BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

SHAUNA FISH, Claimant, vs. MENARD, INC., Employer, and XL INSURANCE AMERICA, INC., Insurance Carrier, Defendants.	:	File Nos. 1655094.05 20700164.05 ARBITRATION DECISION Headnotes: 1402.30, 1803, 1703, 2502

STATEMENT OF THE CASE

Claimant, Shauna Fish, filed petitions in arbitration seeking workers' compensation benefits from Menard, Inc., employer, and XL Insurance America, Inc., insurance carrier, both as defendants. This matter was heard on February 3, 2022, with a final submission date of March 3, 2022.

The record in this case consists of Joint Exhibits 1 through 13, Claimant's Exhibits 1 through 6, Defendants' Exhibits A through J, and the testimony of claimant.

STIPULATIONS

The parties filed a hearing report at the commencement of the arbitration hearing. On the hearing report, the parties entered into various stipulations. All of those stipulations were accepted and are hereby incorporated into this arbitration decision and no factual or legal issues relative to the parties' stipulations will be raised or discussed in this decision. The parties are now bound by their stipulations.

ISSUES

File No. 1655094.05 (DOI 08/15/2017):

1. Whether claimant had a neck injury that arose out of and in the course of employment.

2. Whether the injury resulted in a temporary disability.

3. The extent of claimant's entitlement to permanent partial disability benefits.

4. Commencement date of permanent partial disability benefits.

5. Whether there is a causal connection between the injury and the claimed medical expenses.

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

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

8. Credits.

9. Costs.

File No. 20700164.05 (DOI 08/24/2017):

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

2. Whether the injury resulted in a temporary disability.

3. Whether the injury resulted in a permanent disability; and if so,

4. The extent of claimant's entitlement to permanent partial disability benefits.

5. Commencement date of permanent partial disability benefits.

6. Whether there is a causal connection between the injury and the claimed medical expenses.

7. Whether claimant is entitled to reimbursement for an IME under Iowa Code section 85.39.

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

9. Credit.

10. Costs.

FINDINGS OF FACT

Claimant was 55 years old at the time of hearing. Claimant graduated from high school. She has an associate's degree in business from a community college. (Testimony page 13; Defendants' Exhibit I, page 77)

Claimant was a stay-at home mother from 1987 through 1991. Claimant worked at Amoco as a cashier and assistant manager. She worked at a grocery store as a front end manager. (Ex. I, pp. 78-79) Claimant also worked as a teacher's helper and director at a daycare.

Claimant began working for Menards in February of 2017. Claimant began in the electrical department with Menards. (Ex. F, p. 63, depo p. 19)

At the time of injury, claimant worked in the planogram department. Claimant testified in the planogram department she was responsible for putting up and taking down displays in the store. She said that the planogram job was more physically demanding work than working in the electrical department. (Tr., pp. 16-17)

Claimant's prior medical history is relevant. In October 2015 claimant treated for chronic neck pain. Claimant complained of chronic neck pain for the past 5 years. Claimant had pain radiating into both upper extremities. Claimant was assessed as having neck pain. She was prescribed Mobic and physical therapy. (Joint Exhibit 1, pp. 1-4)

In December of 2015 claimant had a cervical MRI. It indicated degenerative disc disease and spondylosis at the C5-6 level. (JE 1, p. 12)

In March of 2016 claimant treated for neck pain. Records from that visit indicate claimant had a left-sided cervical epidural that provided relief. (JE 1, p. 7)

In July of 2016 claimant treated for neck and left shoulder pain. Records indicate claimant had similar problems for several years. She was prescribed a Medrol dosepak. (JE 1, pp. 13-14)

In May of 2017 claimant was evaluated for neck pain. Claimant was prescribed gabapentin. (JE 3, p. 20)

Claimant testified that on August 15, 2017, she was helping a co-worker move bales of hay for a display from a top shelf. Claimant was standing on the floor. Claimant's co-worker handed down bales of hay to claimant. Claimant testified the bales weighed between 40-50 pounds. She said that as she continued to do the job, her shoulder continued to get sorer until she had to stop. (Tr., pp. 18-19) Claimant told her co-worker about the injury and then went home.

On August 22, 2017, claimant went to the emergency room at Unity Point in Marshalltown for right shoulder pain. Claimant had right shoulder pain from work while lifting 6 days prior. Claimant was assessed as having a possible right rotator cuff injury. (JE 2, pp. 15-17)

On August 24, 2017, claimant was evaluated by Joseph Pollpeter, M.D., for right shoulder pain caused by moving large boxes at work. Claimant was assessed as having a subacromial bursitis. She was given home exercises. (JE 4, p. 34)

On September 5, 2017, claimant saw Michael Miriovsky, M.D., for right shoulder pain after an injury at work. Claimant was assessed as having rotator cuff tendinitis and spinal stenosis. Physical therapy was recommended. (JE 4, p. 35)

Claimant returned to Dr. Miriovsky on October 17, 2017. Claimant had no improvement in her symptoms. An MRI was recommended. (JE 4, p. 36)

Claimant underwent an MRI of the right shoulder. It showed a tendinosis of the supraspinatus tendon with fraying of the superficial fibers. (JE 4, p. 38)

Claimant was evaluated on October 26, 2017, by David Sneller, M.D., for right shoulder pain. Dr. Sneller believed claimant had an overuse injury and nothing structurally needed repair. He recommended against surgery. Dr. Sneller gave claimant an injection and returned claimant to full duty. (JE 4, pp. 39-40)

In March of 2018, claimant moved from working at the Marshalltown Menards to working at Menards in Dubuque. Claimant said the move occurred due to her husband's change in jobs. She said that when she moved to Menards in Dubuque, her job changed to morning stock shift. She said that with that change, her shift was reduced to four-hour periods. (Tr., pp. 20-21)

On July 18, 2018, claimant was evaluated by Debra Rohr, ARNP, for her cervical spine. Claimant was prescribed physical therapy. (JE 5, p. 44)

Claimant returned to Nurse Practitioner Rohr on September 5, 2018, for continued neck pain. Claimant's symptoms had been exacerbated when she returned to work. She was treated with medication. (JE 5, p. 47)

On September 10, 2018, claimant was evaluated by Peggy Barton, ARNP, for shoulder pain caused by lifting at work. Claimant was limited to lifting up to 10 pounds. (JE 7, p. 56)

On October 15, 2018, claimant saw Bryan Trumm, M.D., for complaints of right shoulder pain for the past year. Claimant was assessed as having AC bicipital tendinopathy and a subacromial impingement. Surgery was discussed and chosen as a treatment option. (JE 8, pp. 58-59)

On November 12, 2018, claimant underwent shoulder surgery consisting of a right shoulder rotator cuff repair, subacromial bursectomy, biceps tendon tenotomy, and a right distal clavicle excision. Surgery was performed by Dr. Trumm. (JE 8, p. 60)

Claimant returned in follow up with Dr. Trumm on February 14, 2019. Claimant was given a shoulder injection and was limited to lifting up to 5 pounds. (JE 8, p. 64)

Claimant returned to Dr. Trumm on April 1, 2019. Claimant indicated difficulty lifting more than 15-20 pounds. Dr. Trumm wanted to give claimant restrictions. Claimant indicated Menards did not follow work restrictions. Claimant was returned to work with no restrictions. (JE 8, p. 65)

Claimant returned to Dr. Trumm on May 21, 2019. Claimant indicated return to work had been physically difficult. Claimant developed pain on the lateral epicondyle. Claimant was assessed as having lateral epicondylitis. Claimant was given an elbow strap and limited to lifting up to 5 pounds. (JE 8, p. 66)

Claimant saw Dr. Trumm on July 16, 2019. Claimant had not been able to return to work with her restrictions. Claimant was given another injection. (JE 8, pp. 67-68)

Claimant saw Dr. Trumm on November 4, 2019, with complaints of pain radiating from the shoulder into the neck and down into the elbow. Dr. Trumm found claimant's symptoms consistent with a C4-5 radiculopathy. (JE 8, p. 69)

On January 21, 2020, claimant had a cervical MRI. It showed mild spinal canal stenosis, mild bilateral neural foraminal narrowing at the C4-5 levels. Claimant was referred to a pain clinic. (JE 8, p. 70; JE 10, p. 76)

Claimant returned to Dr. Trumm on February 10, 2020. Claimant had not been able to return to work because lifting more than 5 pounds aggravated her shoulder. On exam claimant had good range of motion of the shoulder. Dr. Trumm opined claimant's symptoms were caused by her cervical spine. She was kept at a 5-pound lifting restriction. (JE 8, pp. 70-71)

On April 29, 2020, claimant had a cervical epidural steroid injection (ESI). (JE 10, p. 78)

Claimant returned to Dr. Trumm on May 12, 2020. Claimant indicated a 50 percent improvement in symptoms in her neck from the injection. Claimant still had radiculopathy in her arms and fingers. Claimant was referred to a spine specialist. (JE 8, p. 72)

On July 10, 2020, claimant was evaluated by Chad Abernathey, M.D. Claimant had a history of neck and right arm pain beginning on August 15, 2017, with an exacerbation on August 24, 2017. He believed claimant's symptoms were caused by degenerative changes ". . . with disc protrusion and osteophyte formation and stenosis

with spinal cord edema at C5-6." Surgery was discussed and chosen as a treatment option. (JE 11, pp. 79-80)

In a letter written by defendants' counsel, Dr. Abernathey opined that claimant's need for cervical surgery was due to her pre-existing spinal condition. He indicated the injury of August 15, 2017, and August 24, 2017, were not a factor in causing claimant's current spinal condition or need for surgery. He opined that the injury of August 15, 2017, and August 24, 2017, did not aggravate claimant's pre-existing spinal condition. (Ex. A)

On December 8, 2020, claimant underwent surgery consisting of a C5-6 cervical discectomy, osteophytectomy and a fusion. Surgery was performed by Dr. Abernathey. (JE 11, pp. 82-83)

Claimant returned for follow up with Dr. Abernathey on January 20, 2021. Claimant had excellent relief from preoperative symptoms. She was allowed to return to her usual activities. (JE 11, p. 81)

In a January 27, 2021 report, Robert Gorsche, M.D., gave his opinions of claimant's condition following an IME. Claimant indicated some improvement in symptoms with her neck following cervical surgery. Dr. Gorsche opined that claimant's work activities caused a shoulder injury. He found that claimant was at maximum medical improvement (MMI) for the right shoulder as of April 1, 2019. He found that claimant had a 6 percent permanent impairment to the right upper extremity. Dr. Gorsche did not give claimant permanent restrictions for her right shoulder. He opined claimant did not require further treatment for the right shoulder. (Ex. B, pp. 8-16)

On April 14, 2021, claimant underwent a functional capacity evaluation (FCE) performed by John Kruzich, OTR/L. Testing indicated claimant gave valid effort in the FCE. Claimant was limited to lifting up to 25 pounds occasionally floor to waist and 12.5 pounds occasionally overhead. (JE 12)

Claimant was evaluated by Satoshi Yamaguchi, M.D., at the University of Iowa Hospitals and Clinics (UIHC). Claimant indicated her symptoms did not significantly improve in her shoulder and neck. Dr. Yamaguchi recommended claimant undergo a cervical MRI, a CT scan and an EMG for the right upper extremity. (JE 13, pp. 94-97)

Claimant returned to Dr. Yamaguchi on August 24, 2021. Imaging studies of the neck showed a stable cervical fusion. Dr. Yamaguchi indicated there was nothing in the diagnostic testing that would explain claimant's cervical symptoms. (JE 13, pp. 103-105)

Claimant was evaluated on September 8, 2021, by Brendan Patterson, M.D., at the UIHC for right shoulder problems. Dr. Patterson found claimant's shoulder to be functioning quite well. He noted claimant's symptoms seemed to be outside the shoulder. Dr. Patterson did not recommend further treatment for the shoulder. (JE 13, pp. 106-109)

In a December 1, 2021, report, Robin Sassman, M.D., gave her opinions of claimant's condition following an IME. Claimant complained of right-sided neck pain radiating to the right arm. Claimant had a burning sensation in the right hand. Claimant indicated she had lost grip strength. Claimant had shoulder pain over the right AC joint and stiffness in the right shoulder. (Ex. 1, pp. 23-24)

Dr. Sassman found claimant's injury of August 2017 to be a substantial aggravating factor for her cervical condition. She based this on the fact that claimant did not have radicular symptoms prior to the August of 2017 injury. Dr. Sassman found claimant at MMI as of November 8, 2021. Dr. Sassman recommended claimant undergo an EMG of the right upper extremity and an MRI of the brachial plexus. (Ex. 1, p. 27)

Dr. Sassman found that claimant had a combined 18 percent permanent impairment to the right upper extremity, converting to an 11 percent permanent impairment to the body as a whole. She found claimant had a 26 percent permanent impairment to the body as a whole for the cervical spine. The combined values for both the spine and shoulder injuries resulted in a 34 percent permanent impairment to the body as a whole. (Ex. 1, pp. 28-29) Dr. Sassman recommended claimant limit lifting, pushing, pulling, and carrying up to 15 pounds at the waist level occasionally. (Ex. 1, p. 30)

In a December 22, 2021, report, Joseph Chen, M.D., gave his opinions of claimant's condition following an IME. Claimant complained of swelling in her neck. Dr. Chen assessed claimant as having right-sided cervical myofascial pain. He did not see evidence that claimant had ongoing cervical radiculopathy. Dr. Chen was unable to observe any swelling in the neck. Dr. Chen did not believe claimant had a brachial plexus injury. (Ex. 2, pp. 44-47)

Dr. Chen did not believe claimant's injuries of August 2017 were a factor in her need for neck surgery. He opined claimant's cervical stenosis, first seen in 2015, progressed naturally, leading to her cervical surgery. He did not believe claimant's work at Menards materially aggravated her neck condition. He opined claimant did not have any permanent impairment to her neck caused or materially aggravated by the August 2017 work injuries. Dr. Chen did not believe claimant had any permanent restrictions for her neck condition. Dr. Chen did not believe claimant required any further medical treatment for her neck condition. (Ex. 2, pp. 47-51)

Claimant testified her neck continues to swell on the right. She said that she has tightness in the muscles of her arms. Claimant says she has lost strength and range of motion in her right upper extremity. (Tr., pp. 30-31)

Claimant testified she did not believe she could return to work in a retail job. She said she could not physically return to work as a daycare provider. She said she does not believe she could return to work at Menards. (Tr., pp. 32-33)

Claimant testified she has not sought employment, outside of Menards, since August of 2017. (Tr., p. 60)

CONCLUSION OF LAW

The first issue to be determined is whether claimant's cervical condition arose out of and in the course of employment.

The party who would suffer loss if an issue were not established has the burden of proving that issue by a preponderance of the evidence. Iowa R. App. P. 6.904(3).

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

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

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

Claimant contends she sustained an aggravation of her pre-existing neck problem that arose out of and in the course of her August 15, 2017, injury. Defendants contend claimant's neck condition, and the need for surgery, were not causally related to the work injury.

As noted in the Findings of Fact, claimant had chronic neck pain due to spondylosis at the C5-6 level. (JE 1, p. 1) Claimant had an MRI in December 2015 indicating degenerative disc disease and spondylosis at the C5-6 levels. (JE 1, pp. 11-12)

Claimant testified that since her cervical surgery, her neck swells, she has tightness in the muscles of her upper extremity, and she has loss of strength and range of motion and endurance in her right arm. (Tr., pp. 30-31)

Three experts have given opinions regarding the cause of claimant's current neck problems. Dr. Abernathey treated claimant for an extended period of time and performed claimant's cervical surgery. Dr. Abernathey opined that claimant's need for her cervical surgery was related to claimant's pre-existing condition and was not caused by her work. (Ex. A, p. 2)

Dr. Chen evaluated claimant once for an IME. He also opined claimant's work at Menards did not permanently or materially aggravate her pre-existing neck condition. (Ex. 2, pp. 47-48)

Dr. Sassman evaluated claimant once for an IME. Dr. Sassman opined that claimant's pre-existing neck condition was substantially and permanently aggravated by the August of 2017 work injury. (Ex. 1, pp. 26-27)

There are several problems with Dr. Sassman's opinion regarding causation. Dr. Sassman appears to base her opinions on causation, in part, that it was not until the injury of August 15, 2017, that claimant began having ". . . radiation of the pain" or cervical radicular symptoms. (Ex. 1, pp. 26-27) This is not correct. On October 16, 2015, claimant was treated for chronic neck pain for the past 5 years. Records from that visit indicate claimant complained of pain radiating into both the left and right arm. (JE 1, p. 1) In short, claimant did have radicular pain from her cervical condition at least back to October 2015.

Second, claimant had a work injury to her shoulder on August 15, 2017. Treatment records following the injury relate only to the shoulder. The first mention in the records claimant's cervical condition was related to her August 15, 2017, work injury do not appear until September 5, 2018. (JE 5, p. 47) Dr. Sassman offers no rationale or explanation, if claimant's neck condition materially aggravated the August 15, 2017, work injury, why claimant did not have treatment for a work-related neck injury until over one year after the date of injury.

Third, claimant's counsel suggests in the post-hearing brief that Dr. Sassman bases her opinion of causation on differences between the 2015 and 2020 MRI. (Claimant's Post-Hearing Brief, p. 5) It does not appear Dr. Sassman bases her opinion and causation on comparisons between the 2015 and 2020 MRI. Even if this were the case, review of the 2015 MRI indicates that in 2015 claimant already showed significant encroachment of the spinal cord. (JE 8, p. 68)

Dr. Sassman bases her opinion of causation on an understanding that claimant did not have radicular symptoms until the 2017 injury. Records show claimant had radicular symptoms in 2015 due to her chronic neck condition. Dr. Sassman offers no explanation why claimant's cervical condition is work related, yet claimant did not relate her neck condition to the 2017 work incident until over a year after the date of injury. The cervical MRI from 2015 indicates that claimant had significant encroachment of the spinal cord due to spondylosis. Given this record, Dr. Sassman's opinion regarding causation is found not convincing.

Diagnostic testing shows that claimant had severe encroachment of the spinal cord at least since 2015. Dr. Abernathey opines that claimant's need for cervical surgery was related to a pre-existing condition. That opinion was corroborated by Dr. Chen. The opinion of Dr. Sassman regarding causation of the neck condition is found not convincing. Given this record, claimant has failed to carry her burden of proof her cervical condition arose out of and in the course of her employment due to the August 15, 2017, work injury.

As claimant failed to carry her burden of proof she sustained a cervical injury that arose out of and in the course of her employment on August 15, 2017, the issues regarding claimant's entitlement to temporary benefits, medical expenses and alternate medical care, as they relate to claimant's neck condition, are moot.

Regarding File Number 20700164.05 (date of injury 08/24/2017), the record shows that claimant's injury to her shoulder occurred on August 15, 2017. The date of August 24, 2017, was when claimant was evaluated by Dr. Pollpeter. Dr. Pollpeter's records indicate that claimant saw him on August 24, 2017, for an August 15, 2015, injury to her right shoulder caused by moving a display at work. There is no evidence in the record that claimant injured her right shoulder on August 24, 2017. Given this record, claimant has failed to carry her burden of proof she sustained an injury that arose out of and in the course of employment on August 24, 2017.

As claimant failed to carry her burden of proof she sustained an injury that arose out of and in the course of employment on August 24, 2017, all other issues relating to the August 24, 2017, date of injury are moot.

The next issue to be determined is the extent of claimant's entitlement to permanent partial disability benefits.

Two experts have opined regarding permanent impairment for claimant's right shoulder. Dr. Gorsche opined that claimant had a 6 percent permanent impairment to

the right upper extremity based on a loss of range of motion and weakness. (Ex. B) Dr. Sassman opined that claimant had an 18 percent permanent impairment to the right upper extremity based on loss of range of motion, loss of strength and distal clavicle excision. (Ex. 1, p. 28)

Dr. Sassman gave her opinions in a report dated December 1, 2021. Dr. Gorsche's report is dated January 27, 2021. Because Dr. Sassman's rating takes into consideration the distal clavicle resection as required by the Guides, and because her rating is closer to the time of hearing, it is found that Dr. Sassman's rating regarding the upper extremity is more convincing than that of Dr. Gorsche. Based on this, claimant is due 72 weeks of permanent partial disability benefits (18 percent x 400 weeks).

The next issue to be determined is commencement date of permanent partial disability benefits for the right shoulder.

Dr. Gorsche opined that claimant had reached maximum medical improvement for the shoulder on April 1, 2019. (Ex. B, p. 15) Dr. Sassman found that claimant had reached MMI as of November 8, 2021. However, the MMI date from Dr. Sassman includes claimant's neck condition. As noted above, claimant failed to carry her burden of proof that her neck condition arose out of and in the course of employment. Given this record, the correct commencement date for permanent partial disability benefits for the August 15, 2017, injury to the right shoulder is April 1, 2019.

The next issue to be determined is whether claimant is entitled to reimbursement for an IME.

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).

Claimant filed a petition for an IME for both dates of injury. This agency ordered defendants to pay the reasonable costs of the expenses for Dr. Sassman's IME exam. Dr. Sassman evaluated claimant for approximately two hours. She reviewed 1,861 pages of medical records. Her report spans 20 pages.

Defendants contend that Dr. Gorsche, Dr. Chen and Jonathan Fields, M.D., charged lesser amounts for their IME reports than Dr. Sassman, and thus Dr.

Sassman's charges are unreasonable. (Defendants' Post-Hearing Brief, p. 29) I have no idea how many pages of medical records Drs. Gorsche, Chen and Fields reviewed. Dr. Sassman's report is far more detailed than the reports of Drs. Gorsche, Chen and Fields. Given this record, it is found that the charges for Dr. Sassman's IME report are reasonable. Defendants shall reimburse claimant for charges associated with Dr. Sassman's IME report including any travel expenses.

The next issue to be determined is whether claimant is entitled to alternate medical care.

Iowa Code section 85.27(4) provides, in relevant part:

> For purposes of this section, the employer is obliged to furnish reasonable services and supplies to treat an injured employee, and has the right to choose the care. . . . The treatment must be offered promptly and be reasonably suited to treat the injury without undue inconvenience to the employee. If the employee has reason to be dissatisfied with the care offered, the employee should communicate the basis of such dissatisfaction to the employer, in writing if requested, following which the employer and the employee may agree to alternate care reasonably suited to treat the injury. If the employer and employee cannot agree on such alternate care, the commissioner may, upon application and reasonable proofs of the necessity therefor, allow and order other care.

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).

Claimant requests alternate medical care consisting of an EMG of the right upper extremity. Claimant also requests that if the EMG is normal, that an MRI of the brachial plexus should be performed. (Claimant's Post-Hearing Brief, p. 13)

Dr. Chen is an orthopedic surgeon. Dr. Chen indicated that he had extensive experience in treating brachial plexus injuries. He also opined that it is unlikely that claimant had a work-related brachial plexus injury. (Ex. 2, p. 49) It is unclear if the additional testing requested by claimant relates to her neck or shoulder injury. As noted, claimant has failed to carry her burden of proof she sustained a work-related neck injury. Given this record, claimant has failed to carry her burden of proof she is entitled to alternate medical care.

The next issue to be determined is credit.

Iowa Code section 85.34(4) (2017) states:

> If an employee is paid weekly compensation benefits for temporary total disability under section 85.33, subsection 1, for a healing period under section 85.34, subsection 1, or for temporary partial disability under section 85.33, subsection 2, in excess of that required by this chapter and chapters 85A, 85B, and 86, the excess shall be credited against the liability of the employer for permanent partial disability under section 85.34, subsection 2, provided that the employer or the employer's representative has acted in good faith in determining and notifying an employee when the temporary total disability, healing period, or temporary partial disability benefits are terminated.

The record indicates defendants paid claimant temporary total disability benefits based on Dr. Trumm's May 21, 2019 restrictions. (JE 8, p. 66) On February 1, 2021, claimant was given notice her indemnity benefits would end as of March 3, 2021. (Ex. 3, p. 68) The record indicates defendants paid temporary total disability benefits from on or about April 5, 2019 through March 3, 2021 at the rate of $228.13. (Id., Ex 4, pp. 93-98, Hearing report p. 3, Claimant's Post-Hearing Brief, page 10, Defendants' Post-Hearing Brief, page 24)

As detailed above, claimant failed to carry her burden of proof her neck injury arose out of and in the course of employment. Based on the above, defendants are due a credit for temporary total disability benefits paid for claimant's neck injury from on or about April 5, 2019, through March 3, 2021.

The final issue to be determined are costs. Costs are awarded at the discretion of this agency. Claimant prevailed on most of the issues found in File Number 1655094.05 (date of injury 08/15/2017). Claimant failed to carry her burden of proof she sustained an injury that arose out of and in the course of employment regarding File Number 20700164.05 (date of injury 08/24/2017). Claimant is awarded costs only for File Number 1655094.05.

ORDER

THEREFORE IT IS ORDERED:

File Number 20700164.05 (date of injury 08/24/2017):

Claimant shall take nothing from these proceedings.

Both parties shall pay their own costs.

File Number 1655094.05 (date of injury 08/15/2017):

That defendants shall pay 72 weeks of permanent partial disability benefits at the rate of two hundred twenty-eight and 38/100 dollars ($228.38) commencing on April 1, 2019.

That 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.

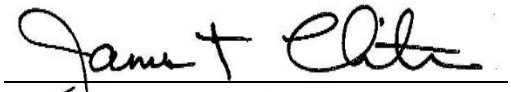
That defendants shall receive a credit for benefits paid from on or about April 5, 2019, through March 3, 2021.

That defendants shall reimburse claimant for the IME from Dr. Sassman, including travel expenses.

That defendants shall pay costs.

That defendants shall file subsequent reports of injury as required by rule 876 IAC 3.1(2).

Signed and filed this 27th day of April, 2022.



JAMES F. CHRISTENSON
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Dirk Hamel (via WCES)

Kent Smith (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.