BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

NATEIGA CAMERON, Claimant, vs. PACIFICA HEALTH SERVICES, Employer, and SFM MUTUAL INSURANCE, Insurance Carrier, Defendants.	File No. 5063931 APPEAL DECISION Head Note Nos.: 1402.40, 1801, 1802, 2500, 2700, 2907

Claimant Nateiga Cameron appeals from an arbitration decision filed on May 5, 2020. Defendants Pacifica Health Services, employer, and SFM Mutual Insurance, insurer, respond to the appeal. The hearing was held on July 9, 2019 and reconvened on October 9, 2019 before Deputy Workers' Compensation Commissioner Michelle A. McGovern. The case was considered fully submitted in front of Deputy Commissioner McGovern on November 6, 2019. Due to Deputy Commissioner McGovern's retirement, however, the case was delegated to Deputy Commissioner Jennifer S. Gerrish-Lampe, who issued the arbitration decision, along with a ruling on motion for rehearing on June 10, 2020.

On December 30, 2020, the Iowa Workers' Compensation Commissioner delegated authority to the undersigned to enter a final agency decision in this matter. Therefore, this appeal decision is entered as final agency action pursuant to Iowa Code section 17A.15(3) and Iowa Code section 86.24.

In the arbitration decision, the deputy commissioner found claimant's October 22, 2017 injury was not the cause of her symptoms that led to her surgery in October of 2018. Instead, the deputy commissioner found claimant sustained a new aggravation in September of 2018 that "may or may not be caused by work" but was "not the subject matter of [the arbitration] hearing." Thus, for the October 22, 2017 date of injury, the deputy commissioner found claimant should take nothing.

On June 10, 2020, the deputy commissioner issued a ruling on motion for rehearing that ordered defendants to pay for the entirety of claimant's IME with John Kuhnlein, M.D.

On appeal, claimant asserts the deputy commissioner erred in finding claimant's ongoing symptoms are not causally related to her October 22, 2017 work injury. Claimant argues she is not at maximum medical improvement (MMI) for her work injury and is entitled to a running award of temporary benefits. Claimant also seeks reimbursement for medical expenses and mileage. In the alternative, should it be found on appeal that claimant has reached MMI, claimant asserts she is entitled to permanent partial disability (PPD) benefits for her industrial disability. Claimant asserts her correct rate is $378.31. Claimant also seeks an order forcing defendants to authorize care with Nicholas Wetjen, M.D. Lastly, claimant seeks a reimbursement for her costs.

Those portions of the proposed agency decisions pertaining to issues not raised on appeal are adopted as a part of this appeal decision.

I performed a de novo review of the evidentiary record and the detailed arguments of the parties. Pursuant to Iowa Code sections 86.24 and 17A.15, the arbitration decision filed on May 5, 2020 is respectfully reversed.

The deputy commissioner found claimant's October 22, 2017 work injury was not the cause of her October 2018 surgery or her ongoing symptoms; instead, the deputy commissioner found claimant experienced a new aggravation in September of 2018. However, none of the experts in this case opined that claimant sustained a new aggravation of her symptoms in September of 2018. While it is true that Dr. Kuhnlein indicated claimant began experiencing "true radiculopathy" in September of 2018, he did not go so far as to say this was due to a new incident or new aggravation; in fact, he indicated she had "equivocal radicular features" leading up to this point. (Claimant's Exhibit 1, p. 10)

Furthermore, though the notes from claimant's emergency room (ER) visit in September of 2018 indicate back pain from the last week to 10 days, her complaints were very much a continuation of the complaints she had been experiencing since October of 2017. The loss of bowel control was a new symptom, but the remainder of her complaints, including numbness and tingling down her right leg, were noted in numerous medical records prior to the ER visit. (See Joint Ex. 1, pp. 13, 15, 17, 20, 22; JE 3, pp. 16, 25; JE 6, pp. 6, 15; JE 7, p. 3) Her imaging had likewise not drastically changed. (See JE 3, p. 32) As claimant explained at hearing, there was no "new incident'" that preceded her ER visit; it was a worsening after an increased workload at her job. (Hearing Transcript, p. 35)

The greater weight of the evidence supports a finding not that claimant sustained a new aggravation or injury in September of 2018 but instead that her work-related symptoms continued after she was placed at MMI by Kurt Smith, D.O., in June of 2017.

The only physician in the record to opine against causation in this case is Trevor Schmitz, M.D., but his opinion is problematic for several reasons. First, Dr. Schmitz initially opined in December of 2017 that claimant had a work injury on October 22, 2017 and that this work injury was causing her symptoms. (Cl. Ex. 3, p. 1) Roughly a year later, in October of 2018, he indicated that surgery was "warranted" for claimant, though he did not believe it was likely to "drastically improve her symptoms." (JE 3, p. 32) It was not until June of 2019, in response to a letter from defense counsel, that Dr. Schmitz offered a different opinion regarding the source of claimant's symptoms. (JE 3, p. 33-38)

While it is not unheard of for a physician to change his or her mind regarding causation, Dr. Schmitz went a step beyond opining against causation; Dr. Schmitz indicated he did "not feel as though [claimant] sustained any injury to her back as a result of her October 22, 2017 incident." (JE 3, p. 35 (emphasis added)) Later in the letter Dr. Schmitz again stated he did not believe claimant "sustained an injury as a result of her October 22, 2017 incident." (JE 3, p. 35)

Importantly, this is contrary to defendants' stipulation in this case that claimant sustained a work-related injury on October 22, 2017. It is also contrary to the opinions of Dr. Kuhnlein, Dr. Wetjen, and William Boulden, M.D.

Dr. Kuhnlein, claimant's IME physician, opined that claimant sustained a work-related low back injury with radiating low back pain on October 22, 2017, for which surgery was eventually required. (Cl. Ex. 1, p. 10) This is consistent with the opinions of Dr. Boulden, who offered a second opinion at defendants' request in April of 2018. Dr. Boulden opined that claimant's October 22, 2017 work injury "caused her problem or aggravated it to a point where she is quite symptomatic from the herniated disc" and that "most likely she is going to need surgical intervention." (Cl. Ex. 4, p. 4) Dr. Wetjen, who performed claimant's surgeries, indicated claimant would require surgery for her back pain that radiated into her right leg. (JE 8, p. 2) Prior to hearing Dr. Wetjen also stated he believed claimant has what appears to be permanent nerve damage from her work injury. (Cl. Ex. 5, p. 4)

Given defendants' stipulation in this case that claimant sustained an injury on October 22, 2017, the opinions of Drs. Kuhnlein, Boulden and Wetjen, and the original opinions of Dr. Schmitz, I simply do not find Dr. Schmitz's opinions from June of 2019 to be credible. Instead, the greater weight of the evidence supports a finding that claimant's ongoing symptoms, including her need for surgery, are related to the

stipulated October 2, 2017 work injury. The deputy commissioner's finding is therefore reversed.

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).

For the above-stated reasons, I found the opinions of Drs. Kuhnlein, Boulden and Wetjen to be most persuasive in this case. I acknowledge the concerns of Dr. Schmitz, Dr. Smith, and Daniel Miller, D.O., that claimant was "dramatic," that her subjective symptoms were not supported by her objective findings, and that claimant had some exaggerated pain behaviors. It is also concerning that claimant had an invalid functional capacity evaluation (FCE) (though she later participated in an FCE that was deemed valid). Regardless, these concerns do not outweigh the opinions of Drs. Kuhnlein, Boulden and Wetjen, which I found to be most persuasive. Notably, Dr. Kuhnlein had the opportunity to review all of the records, including Dr. Schmitz' letter from June of 2019. (See Cl. Ex. 1, p. 16) Given my findings, I conclude claimant satisfied her burden to prove her ongoing symptoms and her need for ongoing medical care, including surgery, are causally related to the stipulated October 22, 2017 work injury. The deputy commissioner is therefore respectfully reversed.

Although claimant's medical treatment, including the surgeries performed by Dr. Wetjen, is causally related to claimant's work injury, it must be determined whether defendants are responsible for the expenses related to such treatment.

Generally speaking, Iowa Code section 85.27 gives defendants the right to control medical care so long as they accept liability for claimant's condition. If a claimant seeks unauthorized care while defendants maintain their right to control the care, recovery of the expenses is appropriate only "upon proof by a preponderance of the evidence that such care was reasonable and beneficial." Bell Bros. Heating & Air Conditioning v. Gwinn, 779 N.W.2d 193, 206 (Iowa 2010). "[U]nauthorized medical care is beneficial if it provides a more favorable medical outcome than would likely have been achieved by the care authorized by the employer." Id.

On the other hand, "the employer has no right to choose the medical care when compensability is contested." Bell Bros.. 779 N.W.2d at 204. Further, when compensability is contested, "the employer cannot assert an authorization defense in response to a subsequent claim by the employee for the expenses of the alternate medical care." R. R. Donnelly & Sons v. Barnett, 670 N.W.2d 190, 197-198 (Iowa 2003). Thus, defendants are precluded from asserting an authorization defense as to any future treatment during its period of denial, and defendants lose the right to control the medical care claimant seeks during this period of denial. Brewer-Strong v. HNI Corp., 913 N.W.2d 235 (Iowa 2018); Bell Bros.. 779 N.W.2d at 204.

As a result, claimant may obtain reasonable medical care from any provider for this treatment, but at claimant's expense, and claimant may seek reimbursement for such care using regular claim proceedings before this agency. Haack v. Von Hoffman Graphics. File No. 1268172 (App. July 31, 2002); Kindhart v. Fort Des Moines Hotel. I Iowa Industrial Comm'r Decisions No. 3, 611 (App. March 27, 1985).

Ultimately, therefore, the standard for reimbursement for medical expenses turns on whether defendants were admitting or denying liability at the time claimant incurred such expenses. In this case, claimant is seeking reimbursement for expenses related to treatment obtained at UnityPoint Health between March of 2018 through February of 2019. (JE 7)

Defendants were not denying liability for claimant's condition in March of 2018; to the contrary, defendants were authorizing treatment during this time and continued to do so through June of 2018 when Dr. Smith placed claimant at MMI. (See Def. Ex. B, pp. 3-5; Hrg. Tr., pp. 31-33) Defendants authorized an additional visit with Dr. Schmitz in October of 2018 after claimant sought treatment in the ER and Dr. Wetjen

recommended surgery. (Def. Ex. B, p. 4) In other words, the care claimant sought during this time period was unauthorized. Thus, to prove her entitlement to reimbursement, she must prove that the unauthorized care was both "reasonable and beneficial." Bell Bros.. 779 N.W.2d at 206.

Claimant testified briefly regarding the treatment she received during this timeframe from her primary care provider at UnityPoint Health, but she never indicated whether it was beneficial or provided a more favorable outcome than what was being offered by defendants. (Hrg. Tr., p. 31) I therefore find there is insufficient evidence that the unauthorized care she received before her urgent care/ER visit in September of 2018 was beneficial.

With respect to her urgent care and eventual ER visit, claimant testified she was "having really, really bad pains after working one night," so bad that she was unable to get off the couch. (Hrg. Tr., p. 33) She also experienced a loss of bowel control. (Hrg. Tr., p. 35) As a result, she went to urgent care, and the providers at urgent care sent her to the ER. (Hrg. Tr., pp. 33-34) Claimant did not offer any testimony regarding whether the urgent care and ER visits provided a more favorable outcome than what would have been achieved had she waited for the care authorized by defendants, so again, I find there is insufficient evidence to determine whether these visits were beneficial. Thus, relying on the standard set forth in Bell Bros., I conclude claimant failed to satisfy her burden to prove she is entitled to reimbursement for the unauthorized care she received through her urgent care and ER visits.

However, there is another avenue to recover the costs of medical expenses in the event of a sudden emergency. "In an emergency, the employee may choose the employee's care at the employer's expense, provided the employer or the employer's agent cannot be reached immediately." Iowa Code § 85.27(4) As discussed, claimant testified she was experiencing such intense pain that she was unable to walk and experienced a loss of bowel control. Though claimant did not offer evidence that she was unable to immediately reach the employer, the increase in pain occurred at night while she was at home after her shift. Furthermore, the urgent care providers sent claimant to the ER, which indicates they believed claimant required emergency care. For these reasons, I find claimant satisfied her burden to prove she is entitled to reimbursement under section 85.27(4) with respect to the urgent care and ER visits in September of 2018.

After the ER visit, claimant was evaluated by Dr. Wetjen, who then performed two surgeries. Claimant testified that after she recovered she "felt better" than she did before the surgeries. (Hrg. Tr., p. 37) She testified she had more strength in her legs

and less numbness and tingling. (Hrg. Tr., p. 37) At the time of the surgeries, Dr. Schmitz and Dr. Smith had indicated they were not interested in performing surgery or providing claimant with additional care. Given claimant's testimony that the surgeries improved at least some of her symptoms, I find the surgeries and subsequent treatment with Dr. Wetjen, including medication and physical therapy, were more favorable than what was being offered by Dr. Schmitz and Dr. Smith, which was no additional care. I therefore find the care offered by Dr. Wetjen was reasonable and beneficial. Claimant thus satisfied her burden to prove she is entitled to reimbursement for the unauthorized care with Dr. Wetjen, including medication and physical therapy under the standard set forth in Bell Bros.

Claimant is likewise entitled to mileage for travel to any authorized care and the unauthorized care for which claimant has proven her entitlement to reimbursement, as set forth above. See Iowa Code § 85.27(1).

Claimant is also seeking what she couches as an order for alternate medical care. At the time of the hearing, however, defendants were denying liability for claimant's ongoing symptoms and were therefore not authorizing treatment. Given my determination that claimant satisfied her burden to prove her ongoing symptoms are causally connected to her work-related injury, claimant is entitled to future medical care for those causally related conditions.

In Brewer-Strong, the court held that the defendant lost its authorization defense and its right to direct care under Iowa Code section 85.27 during its period of denial but then re-acquired the defense and right to direct care once it amended its answer to admit liability. 913 N.W.2d at 245. The difference between this case and Brewer-Strong, however, is that defendants were contesting liability for claimant's ongoing symptoms at hearing.

The court addressed this scenario in Bell Bros., in which it held as follows:

> Likewise, the employer has no right to choose the medical care when compensability is contested ... If the employee establishes the compensability of the injury at a contested case hearing, then the statutory duty of the employer to furnish medical care for compensable injuries emerges to support an award of reasonable medical care the employer should have furnished from the inception of the injury had compensability been acknowledged.

779 N.W.2d at 204 (Iowa 2010).

In this case, claimant established a relationship with Dr. Wetjen. Though this relationship was established after an unauthorized ER visit, it appears defendants initially authorized the surgery with Dr. Wetjen. (See Cl. Ex. 7, p. 1) Furthermore, other than a single visit with Dr. Schmitz on October 1, 2018, it does not appear that defendants offered any additional care to claimant. As a result, Dr. Wetjen went forward with claimant's surgeries and has since directed her post-operative treatment.

Defendants were not authorizing care at the time of the hearing, nor did defendants indicate what clinic or provider they planned to authorize should the deputy find in claimant's favor.

Thus, under the circumstances presented in this case, I find treatment with Dr. Wetjen is reasonable and the type of care defendants should have provided. Therefore, defendants are ordered to authorize ongoing medical care with Dr. Wetjen for claimant's ongoing causally related symptoms.

I now turn to claimant's entitlement to disability benefits. Claimant asserts she has not yet reached MMI. I agree. Though Dr. Kuhnlein initially placed claimant at MMI, he revised his opinion after reviewing Dr. Wetjen's updated records, including Dr. Wetjen's opinion that claimant had not yet reached MMI. (Cl. Ex. 1, p. 10; Cl. Ex. 5, p. 3). The only other physician to render an opinion after claimant's surgeries is Dr. Schmitz, but his opinion is not helpful on this issue because he does not believe claimant sustained an injury as a result of the October 22, 2017 work injury, and to the extent he acknowledges something occurred on that date, he does not address whether claimant has reached MMI. Thus, the opinion that claimant has not yet reached MMI is essentially uncontroverted. Based on these facts, I find claimant has not yet reached MMI, meaning her entitlement to permanency benefits is not ripe for determination.

Because she is not at MMI, claimant asserts she is entitled to a running award of temporary benefits. The injury in this case occurred after the legislature's 2017 amendments to Iowa Code chapter 85 took effect on July 1, 2017, so the amended version of the law pertaining to temporary benefits is applicable. It states:

> 3.a. If an employee is temporarily, partially disabled and the employer for whom the employee was working at the time of injury offers to the employee suitable work consistent with the employee's disability the employee shall accept the suitable work, and be compensated with temporary partial benefits. If the employer offers the employee suitable work and the employee refuses to accept the suitable work offered by the employer, the employee shall not be compensated with temporary partial,

> temporary total, or healing period benefits during the period of the refusal.
> . . .
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> b. The employer shall communicate an offer of temporary work to the employee in writing, including details of lodging, meals, and transportation, and shall communicate to the employee that if the employee refuses the offer of temporary work, the employee shall communicate the refusal and the reason for the refusal to the employer in writing and that during the period of the refusal the employee will not be compensated with temporary partial, temporary total, or healing period benefits, unless the work refused is not suitable. If the employee refuses the offer of temporary work on the grounds that the work is not suitable, the employee shall communicate the refusal, along with the reason for the refusal, to the employer in writing at the time the offer of work is refused. Failure to communicate the reason for the refusal in this manner precludes the employee from raising suitability of the work as the reason for the refusal until such time as the reason for the refusal is communicated in writing to the employer.

Iowa Code § 85.33(3) (post-July 1, 2017) (emphasis added).

The statute first requires defendants to communicate their offer of temporary work in writing. The offer in question in this case was from May 23, 2019, and it was communicated to claimant in writing during a meeting with Matt Archibald, defendant-employer's director of human resources. (Def. Ex. C, p. 18) However, the statute also requires ("shall") employers to communicate the consequences of refusing an offer of temporary work. Without deciding whether the job offered to claimant was, in fact, "suitable" with her restrictions, such consequences are not mentioned in the May 23, 2019 offer, nor did any of defendants' witnesses testify that these consequences were communicated to claimant. Thus, I find the offer of temporary work was not complaint with the statute.

While the legislature set forth what occurs if *claimant* fails to comply with the statutory requirements when refusing an offer of temporary work, it did not specifically set forth how to treat an *employer's* failure to comply with the section's prerequisites. However, the legislature's use of the word "shall" imposes a duty. See Iowa Code § 4.1(3)(1) (providing the word "shall," in statutes enacted after July 1971, "imposes a duty"); In re Det. of Fowler, 784 N.W.2d 184, 187 (Iowa 2010) ("[T]he word 'shall' generally connotes a mandatory duty."); Berent v. City of Iowa City, 738 N.W.2d 193, 209 (Iowa 2007)("The term 'shall' is mandatory."); State v. Klawonn, 609 N.W.2d 515,

521–22 (Iowa 2000) ("The word 'may' can mean 'shall,' but the word 'shall' does not mean 'may.' "). Because defendant-employer in this case failed to satisfy that duty, I conclude their May 23, 2019 offer of temporary work was not a valid offer.

Without a valid offer of light-duty work, claimant is entitled to temporary total or healing period benefits because she was not capable of returning to substantially similar employment and had not reached MMI. See Iowa Code §§ 85.33(1); 85.34(1); Neal v. Annett Holdings, Inc., 814 N.W.2d 512, 519 (Iowa 2012) ("If the employer fails to offer suitable work, the employee will not be disqualified from receiving benefits regardless of the employee's motive for refusing the unsuitable work.")

Defendants assert claimant's termination following the meeting with Mr. Archibald should disqualify her from receiving any and all temporary benefits. As discussed above, however, I found there was no offer of suitable work at the time of claimant's termination, meaning the forfeiture provisions under section 85.33 are inapplicable. See Neal, 814 N.W.2d at 519; Schutjer v. Algona Manor Care Center, 780 N.W.2d 549, 559 (Iowa 2010). For the sake of argument, even assuming defendant-employer met the prerequisites of Iowa Code section 85.33 and the offer of temporary work was valid, I find claimant's termination was not tantamount to a refusal of such work.

Though Iowa Code section 85.33 was amended by the legislature in 2017 to require an employer's offers of temporary work and a claimant's refusal of suitable work to be in writing, the legislature added no provisions to address the impact of a claimant's termination on his entitlement to temporary benefits. As such, I conclude past precedent still applies.

Termination by itself is not sufficient grounds to disqualify an employee from temporary benefits under Iowa Code section 85.33(3). Raymie v. J. B. Schoot Family Farms, File No. 5041943 (App. Oct. 7, 2016); Terhark v. Hope Haven, File No. 5031853 (App. Feb. 26, 2013); Alonzo v. IBP, Inc., File No. 5009878 (App. Oct. 31,2006); Franco v. IBP, Inc., File No. 5004766 (App. Feb. 28, 2005). Instead, for misconduct to be tantamount to a refusal to perform suitable work, it must be "serious and the type of conduct that would cause any employer to terminate any employee" and "have a serious adverse impact on the employer." Reynolds v. Hy-Vee, Inc., File No. 5046203 (App. Oct. 31, 2017). The misconduct needs to be more egregious "than the type of inconsequential misconduct that employers typically overlook or tolerate." Id. While an employee "is not entitled to act with impunity toward the employer," the Commissioner has held that "not every act of misconduct justifies disqualifying an employee from workers' compensation benefits even though the employer may be justified in taking disciplinary action." Id. (citation omitted).

In this case, claimant was terminated after two verbal disagreements with Mr. Archibald. (Hrg. Tr., pp. 55, 58-64, 89-91, 109-126) The disagreement that immediately preceded her termination was due to a misunderstanding regarding what dates claimant asked to have off of work. Claimant admitted she and Mr. Archibald argued, they both yelled, and she accused him of "lying on" her. (Hrg. Tr., pp. 63-64, 95-96) Mr. Archibald described claimant as "[v]ery hostile, argumentative." (Hrg. Tr., p. 123) Dwala Lehman, who is an administrator for defendant-employer, also described claimant as "agitated," "aggressive" and "defensive." (Hearing Transcript II, pp. 12, 16) She stated claimant "just continued to escalate and get louder, and it just got to the point where [Mr. Archibald] just kind of finally said, 'Just at this point I think we're going to terminate employment and move on.'" (Hrg. Tr. II, p. 15)

There is no doubt from the record that claimant was angry and agitated. Claimant admitted she accused Mr. Archibald of lying. However, Mr. Archibald was, according to Ms. Lehman, visibly frustrated as well and raised his voice at claimant. (Hrg. Tr. II, pp. 16, 25-26) In fact, Ms. Lehman asked both claimant and Mr. Archibald to calm down. (Hrg. Tr. II, p. 32) In other words, both claimant and Mr. Archibald contributed to the hostility of the meetings.

Furthermore, though claimant's conduct was inappropriate and demonstrated poor judgment, she was trying to defend herself against a disciplinary action that she believed was unfair and undeserved. Claimant rightly points out in her brief on appeal that she did not swear or threaten Mr. Archibald, nor did she make a scene in front of other employees. While it was no doubt an improper outburst, I find—under the circumstances of this case—that claimant's conduct was not the type of conduct that would cause any employer to terminate any employee. While claimant and Mr. Archibald's relationship may have been somewhat fractured, claimant's conduct was not so severe as to have a serious adverse impact on defendant-employer. Thus, I conclude claimant's termination was not tantamount to a refusal to perform suitable work and therefore did not disqualify claimant from receiving temporary benefits.

Both Iowa Code section 85.33(1) and section 85.34(1) provide that temporary benefits, whether temporary total disability or healing period, are to be paid until the employee has returned to work, has reached MMI, or is medically capable of returning to employment substantially similar to the employment in which the employee was engaged at the time of the injury, whichever occurs first.

Again, at the time of her termination, claimant had not yet reached MMI and was incapable of performing her regular job with defendant-employer. Thus, none of the factors that terminate a claimant's entitlement to temporary benefits had occurred at the time of the hearing. I therefore conclude claimant is entitled to a running award of

temporary benefits from the date of his termination until the first of the above-stated factors occurs.

Given my determination that claimant is entitled to a running award of healing period benefits, I must also make a determination regarding claimant's rate. The parties agree that claimant's gross earnings were $531.00 and that claimant was married at the time of her injury, but there is a dispute as to whether claimant is entitled to four or five exemptions. Defendants argue there is insufficient evidence that claimant's husband should be considered as a dependency exemption given her tax returns, which list her as "head of household" instead of married.

Regardless of her tax returns, however, defendants stipulated claimant was married on the date of injury. (Hrg. Report) She testified was married with three dependent children on the date of injury, and defendants stipulated she was married. (Hrg. Tr., pp. 16-18) As a result, I find claimant was married and entitled to five exemptions (claimant, her husband, and three dependent children; M-5) at the time of her injury. Using the rate book in effect on claimant's date of injury (July 1, 2017 through June 30, 2018) claimant's rate is therefore $378.31.

Lastly, claimant seeks reimbursement for her costs ($100.00, filing fee; $100.00 filing fee for what I presume is file number 5064447, which was dismissed at the start of the hearing; $900.00, FCE with Daryl Short, DPT; and $200.00, conference with Dr. Wetjen). (Cl. Ex. 14).

Assessment of costs is a discretionary function of this agency. Iowa Code § 86.40. Costs are to be assessed at the discretion of the deputy commissioner or workers' compensation commissioner hearing the case. 876 IAC 4.33.

Claimant was generally successful in her claim. As such, I find a taxation of costs is appropriate in this case. Claimant is entitled to reimbursement for her filing fee in this case. 876 IAC 4.33(7). While I did not specifically rely on either Mr. Short's FCE or Dr. Wetjen's March 25, 2019 letter given my determination that claimant had not yet reached MMI, both were helpful to my analysis regarding whether claimant's ongoing symptoms are related to her October 22, 2017 work injury. These reports were also relevant to several disputed issues in this case, including the possibility that claimant was at MMI and might be entitled to an award of industrial disability and whether defendants' offer of temporary work in May of 2019 was "suitable." Thus, I find is appropriate to tax these costs to defendants. 876 IAC 4.33(7).

Defendants did not appeal the deputy commissioner's ruing on rehearing regarding claimant's IME. Thus, that ruling is adopted herein.

ORDER

IT IS THEREFORE ORDERED that the arbitration decision filed on May 5, 2020 is reversed.

Defendants shall pay claimant temporary benefits from May 23, 2019 and continuing until such time as there is a basis for ending such benefits by law.

All weekly benefits shall be paid at the rate of three hundred seventy-eight and 31/100 dollars ($378.31.) per week.

Defendants shall be entitled to the stipulated credit against this award.

Defendants shall pay accrued weekly benefits in a lump sum together with interest at an annual rate equal to the one-year treasury constant maturity published by the federal reserve in the most recent H15 report settled as of the date of injury, plus two percent.

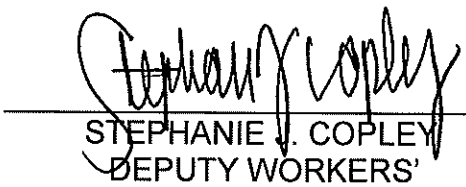
Defendants shall pay directly to the medical provider, reimburse claimant for any out-of-pocket expenses, and hold claimant harmless for the causally related medical expenses and mileage as set forth in this decision.

Defendants shall reimburse claimant for the entirety of Dr. Kuhnlein's IME.

Pursuant to rule 876 IAC 4.33, costs of the arbitration decision are taxed to defendants in the amount of one thousand two hundred and 00/100 ($1,200.00), and defendants shall pay the costs of the appeal, including the hearing transcript.

Defendants shall file subsequent reports of injury (SROI) as required by this agency pursuant to rules 876 IAC 3.1 (2) and 876 IAC 11.7.

Signed and filed this 21st day of January, 2021.



STEPHANIE J. COPLEY
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served as follows:

Nick Platt	(Via WCES)
Lee Hook	(Via WCES)
Tyler Smith	(Via WCES)