IN THE IOWA DISTRICT COURT FOR POLK COUNTY

MARIA S. RIOS – LUIS GARCIA, HER GUARDIAN, Petitioner, v. JOHN DEERE, Self-Insured Employer Respondent.	**Case No. CVCV058795** **RULING ON PETITION FOR JUDICIAL REVIEW**

This case came before the Court on February 7, 2020, for hearing on Petitioner's Petition for Judicial Review. Petitioner was represented by R. Saffin Parrish-Sams. Respondent was represented by James Kalkhoff who appeared by phone. Having entertained the arguments of counsel, having reviewed the court file, agency record, and the applicable law, and being otherwise fully advised in the premises, the Court enters this Order.

I. FACTS AND PROCEDURAL HISTORY

A. Facts and Medical History

"The parties have stipulated that on November 15, 2013, claimant, Maria Rios, sustained an injury which arose out of and in the course of her employment with John Deere." October 26, 2017, Arbitration Decision[1] ("Decision") at 2. On November 15, 2013, Ms. Rios fell head over heels down the stairs while at work. The parties disagree about the exact number of stairs at issue and whether Ms. Rios lost consciousness. It is undisputed, however, that Ms. Rios sustained a concussion and was later diagnosed with post-concussion syndrome. [Claimant's Ex. 17 at 49; Ex. J2 at 4, 6].

[1] Because the Workers' Compensation Commissioner adopted the Deputy Commissioner's reasoning with only minor additions, this Order cites to the Deputy's Arbitration Decision unless otherwise specified.

It is also undisputed that Ms. Rios is currently in a debilitated state and incapable of working. No one opines that Ms. Rios is malingering or faking any of her symptoms. The only disputed issue is whether Ms. Rios' current condition was caused by her workplace fall.

Ms. Rios fell down the stairs in a prior incident in 2010, but did not sustain any head trauma. [Def.'s Ex. D at 1-2]. There are also reports that Ms. Rios suffered a concussion at some point before her fall at John Deere, but no contemporaneous medical records reflect a concussion. [Def.'s Ex. D at 8]. Ms. Rios also has a long history of migraines and headaches. [Def.'s Ex. A at 6; C at 5; D at 3-5; F at 1-6]. However, the frequency and severity of Ms. Rios' pain increased drastically after the fall at John Deere. Ms. Rios also exhibited new symptoms after the fall.

On Monday, November 18, 2013, Ms. Rios reported to John Deere Occupational Health. [Ex. J1 at 1]. Ms. Rios met with Nurse Practitioner, Jean Osgood ("Nurse Osgood"), who was the company provider on site. [Claimant's Ex. 17 at 10]. During this visit, Ms. Rios told Nurse Osgood that she fell down the stairs at work between 1:30 PM and 2:00 PM the previous day after a late lunch. [Ex. J1 at 1]. Moreover, Ms. Rios complained that her entire body hurt, she had a bad headache, she was dizzy with some double vision, and she was really nauseated. [Ex. J1 at 1]. Nurse Osgood performed an exam and noted "Today on exam, she is alert and oriented. Walks without difficulty. Answers questions appropriately. Neurologically she is intact...She demonstrates normal range of motion of all major joint spaces but says there is generalized discomfort with movement and no acute pain." Nurse Osgood further noted tenderness on palpation and some small bruises. Nurse Osgood determined that Ms. Rios had "multiple contusions, muscle aches and pains from the tumble and fall" and had "a minor concussion."

Nurse Osgood told Ms. Rios to rest and alternate between ibuprofen and Tylenol q4h. [Ex. J1 at 1-2]. Ms. Rios vomited multiple times later that evening. [Claimant's Ex. 17 at 44].

On Tuesday, November 19, 2013, John Deere Occupational Health services directed Ms. Rios to go to the Emergency Department at Allen Memorial Hospital because Ms. Rios continued to have symptoms after five days and needed further evaluation. [Claimant's Ex. 17 at 44]. Ms. Rios was admitted to the hospital at 4:30 PM, shortly after she arrived. [E. J2 at 1]. Ms. Rios reported that she fell down approximately 12 steps at work. [Ex. J2 at 2]. Ms. Rios complained that she had pain all over her body and had a worsened headache. She could not concentrate or keep her eyes open. Ms. Rios reported that she was dizzy, nauseous, and vomited twice the day before. [Ex. J2 at 2]. The results of Ms. Rios' physical exam at Allen Memorial were largely the same as her physical exam with Nurse Osgood, albeit more in-depth. [Ex. J2 at 3-4]. Ms. Rios was given IV fluids and medication because she had low blood pressure, felt lightheaded, and was in pain. [Ex. J2 at 4]. The Emergency Department performed a CT scan of Rios' head and cervical spine, which did not show acute abnormalities. [Ex. J2 at 6].

Ms. Rios stayed the night of November 19, 2013 at the hospital. The hospital notes show that she was unsteady, dizzy, and lightheaded around 9:25 PM and that she vomited. [Ex. J2 at 5]. Throughout the night and into the morning, nurses noted that on more than one occasion, Ms. Rios was: (1) not oriented to time, not oriented to place, or both; (2) lethargic; (3) dizzy and lightheaded; and (4) weak and in pain. [Ex. J2 at 22-37]. Ms. Rios was discharged from the hospital at 1:07 PM on November 20, 2013. [Ex. J2 at 1]. She was diagnosed with post-concussion syndrome. [Ex. J2 at 1].

John Deere instructed Ms. Rios to visit Dr. Broghammer at Allen Occupational Health Services immediately after being discharged from the hospital on November 20, 2013. Ms. Rios

told Dr. Broghammer that she fell down the stairs at work. Dr. Broghammer's notes show that Ms. Rios reported a loss of consciousness and woke up on the floor. [Ex. J3 at 1]. Ms. Rios also reported that she was in the hospital overnight, had a headache, was nauseous and vomiting, and was sore all weekend. She was confused and had blurred vision. [Ex. J3 at 1]. Dr. Broghammer further noted that Ms. Rios was "lethargic but aware of place and time…seated in wheelchair, appears tired and slightly confused." [Ex. J3 at 1, 4]. Dr. Broghammer diagnosed Ms. Rios with "Closed Head injury / Concussion." [Ex. J3 at 4]. He released Ms. Rios to work limited duty. [Ex. J3 at 5].

John Deere Occupational Health records show Regene Anderson instructed Ms. Rios to attend a safety meeting at 12:30 PM on Thursday, November 21, 2013. [Claimant's Ex. 17 at 46-47]. Instead, Ms. Rios was confused and ended up going to John Deere Occupational Health, where the nurse recorded:

> States she took her medication this AM and felt very sleepy and took a nap. She states when she opens her eyes things spin and she become [sic] dizzy and nauseated. She states it is better when she closes her eyes. She c/o HA frontal bone and temples. She rates her pain a 7-8 on scale of 1-10. She states pain was a 5 this AM but riding here made it worse. She c/o body aches, mainly her neck and shoulders and sometimes the back of her head.

[Claimant's Ex. 17 at 47].

On November 22, 2013, Ms. Rios was picked up by John Deere security at her home and taken to John Deere Occupational Health. [Claimant's Ex. 17 at 45]. Ms. Rios reported feeling better; however, she still rated her pain as 7 or 8 out of 10. She also reported that although her headache was better in the morning, riding in the car made it worse. The sun made her nauseous and worsened her headache. John Deere security drove Ms. Rios home. The nurse noted that Ms. Rios "is to drive to work Monday morning and report to [John Deere Occupational Health]," but she could contact security for a ride if she could not drive. [Claimant's Ex. 17 at 46].

Ten days after her fall down the stairs, Nurse Osgood released Ms. Rios to regular work duty on November 25, 2013.

During Ms. Rios' visits to John Deere Occupational Health between November 25, 2013 and November 27, 2013, Ms. Rios reported feeling better but still had headaches and nausea. [Claimant's Ex. 17 at 43-46].

Ms. Rios went to Chicago with her family for Thanksgiving from November 28, 2013 until December 1, 2013. [Claimant's Ex. 17 at 43; Arbitration Hr'g Tr. at 126:6-21]. When Ms. Rios returned to John Deere Occupational Health on December 2, 2013, she reported that she was still experiencing headaches. [Claimant's Ex. 17 at 43].

There is a gap in medical notes for Ms. Rios from December 2, 2013, until January 2014. During this time, Ms. Rios returned to Chicago for the holidays with her family when John Deere closed for two weeks. As discussed later in this Order, lay witness testimony demonstrates that Ms. Rios' condition continued to worsen.

On January 4, 2014, Ms. Rios was diagnosed with the flu and presented with headaches and myalgias. [Ex. J10 at 1].

Ms. Rios visited Dr. Christ's office on January 14, 2014, and met with Dr. Ilankeeran. [Ex. J4 at 1]. Ms. Rios told Dr. Ilankeeran about her fall at work and reported that she has been experiencing headaches since the fall. [Ex. J4 at 1]. Ms. Rios reported that she has not been able to focus or think straight, and that she feels a "weird sensation on her head." [Ex. J4 at 1]. Dr. Ilankeeran referred Ms. Rios to Dr. Almullahassani, a neurologist. [Ex. J4 at 2].

On January 15, 2014, Ms. Rios contacted John Deere Occupational Health to see a company doctor about her difficulty concentrating. [Claimant's Ex. 17 at 43]. A nurse informed

Ms. Rios that the company doctor recommended that Ms. Rios follow up with her primary doctor and noted that "She has been released to full duty after fall." [Claimant's Ex. 17 at 43].

Ms. Rios met with Dr. Almullahassani, on February 12, 2014. Ms. Rios reported that she has had a continuous headache for the last few months, "mainly in the frontal area, radiating to the occipital area, can reach 10 out of 10. Most of the time it is between 4 to 5 out of 10. It is a pressure-like pain…She has been having some blurred vision and seeing stars in the visual field." [Ex. J5 at 1]. Dr. Almullahassani reviewed Ms. Rios' CT scan and noted that she had "small lateral ventricles," he diagnosed Ms. Rios with pseudotumor cerebri and removed 20 mL of fluid during a spinal tap, which temporarily improved Ms. Rios' headache. [Ex. J5 at 1]. Ms. Rios followed up with a phone call on February 20, 2014, stating that she was "having severe numbness in her hands, confusion, and no improvement in her headache…" [Ex. J5 at 3]. A nurse called Ms. Rios on February 28, 2014 to follow up and Ms. Rios reported no improvement. [Ex. J5 at 4].

Ms. Rios met with Dr. Christ on February 21, 2014. Dr. Christ notes that Dr. Almullahassani's diagnosis and treatment were not helping Ms. Rios. Ms. Rios' symptoms continued to worsen. [Ex. J4 at 3-4]. Ms. Rios could not drive, think straight, or walk straight. Dr. Christ opined that "there is no way she is going to be able to work in her current state." [Ex. J4 at 4].

Dr. Almullahassani referred Ms. Rios to the Department of Neurology at the Mayo Clinic. [Ex. J7 at 3]. After Dr. Almullahassani's referral, Ms. Rios was ultimately seen by several physicians in various specialties at the Mayo Clinic between April 2014 and November 2016. [Ex. J7 at 1-342].

On April 4, 2014, Ms. Rios had an MRI of her brain with IV contrast and an MR Angiography with IV contrast. [Ex. J7 at 13]. Dr. Koeller reviewed the MRI and an MR Angiography and compared them with an MRI of Ms. Rios' brain from September 19, 2012. [Ex. J7 at 13]. Dr. Koeller did not find significant intracranial abnormalities. [Ex. J7 at 13]. Ms. Rios also had a lumbar puncture, which decreased her headache but caused back pain at the puncture site. [Ex. J7 at 8]. Ms. Rios was informed that she may need to visit the emergency room to be evaluated if her pain persisted. [Ex. J7 at 8].

Ms. Rios visited Emergency Medicine at the Mayo Clinic because of her back pain on April 10, 2014. [Ex. J7 at 18]. Ms. Rios had to be admitted because the doctors in the emergency room were unable to control Ms. Rios' pain despite using morphine and oxycodone. [J7 at 23-24].

Ms. Rios also had a CT scan of her Lumbar Spine without contrast on April 10, 2014. [Ex. J7 at 32]. The CT scan showed "Chronic right L5 spondylolysis, with chronic stress reaction of the left L5 pars…" [Ex. J7 at 32-33].

By April 12, 2014, Ms. Rios' back pain was improving. Still, she was prescribed a walker for her instability while walking. [Ex. J7 at 54-55].

In May 2014, Ms. Rios had an MRI of her brain and cervical spine both with and without contrast due to her persistent headaches, left shoulder pain, and lower extremity pain. [Ex. J10 at 12-13]. The images of Ms. Rios' brain showed two small white matter lesions in the subcortical white matter of the right frontal lobe but the exam was otherwise negative. [Ex. J10 at 12]. The images of Ms. Rios' cervical spine showed "multilevel osteophyte disk bulge complex formation with mild ventral impression upon the thecal sac and minimal mass effect upon the cord…A small central disk protrusion at c3-4 is also present." [Ex. J10 at 14].

Ms. Rios' pain persisted and she was diagnosed with Fibromyalgia in July 2014. [Ex. J7 at 79].

In November 2014, Ms. Rios' neighbors found her in her house "on the floor and unable to move legs, stand, ambulate, [or] move arms." [Ex. J10 at 18]. An ambulance was dispatched to Ms. Rios' home and paramedics brought her to the emergency department at Covenant Medical Center. [Ex. J10 at 18]. Ms. Rios reported intense head and neck pain. [Ex. J10 at 18]. Ms. Rios appeared intoxicated, could not stand, and was slow to respond, requiring redirection when asked questions. [Ex. J10 at 19]. A urine drug screen was negative for drugs or alcohol. [Ex. J10 at 20].

Ms. Rios was examined by multiple doctors, which included MRI's and CT scans in the days following her visit to the emergency department. [Ex. J10 at 21-40].

Between November 2014 and June 2015, Dr. Manshadi noted that Ms. Rios' increased difficulties with attention, memory, and concentration, which he believed resulted from Ms. Rios' concussion from her fall at John Deere. [Ex. J9 at 17].

In June 2015, Richard Roberts, Ph.D. performed a Neuropsychological Evaluation on Ms. Rios and found among other things that she suffered from a mild decline in general IQ of at least 10 IQ points or so. [Ex. J5 at 5-10].

Ms. Rios visited the Mayo Clinic's Brain Rehabilitation Program in October 2015. [Ex. J7 at 187]. She was not oriented to which building she was in or the day of the week, "she could not learn four words given four trials," and she did not know who the first president of the United States was. [Ex. J7 at 187]. Ms. Rios' diagnoses from the visit included: "probable traumatic brain injury with loss of consciousness, following fall down the stairs in 2013,"

cognitive difficulties, headaches, Fibromyalgia, low back pain, and flaccid bladder. [Ex. J7 at 188-189].

In September 2015, Ms. Rios underwent a Psychiatric Evaluation by Dr. Zdilar, who diagnosed Ms. Rios with Mood disorder, Cognitive disorder, TBI/post-concussion syndrome, Bladder problem, Migraine headaches, LBP, and Fibromyalgia. [Ex. J13 at 10-13].

Ms. Rios started using a wheelchair instead of a walker towards the end of 2015. [Ex. J9 at 20-24]. Her pain persisted and her physical and mental symptoms continued to worsen through 2016. [Ex. J7 at 285-291].

Ms. Rios went out on approved FMLA / disability leave from Deere beginning February 13, 2014. [Claimant's Ex. 14 at 1-5]. Ms. Rios has not returned to work in any capacity.

B. Procedural History

Ms. Rios filed her workers' compensation petition on July 20, 2015. The Arbitration Hearing was originally scheduled for December 12, 2016, but was postponed to allow Respondent to submit an additional report from its expert, Dr. Jones. The Arbitration Hearing took place on April 28 and May 1, 2017. The Deputy Commissioner (the "Deputy") filed her Arbitration Decision on October 26, 2017. An Application for Rehearing was denied.

Ms. Rios filed her intra-agency appeal on February 18, 2018. On March 20, 2018, the Agency granted Ms. Rios' Motion to Join Claimant's Legal Guardian as a Party. Ms. Rios' legal guardian is her husband, Luis Garcia. This created the caption as it appears in this judicial review. On August 19, 2019, the Commissioner filed the Appeal Decision in this case, which affirmed the Arbitration Decision in its entirety.

Petitioner timely filed for Judicial Review on August 27, 2019. Oral argument occurred on February 7, 2020. The case was fully submitted and taken under advisement by this Court.

II. APPLICABLE LAW AND ANALYSIS

Iowa Code Chapter 17A governs judicial review of final agency action. "Under the Act, [the court] may only interfere with the commissioner's decision if it is erroneous under one of the grounds enumerated in the statute, and a party's substantial rights have been prejudiced." Meyer v. IBP, Inc., 710 N.W.2d 213, 218 (Iowa 2006). The party challenging a particular agency action bears the burden of demonstrating the action's invalidity and resulting prejudice. Iowa Code §17A.19(8)(a). In exercising the power of judicial review, the district court acts in an appellate capacity. Nance v. Iowa Dept. of Revenue, 908 N.W.2d 261 (Iowa 2018) (quoting Mycogen Seeds v. Sands, 686 N.W.2d 457, 463 (Iowa 2004)).

Where an agency has been clearly tasked with the power to make determinations of fact, "it follows that application of the law to those facts is likewise 'vested by a provision of law in the discretion of the agency.'" Burton v. Hilltop Care Center, 813 N.W.2d 250, 256 (Iowa 2012) (citing Mycogen Seeds v. Sands, 686 N.W.2d 457, 465 (Iowa 2004)). In reviewing factual findings made by the Commissioner, the question is simply whether substantial evidence in the record supports the Commissioner's findings. See Iowa Code §17A.19(10)(f); see also Meyer v. IBP, Inc., 710 N.W.2d 213, 219 (Iowa 2006). "[C]ourts must not simply rubber stamp the agency fact finding without engaging in a fairly intensive review of the record to ensure that the fact finding is itself reasonable." Wal-Mart Stores, Inc. v. Caselman, 657 N.W.2d 493, 499 (Iowa 2003) (internal quotations and citation omitted).

Where the reviewing court is asked to review an agency's interpretation of law, the level of deference that the court affords the agency depends on whether the authority to interpret that law has "clearly been vested by a provision of law in the discretion of the agency." Burton v. Hilltop Care Center, 813 N.W.2d 250, 256 (Iowa 2012). In determining the Commissioner's

interpretation of Iowa Code 85.34(1) and related case law, this Court reviews for "correction of errors at law." Waldinger Corp. v. Mettler, 817 N.W.2d 1, 7 (Iowa 2012).

Here, Petitioner challenges the agency's ultimate conclusion – its determination that Ms. Rios was not entitled to benefits. This is a challenge to the agency's application of the law to the facts. See Meyer v. IBP, Inc., 710 N.W.2d 213, 218-19 (Iowa 2006). Thus, the Court may reverse if it finds that the agency abused its discretion. Id.

III. MERITS

Petitioner asserts that the Commissioner made multiple errors. Each alleged error is addressed in turn.

A. Did the Agency Err in Concluding that a Head First Fall Down 6 to 8 Stairs was an Insignificant Injury?

This allegation is a misnomer. The Commissioner did not err in concluding that Ms. Rios' fall resulted in "insignificant injuries" because the Commissioner made no such findings. Rather, the Commissioner found that Ms. Rios' current serious condition was not causally linked to the workplace fall. The Deputy stated: "I find that Claimant has failed to carry her burden of proof to show that any of her ongoing conditions, complaints or symptomatology are related to the November 15, 2013, fall at John Deere." [Arbitration Decision at 14]

B. Did the Agency Err in Rejecting Uncontroverted Medical Evidence from Numerous Experts Who Diagnosed Causally Related Injuries?

This assertion of error goes to the heart of the case. Petitioner put forth the following experts who opined that Ms. Rios' current symptoms were caused by her fall in the workplace:

- Dr. Billie Schultz, Mayo Clinic Division Chair for Brain Injury Program: Treating Psychiatrist (Exhibit 1)
- Dr. Kevin Fleming, Mayo Clinic Director of Fibromyalgia & Chronic Fatigue Clinic: Treating Internist (Exhibit 2)

- Dr. Richard Roberts, UnityPoint Neurology Clinic: Treating Neuropsychologist (Exhibit 3)
- Dr. Farid Manshadi, Physical Medicine & Rehabilitation Associates of Northeast Iowa: Treating Psychiatrist. (Exhibit 4)
- Dr. James Gallagher, Neurology and Forensic Psychiatry: Psychiatric IME (Exhibit 5)
- Dr. Robin Sassman, Medix Occupational Health: IME (Exhibit 6)
- Dr. Richard Neiman, Mercy Hospital Neurology: Neurological IME (Exhibit 7)
- Dr. Meredith Christ, Primary Care Provider: Treating Physician (Exhibit 27)

The Deputy did not reject these doctors' opinions based on any concerns with their credibility or their credentials. Rather, the Deputy found that their reports or records all contained one or two inaccurate pieces of information. Specifically, the Deputy found "errors" in their report as follows:

- Dr. Billie Schultz ("was given a history of claimant falling down an entire flight of stairs and sustaining a loss of consciousness")
- Dr. Kevin Fleming ("based his expert opinions on a fall down a set of stairs with a loss of consciousness")
- Dr. Richard Roberts ("fall down an extended flight of stairs," "based on an inaccurate history")
- Dr. Farid Manshadi ("fell and rolled over 18 steps with a loss of consciousness")
- Dr. James Gallagher ("fell down (20+?) stairs while working at John Deere on November 15, 2013, and was discovered by a coworker, apparently unconscious")
- Dr. Robin Sassman ("opinions are based on a history of [Ms. Rios] falling down two flights of wooden stairs[2] and sustaining a loss of consciousness")
- Dr. Richard Neiman ("basically fell down 20 steps[3]," "was initially unconscious according to her husband")

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[2] This summary of Dr. Sassman's report is simply inaccurate. The reference to two sets of wooden steps referred to a fall that Ms. Rios sustained in 2010, not the fall that occurred in 2013 at John Deere.

[3] This summary is also inaccurate in that while the notes reference 20 steps, they point out that Ms. Rios corrected this misinformation and said "she fell 12 steps at work." [Claimant's Ex. 7 at 2]. Accordingly, the "20 steps" reference could not have been something Dr. Neiman relied upon.

- Dr. Meredith Christ ("there are notations that state claimant did lose consciousness after the fall, and there are other notations that state she did not lose consciousness after the fall")

[Arbitration Decision at 12-14].

In every instance, the Deputy discounted the experts' opinions because their records contained what the Deputy determined to be inaccurate information about the number of steps involved in the fall and/or whether Ms. Rios lost consciousness. To the extent that the Deputy relied on the number of steps involved to discount the opinions, it would be an abuse of discretion. There is no testimony from anyone that the specific number of steps matters in diagnosing any injuries. The "loss of consciousness" issue is a more reasonable basis for rejecting the experts' opinions, but is ultimately insufficient for the reasons discussed below.

As a threshold matter, the parties dispute whether Ms. Rios did or did not lose consciousness after her workplace fall. The Deputy found persuasive the testimony of one of Ms. Rios' coworkers, Praveen Nagilla, whose deposition transcript was submitted as a hearing exhibit. [Claimant's Ex. 16]. The Deputy summarized the key part of Mr. Nagilla's testimony as "he went to her right away and that he does not remember any loss of consciousness by Maria." [Arbitration Decision at 4]. Although this summary is accurate, it does not paint the full picture of Mr. Nagilla's testimony. The relevant questions and answers are as follows:

Q. When you ran up to help her, did she act like it took her a moment to realize what happened or seem a little dazed or shocked?

A. No. She was – she seemed fine. She smiled a little and she **woke up** and she left.

Q. She woke up?

A. As in I helped her – I helped her stand up and she left.

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Q. You never noticed any loss of consciousness that she had, did you?

A. As far as I remember, no.

[Ex. 16 at 25:9-17; 40:3-5] (emphasis added).

From this somewhat equivocal testimony, the Deputy made the factual finding that Ms. Rios did not lose consciousness, and then used this factual finding to discount all of the Petitioner's expert opinions. Although the Court does not necessarily agree with the factual finding, it believes the finding is supported by substantial evidence. In addition to Mr. Nagilla's testimony, the initial medical records following the incident also indicate that Ms. Rios did not believe she had lost consciousness. [Ex. J1 at 1]. However, the Court cannot support the Deputy's second step of using her factual finding to completely invalidate the experts' testimony.

First and foremost, none of the experts at issue said she or he relied on the existence of a "loss of consciousness" in coming to her or his conclusions. In the absence of any testimony establishing the importance of this "fact," proving it wrong does not warrant a wholesale dismissal of the opinions. Second, the undisputed evidence in the record shows that a loss of consciousness is not required for someone to sustain a brain injury. Even Respondent's expert, Dr. Jones, agrees with this position.

Q. You'd agree that a person can have a brain injury without losing consciousness, correct?

A. Yes.

[Claimant's Ex. 29 at 4:11-13]. Third, even if the inaccurate information hypothetically impacted the causation opinions regarding Ms. Rios' brain injury, it would not be a fair basis to disregard the causation opinions regarding the physical injuries that Ms. Rios sustained, including fibromyalgia.

Respondent's lone expert, Dr. Jones, is neither a Medical Doctor nor a Doctor of Osteopathic Medicine. He has a Ph.D. and is a Board Certified Clinical Neuropsychologist. He defers to Dr. Fleming for opinions regarding fibromyalgia.

Q. So with respect to Dr. Flemming [sic], would you regard him as being competent to make a diagnosis of fibromyalgia, chronic fatigue syndrome or central sensitization syndrome?

A. I think so. He's the pain doctor at Mayo, I believe.

Q. He's the director of the Mayo Clinic fibromyalgia and chronic fatigue clinic.

A. Then I would view him as competent.

Q. All right. And you'd assume that he has a lot of experience treating those conditions, correct?

A. I assume so, yes.

Q. And are you disagreeing with his diagnosis of fibromyalgia?

A. I'm not. **I would rely on him for that diagnosis actually.**

Q. So you've relied on him for the diagnosis of fibromyalgia, chronic fatigue syndrome and central sensitization syndrome?

A. Correct.

Q. You have no reason to dispute those diagnoses?

A. No. Although I have to say that the central sensitization is an interesting diagnosis and something that's kind of new-ish. I don't know as much about it as I do the others.

Q. All right.

A. But I wouldn't disagree with his characterization.

[Claimant's Ex. 29 at 76:9-77:14] (emphasis added).

Petitioner's counsel argued at the hearing that it was "undisputed" that the fall at work led to Ms. Rios' physical ailments including fibromyalgia. Respondent's counsel disagreed,

stating there was no evidence that the fall caused Ms. Rios' fibromyalgia. A review of the record demonstrated that Petitioner's counsel was correct:

In his Sworn Statement, Dr. Fleming (Director of the Fibromyalgia and Chronic Fatigue Clinic at the Mayo Clinic) states:

> Q. So while Maria may have been more likely to get a condition like this, or predisposed to having a condition like this, you would agree that the trauma that occurred in November of 2013 when she fell down the stairs was a substantial factor in causing her fibromyalgia or central sensitization syndrome to become symptomatic?
>
> A. Yes.

[Claimant's Ex. 2 at 4].

The Deputy dismissed Dr. Fleming's opinions stating:

> Dr. Fleming based his expert opinions on a fall down a set of stairs with a loss of consciousness; this history is not correct. Additionally, it is not known what, if any, pre-November 15, 2013 medical history Dr. Fleming had when he rendered his opinions. Thus it is not known if Dr. Fleming's opinions were based on a complete history. For these reasons, Dr. Fleming's opinions cannot be relied upon.

[Arbitration Decision. at 12].

Dr. Fleming stated that he had an opportunity to review Ms. Rios' medical record from the Mayo Clinic. [Claimant's Ex. 2 at 3]. Nowhere in his sworn statement does Dr. Fleming indicate that his opinion is reliant on Ms. Rios having fallen down any particular number of steps nor are the opinions dependent on her reported loss of consciousness.

Ms. Rios' family doctor also offered a causation opinion that the following conditions were "directly or indirectly caused by her November 15, 2013 fall down the stairs while working at John Deere": Traumatic Brain Injury, Materially worsened migraines related to the Traumatic Brain Injury, Central Sensitization Syndrome, Fibromyalgia, Chronic Fatigue Syndrome, Hypotonic neurogenic bladder. [Claimant's Ex. 27 at 1]. The letter discussing causation makes no mention of the number of steps involved in the fall nor any mention of a loss of

consciousness. This opinion was rejected by the Deputy because she was "unable to ascertain what details Dr. Christ had regarding the fall." The Deputy notes that some of Dr. Christ's records mention a loss of consciousness and others do not. It was error a) to assume that Dr. Christ's diagnosis relied on whether Rios lost consciousness and b) to assume that if that fact was pivotal, Dr. Christ relied on the incorrect information in the records.

The opinions that the workplace fall caused the fibromyalgia and central sensitization syndrome[4] are unrebutted and should be relied upon. "We are reluctant to allow the commissioner totally to reject expert testimony which is the only medical evidence presented." Poula v. Siouxland Wall & Ceiling, 516 N.W.2d 910, 911-12 (Iowa App. 1994); Estate of Herman v. Overhead Door Co. of Des Moines, 834 N.W.2d 870 (Iowa App. 2013) (same); Gallo v. Penford Prods. Co., 829 N.W.2d 590 (Iowa App. 2013) (same); Espinosa v. Excel Corp., No. 07-0936, (Iowa App. Feb. 13, 2008) (same). See also Cozad v. Russell Corp., 810 N.W.2d 532 (Iowa App. 2012) ("We are reluctant to allow the commissioner totally to reject expert testimony which is the only medical evidence presented. At the outset, it is important to note that this case does not present a classic 'battle of the experts' where the commissioner must choose between conflicting expert opinions.... There are no medical opinions in the record supporting the commissioner's finding that Cozad's workplace injury was temporary. Furthermore, these doctors did not testify, and only their reports and causation letters were placed into the record.

[4]"It is a well-established principle in workmen's compensation law if a claimant had a preexisting condition or disability, aggravated, accelerated, worsened or 'lighted up' by an injury which arose out of and in the course of employment resulting in a disability found to exist, he would accordingly be entitled to compensation." Dep't of Transp. v. Van Cannon, 459 N.W.2d 900, 904 (Iowa App. 1990) (quoting Musselman v. Centr. Tel. Co., 154 N.W.2d 128, 132 (Iowa 1967)). See also Gosek v. Garmer & Stiles Co., 158 N.W.2d 731, 737 (Iowa 1968) (same); Barz v. Oler, 133 N.W.2d 704, 707 (Iowa 1965); Nicks v. Davenport Produce Co., 115 N.W.2d 812, 815 (1962) (same); Yeager v. Firestone Tire & Rubber Co., 112 N.W.2d 299 (1961) (same); Rose v. John Deere Ottumwa Works, 76 N.W.2d 756, 761 (Iowa 1956) (same). Thus, any distinction as to whether the fall "caused these conditions" versus "caused these conditions to become symptomatic" is immaterial.

Thus, the commissioner made no credibility determinations. Nonetheless, the commissioner rejected all three opinions.") (internal citations omitted).

Because it should be presumed that the fall caused the fibromyalgia, it is important to consider whether fibromyalgia the cause of any of Ms. Rios' current symptoms. Dr. Fleming's sworn statement indicates that this is the case.

Q. All right. Can you explain for the work comp judge what fibro fog is?

A. It's a name given to what I mentioned, is the reduced attention and focus. That's part of fibromyalgia. But also refers to the daytime effects of poor sleep. Meaning people have inadequate sleep from pain and then during the daytime they are actually not quite fully awake. And that contributes to the sense of fogginess, I think.

Q. Can that also affect a person's memory?

A. So because of the lack of attention and focus you can't form recent memories. It's a requirement that you be able to focus. So if you are unable to focus you can't form new memories very well. So that lack of short-term memory, which becomes a long-term memory, becomes a real problem for this disorder, yes.

Q. Do people with fibromyalgia also have significant fatigue?

A. Yes, generally they do. Some people actually fully meet criteria separately for chronic fatigue, as she did. So chronic fatigue syndrome has its own set of criteria. She certainly met that.

And the main feature of that really is not just profound fatigue but something called post exertional malaise. And what that means is if they try to do things, more than the usual daily routine, which in her case has become limited, but if they try to do more they actually feel worse the next day. And so that trains them not to do anything at all because they feel -- that's part of that problem of avoiding activity, because they feel worse with it.

Q. And that's what's been going on with Maria, correct?

A. Yes.

Q. All right.

A. So as she does less and less, she gets less and less tolerant of any activity.

Q. Okay. So gradually over time, because of the fibromyalgia, the chronic fatigue syndrome, the central sensitization syndrome, and the difficulty in maintaining function versus having the post exertional malaise Maria has slowly declined; is that accurate?

A. Yes.

Q. Okay. Doctor, are you aware of any other trauma besides the November 15, 2013 fall down these stairs that could have triggered the chronic pain syndrome or fibromyalgia or central sensitization syndrome?

A. No.

Q. Do you feel that Maria is faking or malingering or otherwise deliberately exaggerating her symptoms?

A. No. …

Q. Can a person with chronic fatigue syndrome, fibromyalgia and central sensitization syndrome like Ms. Rios have good days and bad days?

A. Yes. It's continuous but fluctuates.

[Claimant's Ex. 2 at 10:4-12:6, 14:25-15:3]

Once again, Respondent's expert, Dr. Jones, does not disagree.

Q. Those symptoms could also be consistent with the fibromyalgia, chronic fatigue or central sensitization syndrome too, correct?

A. I don't know. I would defer to them. They made the diagnosis. It's highly possible that she has some features of somatizing disorder, whether it's conversion disorder or not, I don't know. That's a theme that comes up in the records at multiple points.

***

Q. So you'd agree that the cause – that fall precipitated diagnoses after have led to her present decline, you're just disagreeing that it's a brain injury.

A. Well, the second half of your supposition is true. I do not think that her cognitive deficits are due to brain injury. As I put it in my report, it would be highly, highly unusual for this to be explainable by a traumatic brain injury. The first part of your question that the fall precipitated these multiple other diagnoses you're talking about, that's possible, but I would defer to other folks about that.

[Claimant's Ex. 29 at 82:7-15, 83:12-24].

Assuming for the sake of argument that Ms. Rios' current condition was not caused in any part by a traumatic brain injury, the Commissioner still erred in finding Ms. Rios was not entitled to any benefits. Petitioner's experts have testified that Ms. Rios' symptoms are caused by a *combination* of the traumatic brain injury and the other conditions, including "fibro fog." If those experts happen to all be wrong with respect to the traumatic brain injury, then the current symptoms would, by process of elimination, all be caused by the other fall-related conditions including fibromyalgia.

It is undisputed that Ms. Rios is not malingering or faking her symptoms. *Something* is clearly wrong with her. Despite rejecting all of Petitioner's experts, the Deputy did not clearly spell out what she believes to be the cause of Ms. Rios' condition. Based on the factual findings in the Decision, one can presume that the Deputy believed it is either a flare-up of a prior condition or physical manifestations of workplace or marital stress.

It is important to note that the records contain no cause, other than the workplace fall, for Ms. Rios' current debilitating condition. The Deputy cites to certain symptoms that Ms. Rios exhibited to varying degrees before and after the November 15, 2013 fall. Specifically, she notes Ms. Rios' past history of light sensitivity (2006), concussion (2010), headaches/dizziness (2011), migraines, vomiting and photophobia (2011), headaches, migraines, light sensitivity (2012), pain and blurry vision (2012), migraines, nausea, nausea with vomiting, and photo/phonophobia (2013). None of these prior medical records include a diagnosis of fibromyalgia or centralized sensitization syndrome. No one has argued that the symptoms from the 2010 concussion had not fully dissipated by the time Ms. Rios fell down the stairs at John Deere. Thus, it would not be reasonable to attribute Ms. Rios' current symptoms to a pre-existing condition.

With respect to Ms. Rios' condition being stress-induced, the Deputy cites to a statement made by her husband, Luis Garcia, contained in a 2013 Medical Record. Mr. Garcia purportedly "noted that every time Maria had these symptoms there had been something emotional going on, and he thought that was what triggered her headaches."[5] [Arbitration Decision at 11]. Assuming this statement was made, it was related to symptoms that pre-dated the workplace fall.

The Deputy discusses additional workplace stress that occurred following the fall. Specifically, the Deputy references the testimony of John Deere employee Ryan Cawelti, who testified that Ms. Rios had been given a "Performance Needs Improvement" rating during a job review that occurred December 2, 2013. [Arbitration Decision at 7]. Ms. Rios was given a performance improvement plan dictating what she needed to accomplish over the next year to remove the PNI Rating. [Arbitration Decision at 8].

Similarly, Respondent's arguments in its Brief and at the hearing focus on the issues Ms. Rios was facing at work and stressors occurring in her marriage. Respondent implies that those outside issues, rather than the workplace fall, have led to her current condition. However, it is undisputed that Ms. Rios was a functioning, if not ideal, employee at the time of her fall. Additionally, though her stress had manifested in some physical symptoms in the past, it had never placed her in a debilitated condition. Finally, and most importantly, no expert testimony properly supports Respondent's theory of causation.

Dr. Jones states: "Given the facts of the accident as reflected in the records and by the patient's husband in our assessment, it is reasonable to **consider** non-neurological factors or psychological factors, as noted in a number of outside evaluations, and as is noted both in prior neuropsychological assessments." [Def.'s Ex. L at 4] (emphasis added). Saying that such factors

[5] The Decision cites to Defendant's Exhibit F. The Employer's Post-Hearing Brief references a similar statement in Defendant's Exhibit C on page 4. The Court cannot locate this statement in either exhibit.

should be considered is not equivalent to diagnosing them as the cause. Further, those treating physicians who examined Ms. Rios did not come to such a diagnosis. Rather, they attributed her condition to her workplace fall. In sum, no expert explicitly links Ms. Rios' current condition to this additional workplace stress that arose in December 2013 or any other stressor. In the absence of such testimony, the cause identified by Petitioner's experts must carry the day when using a preponderance of the evidence standard.

The Court is not saying that it is not possible that stress played a role in Rios' condition. As it purportedly did in the past, stress may have exacerbated some of her symptoms. However, if the workplace fall was also a substantial factor, Ms. Rios is entitled to benefits. Employment "only needs to be one cause; it does not have to be the only cause," for a condition to be deemed work related. Blacksmith v. All-American, Inc., 290 N.W.2d 348, 354 (Iowa 1980) (citing Langford v. Kellar Excavating & Grading, Inc., 191 N.W.2d 667 (Iowa 1971)) See also Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417, 420 (Iowa 1994) (same). Likewise, under Iowa law: "The employer is liable for all consequences that naturally and proximately flow from the accident." Oldham v. Scofield, 266 N.W. 480, 482 (Iowa 1936).

C. Did the Agency Err in Failing to Properly Consider Lay Testimony Which Unanimously Supports the Affirmative Causation Findings from the Unrebutted Medical Experts?

"When the record is viewed as a whole" means that the adequacy of the evidence in the record before the court to support a particular finding of fact must be judged: (1) in light of all the relevant evidence in the record cited by any party that detracts from that finding; (2) in light of all of the relevant evidence in the record cited by any party that supports that finding; (3) in light of any determinations of veracity by the presiding officer who personally observed the demeanor of the witnesses; and (4) in light of the agency's explanation of why the relevant evidence in the record supports its material findings of fact. Iowa Code § 17A.19.

The Deputy referenced the lay testimony of Luis Garcia, Vanessa Gomez and Juana Andrade as well as the submitted videos from Maria Cerda and Ms. Rios' minor daughter, N.G. [Arbitration Decision at 11]. The Deputy stated that this testimony was "compelling" but offered no details or even summary of it. Id. Thus, it is unclear if the Deputy "failed to properly consider lay testimony" as Petitioner contends.

The Deputy was certainly correct that the lay testimony would not be sufficient to provide benefits and "expert medical evidence must be considered with all other evidence introduced bearing on the causal connection between the injury and the disability." Id. What the Deputy appears to have overlooked is the importance of the lay persons' testimony with respect to the timing of Ms. Rios' symptoms.

The Deputy apparently concluded that the injuries sustained in the fall, whatever their severity, have fully resolved. If they have not, then benefits must be awarded. As discussed later in this Opinion, neither the Deputy nor the Commissioner found a date of Maximum Medical Improvement ("MMI"). Likewise, no such date is proposed by Respondent. When Ms. Rios was seen by Nurse Osgood at John Deere on November 27, 2013, her symptoms had not fully resolved. So, the Deputy presumably believed the symptoms resolved sometime after this date. The Deputy also presumably believes the symptoms resolved prior to January 4, 2014 and that the symptoms Ms. Rios reported on that date, including headache, had an independent cause. The Deputy notes the "gap in the medical notes" between these two medical visits.

Ms. Rios' medical condition between those two dates is important. If she returned to 100%, then it would bolster the opinion that her workplace injuries did not lead to her current condition. Conversely, if she continued to decline over that period, then it would be hard to argue that her workplace injuries ever fully resolved. Given the gap from late November 2013 to early

January 2014, medical records cannot be used to ascertain Ms. Rios' condition between those two key dates. That is why the layperson testimony is so important. "Supportive lay testimony may be used to buttress the expert testimony and, therefore, is also relevant and material to the causation question." Hildebrand v Rousselot, Inc., No. 5013745, 2006 WL 6848100 (Iowa Dist. May 05, 2006).

Multiple lay witnesses testified at the Arbitration Hearing that Ms. Rios changed completely after her fall. These witnesses include Ms. Rios' friends, Vanessa Gomez and Juana Andrade, and Ms. Rios' husband, Luis Garcia. Each witness testified that Ms. Rios was a high-functioning individual who took care of herself and others before the fall, but that after the fall, she cannot maintain conversations or take care of herself in the most basic ways. Ms. Rios' young daughter also discussed her observations of her mother before and after the fall.

Ms. Gomez first met Ms. Rios through their church in 2007. [Arbitration Hr'g Tr.at 34:5-7]. Ms. Gomez spent time with Ms. Rios at least weekly between 2007 and Ms. Rios' fall in 2013. [Arbitration Hr'g Tr.at 34:12-16]. In addition to seeing Ms. Rios at Sunday Masses, Ms. Gomez spent time with Ms. Rios organizing and attending church activities. [Arbitration Hr'g Tr.at 34:12-16]. Ms. Gomez testified that before her fall, Ms. Rios was a leader and a role model within the church and a high-functioning individual. Ms. Gomez described Ms. Rios as "honorable" and "organized." Ms. Rios was the "go-to person for various activities, even the council itself." [Arbitration Hr'g Tr.at 36:2-15]. Ms. Gomez testified that Ms. Rios changed completely after the fall. [Arbitration Hr'g Tr.at 40:12]. Ms. Gomez stopped by Ms. Rios' house in December after Ms. Rios did not come to church for a couple of Sundays and did not answer her phone. [Arbitration Hr'g Tr.at 40:24-41:8]. Ms. Gomez testified that Ms. Rios looked pale and tired during the visit. [Arbitration Hr'g Tr.at 41:15-16]. Ms. Rios seemed confused and had

difficulty following the conversation. [Arbitration Hr'g Tr.at 41:16-19]. "[Ms. Rios] wasn't there." [Arbitration Hr'g Tr.at 43:12-14]. Ms. Gomez visited Ms. Rios 2-3 times in December 2013 and each time, Ms. Rios and her children were home but Mr. Garcia was out. [Arbitration Hr'g Tr.at 42:4-43:6]. Ms. Gomez first learned of Ms. Rios' fall at work in January or February when Mr. Garcia was home during a visit. [Arbitration Hr'g Tr.at 42:23-43:6]. Ms. Rios could not even answer the phone on her own. [Arbitration Hr'g Tr.at 41:23-42:3]. According to Ms. Gomez, Ms. Rios' condition progressively worsened. [Arbitration Hr'g Tr.at 44:1-46:6]. Ms. Gomez and her husband have been helping Ms. Rios and her family with daily tasks 2-4 times a week since the fall. [Arbitration Hr'g Tr.at 46:11-48:25].

Ms. Andrade also met Ms. Rios through church but has known her for 10-12 years. [Arbitration Hr'g Tr.at 56:18-21]. Ms. Andrade and Ms. Rios would socialize every weekend or every other weekend with their families prior to the fall. [Arbitration Hr'g Tr.at 57:1-4]. Ms. Andrade described Ms. Rios as honest, "a woman of values." [Arbitration Hr'g Tr.at 58:4-5]. Before the fall, Ms. Andrade says that Ms. Rios was extremely active. [Arbitration Hr'g Tr.at 59:18-24]. After the fall, Ms. Andrade says that Ms. Rios was a different person, "it's like she doesn't have a life." [Arbitration Hr'g Tr.at 60:3-5] Ms. Andrade testified that Ms. Rios could not even take care of herself after the fall when she used to take care of herself, her children, and her community before the fall. [Arbitration Hr'g Tr.at 58:24-60:9].

According to Mr. Garcia, Ms. Rios called to tell him what happened on November 15, 2013. [Arbitration Hr'g Tr.at 118:13-20]. Ms. Rios reported to her husband that she had just fallen down the stairs at work and that she rolled like a ball. [Arbitration Hr'g Tr.at 118:16-20]. Ms. Rios said that a coworker helped her up and that she made her way back to her desk because she had reports to finish. [Arbitration Hr'g Tr.at 119:6-8]. "[T]hings started spinning and moving

around" when Ms. Rios looked at her computer screen, so she put her head down to rest "for a minute." [Arbitration Hr'g Tr.at 119:9-13]. When she picked her head back up, Ms. Rios called her husband. [Arbitration Hr'g Tr.at 119:13-15]. It was between 4 and 5 PM when Ms. Rios called her husband reporting that she had just fallen; Ms. Rios fell around 2:00 PM. [Arbitration Hr'g Tr.at 118:16-119:20]. Ms. Rios said that she was in immense pain and was not able to drive so she needed a ride home. [Arbitration Hr'g Tr.at 118:21-119:3]. When Mr. Garcia went to pick Ms. Rios up from work, he recalled that she was dazed and not really herself. [Arbitration Hr'g Tr.at 120:4-20]. Mr. Garcia testified that Ms. Rios was like this throughout the weekend and that she vomited "a couple of times." [Arbitration Hr'g Tr.at 120:21-121:16].

Mr. Garcia testified that their family spent Thanksgiving 2013 in Chicago and that Ms. Rios was not herself. [Arbitration Hr'g Tr.at 126:6-21]. When the family returned from Chicago and Ms. Rios returned to work, Mr. Garcia testified that Ms. Rios continued to struggle. [Arbitration Hr'g Tr.at 127:11-14]. Ms. Rios could not focus and she was struggling with typing emails that made sense, "Her past and present tense were way off." [Arbitration Hr'g Tr.at 127:13-128:4]. During this time, Mr. Garcia proofread Ms. Rios' emails before she sent them. [Arbitration Hr'g Tr.at 128:4-6].

Mr. Garcia testified that John Deere closed for two weeks, just before Christmas until shortly after New Year's Day and that the family again visited Chicago during that time. [Arbitration Hr'g Tr.at 129]. Mr. Garcia further testified that Ms. Rios was dazed, could not balance, and experienced difficulty following conversation [Arbitration Hr'g Tr.at 130].

Even Ms. Rios' young daughter stated that her mother changed after her fall at John Deere. N.G. points out that her mother was helpful and active before the fall. N.G. stated that before the fall, her mother would help her with homework, cooking, driving, gardening, running,

and riding bikes. However, she stated that her mother cannot get out of the wheelchair or use the restroom by herself anymore.

In sum, while the Deputy did not "disregard" the testimony of the above individuals, it does not appear that she "properly considered" it. She should do so on remand.

D. Did the Agency Err in Holding Claimant to Too High of a Burden of Proof on Causation, Effectively Requiring Proof Beyond a Reasonable Doubt Instead of the Legally Correct Preponderance of the Evidence Standard?

The Deputy explicitly mentioned the preponderance of the evidence standard in her decision. [Arbitration Decision at 16]. Petitioner simply concludes the wrong standard must have been used based on the result reached. The Court presumes the agency used the applicable burden of proof and will do so again on remand.

The Court notes that Petitioner is capable of meeting her burden of proof even though another possible explanation for her symptoms may exist. Respondent has argued that on an undetermined date, Ms. Rios' symptoms resolved, and that all of her current conditions are manifestations of emotional distress related to her marriage and workplace. For this explanation to be adopted, the agency must find it a "more likely" explanation than the workplace fall. In weighing the evidence, the agency must not discount Petitioners' expert opinions as discussed above.

E. Did the Agency Err By Admitting Dr. Jones' Opinions into Evidence?

The dispute about the admittance of Dr. Jones' reports was thoroughly addressed at the agency level. Although the Court believes that the admission of those reports (and the related *sua sponte* continuance of the scheduled hearing date) was prejudicial to Petitioner, the Court does not find that the agency abused its discretion in admitting the reports.

There were delays in the submission of reports from Petitioner's experts. Although the parties debate who is at fault for those delays, those delays occurred. Dr. Jones' reports were also delayed due to Petitioner's inability to fully participate in testing. The Court also notes that the Deputy took appropriate steps to attempt to minimize the prejudice to Petitioner. Specifically, she allowed Petitioner to depose Dr. Jones prior to the new hearing date and would have allowed Petitioner to depose and submit testimony from a lay witness who was available at the originally scheduled hearing date but not the rescheduled date.

"The commissioner commits an abuse of discretion when the exercise of discretion is clearly erroneous or rests on untenable grounds." Univ. of Iowa Hosps. & Clinics v. Waters, 674 N.W.2d 92, 96 (Iowa 2004). Here, in light of the history, the Commissioner's decision to admit Dr. Jones' reports was not clearly erroneous and did not rest on untenable grounds.

F. Did the Agency Err in Failing to Order John Deere to Reimburse Claimant's IME Expense Under Iowa Code § 85.39?

Ms. Rios underwent an Independent Medical Examination with Dr. Sassman on April 4, 2016. The applicable statute states:

> **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 physician chosen by the employee has the right to confer with and obtain from the employer-retained physician sufficient history of the injury to make a proper examination. An employer is only liable to reimburse an employee for the cost of an examination conducted pursuant to this subsection if the injury for which the employee is being examined is determined to be compensable under this chapter or chapter 85A or 85B. An employer is not liable for the cost of such an examination if the injury for which the employee is being examined is determined not to be a compensable injury. A determination of the reasonableness of a fee for an examination made pursuant to this subsection, shall be based on the typical fee charged by a medical provider to perform an impairment rating in the local area where the examination is conducted.

Iowa Code § 85.39(2) (emphasis added). Here, the Deputy found that Respondent "did not retain any physician to provide an opinion on permanent disability." [Arbitration Decision at 17]. Accordingly, the Deputy found no entitlement to reimbursement.

Petitioner cites numerous opinions from the Workers' Compensation Commission for the proposition that, despite the clear language of the statute, reimbursement for an Independent Medical Examination is appropriate whenever the employer has taken the position that there is no permanent disability.

> An evaluation of permanent disability that triggers the employee's right to an evaluation by a physician of the employee's choice at the employer's expense can be an express or implied. **The law does not require a formal impairment rating. A physician's conduct of releasing the employee to work,** with or without permanent restrictions, or simply terminating **care can be an implied evaluation of permanent disability.**

Kuntz v. Clear Lake Bakery, File No. 1283423 (App. July 13, 2004) (emphasis added). Kuntz and the agency decisions from other matters are informative, but are not binding on this Court.

Respondent cites Kohlhaas v. Hog Slat, Inc. 777 N.W.2d 387 (Iowa 2009), for the proposition that reimbursement is not appropriate under Iowa Code § 85.39 unless an impairment rating has been obtained in advance. This citation is inapposite because it involved a "review reopening proceeding." However, the Court affirms the Commissioner because it finds that Petitioner has not met the applicable statutory requirement.

Here, there is no dispute that Dr. Jones' evaluation of Ms. Rios did not occur until after the IME conducted by Dr. Sassman. Petitioner argues that the preceding evaluation entitling her to her own IME was that of Nurse Practitioner Jean Osgood from the John Deere Occupational Health / In-Plant Clinic. Nurse Osgood released Ms. Rios for "regular work" on November 25, 2013. [Ex. J1 at. 4]. Petitioner argues that this is an implied evaluation of permanent disability.

Even if the Court assumes that a nurse practitioner meets the statutory definition of a "physician," and even if the court assumes that a member of an in-house medical team has been "retained," the medical notes by Nurse Osgood still do not meet the standard of Iowa Code § 85.39(2). The code requires an "evaluation of permanent disability." Nurse Osgood's notes contain no such evaluation. As Petitioner argues elsewhere in her Petition, she still had symptoms on this date. Further, one could have a "permanent disability" but still be able to return to work. In the absence of a prior evaluation of permanent disability, a claimant is not entitled to reimbursement for an IME. See Streit v. Streit Construction, Inc. and EMC Insurance Companies, File No. 5043612, Iowa Workers Compensation Commission Appeal Decision (Dec. 7, 2016) (reversing the Deputy Commissioner and holding that physician opinions regarding causation were not implied evaluations of disability).

Although workers' compensation statutes "are to be liberally construed in favor of the employee," Second Injury Fund of Iowa v. Kratzer, 778 N.W.2d 42, 46 (Iowa 2010), the Court lacks the authority to change the procedures outlined in Iowa Code § 85.39(2).

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

Des Moines Area Reg'l Transit Auth. v. Young, 867 N.W.2d 839, 847 (Iowa 2015) (emphasis added).

In sum, because Respondent had not obtained an evaluation of permanent disability prior to Ms. Rios obtaining an IME, Respondent is not obligated to reimburse Ms. Rios for the expenses of that IME. The Commissioner is affirmed on this point.

Conclusion

The Deputy's Arbitration Decision, affirmed by the Commissioner, that Ms. Rios shall receive no benefits, is REVERSED by this Court and REMANDED for further evaluation consistent with this Order. Upon remand, the Commission should consider whether the award of benefits should result in a different opinion with respect to the awarding of costs.

The Deputy's Order, affirmed by the Commissioner, that Ms. Rios is not entitled to reimbursement for her Independent Medical Examination is AFFIRMED by this Court.

IT IS SO ORDERED.

State of Iowa Courts

Type: OTHER ORDER

Case Number	**Case Title**
CVCV058795	LUIS GARCIA VS JOHN DEERE

So Ordered

David Nelmark, District Judge
Fifth Judicial District of Iowa