BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

ANA GONZALEZ MORENO, Claimant, vs. DMF GARDENS, INC., Employer, and SELECTIVE INS. CO. OF AMERICA, Insurance Carrier, Defendants.	File No. 5055527 ARBITRATION DECISION Head Notes: 1100, 1802, 1803, 2501

STATEMENT OF THE CASE

The claimant, Ana Gonzalez Moreno, filed a petition for arbitration and seeks workers' compensation benefits from DMF Gardens, Inc., employer, and Selective Insurance Company of America, insurance carrier. The claimant was represented by Jerry Jackson. The defendants were represented by Jeffrey Lanz.

The matter came on for hearing on December 15, 2017, before Deputy Workers' Compensation Commissioner Joe Walsh in Des Moines, Iowa. The record in the case consists of Claimant's Exhibits 1 through 7 and Defense Exhibits A through N. The claimant testified under oath at hearing, as did Vernon Holt and Frank Holt. Kristi Miller was appointed the official reporter and custodian of the notes of the proceeding. Darcy Lopez served as the Spanish language interpreter. The matter was fully submitted on February 13, 2017, after helpful briefing by the parties.

ISSUES

The parties submitted the following issues for determination:

1. Whether the claimant sustained an injury which arose out of and in the course of her employment on September 28, 2015.

2. Whether the alleged work injury is a cause of any temporary or permanent disability.

3. Whether the claimant is entitled to a running award of healing period benefits. This includes the issue of whether the defendants have proven that claimant refused suitable work and should be denied temporary disability during the period of refusal.

4. Whether the claimant is entitled to permanent partial disability benefits, and if so, the commencement date for such benefits.

5. Whether the claimant is entitled to medical expenses pursuant to section 85.27.

6. Whether the claimant is entitled to alternate medical care.

7. Whether the claimant is entitled to IME expenses.

STIPULATIONS

Through the hearing report, the parties stipulated to the following:

1. The parties had an employer-employee relationship at the time of the alleged injury.

2. The claimant was single and entitled to three exemptions at the time of the alleged injury with gross earnings of $407.96 per week.

3. Affirmative defenses, except refusal of suitable work, have been waived.

4. Defendants have not paid any benefits on this claim.

FINDINGS OF FACT

Claimant Ana Gonzalez Moreno was 26 years old at the time of hearing. She was born in Mexico and came to the United States at age 17. She left school in approximately fifth grade. She took care of her younger siblings. Her past work history is fairly sketchy. Prior to 2015, she mostly worked cash jobs, such as cleaning apartments and restaurants. She worked in a car wash for a short period in 2015. She began working for the employer, DMF Gardens, in August 2015. She worked as a greenhouse laborer for DMF Gardens, earning $9.25 per hour.

Ms. Moreno testified live at hearing. She is young and her native language is Spanish so she testified through an interpreter. She is not sophisticated and she is not a great historian. Having watched her testify live and under oath, I believe she was being truthful generally. Some of her perceptions are tarnished by feelings of anger and stress.

On September 6, 2015, claimant sought treatment at the emergency room at Iowa Lutheran Hospital for a severe headache. (Defendants' Exhibit D, page 4) She also complained of neck pain, low back pain and left leg pain. (Def. Ex. D, p. 4) She was only treated for the headache and released with medications. (Def. Ex. D, pp. 9-10)

Claimant testified she suffered an injury to her back on September 28, 2015. She testified she was moving one-gallon pots in a wheelbarrow which started to go sideways.

> . . . And then after I was done cleaning, there was a lot of bottles that I had taken out from a gallon. And they were there already on the floor. I grabbed all the bottles and the cart. And I filled it up with all the bottles. And then I wanted to go and take it where I was taking it to. And I grabbed the cart and the cart wanted to go sideways. Or it did – actually, it did tip, but I didn't want it to fall on the floor. And that's when I twisted and I put this side in.

(Def. Ex. A, pp. 18-19) The "bottles" were actually pots that the plants went in. (Def. Ex. A, p. 20) She felt pain in her low back when she attempted to keep it from tipping. She testified that she told Isabela Santos, a supervisor for the employer, shortly after the incident occurred. She testified other individuals were around. It is apparent from the claimant's description that this was a minor incident. She testified that the injury occurred toward the end of her work day, and she told Isabela shortly after the incident. (Def. Ex. A, pp. 22-23) Ms. Moreno further testified that the following day, she was in significant pain and could not "get up." (Def. Ex. A, p. 24)

There is a great deal of evidence in this record about when the claimant told her employer about this injury. The employer contends that claimant did not tell Isabela about the alleged injury at all. Rather, according to defendants, she reported it two days later to Frank Holt, the owner and general manager, or his son, Vernon Holt. The employer contends that this evidence is critical because Ms. Moreno was not truthful about who she told about the injury or when. They also point to a number of other factual discrepancies which they claim tarnish the claimant's credibility. The claimant insists she reported the injury immediately and then did not report to work the following day.

Isabela Santos testified under oath via deposition. I give her testimony very little weight. Looking at this record as a whole, it is fairly clear that Isabela believed she had to "defend" herself from claimant's contentions that she had reported the injury to her. (Def. Ex. B, pp. 15-16) I interpret this, particularly when combined with other portions of Isabela's testimony, to mean that she believed that she may be in trouble if Ms. Moreno had reported the issue to her and she had not passed that information on to Mr. Holt. (Def. Ex. B, pp. 11-12) As a result, Isabela recorded some conversations with the claimant and allegedly recorded an admission from Ms. Moreno that she had never reported the injury to her. (Def. Ex. G, pp. 39-43) I find the translated transcript of this recording to be unclear.

Vernon Holt, a manager at DMF Gardens, believed this was a significant admission by the claimant. (Def. Ex. C, pp. 13-16) Vernon admitted that while the translated transcript was "not real clear," he testified that if one listens to the recording in Spanish, it is very clear that Ms. Moreno admitted she had not told Isabela about the injury. (Def. Ex. C, p. 16) Vernon conducted an investigation of sorts a few days after the alleged injury. He took photos of the work site a few days after the alleged injury. (Def. Ex. G, pp. 36-37) He testified that the photos demonstrate that Ms. Moreno could not have been injured as she claimed. (Def. Ex. C, pp. 9-11) He did not take any photos of the wheelbarrow or the pots, and he seemed to suggest that she was not really working with those items. (Def. Ex. C, pp. 10-12)

When looking at this entire record, I find Ms. Moreno's statement of what occurred more convincing than the contrary evidence presented by defendants. First, it should be noted that the initial injury did not appear to be severe. She attempted to prevent a wheelbarrow from dumping and felt some pain in her back. She was able to keep working at that time. It is not surprising at all that no one witnessed this. The claimant is not contending she fell off a ladder onto a concrete floor. Second, the claimant's statement is consistent with all of her statements in the contemporaneous medical records. (*See* Cl. Ex. 1, p. 2; Cl. Ex. 2, p. 1; Cl. Ex. 3, p. 1; Cl. Ex. 5, p. 1) Third, the employer's investigation of the incident was lacking in numerous respects. The greater weight of evidence supports the occurrence of an injury at work.

The defendants appear to be contending that claimant was either already injured or injured herself after September 28, 2015, and then made up the story that she was injured on September 28, 2015, at work. Based upon this record, I find this scenario highly unlikely. More likely than not, she injured herself at work on September 28, 2015, feeling some pain and discomfort in her low back. I cannot tell for sure whether she told anyone about this after it happened, however, she clearly reported it two days later after the symptoms became more severe.

Ms. Moreno testified she could not get up on September 30, 2015. The employer paid the claimant wages for her time off work on September 29 and September 30. The employer attempted to arrange an appointment for claimant with some type of chiropractor, which claimant declined. She first sought treatment at Lutheran Hospital Emergency Department on October 3, 2015. After having some x-rays, she was diagnosed with right-sided low back pain without sciatica and given a dose of Toradol and Valium. (Cl. Ex. 1, p. 7) The matter was slightly complicated because of issue with her menstrual cycle. (Cl. Ex. 1, p. 1) "I feel her symptoms are most consistent with back pain secondary to a mechanical strain which occurred at work." (Cl. Ex. 1, p. 7) A prescription for Valium was given and she was recommended to use ice and heat.

She next went to the Mercy Emergency Room on October 9, 2015. Again, there was some discussion of whether any of her symptoms were related to issues with her menstrual cycle. (Cl. Ex. 2, p. 1) She was again given a dose of Toradol which helped. "Given that her pain is reproducible to palpation and worsening with movement/activity suspect more in keeping with musculoskeletal etiology." (Cl. Ex. 2, pp. 4-5) At this

time, she had normal strength, she was able to walk without difficulty and she was not in acute distress. (Cl. Ex. 2, pp. 3-4)

Between October 3, 2015, and October 9, 2015, Ms. Moreno was clearly in significant pain; however, she was provided no formal work restrictions by any physician. None of the emergency room physicians ever addressed the issue of work restrictions or work status. (Cl. Exs. 1 and 2) The employer finally directed claimant to its medical provider, Concentra on October 15, 2015. Carlos Moe, D.O., diagnosed lumbar strain and sciatica. He placed claimant on Meloxicam, Metaxalone and recommended physical therapy. (Cl. Ex. 3, p. 2) He also placed claimant on restrictions, including no lifting, pushing or pulling over 5 pounds. (Cl. Ex. 3, p. 4) She continued on these restrictions over the next month while treating with Dr. Moe.

Vernon Holt testified that he offered Ms. Moreno light-duty work within her restrictions. (Def. Ex. C, pp. 24-25) There is no documentation of this other than the testimony of Vernon Holt. It was not clear when the offer was made. There is nothing in writing. Vernon Holt did testify that Ms. Moreno performed a light-duty job "sorting tags or planting seeds in trays" at some point after the injury for less than a day before going home. (Def. Ex. C, p. 24) This is actually consistent with claimant's testimony.

> Q. And why did you stop going to work?
>
> A. Because truly, I couldn't handle it. And the pace that the doctor gave me, I can't remember how many pounds I would lift, but I was there just standing and sitting down. And that bothered me. And since it was cold, it was hurting more because of the cold weather. Because it's cold there.
>
> Q. So you just stopped going to work?
>
> A. Yeah, that's why. Because if I couldn't bend down or bend of lift nothing heavy, for me to do nothing, I said I'm not doing anything. I'm just hurting myself more.

(Def. Ex. A, p. 29)

Ms. Moreno continued to treat with Concentra for a short period of time and suddenly stopped going in October. She started treating with her primary care physician through UnityPoint Clinic La Clinica De La Esperanza. In October 2015, Kelly Gann, P.A., diagnosed her with right-sided low back pain without sciatica. She prescribed some flexeril and recommended more x-rays and physical therapy. (Cl. Ex. 5, pp. 3-4) She did not recommend any restrictions at this time.

Claimant had an MRI in November 2015, which showed some mild degenerative disc disease and a central disc bulging at L5-S1, but no frank disc herniation or lumbar nerve root impingement. (Cl. Ex. 4, p. 1) Claimant then had no treatment from November 2015, through April 2016. On April 6, 2016, she returned to UnityPoint and was again diagnosed with right-sided lower back pain, now described as "chronic" and

provided some additional medications. (Cl. Ex. 5, p. 5) She returned again in May 2016. In that note, it was noted that she "stopped going to the concentra [sic] clinic because she doesn't believe what they say and feels like they are not helping her." (Cl. Ex. 5, p. 8)

In September 2016, Frank Holt testified that he called the claimant and offered her more light-duty work. Claimant did not begin working again. He testified that she is still an employee on their books. At some point, however, it is clear that the defendants began denying the claimant's work injury. (Def. Ex. F, p. 12) Based upon this record, the first evidence of a formal denial is noted in the Defendants' Answer filed in February 2016.

The claimant has undergone two evaluations from medical experts: Mark Taylor, M.D., evaluated her on October 20, 2016. (Cl. Ex. 6) William Boulden, M.D., evaluated her for defendants on October 12, 2016. (Def. Ex. F, p. 13) Dr. Taylor issued his report first on November 9, 2016. (Cl. Ex. 6, p. 1) Dr. Boulden filed his report on November 10, 2016. (Def. Ex. F, p. 15) Both physicians performed a thorough history and physical examination. Both physicians understood the basic medical history.

Dr. Taylor opined claimant suffered a 7 percent body as a whole impairment, placing her in DRE Lumbar Category II. (Cl. Ex. 6, p. 6) He recommended permanent restrictions of no lifting in excess of 25 pounds, and limited squatting, bending and kneeling, among others. (Cl. Ex. 6, p. 6) He recommended further treatment and suggested she may benefit from physical therapy or pain management treatment. (Cl. Ex. 6, p. 5)

Dr. Boulden disagreed. He diagnosed myofascial back pain with only subjective complaints. (Def. Ex. F, p. 18) He assigned no impairment or restrictions. (Def. Ex. F, pp. 18-19) It is noted Dr. Boulden is an orthopedic surgeon. He saw no surgical issues.

Defendants conducted some surveillance of the claimant just prior to hearing in November 2016. (Def. Ex. M) The video shows claimant walking without difficulty with her child and even carrying her small child. The video is not earth shattering but it does shed some light on the case. The claimant is able to walk and she is able to lift her child. She does not appear to be in acute distress when she is walking in public. It demonstrates in fact that her functional impairment is quite limited. She has not made any attempts to work since she stopped working for DMF Gardens.

Claimant is seeking payment of medical bills as attached to the hearing report. I have compared those bills with the medical records. All of the treatment set forth in the medical bills corresponds with the medical exhibits. The treatment was for her work-related condition. It was fair and reasonable and the costs are reasonable.

CONCLUSIONS OF LAW

There are a number of issues submitted for determination. The first is whether

the claimant suffered an injury which arose out of and in the course of her employment.

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" referred 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 Electric 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.

A personal injury contemplated by the workers' compensation law means an injury, the impairment of health or a disease resulting from an injury which comes about, not through the natural building up and tearing down of the human body, but because of trauma. The injury must be something that acts extraneously to the natural processes of nature and thereby impairs the health, interrupts or otherwise destroys or damages a part or all of the body. Although many injuries have a traumatic onset, there is no requirement for a special incident or an unusual occurrence. Injuries which result from cumulative trauma are compensable. Increased disability from a prior injury, even if brought about by further work, does not constitute a new injury, however. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); Ellingson v. Fleetguard, Inc., 599 N.W.2d 440 (Iowa 1999); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995); McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985). An occupational disease covered by chapter 85A is specifically excluded from the definition of personal injury. Iowa Code section 85.61(4) (b); Iowa Code section 85A.8; Iowa Code section 85A.14.

For the reasons set forth in the finding of fact, I conclude claimant did suffer an injury which arose out of and in the course of her employment on September 28, 2015. To conclude otherwise, I would be required to determine claimant fraudulently or intentionally falsified a work injury. The weight of evidence does not support this conclusion.

The next issue is whether this injury caused any temporary or permanent disability.

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).

After reviewing this entire record as a whole, I conclude that claimant's work injury resulted in right-sided lumbar strain. It definitely resulted in some temporary disability during a period of recovery, and likely has resulted in some level of ongoing functional impairment as opined by Dr. Taylor. Dr. Boulden performed a thorough evaluation and many of his findings are undoubtedly accurate. His ultimate conclusion that claimant has zero impairment, is likely influenced by the fact he did not believe the claimant's ongoing complaints. I do find it likely, however, that claimant has exaggerated some of her ongoing symptoms. For this reason, I cannot completely discount Dr. Boulden's opinions, nor place too much weight in those of Dr. Taylor. Nevertheless, having reviewed this entire record and listened to Ms. Moreno's live, sworn testimony, I conclude that she did not fully recover from her work injury and she has some associated permanency.

The next issue is entitlement to healing period benefits. Claimant alleges she is owed a running award of benefits. Defendants contend that, even if claimant was injured, she is entitled to no temporary benefits of any kind.

Section 85.34(1) provides that healing period benefits are payable to an injured worker who has suffered permanent partial disability until (1) the worker has returned to work; (2) the worker is medically capable of returning to substantially similar employment; or (3) the worker has achieved maximum medical recovery. The healing period can be considered the period during which there is a reasonable expectation of improvement of the disabling condition. See Armstrong Tire & Rubber Co. v. Kubli, 312 N.W.2d 60 (Iowa App. 1981). Healing period benefits can be interrupted or intermittent. Teel v. McCord, 394 N.W.2d 405 (Iowa 1986).

The defendants, of course, contend that claimant was never injured at all. That argument has been rejected. Alternatively, defendants contend that the claimant

refused suitable work. For this defense to apply, the employer must prove applicability of Iowa Code section 85.33(3) (2015). When an employee is temporarily disabled and an employer "offers to the employee suitable work consistent with the employee's disability the employee shall accept the suitable work, ..." In the event that the claimant refuses suitable work, benefits are not owed during the period of refusal.

In this case, the employer did not put its offer in writing. Had the employer done so, the record would be clear when and under what circumstances work was offered. Since it was not, the matter is more complicated. When reviewing the evidence in the record, it is clear the employer offered the claimant some type of light-duty work and that she initially accepted it. Ms. Moreno, however, subsequently stopped working and provided unconvincing reasons for stopping. (Def. Ex. A, p. 29) While this case is not as clean as it could have been, the greater weight of evidence is that claimant was offered suitable work and she ultimately refused it. She had no temporary restrictions after April 2016. As such, claimant is not entitled to any healing period benefits.

The next issue is extent of entitlement to permanent partial disability benefits.

Since claimant has an impairment to the body as a whole, an industrial disability has been sustained. Industrial disability was defined in Diederich v. Tri-City R. Co., 219 Iowa 587, 258 N.W. 899 (1935) as follows: "It is therefore plain that the legislature intended the term 'disability' to mean 'industrial disability' or loss of earning capacity and not a mere 'functional disability' to be computed in the terms of percentages of the total physical and mental ability of a normal man."

Functional impairment is an element to be considered in determining industrial disability which is the reduction of earning capacity, but consideration must also be given to the injured employee's age, education, qualifications, experience, motivation, loss of earnings, severity and situs of the injury, work restrictions, inability to engage in employment for which the employee is fitted and the employer's offer of work or failure to so offer. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963); Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961).

Compensation for permanent partial disability shall begin at the termination of the healing period. Compensation shall be paid in relation to 500 weeks as the disability bears to the body as a whole. Section 85.34.

Considering all of the relevant factors of industrial disability when viewing this record as a whole, I find that the claimant has suffered a 7 percent industrial loss. She has a minor low back impairment which causes her some insignificant difficulties and discomfort when bending and lifting. She is young and bright, however, she has limited English proficiency and she is not sophisticated. She has not sought any employment since she left work for the employer. Her testimony is likely exaggerated as it pertains to her ongoing difficulties. Nevertheless, I conclude that she did not fully recover from her injury and this entitles her to some benefits. Since the claimant has a 7 percent

industrial loss, she is entitled to 35 weeks of benefits commencing on March 21, 2016, the date she reached maximum medical improvement.

The next issue is medical expenses. Claimant seeks the medical expenses as attached to the hearing report and order. Defendants deny she is entitled to any of these payments.

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. Iowa Code section 85.27 (2015).

Claimant is entitled to an order of reimbursement only if she has paid treatment costs; otherwise, to an order directing the responsible defendants to make payments directly to the provider. See, Krohn v. State, 420 N.W.2d 463 (Iowa 1988). Defendants should also pay any lawful late payment fees imposed by providers. Laughlin v. IBP, Inc., File No. 1020226 (App., February 27, 1995).

Evidence in administrative proceedings is governed by section 17A.14. The agency's experience, technical competence, and specialized knowledge may be utilized in the evaluation of evidence. The rules of evidence followed in the courts are not controlling. Findings are to be based upon the kind of evidence on which reasonably prudent persons customarily rely in the conduct of serious affairs. Health care is a serious affair.

Prudent persons customarily rely upon their physician's recommendation for medical care without expressly asking the physician if that care is reasonable. Proof of reasonableness and necessity of the treatment can be based on the injured person's testimony. Sister M. Benedict v. St. Mary's Corp., 255 Iowa 847, 124 N.W.2d 548 (1963).

It is said that "actions speak louder than words." When a licensed physician prescribes and actually provides a course of treatment, doing so manifests the physician's opinion that the treatment being provided is reasonable. A physician practices medicine under standards of professional competence and ethics. Knowingly providing unreasonable care would likely violate those standards. Actually providing care is a nonverbal manifestation that the physician considers the care actually provided to be reasonable. A verbal expression of that professional opinion is not legally mandated in a workers' compensation proceeding to support a finding that the care provided was reasonable. The success, or lack thereof, of the care provided is evidence that can be considered when deciding the issue of reasonableness of the care. A treating physician's conduct in actually providing care is a manifestation of the physician's opinion that the care provided is reasonable and creates an inference that can support a finding of reasonableness. Jones v. United Gypsum, File 1254118 (App.

May 2002); Kleinman v. BMS Contract Services, Ltd., File No. 1019099 (App. September 1995); McClellon v. Iowa Southern Utilities, File No. 894090 (App. January 1992). This inference also applies to the reasonableness of the fees actually charged for that treatment.

I conclude that the claimant is entitled to reimbursement for the medical expenses as attached to the hearing report. At the time claimant sought treatment with the emergency rooms at Lutheran and Mercy, no care was being offered. By the time she sought treatment with UnityPoint, the claim had been denied and no authorization defense has been asserted in any event. I find defendants are responsible for the medical expenses submitted.

She also seeks alternate medical care.

By challenging the employer's choice of treatment – and seeking alternate care – claimant assumes the burden of proving the authorized care is unreasonable. See Long v. Roberts Dairy Co., 528 N.W.2d 122 (Iowa 1995). Determining what care is reasonable under the statute is a question of fact. Id. The employer's obligation turns on the question of reasonable necessity, not desirability. Id.; Harned v. Farmland Foods, Inc., 331 N.W.2d 98 (Iowa 1983).

An application for alternate medical care is not automatically sustained because claimant is dissatisfied with the care he has been receiving. Mere dissatisfaction with the medical care is not ample grounds for granting an application for alternate medical care. Rather, the claimant must show that the care was not offered promptly, was not reasonably suited to treat the injury, or that the care was unduly inconvenient for the claimant. Long v. Roberts Dairy Co., 528 N.W.2d 122 (Iowa 1995).

An employer's statutory right is to select the providers of care and the employer may consider cost and other pertinent factors when exercising its choice. Long, at 124. An employer (typically) is not a licensed health care provider and does not possess medical expertise. Accordingly, an employer does not have the right to control the methods the providers choose to evaluate, diagnose and treat the injured employee. An employer is not entitled to control a licensed health care provider's exercise of professional judgment. Assman v. Blue Star Foods, File No. 866389 (Declaratory Ruling, May 19, 1988). An employer's failure to follow recommendations of an authorized physician in matters of treatment is commonly a failure to provide reasonable treatment. Boggs v. Cargill, Inc., File No. 1050396 (Alt. Care Dec. January 31, 1994).

The claimant is entitled to additional medical treatment. The defendants shall authorize a physician to make recommendations and provide further treatment if recommended.

The final issue is the independent medical evaluation and costs.

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

Defendants are responsible only for reasonable fees associated with claimant's independent medical examination. Claimant has the burden of proving the reasonableness of the expenses incurred for the examination. See Schintgen v. Economy Fire & Casualty Co., File No. 855298 (App. April 26, 1991). Claimant need not ultimately prove the injury arose out of and in the course of employment to qualify for reimbursement under section 85.39. See Dodd v. Fleetguard, Inc., 759 N.W.2d 133, 140 (Iowa App. 2008).

In this instance, the employer did not retain a physician or obtain a permanent impairment rating from any physician until just after the claimant did (by one day). Claimant cannot establish the necessary prerequisites of Iowa Code section 85.39 to qualify for reimbursement of his independent medical evaluation. Therefore, I conclude that claimant's request for reimbursement of his independent medical evaluation fee should be denied. Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839, 844 (Iowa 2015).

Claimant alternatively seeks reimbursement of this evaluation as a cost. In Young, 867 N.W.2d at 845, the Iowa Supreme Court held that only the cost of drafting a report in lieu of testimony by a physician is taxable as a cost in a worker's compensation case. In other words, claimant cannot recover the cost of Dr. Taylor's examination but may recover the cost of having the physician draft a report following that examination. Based upon the evidence before me, I find that Dr. Taylor's report shall be taxed in the amount of $1,028.75.

Defendants shall pay reasonable costs in the amount of $1,329.70.

ORDER

THEREFORE IT IS ORDERED:

Defendants shall pay the claimant thirty-five (35) weeks of permanent partial disability benefits at the stipulated rate of two hundred eighty-two and 44/100 dollars ($282.44) per week commencing March 21, 2016.

Defendants shall pay the medical expenses as outlined in the attachment to the hearing report.

Defendants shall pay accrued weekly benefits in a lump sum.

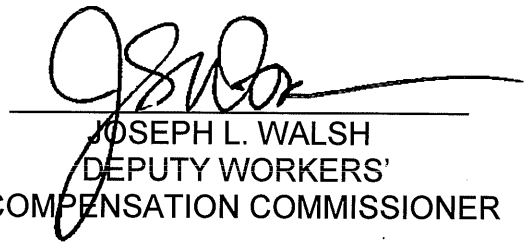
Defendants shall pay interest on unpaid weekly benefits awarded herein as set

forth in Iowa Code section 85.30.

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

Costs are taxed to defendants in the amount of one thousand three hundred twenty-nine and 70/100 dollars ($1,329.70).

Signed and filed this 19th day of January, 2018.



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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 in writing and received by the commissioner's office 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 a legal holiday. The notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 1000 E. Grand Avenue, Des Moines, Iowa 50319-0209.