa Code section 85.23.

As claimant's claim for benefits is barred by application of Iowa Code section 85.23, all other issues are moot except whether claimant is entitled to reimbursement of the cost of an IME under Iowa Code section 85.39.

The next issue to be determined is whether claimant is due reimbursement for an IME under Iowa Code section 85.39.

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

Defendants are responsible only for reasonable fees associated with claimant's independent medical examination. Claimant has the burden of proving the reasonableness of the expenses incurred for the examination. See Schintgen v. Economy Fire & Casualty Co., File No. 855298 (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).

Regarding the IME, the Iowa Supreme Court provided a literal interpretation of the plain-language of Iowa Code section 85.39, stating that section 85.39 only allows the employee to obtain an independent medical evaluation at the employer's expense if dissatisfied with the evaluation arranged by the employer. Des Moines Area Reg'l Transit Auth. v. Young, 867 N.W.2d 839, 847 (Iowa 2015).

Under the Young decision, an employee can only obtain an IME at the employer's expense if an evaluation of permanent disability has been made by an employer-retained physician.

Iowa Code section 85.39 limits an injured worker to one IME. Larson Mfg. Co., Inc. v. Thorson, 763 N.W.2d 842 (Iowa 2009).

The Supreme Court, in Young noted that in cases where Iowa Code section 85.39 is not triggered to allow for reimbursement of an independent medical examination (IME), a claimant can still be reimbursed at hearing the costs associated with the preparation of the written report as a cost under rule 876 IAC 4.33. Young at 846-847.

Dr. Wenzel, the employer-retained physician, did not give an opinion on permanent impairment in his report dated July 1, 2020. Dr. Sassman, the employee-retained physician, gave her opinion of permanent impairment in her report dated July 21, 2020. Given this chronology, claimant is not due reimbursement for Dr. Sassman's IME report.

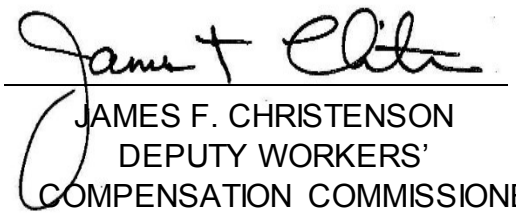
ORDER

THEREFORE, IT IS ORDERED:

That claimant shall take nothing in the way of benefits from this proceeding.

That both parties shall pay their own costs.

Signed and filed this 19th day of May, 2021.



JAMES F. CHRISTENSON
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Mark Soldat (via WCES)

Abigail Wenninghoff (via WCES)

Right to Appeal: This decision shall become final unless you or another interested party appeals within 20 days from the date above, pursuant to rule 876-4.27 (17A, 86) of the Iowa Administrative Code. The notice of appeal must be filed via Workers' Compensation Electronic System (WCES) unless the filing party has been granted permission by the Division of Workers' Compensation to file documents in paper form. If such permission has been granted, the notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 150 Des Moines Street, Des Moines, Iowa 50309-1836. The notice of appeal must be received by the Division of Workers' Compensation within 20 days from the date of the decision. The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or legal holiday.