BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

TARA WALKER, Claimant, vs. WHIRLPOOL CORPORATION, Self-Insured Employer, Defendant.	: : : : : : : : : : : : :	File No. 1653739.01 ARBITRATION DECISION Head Note Nos.: 1402.30, 1402.40, 1701, 1802, 1803, 2501, 2907

STATEMENT OF THE CASE

Tara Walker, claimant, filed a petition for arbitration against Whirlpool Corporation (hereinafter referred to as "Whirlpool") as a self-insured employer. This case came before the undersigned for an arbitration hearing on May 20, 2021. Due to the ongoing pandemic in the state of Iowa and pursuant to an order of the Iowa Workers' Compensation Commissioner, this case was tried using the CourtCall videoconference platform.

The parties filed a hearing report before the scheduled hearing. On the hearing reports, the parties entered into numerous stipulations. Those stipulations were accepted and no factual or legal issues relative to the parties' stipulations will be made or discussed. The parties are now bound by their stipulations.

The evidentiary record includes Joint Exhibits 1 through 5, Claimant's Exhibits 1 through 7, and Defendant's Exhibits A through H. It should be noted that Claimant's Exhibit 7 was filed and received into the evidentiary record after the completion of the live arbitration hearing as the result of an evidentiary ruling entered at the time of the hearing.

Claimant testified on her own behalf. No other witnesses testified at trial. The evidentiary record closed upon receipt of Claimant's Exhibit 7.

However, counsel for the parties requested an opportunity to file post-hearing briefs. This request was granted and both parties filed briefs simultaneously on July 16, 2021. The case was considered fully submitted to the undersigned on that date.

STATEMENT OF THE ISSUES

The parties submitted the following disputed issues for resolution:

1. Whether claimant sustained an injury, which arose out of and in the course of her employment on June 12, 2018.

2. Whether defendant offered binding admissions during discovery that conclusively establish claimant sustained an injury arising out of and in the course of her employment on June 12, 2018.

3. Whether the alleged June 12, 2018 work injury caused temporary disability and, if so, the extent of claimant's entitlement to temporary total disability, or healing period, benefits.

4. Whether the alleged June 12, 2018 work injury caused permanent disability and, if so, the extent of claimant's entitlement to permanent disability benefits.

5. Whether claimant is entitled to payment, reimbursement, or satisfaction of past medical expenses, including a dispute about the employer's right to a credit for any past medical expenses paid through the company-offered health insurance.

6. Whether claimant is entitled to reimbursement of her independent medical evaluation pursuant to Iowa Code section 85.39.

7. Whether costs should be assessed against either party and, if so, in what amount.

FINDINGS OF FACT

The undersigned, having considered all of the evidence and testimony in the record, finds:

Tara Walker is a 50-year-old woman, who lives in Amana, Iowa. She is employed at Whirlpool and has worked there since May 1996. She alleges she sustained injuries to her right shoulder and neck as a result of a specific incident that occurred at work on June 12, 2018. (Transcript, pages 20-22, 24-25)

Specifically, Ms. Walker testified that she worked as a Quality Team Lead for the employer on June 12, 2018. Claimant testified that on June 12, 2018 she was walking the production line to which she was assigned inspecting refrigerators being produced for defects. She identified a refrigerator with a defect and diverted it off the production line. (Tr., p. 24)

Ms. Walker explained that the refrigerator moved down the production line on its back and that she needed to stand the unit upright to get it out of the way. She thought she had assistance from a co-worker. However, when she began to lift the refrigerator, her co-worker was distracted and was not helping. Ms. Walker ultimately lifted the refrigerator by herself with her right hand under the refrigerator and her right ear against the side of the unit. She testified that she experienced shooting or jolting pain after this

incident in both her right shoulder and neck. (Tr., pp. 24-27) Claimant further testified that she immediately reported the incident to her supervisor, Chris Seaton, and that her supervisor took her to the company's first aid station. (Tr., pp. 27-28; Defendant's Exhibit D, p. 18 (deposition tr., p. 14))

Following the June 12, 2018 incident, claimant obtained conservative medical care with her personal physician. Defendant sought an evaluation with Joseph Chen, M.D. in October 2018 and subsequently denied further medical care for claimant's injuries. Unfortunately, conservative care through her personal physician's office was not successful and claimant sought referral to a specialist. (Joint Ex. 3, p. 30) Claimant then sought medical care with a neurosurgeon, Chad Abernathey, M.D. in January 2019. Dr. Abernathey diagnosed claimant with "C5-6 and C6-7 disc degeneration with osteophyte formation and stenosis. She does have a substantial degree of stenosis, primary at C6-7 with spinal cord compression." (Joint Ex. 1, p. 1) Dr. Abernathey recommended a 2-level fusion of the cervical spine, took claimant to surgery, and performed that fusion on February 5, 2019. (Joint Ex. 1, pp. 1-2, Joint Ex. 2, p. 3)

Ms. Walker was off work after the February 5, 2019 surgery. She requested, and Dr. Abernathey permitted, a return to work with restrictions effective February 21, 2019. (Joint Ex. 1, p. 2) Accordingly, claimant was off work from February 5, 2019 through February 20, 2019. She was not capable of performing substantially similar work to that which she was performing on the date of injury during this period and had not yet achieved maximum medical improvement by February 20, 2019. (Joint Ex. 1, p. 2; Claimant's Ex. 1, pp. 32-33)

Surgery resulted in a resolution of some of claimant's neck symptoms and some of the radicular pain to claimant's right shoulder. She continued to have migraine headaches, which were later determined to be unrelated and the result of a personal health condition. (Tr., pp. 37-39, 42) However, claimant continued to have right shoulder symptoms, including a constant aching pain, difficulties with range of motion, and loss of strength. (Tr., pp. 45-46) Claimant continues to experience some pain in her neck and difficulties with range of motion attempting to look to her right. (Tr., p. 47)

In response to requests for admissions and in their answer, defendant admitted that claimant sustained an injury that arose out of and in the course of her employment on June 12, 2018. (Claimant's Ex. 3, p. 71) However, in the hearing report, defendant denied that claimant sustained an injury on that date arising out of and in the course of her employment. (Hearing Report) Claimant asserts that the responses to requests for admissions were never withdrawn, an assertion that is acknowledged by defendant. (Tr., p. 8)

Though the response to request for admission was not formally withdrawn, defendant asserts that there was an initial injury, but that causal connection was broken

and challenged through the opinions of Dr. Chen.[1] (Tr., pp. 8-9) The argument posited by defendant seems to admit that an initial injury occurred. Their response to request for admission concedes or admits that an injury occurred on June 12, 2018. Given the response to request for admission and the concession by defense counsel at the hearing that there was an initial work injury on June 12, 2018, I find that defendant admitted an injury arose out of and in the course of claimant's employment on June 12, 2018. Nevertheless, I will analyze the issue because defendant raises it as a dispute in the hearing report.

Defendant points out that records from their first aid station and some early medical records in this case contradict the method and manner of claimant's injury as well as the date of her injury. Indeed, claimant conceded that she completed a medical aid request on the date of injury. On that form, claimant concedes that she listed her date of injury as 2008. Indeed, Ms. Walker testified that she has experienced symptoms off and on in her neck and right shoulder since 2008. She concedes that the injury date and information she supplied was erroneous in hindsight. (Tr., pp. 30-31; Defendant's Ex. A-B)

Defendant also points out that claimant's initial medical record with her personal physician records "the pain started over 10 years ago at work and has gotten worse over the years." (Joint Ex. 3, p. 21) There is no mention of the June 12, 2018 work injury in the initial medical record generated by claimant's personal physician. Yet, claimant did apparently report the injury to her supervisor. In fact, her supervisor prepared a "Safety Emergency Work Order" (SEWO). (Claimant's Ex. 3, pp. 73-76)

On that SEWO, claimant's supervisor documented the report of an injury by claimant on June 12, 2018 involving the right shoulder and neck area. The supervisor included a description from claimant of how the injury occurred: "went to lift a unit coming off foam decline and thought other individual was ready to start lifting felt pain in right shoulder." (Claimant's Ex. 3, p. 75) Later in the report, the supervisor mentions symptoms again in the neck after the claimant lifted the refrigerator on June 12, 2018. (Claimants' Ex. 3, p. 75)

Acknowledging that the claimant did not specifically reference her traumatic event of June 12, 2018 in her initial written report and that it is not contained in her initial medical record with her personal physician, I still found her testimony to be credible and convincing that the June 12, 2018 incident occurred as she described it. Claimant's version of the events was plausible and documented by her supervisor on the date of the injury. She was taken to the first aid station on that date. The fact that she

---

[1] Defendant's post-hearing brief appears to contradict defense counsel's statement at hearing. In fact, the defendant's post-hearing brief does not concede that an injury arising out of and in the course of employment occurred on June 12, 2018. Instead, defendant's post-hearing brief argues, "The claimant has failed to prove by a preponderance of the evidence that her alleged June 12, 2018, work incident was a significant and/or substantial contributing factor in her alleged neck/shoulder condition or injury." (Employer's Post-Hearing Brief, p. 8)

misunderstood the questions about when her symptoms began does not mean that the June 12, 2018 incident did not occur. I find that Ms. Walker sustained an injury to her right shoulder and neck while lifting a refrigerator on June 12, 2018. I find that this incident was a direct part of her work duties and that it was conducted at a time and location where she was supposed to be performing her work duties.

Defendant obtained a report from the treating neurosurgeon, Chad D. Abernathey, M.D., dated May 10, 2021. In that report, defendant pointed out to Dr. Abernathey the inconsistency of the June 12, 2018 first aid report. Based upon that information, Dr. Abernathey opined that he is "unable to state to within a reasonable degree of medical probability that Tara Walker's employment duties, including any alleged acute injury, is/are a significant and/or substantial contributing factor to her neck condition which warranted … surgical intervention." (Defendant's Ex. H, p. 49)

Interestingly, however, defense counsel did not refer to the SEWO when writing to and requesting an opinion from Dr. Abernathey. Nor does defendant note for Dr. Abernathey that they have admitted the initial injury occurred. Yet, in a prior report, claimant's counsel specifically referenced and made Dr. Abernathey aware of the contents of the SEWO prepared by claimant's supervisor on June 12, 2018.

Addressing the specific events referenced in the SEWO, Dr. Abernathey opined that the physical events described in the "SEWO" are consistent with an injury to the cervical spine. When asked to assume the accuracy of the events described in the SEWO, Dr. Abernathey opined that the events described therein are more likely than not a substantial contributing factor for the cervical spine surgery he performed in February 2019.

Therefore, Dr. Abernathey's opinion is reliant upon and conditional based upon the accuracy of the underlying facts he is presented. I find the facts described by claimant at hearing of lifting the refrigerator on June 12, 2018 and those described in the SEWO to be accurate. Relying upon the accuracy of those facts, it appears that Dr. Abernathey believes the June 12, 2018 incident is a significant contributing factor for claimant's injury and resulting neck surgery. I accept this opinion of Dr. Abernathey based upon the accurate facts summarized in the SEWO and reject the opinion subsequently offered by Dr. Abernathey that relies solely upon other information I did not find to be accurate.

Similarly, claimant offered a medical opinion from her independent medical evaluator, David Segal, M.D. Dr. Segal evaluated claimant one time on March 18, 2021. He opined that the June 12, 2018 events were a significant contributing factor causing claimant's right shoulder and neck injuries and that the June 12, 2018 event certainly caused a significant aggravation or worsening of any underlying right shoulder and neck conditions. (Claimant's Exhibit 1)

Defendant challenges the opinions of Dr. Segal and point out that the Iowa Board of Medicine sanctioned Dr. Segal. (Defendant's Ex. F) Indeed, Dr. Segal entered into a written agreement with the Iowa Board of Medicine and accepted some discipline. He

offers a statement in this case to explain the basis for the disciplinary action. (Claimant's Ex. 1, pp. 66-67) Nevertheless, he was disciplined and accepted that discipline. (Defendant's Ex. F) He indicates that he no longer performs neurosurgery due to a personal health condition. (Claimant's Ex. 1, pp. 66-67)

I consider the disciplinary sanctions relative to Dr. Segal's medical license. Those charges and the settlement agreement certainly do not instill an increased level of confidence about Dr. Segal's credentials, competence, and credibility to offer opinions in this case. On the other hand, the Board of Medicine permitted Dr. Segal to continue the practice of medicine (other than neurosurgery) and imposed a relatively minor penalty in the disciplinary proceedings. I find Dr. Segal continues to be qualified to offer medical opinions and I consider his opinions in this case.

To the extent that Dr. Segal's opinions correspond with Dr. Abernathey's opinions pertaining to causation after consideration of the mechanism of injury detailed in the SEWO, I accept those opinions. Specifically, I find that claimant proved by a preponderance of the evidence that the June 12, 2018 incident lifting a refrigerator occurred and that it caused injury to claimant's right shoulder and neck.

I acknowledge the contrary opinion of Joseph J. Chen, M.D. Specifically, on October 4, 2018, Dr. Chen evaluated claimant. He noted that he was asked, "to address causation for chronic neck and right shoulder pain after working at Whirlpool for 23 years." (Joint Ex. 5, p. 42) Dr. Chen notes that he reviewed outside notes and indicates that claimant reported "no clear injury" on June 12, 2018 and that she "[a]ttributes pain to repetitive reaching and pushing x 23 years." (Joint Ex. 5, p. 42)[2]

Based upon the history as he understood it, as well as his physical examination and EMG testing, Dr. Chen opined, "her cervical spondylosis is not related to her work activities and that cervical spondylosis also occurs in individuals who do not have heavy or repetitive work requirements." (Joint Ex. 5, p. 46) He declared maximum medical improvement from any reported June 12, 2018 work injury and opined that claimant has no ratable permanent impairment and requires no restrictions as a result of the reported June 2018 work incident. (Joint Ex. 5, p. 46)

Dr. Chen was not provided a copy of the SEWO. The facts that he understood and relied upon differ from the facts that I accept to be accurate. Specifically, Dr. Chen concludes there was not a clear, or traumatic, injury on June 12, 2018. I find to the contrary. For reasons similar to the reasons I rejected Dr. Abernathey's report that did not consider the SEWO, I similarly reject the opinions of Dr. Chen. I find that the facts

---

[2] I note that defendant asserted at trial that the opinions of Dr. Chen changed their stance and defense in the case. Although they challenged whether claimant sustained an injury arising out of and in the course of employment in the hearing report, defendant referenced the opinions of Dr. Chen in their responses to requests for admissions and still admitted that claimant sustained an injury that arose out of and in the course of her employment on June 12, 2018. (Claimant's Ex. 3, p. 71) Defendant appears to be taking an inconsistent position in this proceeding to that which they conceded, or admitted, when responding to discovery.

relied upon and understood by Dr. Chen in formulating his causation opinion are inaccurate or incomplete.

Having found that claimant proved she sustained neck and right shoulder injuries as a result of her work duties on June 12, 2018, I must also determine if she sustained permanent disability as a result of those injuries. As noted above, Dr. Chen opined that claimant did not sustain ratable impairment due to the June 12, 2018 incident. However, I reject that opinion because Dr. Chen was not aware of the traumatic incident that occurred. I find his opinion that claimant sustained no ratable impairment to be inaccurate and not credible given that claimant submitted to a neck fusion after Dr. Chen's evaluation and opinion.

Both Dr. Abernathey and Dr. Segal offer opinions that claimant sustained permanent impairment as a result of the June 12, 2018 work injury. Noting that claimant submitted to a neck fusion after this injury, I find that claimant sustained permanent disability as a result of the work injury.

The parties concur that claimant has returned to work since the injury date and earns more now than she did at the time of the injury. Accordingly, I must determine the extent of claimant's permanent functional impairment resulting from the June 12, 2018 injury.

Dr. Abernathey performed claimant's neck fusion. He had a chance to inspect the neck intra-operatively. He evaluated claimant more than once after surgery. As the treating neurosurgeon, Dr. Abernathey's opinion is entitled to significant consideration.

Dr. Abernathey offers an opinion that claimant sustained a 15 percent permanent functional impairment as a result of the neck injury sustained on June 12, 2018. (Defendant's Ex. H, p. 50) Dr. Abernathey's report indicates this impairment rating is rendered pursuant to the AMA Guides, Fifth Edition. However, no specific analysis or reference to applicable portions of the AMA Guides, Fifth Edition, is provided by Dr. Abernathey to support or justify his impairment rating.

On the other hand, Dr. Segal provides a comprehensive opinion, including a specific discussion of the AMA Guides, Fifth Edition. Dr. Segal explains why he utilizes the range of motion methodology for rating claimant's neck injury. He explains why Dr. Abernathey's impairment rating is not consistent with the AMA Guides, Fifth Edition. Dr. Segal also offers an impairment rating relative to claimant's right shoulder. Specifically, Dr. Segal opines that claimant sustained permanent functional impairment equivalent to 31 percent of the whole person as a result of the neck injury and an additional 5 percent of the whole person as a result of the right shoulder injury.

Dr. Segal references specific tables and methodologies for each of his impairment ratings. His opinion is thorough and appears to derive from ratings provided for by the AMA Guides Fifth Edition. His opinions were also derived from specific range of motion measurements, which were documented photographically as part of his evaluation and report. In conclusion, Dr. Segal opines that Ms. Walker sustained a 34

percent permanent functional impairment of the whole person as a result of the combined effects of the June 12, 2018 neck and right shoulder injuries.

Comparing the impairment ratings of Dr. Abernathey and Dr. Segal, I find that those offered by Dr. Segal are more comprehensive and consistent with the AMA Guides, Fifth Edition. Dr. Segal rates both the neck and the right shoulder. I find that Dr. Segal offers specific reference to the tables and methodologies used within the AMA Guides, Fifth Edition, to reach his impairment ratings. Ultimately, I find Dr. Segal's impairment rating to be more comprehensive and consistent with the AMA Guides, Fifth Edition. Therefore, I find that claimant proved she sustained a 34 percent permanent functional impairment of the whole person as a result of the June 12, 2018 injuries.

Ms. Walker also seeks an award of past medical expenses. Defendant concedes that the medical expenses sought were fair and reasonable. Defendant admits that the medical expenses were for reasonable and necessary treatment. Defendant also concedes that the expenses were causally connected to the medical conditions upon which the claim of injury is based. (Hearing Report) Having found that the claimed injury occurred, I similarly find that the claimed past medical expenses are causally connected to the June 12, 2018 work injury. Defendant admitted that the medical expenses sought would be owed if I found the work injury occurred. (Tr., p. 5)

Defendant asserts that they should be entitled to a credit for all medical expenses paid by their health insurance. (Tr., pp. 5-6) Claimant does not resist such a credit, but also requests an order be entered noting that the employer's workers' compensation plan must reimburse any health insurance claims asserted against claimant to ensure all medical expenses are paid by the employer. (Tr., pp. 6-7) Claimant also has some out-of-pocket medical expenses that were not paid by the employer, which are specifically found to be related to the June 12, 2018 work injury. (Claimant's Ex. 4)

CONCLUSIONS OF LAW

The initial dispute I address is a claim by Ms. Walker that defendant conclusively admitted in response to requests for admissions that she sustained an injury that arose out of and in the course of employment on June 12, 2018. My review of the defendant's response to requests for admissions found that defendant did admit claimant sustained an injury arising out of and in the course of employment on June 12, 2018. Defendant did not withdraw that request for admission and defense counsel reiterated at the time of trial that the defendant admitted an initial injury occurred but later disputed ongoing causal connection as a result of the opinion of Dr. Chen.

Iowa Rule of Civil Procedure 1.510 permits a party to serve requests for admissions and requires an opposing party to respond to those requests for admissions. Iowa Rule of Civil Procedure 1.511 provides, "Any matter admitted under rule 1.510 is conclusively established in the pending action unless the court on motion permits withdrawal or amendment of the admission." Defendant concedes that the admissions were not withdrawn. Accordingly, pursuant to Iowa Rule of Civil Procedure

1.511 the defendant's admissions that claimant sustained an injury on June 12, 2018 arising out of and in the course of her employment were "conclusively established." I find no basis upon which defendant could withdraw those or challenge whether claimant sustained an injury arising out of and in the course of her employment on June 12, 2018. Defendant's dispute of this issue on the hearing report was inappropriate because the issue was conclusively established during discovery.

Nevertheless, recognizing that defendant asserted this dispute in the hearing report and for appellate purposes, I will address the dispute about whether claimant sustained an injury arising out of and in the course of her employment on June 12, 2018.

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

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

The question of causal connection is essentially within the domain of expert testimony. The expert medical evidence must be considered with all other evidence introduced bearing on the causal connection between the injury and the disability. Supportive lay testimony may be used to buttress the expert testimony and, therefore, is also relevant and material to the causation question. The weight to be given to an expert opinion is determined by the finder of fact and may be affected by the accuracy of the facts the expert relied upon as well as other surrounding circumstances. The expert opinion may be accepted or rejected, in whole or in part. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); IBP, Inc. v. Harpole, 621 N.W.2d 410 (Iowa 2001); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995). Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417 (Iowa 1994). Unrebutted expert medical

testimony cannot be summarily rejected. Poula v. Siouxland Wall & Ceiling, Inc., 516 N.W.2d 910 (Iowa App. 1994).

In this case, I found the opinions of Dr. Segal and the initial causation opinion of Dr. Abernathey, which considered the SEWO, to be the most convincing on the issue of causation. Relying upon those medical opinions, I found that claimant proved she sustained an injury to her neck as well as an injury to her right shoulder that both arose out of and in the course of her employment due to a traumatic injury on June 12, 2018. Accordingly, I conclude that claimant carried her burden of proof to establish a compensable work injury to both her neck and right shoulder on June 12, 2018.

Similarly, I found the opinions of Dr. Segal and Dr. Abernathey to be more convincing than the opinion offered by Dr. Chen on the issue of permanent disability. Specifically, I noted that Dr. Chen's opinion was based upon inaccurate or incomplete information and that both Dr. Abernathey and Dr. Segal offered permanent functional impairment ratings for claimant's work injuries. I further noted that claimant submitted to a neck fusion subsequent to the opinion of Dr. Chen. Ultimately, I conclude that claimant carried her burden of proof to establish she sustained permanent disability as a result of the June 12, 2018 work injury.

Claimant's neck injury is an unscheduled injury. Accordingly, her injuries are compensated pursuant to Iowa Code section 85.34(2)(v) (2018). Section 85.34(2)(v) provides:

> If an employee who is eligible for compensation under this paragraph returns to work or is offered work for which the employee receives or would receive the same or greater salary, wages, or earnings than the employee received at the time of the injury, the employee shall be compensated based only upon the employee's functional impairment resulting from the injury, and not in relation to the employee's earning capacity.

All parties acknowledged that claimant has returned to work since the injury and that she earns more now than at the time of the injury. (Tr., pp. 4-5) Accordingly, claimant's recovery is limited at this time to her functional impairment resulting from the injury. Iowa Code section 85.34(2)(v).

Iowa Code section 85.34(2)(v) provides that permanent impairment should "be determined by use of the guides to the evaluation of permanent impairment, published by the American medical association, as adopted by the workers' compensation commissioner by rule." The Commissioner has adopted the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, as the applicable version "for determining the extent of loss of percentage of impairment for permanent partial disabilities and payment of weekly compensation for permanent partial scheduled injuries under Iowa Code section 85.34(2) not involving a determination of reduction in an employee's earning capacity." 876 IAC 2.4. Iowa Code section 85.34(2)(x) provides that the "percentage of permanent impairment shall be determined solely by utilizing the

guides to the evaluation of permanent impairment, published by the American medical association, as adopted by the workers' compensation commissioner."

Three physicians offered opinions about claimant's permanent functional impairment related to the June 12, 2018 injuries. Having considered the opinions of Dr. Chen, Dr. Abernathey, and Dr. Segal, I ultimately found the opinions of Dr. Segal to be most thorough, consistent with the AMA Guides, Fifth Edition, and most credible and convincing on the issue of permanent impairment. Dr. Segal opined that claimant sustained permanent functional impairment to both the neck and the right shoulder and combined those impairment ratings pursuant to the requirements of the AMA Guides, Fifth Edition. Ultimately, I accepted Dr. Segal's impairment rating and found that claimant proved she sustained a 34 percent permanent functional impairment of the whole person as a result of the June 12, 2018 injuries to her neck and right shoulder.

Pursuant to Iowa Code section 84.34(2)(v), the claimant shall be paid proportionally based upon the functional limitation on a 500-week basis. Having found that claimant sustained a 34 percent permanent functional impairment of the whole person, I conclude she proved entitlement to 170 weeks of permanent partial disability benefits at this time. Iowa Code section 85.34(2)(v). If claimant's employment ends subsequent to this award, she may be entitled to further permanent disability benefits pursuant to Iowa Code section 85.34(2)(v).

Ms. Walker also asserts a claim for healing period benefits from February 5, 2019 through February 20, 2019.

Healing period compensation describes temporary workers' compensation weekly benefits that precede an allowance of permanent partial disability benefits. Ellingson v. Fleetguard, Inc., 599 N.W.2d 440 (Iowa 1999). Section 85.34(1) provides that healing period benefits are payable to an injured worker who has suffered permanent partial disability until the first to occur of three events. These are: (1) the worker has returned to work; (2) the worker medically is capable of returning to substantially similar employment; or (3) the worker has achieved maximum medical recovery. Maximum medical recovery is achieved when healing is complete and the extent of permanent disability can be determined. Armstrong Tire & Rubber Co. v. Kubli, Iowa App., 312 N.W.2d 60 (Iowa 1981). Neither maintenance medical care nor an employee's continuing to have pain or other symptoms necessarily prolongs the healing period.

In this case, I found that claimant was off work and not capable of a return to substantially similar work from Dr. Abernathey's February 5, 2019 surgery through the date he released claimant to return to work on February 21, 2019. Dr. Segal offers an unrebutted opinion that claimant did not achieve maximum medical improvement until February 5, 2020 and the parties stipulate this is the appropriate date to commence permanent disability. (Claimant's Ex. 1, p. 32; Hearing Report) To the extent necessary, I accept Dr. Segal's opinion regarding maximum medical improvement as accurate. Accordingly, I conclude that claimant proved she was off work, incapable of performing substantially similar employment and had not achieved maximum medical improvement

between February 5, 2019 and February 20, 2019. Claimant proved healing period benefits are payable from February 5, 2019 through February 20, 2019. Iowa Code section 85.34(1).

Ms. Walker also asserts a claim for payment or reimbursement of past medical expenses. Defendant offered stipulations that the medical charges sought were fair and reasonable. Defendant stipulated that the charges were for treatment that was reasonable and necessary. Defendant also stipulated that the charges were for treatment of conditions upon which the claim for benefits was asserted.

The employer shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance, and hospital services and supplies for all conditions compensable under the workers' compensation law. The employer shall also allow reasonable and necessary transportation expenses incurred for those services. The employer has the right to choose the provider of care, except where the employer has denied liability for the injury. Section 85.27. Holbert v. Townsend Engineering Co., Thirty-second Biennial Report of the Industrial Commissioner 78 (Review-Reopening October 1975).

Having found that the medical charges sought in Claimant's Exhibit 4 are causally related to the June 12, 2018 injury, I conclude that claimant has established entitlement to payment or reimbursement of those charges.

Some debate arose at the commencement of hearing about a credit for payment of those charges by defendant's health insurance coverage. Defendant wants credit for having paid the medical expenses under its health insurance plan. Iowa Code section 85.38. This is appropriate to avoid claimant recovering expenses she did not directly pay.

On the other hand, claimant seeks an order requiring the employer's workers' compensation plan to reimburse the health insurance plan, should the workers' compensation plan seek reimbursement from claimant. In other words, defendant seeks to avoid a windfall to claimant for expenses she did not directly pay, and claimant seeks to avoid a scenario in which she is required to reimburse medical expenses that should have been paid by the employer's workers' compensation plan. Both parties seek reasonable orders that prevent any overpayment or underpayment of benefits to claimant. Therefore, I conclude the employer should be granted a credit for any medical expenses paid by its health insurance plan but that the employer's workers' compensation plan should also be ordered to reimburse the health insurance plan to the extent that reimbursement is sought from claimant by the health insurance plan.

Ms. Walker also paid some past medical expenses out-of-pocket. The employer should reimburse all out-of-pocket expenses documented in Claimant's Exhibit 4. Iowa Code section 85.27.

Claimant also seeks reimbursement of her independent medical evaluation performed by Dr. Segal. Dr. Segal's evaluation occurred on March 18, 2021.

Defendant previously obtained a September 5, 2018 evaluation and impairment rating from Dr. Chen.

This injury has been determined to be compensable; therefore, claimant potentially qualifies for reimbursement of an independent medical evaluation. Iowa Code section 85.39.

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

Defendants are responsible only for reasonable fees associated with claimant's independent medical examination. Claimant has the burden of proving the reasonableness of the expenses incurred for the examination. See Schintgen v. Economy Fire & Casualty Co., File No. 855298 (App. April 26, 1991).

Claimant has established the prerequisites of Iowa Code section 85.39. She has established the claim is compensable. She has established that Dr. Chen offered a permanent impairment rating prior to her independent medical evaluation by Dr. Segal. Finally, I note that defendant authorized the claimant's independent medical evaluation. (Claimant's Ex. 5, p. 95) Accordingly, I conclude that claimant is entitled to reimbursement of her independent medical evaluation fees totaling $4,250.00. Iowa Code section 85.39.

Finally, claimant requests that her costs be taxed against defendant. Costs are taxed at the discretion of the agency. Iowa Code section 86.40. However, costs statutes are construed strictly. Coker v. Abell-Howe Co., 491 N.W.2d 143, 151 (Iowa 1992). Claimant has prevailed on the merits of this case. Accordingly, I conclude that claimant's costs should be assessed in some amount.

Ms. Walker seeks assessment of her filing fee ($100.00) as well as the cost of service upon defendant ($7.05). Both of these costs are reasonable and appropriate pursuant to 876 IAC 4.33(3), (7). Defendant is taxed with the costs of the filing fee and service expense.

Claimant requests the costs of her deposition transcript be assessed. Agency rule 876 IAC 4.33(3) permits the assessment of "transcription costs when appropriate." Defendant elected to introduce the deposition transcript as an exhibit. Therefore, I find it appropriate to tax the cost ($95.00) of this deposition transcript.

Finally, claimant seeks the cost of a conference with Dr. Abernathey to obtain a causation opinion. Agency rule 876 IAC 4.33(6) permits the agency to assess the reasonable cost of obtaining up to two doctors' reports. However, this rule does not permit assessment of the cost of a conference between the attorney and the physician in advance of requesting such a report. The invoice from Dr. Abernathey's office

indicates the $300.00 charge was to obtain a telephone conference with the physician. I conclude this is not a taxable cost. Therefore, claimant's request to tax this cost is denied. In total, I assess costs in the amount of $202.05. 876 IAC 4.33.

ORDER

THEREFORE, IT IS ORDERED:

Defendant shall pay claimant healing period benefits from February 5, 2019 through February 20, 2019.

Defendant shall pay claimant one hundred seventy (170.00) weeks of permanent partial disability benefits commencing on February 5, 2020.

All weekly benefits shall be payable at the stipulated weekly rate of six hundred thirty-three and 85/100 dollars ($633.85) per week.

Defendant shall pay accrued weekly benefits in a lump sum together with interest payable 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, as required by Iowa Code section 85.30.

Defendant shall satisfy, pay, or reimburse all medical expenses incurred for treatment detailed in Claimant's Exhibit 4, including but not limited to all out-of-pocket expenses paid by claimant.

Defendant receives credit for all medical expenses contained in Claimant's Exhibit 4 for which the employer's health insurance plan paid benefits.

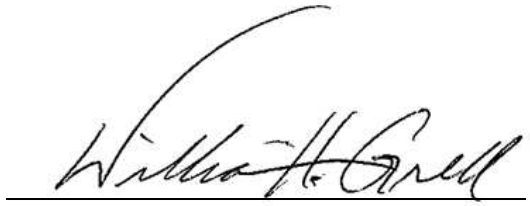
To the extent that the employer's health insurance plan seeks reimbursement of any medical expenses contained in Claimant's Exhibit 4, the employer's workers' compensation plan shall reimburse such payments and hold claimant harmless for any such expenses.

Defendant shall reimburse claimant for her independent medical evaluation in the amount of four thousand two hundred fifty and 00/100 dollars ($4,250.00).

Defendant shall reimburse claimant's costs in the amount of two hundred two and 05/100 dollars ($202.05).

Defendant 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 ____22nd_____ day of November, 2021.



WILLIAM H. GRELL
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Thomas Wertz (via WCES)

Steven Durick (via WCES)

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