IN THE COURT OF APPEALS OF IOWA

No. 2-933 / 12-0186
Filed January 9, 2013

MERCY HOSPITAL IOWA CITY, and
CAMBRIDGE INTEGRATED SERVICES,
Appellants,

vs.

SUSAN GOODNER,
Appellee.

Appeal from the Iowa District Court for Polk County, Artis Reis, Judge.

An employer appeals the district court's judicial review ruling affirming the award of the workers' compensation commissioner. **AFFIRMED IN PART AND REVERSED IN PART.**

Peter M. Sand, Des Moines, for appellants.

Paul J. McAndrew Jr. of Paul McAndrew Law Firm, Coralville, for appellee.

Heard by Eisenhauer, C.J., and Vogel and Vaitheswaran, JJ.

VOGEL, J.

Mercy Hospital Iowa City and Cambridge Integrated Services (Mercy Hospital) appeal the district court's ruling that affirmed the workers' compensation commissioner's decision finding Susan Goodner to be permanently and totally disabled as a result of a work injury. Mercy Hospital asserts the district court erred in finding (1) it was judicially estopped from contesting liability for the injury, (2) Goodner's medical evidence was reliable, (3) Goodner is permanently and totally disabled, and (4) it is responsible for the cost of Goodner's bariatric surgery and one-half of the cost of the family therapy sessions. Mercy Hospital also contests the district court's finding that it failed to preserve error on two issues. For the reasons stated herein, we affirm in part and reverse in part.

I. BACKGROUND FACTS AND PROCEEDINGS.

A. Medical Treatment. Goodner, a family practice physician, treated two patients with mononucleosis in January 2000. On January 18, 2000, one of the patients Goodner treated vomited on her hands during the examination. Goodner began experiencing a sore throat, sweats, chills, and enlarged lymph glands on February 4. She initially believed she had contracted strep throat, but when her symptoms did not subside after a course of antibiotics, she performed a mono spot test on herself on February 13, which came back positive. Goodner sought medical treatment on February 18, from Kara Wools-Kaloustian, M.D., an infectious disease specialist, who diagnosed Goodner with mononucleosis. Goodner also saw Cheryl K. Johnson, M.D., on February 24, who was able to palpate the edge of her spleen and liver, both of which were tender. The next

day Goodner reported her illness to her employer. Goodner remained off work or worked reduced hours as a result of feeling extreme fatigue and continued to see Dr. Wools-Kaloustian.

Goodner was eventually referred to Dale Minner, M.D., by the workers' compensation carrier in July 2000, to determine if there was a work-related condition and whether a further referral for treatment was necessary. Dr. Minner stated in the appointment record, "Ordinarily I find it difficult to recommend acceptance of infectious disease. However, this individual was directly and extensively exposed and came down with the laboratory confirmed diagnosis of infectious mononucleosis at precisely the right incubation period thereafter." He recommended Goodner continue to receive care for the illness from an internist, who would now be Fred H. Ovrom, M.D.[1] Dr. Minner stated Goodner should continue to work at least two hours a day and gradually increase under Dr. Ovrom's guidance. He believed "the long-term prognosis is good for a complete recovery."

In November of 2000, Goodner was seen by Daniel H. Gervich, M.D., for a second opinion at the request of Goodner's private disability company. Dr. Gervich expressed doubt that Goodner ever contracted infectious mononucleosis, though he could not disprove it. He was concerned that the incubation period of the disease is typically four to six weeks, and Goodner's incubation period was much shorter. He also believed she did not meet the

[1] Dr. Wools-Kaloustian changed employment and referred Goodner's ongoing care to Dr. Ovrom.

criteria for chronic fatigue syndrome, and her symptoms should remit in three to six months.

Dr. Minner referred Goodner to Robert B. Wesner, M.D., a psychiatrist, in December 2001, as Dr. Minner believed the symptoms were consistent with possible depression. Dr. Wesner diagnosed Goodner with depression, which he related to the chronic fatigue syndrome following her viral infection. In addition to providing her medication, Dr. Wesner also referred her to individual and family therapy, both of which he believed were reasonable and necessary treatment for her major depressive disorder and the chronic fatigue syndrome.

Goodner's symptoms of fatigue waxed and waned over the next few years with Goodner continuing to see Drs. Ovrom, Wesner, and Minner. Dr. Ovrom's initial diagnosis was post viral fatigue, but he revised his diagnosis in April of 2002 because he believed Goodner's condition met the criteria for chronic fatigue syndrome, and recommended consideration of permanent partial disability. Shortly before his retirement, Dr. Minner placed Goodner at maximum medical improvement and believed she was "medically stable" as of July 24, 2002. At that time Goodner was able to work twenty hours per week and was "overall at approximately 70% of full-time productivity." When Dr. Minner retired, Charles A. Buck, M.D., began monitoring the treatment for the workers' compensation carrier.

Goodner first saw Dr. Buck in October of 2002. Dr. Buck concurred with Dr. Minner's assessment of maximum medical improvement, stating, "Clearly her condition has and will continue to have mild episodic relapse, but the overall pattern has been quite stable now for some time." He anticipated her needing

periodic care with both Dr. Wesner and Dr. Ovrom, and he authorized additional visits with both providers. In his deposition, Dr. Buck stated that while he had no reason to doubt Goodner's self-reported problems of fatigue and memory loss, he now believed there was a "significant possibility" that Goodner had not contracted mononucleosis.

Goodner was referred to Jeffery L. Meier, M.D., an infectious disease specialist, in November 2002 for a second opinion. Dr. Meier diagnosed Goodner with chronic fatigue syndrome triggered by infectious mononucleosis. He did not feel she had reached maximum medical improvement as her condition remained "in a state of flux." He did recommend she continue to limit her work hours to twenty hours per week and refrain from taking night calls or practicing obstetrics. During his deposition as part of the workers' compensation claim, Dr. Meier opined that a "seventeen day period of incubation after exposure to a heavy inoculum of infectious virus is certainly within the realm of possibility." He also asserted that while it is atypical, it is scientifically feasible to contract mononucleosis through the aerosolization of saliva that then contacts the mucous membranes of another. He opined mononucleosis is one of a multitude of triggers for chronic fatigue syndrome.

Goodner underwent a series of studies including a sleep study, hormonal study, and immune disorder study at the prompting of the board of medical examiners. These studies came back normal, ruling out other conditions causing the fatigue. Goodner, who was five foot, five inches, and weighed 199 pounds at the time of the injury, gained approximately thirty-three pounds during the course of her illness. Goodner attributed this weight gain to her fatigue as she was

unable to exercise regularly or plan healthy meals. She also developed type 2 diabetes, high cholesterol, and hypertension. She sought assistance from a weight loss clinic. When Goodner's attempts to lose weight were unsuccessful, she underwent bariatric surgery in May of 2007. At the time of the workers' compensation hearing, Goodner stated she had lost 70 pounds.

Goodner was referred to Alan G. Pocinki, M.D., an expert on chronic fatigue syndrome in October 2008. It was Dr. Pocinki's opinion that Goodner met all the criteria for chronic fatigue syndrome, and he believed the condition was triggered by the mononucleosis infection. He determined she was not yet at maximum medical improvement and anticipated it would be another two to three years before she would achieve this state.

Goodner was seen by Winthrop S. Risk, M.D., for an independent medical exam at the request of her attorney in February 2009. Dr. Risk opined Goodner developed post viral fatigue syndrome as a result of her exposure to mononucleosis. Although her obesity predated her symptoms, her subsequent fatigue lead to inactivity and poor diet. This condition resulted in her gaining the additional weight and developing diabetes, hypertension, and high cholesterol. He also believed the fatigue led to depression. He did not believe she was at maximum medical improvement at that time.

Mercy Hospital sought an opinion from an infectious disease specialist, David Katz, M.D., as part of the workers' compensation claim. Dr. Katz did a records review only and did not examine Goodner. He opined that while Goodner may have a fatigue syndrome, the fatigue did not develop from mononucleosis, and he did not believe Goodner contracted mononucleosis at all.

He stated the likelihood of contracting mononucleosis in the way Goodner described was essentially zero. He also asserted the incubation period reported in Goodner's case, seventeen days, was out of the question for this virus, which has a typical incubation period of forty to sixty days. He also stated Goodner's clinical symptoms did not fit with infectious mononucleosis, which in older patients is typically characterized by a prolonged fever and liver involvement. Finally, it was Dr. Katz's opinion that there was no specific concrete connection as to the cause of chronic fatigue syndrome; therefore, he doubted the causal link between mononucleosis and chronic fatigue syndrome.

Mercy Hospital also had F. Brobson Lutz, M.D., an infectious disease specialist, conduct a records review in this case. Like Dr. Katz, Dr. Lutz opined, in his March 2, 2009 report, there is no medical literature support for the way Goodner claims the mononucleosis virus was transmitted to her. He also found the incubation period in this case was too short for mononucleosis, which typically has an incubation period of one to three months. He found no peer-reviewed articles to support either a seventeen-day incubation period or to support the transmission of mononucleosis from a patient to a healthcare provider in a clinical setting as Goodner had described.

He asserted Goodner's case likely was the result of "VIP syndrome" where a physician treats a patient differently when the patient is an important person such as a doctor. Dr. Lutz believed this was why no initial treating doctor tested for mononucleosis, but just accepted Goodner's description and self-diagnosis. He states that her treating providers assumed causation in this case rather than establishing it based on her history. He also opined that there was no data to

support a viral cause of chronic fatigue syndrome as the cause of chronic fatigue is unknown. Finally, he was concerned with the level of medications Goodner was taking, because many of the medications could be the cause of her fatigue and have a sedating effect.

Finally, Mercy Hospital had William Stutts, D.O., conduct a psychiatric evaluation of Goodner in January 2009. After conducting a review of the medical records and a patient examination, Dr. Stutts recommended that Goodner discontinue many of the medications she was on because he believed the medications were contributing to her chronic fatigue syndrome in a significant fashion and likely perpetuating her problems. Dr. Stutts was particularly concerned with the high dosage of the medications Goodner was taking and considered the dosage to be excessive. Consistent with Dr. Lutz's observations, he concluded many of the symptoms Goodner complained of could be explained by the drugs she was taking, which could delay REM sleep, cause memory impairment, have a sedating effect, and result in slow cognition. Dr. Stutts believed the psychotropic medication had so muddied the water that he could not tell if Goodner had chronic fatigue or if the symptoms were caused by the medication.

Goodner described her current symptoms during her deposition to include: profound fatigue, frequent migraines, muscle and joint pain, post-exertional malaise, reduced concentration and cognitive functioning, trouble analyzing and processing information, trouble finding words, and autonomic dysfunction leading to episodes of fainting.

B. Employment. When she became ill, Goodner was working full time as a family practitioner in a clinic that had been acquired by Mercy Hospital. After being off work for approximately six weeks from the illness in 2000, Goodner returned to work on a modified schedule working initially two to three hours per day and worked her way up to six hours per day, four days per week. The clinic was notified in 2003 by Mercy Hospital that it would be closing. From the fall of 2003 until February 2005, Goodner worked for the University of Iowa Student Health Services; however, she testified she was unable to continue in the job because she became too fatigued. She was then recruited to start a women's clinic for the Veterans Administration. She was advised the job would be strictly limited to four hours per day, but the hours turned out to be much more. She testified she decided to leave the Veterans Administration in September 2005 to start a house-call business to serve the Amish community because she was having difficulty gathering and processing information from patients. She believed the new arrangement would allow her to more easily regulate the number of hours she worked. However, that winter there was a large whooping cough outbreak in the Amish community, which again resulted in Goodner becoming overly fatigued. She notified her patients in September of 2006 that she would no longer be practicing.

She took a full year off of work from the fall of 2006 until the fall of 2007 on the advice of her treating physicians who wanted her to focus on physical exercise, cognitive therapy, and psychological counseling for herself and her family. Dr. Buck, Mercy Hospital's authorized physician, disagreed with this treatment plan as he believed a full year off work was counterproductive to a full

recovery. Goodner reported that the year off work helped her improve more than she had over the previous seven years. She increased her aerobic tolerance, was lifting weights, and underwent bariatric surgery.

In 2007, Goodner began planning to revive her house-call business for the Amish community when she was offered a position in a clinic in Kalona, Iowa, where she could keep the house-call business and be employed by the clinic. She saw her first patient through this clinic arrangement in December of 2007 but resigned her position in January of 2008 due to fatigue. She was advised by the medical board to stop seeing patients, and her medical license was placed on inactive status by mutual agreement in January of 2008. For Goodner to once again practice medicine, her treating physicians would need to recommend to the board of medicine that her license be reactivated, she would need to present a plan for how she would see patients without becoming fatigued, and the board would need to approve her plan.

C. Workers' Compensation Claim. Goodner first notified her employer of her mononucleosis and the alleged mechanism of contracting the illness on February 25, 2000, approximately three weeks after she became ill. She explained that she was not aware until then that contracting an illness in the course of her employment qualified for workers' compensation benefits. At that time, she had been off work since February 7.

It appears from our record on appeal that the workers' compensation claim was accepted, and treatment and benefits were provided with no agency intervention until September of 2006. At that time Goodner filed a petition for alternate medical care asking the workers' compensation commissioner to order

Mercy Hospital to pay for physical therapy for strengthening and conditioning, and massage therapy for muscle aches. During the telephone hearing with the deputy commissioner, counsel for Mercy Hospital admitted liability for Goodner's February 2000 injury. Counsel also admitted that Goodner had a case of chronic fatigue syndrome "that has been accepted as a work injury." During the hearing, Mercy Hospital agreed to provide the physical therapy requested, but asserted the massage therapy prescribed by Dr. Ovrom was "not causally related to the work injury." The deputy commissioner authorized the care requested.

Goodner filed an arbitration petition with the agency on May 18, 2007, alleging she was permanently and totally disabled as a result of her work injury, which developed on February 4, 2000. In Mercy Hospital's answer to the petition, it admitted that it had accepted liability for a work-related infection with an injury date of February 7, 2000. Mercy Hospital denied any other date of injury and stated the extent of the injury from the infection was in dispute. On February 18, 2009, after consulting with Drs. Katz and Lutz, Mercy Hospital amended its answer to generally deny the injury.

The case proceeded to a full hearing on April 30, 2009. The deputy commissioner issued his decision on December 30, 2009, finding Mercy Hospital judicially estopped from contesting liability for the injury due to the position Mercy Hospital took at the alternate care proceeding. Despite this initial finding, the deputy went on to conclude Goodner sustained an injury in the course and scope of her employment and that the chronic fatigue syndrome was causally related to that injury. The deputy commissioner found Mercy Hospital responsible for one-half of the cost of the family counseling ordered by her treating physicians. He

also ordered Mercy Hospital pay the full cost of the bariatric surgery after concluding, "there is no evidence in the record that claimant ever had any weight problem before her exposure to [the virus]." The deputy finally concluded that the injury caused Goodner to be permanently and totally disabled as an odd-lot employee because her injury made her unable to perform work "that her experience, training, education, intelligence, and physical capabilities would otherwise permit her [to] perform."

On January 14, 2010, Mercy Hospital appealed the decision to the commissioner who, on March 21, 2011, summarily affirmed the decision except for correcting the weekly compensation rate to the maximum rate per Iowa Code section 85.37 (2007). Mercy then sought judicial review on April 7. After a hearing, the district court affirmed the agency's decision on December 22, 2011, finding Mercy Hospital did not preserve error on its claim nor did it prove the agency acted irrationally, illogically, or without justification in finding Mercy Hospital should be judicially estopped from contesting liability for the injury after having admitted liability in the alternate care petition. The district court also found substantial evidence supported the agency's decision that: (1) Goodner's mononucleosis arose out of and in the course of her work, (2) Goodner's mononucleosis triggered her chronic fatigue syndrome, (3) Goodner was permanently and totally disabled, and (4) Mercy Hospital should be responsible for the cost of the family therapy and the bariatric surgery.

Mercy Hospital appeals asserting the district court erred in finding (1) it was judicially estopped from contesting liability for the injury, (2) Goodner's medical evidence was reliable, (3) Goodner is permanently and totally disabled,

and (4) it should be responsible for the cost of the bariatric surgery and one-half of the cost of the family therapy.[2]

II. SCOPE AND STANDARD OF REVIEW.

Judicial review of an agency's actions is governed by Iowa Code chapter 17A. *Neal v. Annette Holdings, Inc.*, 814 N.W.2d 512, 518 (Iowa 2012). The district court reviews the agency's actions in an appellate capacity and "may grant relief if the agency action has prejudiced the substantial rights of the petitioner, and the agency action meets one of the enumerated criteria contained in section 17A.19(10)(a) through (n)." *Burton v. Hilltop Care Ctr.*, 813 N.W.2d 250, 256 (Iowa 2012). We then apply the same standards of section 17A.19(10) to determine whether we reach the same result as the district court. *Id.* at 255–56. "If we reach the same conclusion as the district court, we affirm, but if we reach a different conclusion, we reverse." *Westling v. Hormel Food Corp.*, 810 N.W.2d 247, 251 (Iowa 2012).

The standard of review applicable to the agency's decision depends on the type of error alleged. *Jacobson Transp. Co. v. Harris*, 778 N.W.2d 192, 196 (Iowa 2010). "Because of the widely varying standards of review, it is 'essential for counsel to search for and pinpoint the precise claim of error on appeal.'" *Id.* (citation omitted). In this case, Mercy Hospital asserts the agency erred in finding they were judicial estopped from contesting liability for the work injury

[2] At oral arguments, the parties were asked to supplement the appendix to include the agency decision on the alternate medical care petition and also the referral of Goodner to Dr. Isaac Samuel for bariatric surgery. The parties supplemented the record on December 7, 2012. The referral letter was part of the record on appeal; however, it appears the alternate medical care decision was not part of the agency record considered by the district court on judicial review. It therefore will not be considered by this court.

under the holding of *Winnebago Industries*, *Inc*. *v*. *Haverly*, 727 N.W.2d 567 (Iowa 2006). The interpretation of case law related to workers' compensation cases has not been clearly vested by a provision of the law in the discretion of the agency. *Finch v*. *Schneider Specialized Carriers*, *Inc*., 700 N.W.2d 328, 330 (Iowa 2005). Therefore, we are free to substitute our own judgment de novo for the agency's interpretation. *Id.*

Next, Mercy Hospital asserts the agency's decision is not supported by substantial evidence because the medical opinions the agency relied on lack scientific reliability with respect to alleged way Goodner contracted mononucleosis and with respect to the causation of Goodner's chronic fatigue syndrome. The question of medical causation is a fact question that is vested in the discretion of the agency. *Cedar Rapids Cmty*. *Sch*. *Dist*. *v*. *Pease*, 807 N.W.2d 839, 844 (Iowa 2011). We will disturb the agency's findings only if they are not supported by substantial evidence, which is defined in Iowa Code section 17A.19(10)(f)(1) as, "the quantity and quality of evidence that would be deemed sufficient by a neutral, detached, and reasonable person, to establish the fact at issue when the consequences resulting from the establishment of that fact are understood to be serious and of great importance." *Id.* at 845.

We judge the findings of the agency "'in light of all the relevant evidence in the record cited by any party that detracts from that finding as well as all of the relevant evidence in the record cited by any party that supports it.'" *Id.* (citing Iowa Code § 17A.19(10)(f)(3)). While our review is fairly intensive, we will not find evidence insubstantial merely because different conclusions may be drawn from the evidence. *Id.* "Our task, therefore, is not to determine whether the

evidence supports a different finding; rather, our task is to determine whether substantial evidence, viewing the record as a whole, supports the findings actually made." *Id.* This same standard applies to Mercy Hospital's claim that the agency erred in ordering it to pay for Goodner's bariatric surgery as this claim presents a fact question. *Bell Bros*. *Heating & Air Conditioning v*. *Gwinn*, 779 N.W.2d 193, 208–09 (Iowa 2010)

Mercy Hospital also asserts the agency erred in concluding Goodner was permanently and totally disabled. This claim involves the agency's application of the law to the facts of the case, which is clearly vested in the discretion of the agency. *Lakeside Casino v*. *Blue*, 743 N.W.2d 169, 173 (Iowa 2007). Therefore, we will reverse the agency's decision only if it is "irrational, illogical, or wholly unjustifiable." *Schutjer v*. *Algona Manor Care Ctr*., 780 N.W.2d 549, 558 (Iowa 2010). We accord some deference to the agency's determinations, but less than we give to the agency's findings of fact. *Larson Mfg*. *Co*. *v*. *Thorson*, 763 N.W.2d 842, 850 (Iowa 2009).

III. JUDICIAL ESTOPPEL.

Mercy Hospital's first claim on appeal is that the agency erred in applying the holding in *Haverly*, 727 N.W.2d at 575, to preclude it from contesting liability for the injury. Mercy Hospital argues the *Haverly* case should be overruled because it gives preclusive effect to alternate medical care proceedings, where an employer has few due process protections. Mercy Hospital next argues that in the event this court declines overruling *Haverly*, we should find that the holding in *Haverly* has been severely limited by the holding in *Tyson Foods*, *Inc*. *v*. *Hedlund*, 740 N.W.2d 192, 199 (Iowa 2007), where the court found an exception

to the *Haverly* ruling. Mercy Hospital also attempts to distinguish this case from *Haverly*. Finally, Mercy claims this case fits within the exception identified in *Haverly*—"a significant change in facts after the admission of liability." 727 N.W.2d at 575.

In *Haverly*, a worker sought benefits for a back injury that he asserted occurred in the scope and course of his employment. *Id.* at 569. When the employer denied the back surgery recommended by his doctor, Haverly filed a petition for alternate medical care. *Id.* At the hearing on the petition, the employer's attorney confirmed that the employer was not disputing liability for the injury, and the deputy commissioner granted the application, ordering the employer to provide the surgery. *Id.* at 570. At the subsequent arbitration hearing, the deputy commissioner determined the employer was barred by res judicata from disputing liability for the injury. *Id.* On judicial review, the supreme court determined the employer was not prevented from disputing liability on the basis of res judicata, as the issue had not been "fully litigated," but the court found the employer was prevented from changing its position on liability by the doctrine of judicial estoppel. *Id.* at 572, 575. Judicial estoppel

> "prohibits a party who has successfully and unequivocally asserted a position in one proceeding from asserting an inconsistent position in a subsequent proceeding." It is a "common sense" rule, designed to protect the integrity of the judicial process by preventing deliberately inconsistent—and potentially misleading—assertions from being successfully urged in succeeding tribunals.

Id. at 573 (citations omitted). The doctrine is limited to those cases where there is proof the prior inconsistent position was successfully asserted in the prior tribunal. *Id.* "Without such proof, 'application of the rule is unwarranted because

no risk of inconsistent, misleading results exists.'" *Id.* (citation omitted). The *Haverly* court concluded the employer had understandably admitted liability at the alternate medical care proceeding for the purpose of maintaining control over the worker's medical care, but now wanted to challenge liability for payment of workers' compensation benefits. *Id.* at 575. The court concluded, "this ordinarily cannot be permitted." *Id.* The court did leave room for an exception to the rule where there has been "a significant change in the facts after the admission of liability that could justify a change in position by the employer," but found no such facts present in Haverly's case. *Id.*

Mercy Hospital first asks us to overrule *Haverly* as it asserts the holding gives preclusive effect to the alternate care proceedings, where Mercy Hospital claims to have very few if any due process protections.[3] Mercy Hospital concedes the procedures provided in an alternate care proceeding are generally

[3] Goodner asserts here, as she did in the district court, that Mercy Hospital did not preserve error on its claim that its due process rights were violated by the agency's application of the *Haverly* decision. *See HyVee Food Stores, Inc. v. Iowa Civil Rights Comm'n*, 453 N.W.2d 512, 527 (Iowa 1990) ("To preserve error for appeal, a party must raise the issue before the agency."). We have reviewed the record at the agency and find the due process claim has been preserved. *See Lamasters v. State*, 821 N.W.2d 856, 864 (Iowa 2012) ("If the court's ruling indicates that the court considered the issue and necessarily ruled on it, even if the court's reasoning is 'incomplete or sparse,' the issue has been preserved.") Therefore, we find the district court erred in concluding the issue had not been preserved.

However, the district court went on to address the merits of Mercy's due process argument concluding, "Defendants have not proven the Commissioner acted irrationally, illogically, or without justification, as regards: a. defendants' constitutional challenge to the Iowa Code section 85.27 alternate care process." Because the district court addressed the issue on the merits, we need not remand for the district court to consider the claim.

Of note, in arguing error was preserved, counsel for Mercy Hospital asserted in its brief the belief that constitutional issues do not have to be raised before an agency because "the agency has no power to rule on constitutional issues." While it is true an agency's decision on constitutional questions has no binding authority, constitutional issues must still be raised at the agency level to be preserved for judicial review. *Soo Line R.R. Co. v. Iowa Dep't of Transp.*, 521 N.W.2d 685, 688 (Iowa 1994).

adequate until *Haverly* is applied to give its liability position preclusive effect. Because Mercy Hospital believes the application of the *Haverly* holding violates its due process rights,[4] it urges us to overrule the case. We are not at liberty to overrule prior precedent from the supreme court. *See State v*. *Eichler*, 83 N.W.2d 576, 578 (Iowa 1957) ("If our previous holdings are to be overruled, we should ordinarily prefer to do it ourselves."). As we leave it outside of our purview to overrule *Haverly*, we next turn to Mercy Hospital's claim that the case of *Hedlund*, 740 N.W.2d at 199, limits *Haverly*'s application in this case.

In *Hedlund*, a worker alleged various injuries arose out of and in the course of her employment. 740 N.W.2d at 193. The employer found the authorized treating doctor's opinions to be in conflict, so it scheduled an independent medical examination for the worker to attend. *Id.* at 194. Incorrectly believing the medical appointment was an attempt to change the authorized treating physician, the worker filed a petition for alternate medical care. *Id.* At the hearing on the petition, the employer admitted liability for the injury, but the petition was ultimately dismissed by the deputy after the employer clarified the appointment was only for an independent medical examination. *Id.* The deputy wrote in the dismissal order that there was no issue to be resolved once the claimant realized the basis for her claim no longer existed. *Id.*

A few months later the worker filed a second petition for alternate medical care. *Id.* In this proceeding the employer sought to dispute liability for the injury.

[4] It is assumed for the purposes of this appeal that Mercy Hospital is referring to its procedural due process rights as opposed to its substantive due process rights because the case it cites in support of its claim addresses procedural due process in the administrative proceeding context. *See Matthew v. Eldridge*, 424 U.S. 319, 332 (1976).

Id. The agency refused to permit the change in position on liability, *id.*, but on appeal, our supreme court held that judicial estoppel did not apply to prevent the employer from changing its position because the employer's admission of liability in the first action played no role in the dismissal of the petition by the deputy. *Id.* at 199. While it was clear the employer advanced inconsistent positions in the two alternate care proceedings, what was missing from the first alternate care proceeding was the deputy's acceptance of the employer's admission of liability. *See id.* ("[T]he commissioner did not act in any way to dispose of the application based on that position."). "The alternate medical care issue was rendered moot, and the proceeding was, as a result, a nonevent." *Id.* Because there was no acceptance of the prior inconsistent position by the agency, the doctrine of judicial estoppel was found to be inapplicable. *Id.*

While we agree with Mercy Hospital that the *Hedlund* decision further developed the issues involved in the application of judicial estoppel in alternate care proceedings, we disagree that its result limited *Haverly*'s application to the case at hand. Unlike *Hedlund*, the alternate medical care proceeding in this case was decided by the deputy on its merits. According to *Hedlund*, for the petition to be decided by the agency, the deputy must rely on the employer's position on the issue of liability for the injury. *Id.* at 198–99. If the employer accepts liability, the deputy can then determine whether the requested medical care is reasonable and necessary. *Id.* at 198. If the employer denies liability, the deputy must

dismiss the petition.[5] *Id.*; *see also* Iowa Admin. Code r. 876-4.48(7) ("If an application [for alternate care] is filed where the liability of the employer is at issue, the application will be dismissed without prejudice.").

The deputy in this case necessarily had to accept Mercy Hospital's acceptance of the injury—mononucleosis and chronic fatigue syndrome—before it could determine whether the requested massage therapy was reasonable and necessary to treat the injury. Because the deputy ruled on the merits of the alternate care petition, and did not dismiss it as moot, as the deputy did in *Hedlund*, 740 N.W.2d at 199, this case falls squarely within application of the judicial estoppel doctrine announced in *Haverly*, 727 N.W.2d at 575. We reject Mercy Hospital's claim that *Hedlund* dictates a different result here.

Next, Mercy Hospital asserts *Haverly* is distinguishable from this case because the alternate care petition in *Haverly* was filed during the pendency of the contested case proceeding, whereas Goodner filed her alternate care petition before she filed her contested case petition. Based on this factual distinction, Mercy Hospital asserts it should not be judicially estopped from changing its liability position.[6] We find this minor distinction of no consequence to the

[5] Mercy Hospital in its brief asserts that for the agency to "accept" its liability position in an alternate care proceeding, the employer must "win the alternate care action." We find this to be an inaccurate interpretation of the *Hedlund* court's ruling. This interpretation of *Hedlund*'s holding would in fact overrule *Haverly*, as the employer in *Haverly* was judicially estopped from taking a position on liability that contradicted the position it took in the alternate care proceeding, which it lost on the merits. 727 N.W.2d at 569–70. *Hedlund* made no reference to overruling *Haverly* and instead cited it with approval multiple times. If the supreme court intended to overrule *Haverly*, we find they would have explicitly said so.

[6] Mercy Hospital asserts once the "regular litigation" was filed, it consistently denied liability. We find this assertion disingenuous. In its original answer to the arbitration proceeding Mercy Hospital admitted the injury but denied the date on which it occurred. Mercy did not deny an injury occurred at all until its amended answer in February 2009.

application of the doctrine of judicial estoppel. The doctrine is intended to prevent a party from asserting a position in a subsequent proceeding that is inconsistent with its position in a prior proceeding in order to "protect the integrity of the judicial process by preventing deliberately inconsistent—and potentially misleading—assertions from being successfully urged in succeeding tribunals." *Haverly*, 727 N.W.2d at 573 (citing *Wilson v. Liberty Mut. Group*, 666 N.W.2d 163, 166 (Iowa 2003), which applied judicial estoppel to prevent a worker from taking an inconsistent position in a district court action from the position he took in his workers' compensation claim).

Finally, Mercy Hospital claims the exception to the judicial estoppel doctrine articulated in *Haverly* applies to its case. In *Haverly*, the court stated, "There might, in some cases, be a significant change in the facts after the admission of liability that could justify a change of position by the employer." *Id.* at 575. Mercy Hospital asserts its receipt of the reports of Drs. Lutz and Katz was a significant change in the facts that justified the change in its position on liability.

In concluding that judicial estoppel applied, the deputy commissioner wrote in his decision:

> It also cannot be said that defendants discovered some new evidence not previously available to them that would justify a change in their position on liability. Defendants, through the testimony of the claims adjuster, have admitted the opinions of Dr. Katz and Dr. Lutz prompted them to change their position on compensability. However, those opinions were not obtained until several years after claimant's injury, and only shortly before the hearing. They were not obtained until long after the alternate medical care proceeding. The alternate medical care proceeding itself did not occur until 2006, six years after the work injury, and thus defendants cannot argue they were pressured to take a

> position on compensability without adequate time to investigate the claim. There is no showing as to why the opinions of Dr. Katz and Dr. Lutz could not have been obtained much earlier. Certainly the opinions of Dr. Katz and Dr. Lutz, which primarily addressed the 2000 exposure mechanism of injury itself and not later aspects of treatment, could have been obtained immediately and certainly during those six years, forming a basis for defendants to deny liability at the alternate medical care hearing. Instead, defendants chose to admit liability from the beginning, thereby enjoying control of the medical care for nine years, then at the eleventh hour reversed that position in order to contest liability at the hearing.
>
> . . . .
>
> Thus, there can be no dispute that defendants accepted this claim and admitted liability for it for all but the last two or three months of the nine year pendency of this case, including admitting liability at a prior alternate medical care proceeding. Defendants now seek to dispute liability for the injury itself.
>
> Permitting such conduct in this case would permit defendants in other cases to admit liability at an alternate medical care proceeding in order to enjoy the control of the medical care throughout the pendency of the case, then, as here, changing that position just prior to hearing in order to enjoy the benefits of contesting liability. In other words, Defendants seek to have their cake and eat it, too.

The agency appears to have rejected the "significant change in facts" exception on the basis that Mercy Hospital could have obtained the medical opinions from Drs. Lutz and Katz earlier. Dr. Katz's report is dated January 2008, and Dr. Lutz's report is dated March 2009. It was in February of 2009 that Mercy Hospital amended its answer to deny liability for the injury. The contested case hearing occurred April 30, 2009, a little more than two months later.

The *Haverly* court does not explain or expound upon what set of circumstances will justify the application of the exception to the judicial estoppel doctrine. However, we need not decide whether this case falls within the exception in *Haverly*. The agency did not stop at its conclusion that Mercy Hospital was judicially estopped from challenging liability but went on to address

Mercy Hospital's liability claims on the merits. Even if we find this case fell within the exception announced in *Haverly*, such that Mercy Hospital should not have been judicially estopped from challenging liability, no remand would be necessary because the agency has already addressed and rejected Mercy Hospital's challenges to liability. Therefore, we turn now to Mercy Hospital's claims that the agency's decision on compensability is not supported by scientifically reliable medical evidence.

IV. SCIENTIFIC RELIABILITY OF MEDICAL EVIDENCE.

Mercy Hospital claims there is a lack of scientifically reliable medical evidence to support the agency's opinion. Mercy Hospital asks us to "inform the agency and those that litigate before it" that "the finder of facts still must adjudge the reliability of the evidence, and only base decisions on reliable evidence." While it is not challenging the admissibility of the medical reports Goodner submitted in support of her claim,[7] Mercy Hospital asserts the agency should be instructed to apply the standards on the admissibility of expert testimony articulated by the United States Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 593–94 (1993), and applied in the Iowa courts in *Ranes v. Adams Laboratories, Inc.*, 778 N.W.2d 677, 686 (Iowa 2010).[8] It contends if those standards are applied in this case, we would find the

[7] Because Mercy Hospital did not object to the agency receiving the challenged expert reports into evidence, it failed to preserve error on any claim that the agency erred in admitting the reports. *See McSpadden v. Big Ben Coal Co.*, 288 N.W.2d 181, 186–87 (Iowa 1980) (finding a claimant failed to preserve error on his claim a doctor's testimony lacked foundation by failing to object to the lack of foundation at the hearing).

[8] The factors to assess the reliability of expert testimony identified in *Daubert*, and accepted in *Ranes*, include: "(1) whether the theory or technique is scientific knowledge that can and has been tested, (2) whether the theory or technique has been subjected to peer review or publication, (3) the known or potential rate of error, or (4) whether it is generally accepted within the relevant scientific community." *Ranes*, 778 N.W.2d at 686.

evidence lacks reliability, and therefore, the agency's decision is not supported by substantial evidence and must be vacated.

Mercy Hospital claims "no expert could point to any case study in which a person contracted any infection in the manner proposed." It also asserts the only definitive study offered regarding the incubation period of mononucleosis stated the shortest period was about thirty days. It points to the lack of evidence to support a scientific connection between mononucleosis and chronic fatigue syndrome. Mercy Hospital claims two of Goodner's experts, Drs. Wools-Kaloustian and Meier, simply base their opinion on the fact that Goodner never complained of fatigue before she became infected with mononucleosis. Mercy Hospital also claims Dr. Pocinki relied on a study that found less of a connection between mononucleosis and chronic fatigue syndrome than any generic unidentified infection in the world. Mercy Hospital claims Dr. Pocinki was unable to articulate what changes occur in the body that cause people to suffer from chronic fatigue.

We begin by agreeing with the Eighth Circuit when it said "we do not believe that a medical expert must always cite published studies on general causation in order to reliably conclude that a particular object caused a particular illness." *Turner v*. *Iowa Fire Equip*. *Co*., 229 F.3d 1202, 1208 (8th Cir. 2000). In addition, whether an injury has a direct causal connection with a worker's employment is essentially within the domain of expert testimony. *Dunlavey v*. *Economy Fire & Cas*. *Co*., 526 N.W.2d 845, 853 (Iowa 1995). The weight to be given to experts' opinions is for the finder of fact, who may accept or reject in whole or in part the expert's testimony. *IBP*, *Inc*. *v*. *Al-Gharib*, 604 N.W.2d 621,

630–31 (Iowa 2000). Our courts have said that the weight to be assigned a particular expert's opinion depends "on the accuracy of the facts relied upon by the expert and other surrounding circumstances." *Id.* at 631. If the fact-finder rejects evidence after receiving it, he must say why he did so. *Id.* Otherwise, we are unable to determine whether the agency acted arbitrarily or misapplied the law. *Id.*

Administrative agencies are not bound by the technical rules of evidence. *Id.* at 630. Iowa Code section 17A.14(1) provides:

> Irrelevant, immaterial, or unduly repetitious evidence should be excluded. A finding shall be based upon the kind of evidence on which reasonably prudent persons are accustomed to rely for the conduct of their serious affairs, and may be based upon such evidence even if it would be inadmissible in a jury trial.

This same code section also provides in subsection five, "The agency's experience, technical competence, and specialized knowledge may be utilized in the evaluation of the evidence." Iowa Code § 17A.14(5). With respect to the admission of medical reports in workers' compensation cases, Iowa Administrative Code rule 876–4.18 provides in part, "Any relevant medical record or report served upon a party in compliance with these rules prior to any deadline established by order or rule for service of the records and reports shall be admissible as evidence at hearing of the contested case unless otherwise provided by rule."

Here the deputy admitted all expert reports pursuant to the rules and then articulated the opinions of each doctor who rendered an opinion on causation over the course of Goodner's nine years of treatment. The deputy found "the greater weight of the evidence shows that on January 18, 2000, [Goodner] was

exposed to [mononucleosis] and thereafter contracted . . . mononucleosis as a result. . . . It is found [Goodner] suffered an injury arising out of and in the course of her employment on January 18, 2000." The deputy also stated, "the greater weight of the evidence shows that [Goodner]'s current condition of [chronic fatigue syndrome] and her psychological condition are causally connected to her work injury where she was exposed to [mononucleosis]."

Mercy Hospital asks us to find that Goodner's experts should be given no weight as they are based on unreliable evidence. Mercy asserts that without applying *Daubert* principles, the agency is essentially "empowered to rely upon any admissible medical opinion" regardless of its reliability. However, the weight to be given to expert reports is for the finder of fact—the agency. *Al-Gharib*, 604 N.W.2d at 630. When faced with a claim that the agency's decision lacks substantial evidence, "[o]ur task . . . is not to determine whether the evidence supports a different finding; rather, our task is to determine whether substantial evidence, viewing the record as a whole, supports the findings actually made." *Pease*, 807 N.W.2d at 845. In this case, we find substantial evidence support the agency's decision. Several of Goodner's treating physicians testified, based on their knowledge and experience the mechanism of injury, the incubation period, and the causal connection between mononucleosis and chronic fatigue syndrome all supported a finding that Goodner suffered a work-related illness—mononucleosis—and her current condition—chronic fatigue syndrome—was causally related to work. We will not, nor can we under our case law, reweigh the evidence the agency found to be most credible among the medical experts in this case. *Arndt v*. *City of Le Claire*, 728 N.W.2d 389, 394–95 (Iowa 2007).

V. PERMANENT AND TOTAL DISABILITY.

Next, Mercy Hospital asserts the agency erred in concluding Goodner was permanently and totally disabled as a result of her chronic fatigue syndrome. Mercy Hospital claims Goodner in her deposition admitted that if she exercised and did the right things she would regain the ability to work at least part time as she had from the onset of her illness until quitting her job at the clinic in 2008. Mercy Hospital claims the agency cannot award total disability to a claimant who admits she can take action to return to work, but refuses to do so. While Mercy's argument is appealing, the expert testimony supports a finding that Goodner is permanently and totally disabled. Further, Mercy Hospital cites no legal support for its assertions. *See* Iowa R. App. P. 6.903(2)(g)(3) ("Failure to cite authority in support of an issue may be deemed a waiver of that issue.").

The deputy found,

> The unfortunate truth is that [Goodner] has valiantly tried to return to the practice of medicine, even on a half time basis, on and off over nine years but has not been able to do so. She has attempted several jobs without success. Functioning only one and a half hours per day is not compatible with performing the duties of a physician, and few other jobs, for that matter. It is the sincere hope of the undersigned that [Goodner]'s condition does indeed improve to the point she can return to medicine, but realistically it must be said that is not likely.

The deputy went on to say, "[Goodner] has shown remarkable dedication to trying to return to work, but has met with failure due to fatigue on each try. Each attempt has worsened her symptoms and resulted in [Goodner] having to quit her job." The deputy stated he could not "conceive of any job [Goodner] could reasonably be expected to perform in light of her [chronic fatigue syndrome]." In conclusion the deputy found,

> [Goodner] has made a stalwart effort to return to employment but her [chronic fatigue syndrome] has doomed those efforts to failure each time. Her potential for retraining in another field is almost nil, in spite of her intelligence, in light of her age, her lack of concentration, her fatigue, and her inability to stay awake sufficiently to attend any course of training.
>
> It is found that [Goodner] is an odd-lot employee.

"Under [the odd-lot] doctrine a worker becomes an odd-lot employee when an injury makes the worker incapable of obtaining employment in any well-known branch of the labor market." *Michael Eberhart Constr*. *v*. *Curtin*, 674 N.W.2d 123, 125 (Iowa 2004). An odd-lot employee is totally disabled if "the only services the worker can perform are 'so limited in quality, dependability, or quantity that a reasonably stable market for them does not exist.'" *Id.* (citation omitted). Where evidence at the hearing discloses that the worker made a reasonable effort to obtain employment, "'the burden of going forward with evidence to show the availability of suitable employment is on the employer and carrier.'" *Id.* (citation omitted).

Thus, even assuming Goodner was able to obtain her license to practice medicine again and could practice medicine part time if she "exercised and did the right things" as Mercy Hospital contends she should do, this does not foreclose the agency's determination she is an odd-lot employee entitled to an award of permanent total disability. There was substantial evidence to support the finding that the services Goodner can perform (working one to four hours per day) are "so limited in quality, dependability or quantity, that a reasonably stable market for them does not exist." *See id.* Goodner attempted to find a job in the medical profession for eight years following her injury that would permit her to practice medicine and also allow her to get sufficient rest so that she did not

become overly fatigued. She tried a number of positions, and none of them were able to accommodate her need for rest. Goodner has satisfied her burden to make a reasonable effort to obtain employment. *See id.* The burden then shifted to Mercy Hospital to show the availability of suitable employment. *See id.*

The deputy found Mercy Hospital has failed to satisfy its burden. The deputy found Mercy Hospital's vocational expert, Nicole Oxenford, suggested jobs for Goodner where she had no experience or training. The deputy found her suggestions to be "unrealistic and [to] display a lack of understanding of [Goodner]'s actual condition. [Oxenford] also did not properly take into account [Goodner]'s actual work restrictions." For that reason, the deputy found

Goodner's vocational expert, Kent Jayne, more accurate and gave his opinions greater weight.[9] We find no error in the agency's conclusions.

VI. MEDICAL EXPENSES.

Mercy Hospital's final claim on appeal is that the agency erred in ordering it to pay for Goodner's bariatric surgery and family therapy sessions. It asserts the bariatric surgery was not beneficial to Goodner's work-related condition as required by *Bell Bros*., 779 N.W.2d at 206. It also asserts that it should not be responsible for the family therapy sessions because the medical care the employer is required to provide an injured employee under Iowa Code section 85.27 is for the worker alone, not the worker's family.

---

[9] Kent Jayne found:

> Based upon the multiplicity of her symptoms including extremely limited physical and mental endurance, and the restrictions and opinions expressed by her treating physicians, Dr. Goodner would not be capable of performing at a level consistent with any of her pre-injury career. Even at 4 hours per day three days per week, she would be precluded from competitive work within her previously established transferable skills. A serious barrier to any employment would be encountered due to her limited mental ability and endurance, fatigue, and any stress which would limit her pace, persistence, and quality of thought. This would likely cause Dr. Goodner even during her very limited periods of lucidity to pose a direct threat to health and safety, not only of herself but to others as well. Her limited driving ability would also discount the time available for lucid thought and productive work.
>
> . . . .
>
> Based upon all of the factors noted above, it is unlikely that Dr. Goodner is currently employable in the competitive labor market. She does not appear to have significant marketable transferable skills at her present level of capacity. Her age at 56.7 years is a further limiting factor in employability. Dr. Goodner has essentially been precluded as a consequence of her multiple difficulties from performing work that her experience, education, training, intelligence, and physical capacities would otherwise have permitted her to perform but for her current disability. She is unable to perform any services except those which are so limited in quantity, dependability, or quality that there is no reasonably stable labor market for them.

A. Bariatric Surgery. The supreme court in *Bell Bros*. stated that there are a number of exceptions to an employer's right to choose medical care for an injured employee. 779 N.W.2d at 203–04. An employee can choose her own care in an emergency, if the employer consents, or if the commissioner ordered the care through an alternate medical care proceeding. *Id.* In addition, if the employer denies compensability for an injury, the employer loses control of the medical care, the employee can seek her own medical care, and the employer does not have to pay for the medical care until such time as the employee establishes compensability for the injury and the reasonableness of the care at a contested case hearing. *Id.* at 204.

Finally, when an injury is accepted as compensable, an employee may select her own medical care "when the employee abandons the protections of section 85.27 or otherwise obtains his or her own medical care independent of the statutory scheme." *Id.*

> This circumstance would ordinarily occur when the employer admits compensability of the injury and assumes responsibility for furnishing medical care, but the employee disagrees with the care provided or otherwise rejects the care, and obtains alternative medical care with neither the consent of the employer nor an order for alternative care from the workers' compensation commissioner. Unlike the first situation, this circumstance would normally occur when a difference of opinion over a diagnosis or treatment arises, "as when the employer's doctor recommends conservative measures while the claimant thinks he or she should have surgery."

Id. at 204–05 (citation omitted). The employer is not responsible to pay for the unauthorized care unless and until the employee can prove that the care she obtained was both reasonable and beneficial at the contested case hearing. *Id.* at 206. Thus, there are two different burdens of proof an employee must satisfy

in order to require an employer to pay for unauthorized medical care. Which burden applies depends on whether the injury was accepted or denied by the employer.

It is undisputed in this case that the bariatric surgery was not initially authorized by Mercy Hospital. The deputy commissioner found Dr. Ovrom, the authorized treating physician, recommended the surgery "as part of her work injury treatment." However, in a letter to the weight loss clinic in April of 2007, Dr. Ovrom stated Goodner was being referred for consideration for the surgery based on the following criteria: "1. A BMI greater than 35. 2. Type 2 diabetes developing in the past year. 3. Worsening lipid profile. 4. Mild stress urinary incontinence. 5. Arthritis, left knee. 6. Failure of multiple diet attempts including Nutri-Systems, Optifast twice, Weight Watchers twice, and Weight and Wellness clinic participation." Nowhere in the letter did Dr. Ovrom mention chronic fatigue syndrome or the exposure to mononucleosis as a criteria for the referral. In his deposition, Dr. Ovrom stated it was his recollection that Goodner self-referred for the surgery.

Goodner asserted at the hearing that Dr. Ovrom did refer her for the surgery, but she acknowledged she took no steps to try to get the surgery covered as part of her work injury claim at that time. Despite the fact this was an accepted injury claim, there is no indication in our record when Mercy Hospital became aware that Goodner was alleging the chronic fatigue syndrome was causing her to gain weight or that she or her doctors ever requested treatment for the weight gain. The contested case petition, filed by Goodner on May 18, 2007, before the bariatric surgery, stated the dispute included: "Compensability; Rate;

Date of Injury; Nature and Extent of Industrial Disability; Penalty." It also asserted Goodner was making a claim for medical benefits, but stated the list was "[b]eing compiled." While Mercy Hospital initially disputed only the date of injury Goodner listed her in petition, by the time this case went to hearing in April 2009, Mercy Hospital had amended its answer to completely deny liability for the injury.

Thus, at the time the surgery was conducted in late May 2007, it appears the bariatric surgery was unauthorized care for an accepted injury. Under *Bell Bros*., she would have the burden to prove the medical treatment was both reasonable and beneficial. *See id*. at 206. However, by the time the case was presented to the deputy commissioner at the contested case hearing, it was a fully denied claim, and Mercy Hospital had lost the ability to control medical care. *See id.* at 204. Under a denied claim analysis, so long as Goodner proved compensability of her injury and the reasonableness of the treatment, Mercy Hospital could be ordered to pay for the medical care obtained by Goodner. *See id.*

The question in this case becomes whether we allocate the burden to Goodner based on the employer's liability position at the time the care was sought or at the time the claim was presented to the commissioner for a determination. We find based on the language in *Bell Bros*., that the liability position of the employer at the time the treatment was sought controls which burden the employee must satisfy when seeking to hold an employer responsible for unauthorized medical treatment. *See id.* at 207 ("The employer's right to control medical care attaches under the statute when the employer

acknowledges compensability following notice and furnishes care to the employee, and it remains with the employer under the statute until the employer denies the injury is work-related, withdraws authorization of the care, or until the commissioner orders alternative care."). Therefore, because Mercy Hospital had accepted the injury and maintained control of the medical care at the time Goodner obtained the bariatric surgery, Goodner must prove the treatment was both reasonable and beneficial.

Now that the appropriate burden has been established, we turn to evaluate the deputy's finding in order to determine whether substantial evidence supports a finding that the bariatric surgery was both reasonable and beneficial to treat the work injury. *See id.* at 208–09 ("The issue of whether the unauthorized care was reasonable and beneficial presents fact questions."). "[T]he concept of 'reasonableness' in this analysis includes the quality of the alternative care and the quality of the employer-provided care." *Id.* at 208. It includes "the reasonableness of the employer-provided care, and the reasonableness of the decision to abandon the care furnished by the employer in the absence of an order from the commissioner authorizing alternative care." *Id.* The medical care is "beneficial if it provided a more favorable medical outcome than would likely have been achieved by the care authorized by the employer." *Id.* The medical care is considered beneficial to the employer because it reduces the amount of indemnity benefits the employer ultimately would be required to pay without the unauthorized medical care. *Id.*

The reasonableness prong of Goodner's burden requires us to evaluate the reasonableness of both the employer-provided care and the unauthorized

alternative care obtained. *See id.* In this case, because neither Goodner nor the authorized treating physicians ever requested Mercy Hospital provide treatment for the weight gain, we have no employer provided care to compare to the bariatric surgery. In this case, there was not a "difference of opinion over the diagnosis or treatment" of Goodner's condition. *Id.* at 205. Goodner cannot be said to have "abandon[ed] the care provided by the employer" in this case because neither she nor her authorized treating physician ever asked for care to be provided. *Id.* at 206.

On the beneficial prong, Goodner testified the bariatric surgery improved her chronic fatigue syndrome. In the record we find no evidence that any doctor recommended the weight-loss surgery to treat Goodner's chronic fatigue syndrome before the surgery was conducted, nor is there any indication in the record that any doctor recommended that she lose weight to treat the chronic fatigue syndrome. Dr. Ovrom opined after the surgery that the weight loss surgery improved Goodner's ability to overcome the signs and symptoms of chronic fatigue and increased the likelihood she would be able to work successfully again. However, the facts of this case do not support Dr. Ovrom's optimistic opinion. Before the surgery, Goodner was able to work as a physician part-time. After the surgery, she only worked part-time for three months before quitting and surrendering her medical license. At the time of the hearing, almost two years after her surgery, she claimed she was permanently and totally disabled.

From our review of the medical records, at the time Goodner became ill with mononucleosis she weighed 199 pounds and was five feet, five inches tall.

Goodner had a weight problem before her injury, and the medical records from the weight loss clinic indicated she had struggled with morbid obesity since age twenty or twenty-one. During the seven-year course of her illness before she underwent surgery, she had gained approximately thirty-three pounds. Following the May 2007 surgery, Goodner was able to lose approximately sixty-five pounds as of November 2008; approximately half of this weight was pre-injury, and therefore, cannot be said to be causally related to the work injury.

Based on the record before us, we are unable to conclude substantial evidence supports the determination that the weight-loss surgery was both reasonable and beneficial to the work-related injury. The deputy found "there is no evidence in the record that claimant ever had any weight problem before her exposure to [the virus]." We find that substantial evidence does not support this finding. There is no employer-provided care in order to compare the reasonableness of the alternative care sought. This is not a case where an employee abandoned the care provided by the employer to seek alternative care as a result of a disagreement of her diagnosis or treatment. Most importantly, Goodner has not made a successful return to the labor market following the bariatric surgery and has instead been found to be permanently and totally disabled. The surgery therefore cannot be said to have been beneficial.

We therefore reverse the district court's decision affirming the agency's ruling because we find the agency erred by ordering Mercy Hospital to pay for the cost of the bariatric surgery. Because we find no substantial evidence supports the agency's ruling, a remand is not necessary.

B. Family Therapy Sessions. Next, Mercy Hospital claims the agency erred by ordering it to pay for the family therapy sessions. It asserts the medical care contemplated by section 85.27 is for the worker alone, not the worker's family. We begin by noting the deputy agreed with Mercy Hospital that it could only order Mercy Hospital to pay for medical care to Goodner, not her family. However it found the family therapy was recommended by the treating physicians to treat Goodner's depression. Part of the family therapy benefited Goodner, and part benefited her family. Because the deputy was unable to dissect out what part of the therapy benefited Goodner alone, it ordered Mercy Hospital to pay for one-half of the cost.

We find no error in the deputy's decision. The deputy did not order Mercy Hospital to pay for care given to the family. The deputy reduced the amount payable by half in order to hold Mercy Hospital responsible for a portion of the therapy that benefited Goodner. Dr. Wesner testified the family therapy was reasonable and necessary for Goodner's chronic fatigue syndrome because there was a profound impact on the family due to the loss of her high wage and the family needed to learn how to cope with a long-term illness. We find the agency did not err in ordering Mercy Hospital to pay half the cost of the family therapy counseling.

VII. CONCLUSION.

We affirm part of the district court's decision on judicial review. We find *Haverly* was appropriately applied by the agency to judicially estop Mercy Hospital from contesting liability in this case. There was substantial reliable medical evidence to support the agency's conclusion that Goodner's

mononucleosis and subsequent chronic fatigue syndrome arose out of and in the course of her employment. There is also substantial evidence supporting the agency's conclusion that Goodner is permanently and totally disabled as an odd-lot employee. We also affirm the agency's decision ordering Mercy Hospital to pay one-half of the cost of the family therapy sessions. However, we reverse the agency's decision ordering Mercy Hospital to pay for Goodner's bariatric surgery because there is not substantial evidence to support the conclusion that the surgery was reasonable and beneficial.

AFFIRMED IN PART AND REVERSED IN PART.