BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

PAMELA CARROW,

Claimant,

vs.

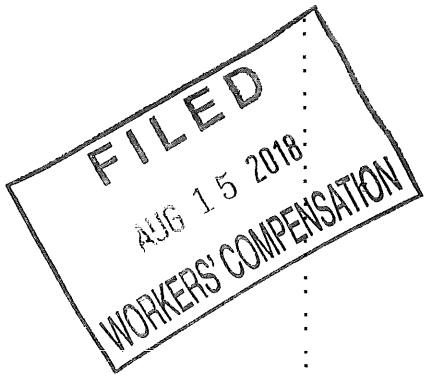
HY-VEE, INC.,

Employer,

and

EMC PROPERTY AND CASUALTY COMPANY,

Insurance Carrier,
Defendants.



File Nos. 5062477, 5062478

ARBITRATION

DECISION

Head Note No.: 1803

STATEMENT OF THE CASE

Pamela Carrow, claimant filed two petitions in arbitration seeking workers' compensation benefits from Hy-Vee and its insurer, EMC Property and Casualty Company as a result of injuries she allegedly sustained on August 18, 2015 and October 9, 2015 that allegedly arose out of and in the course of her employment. The evidence in this case consists of the testimony of claimant, Michael Carrow, Sheila McGuire, Joint Exhibits 1 – 16, Claimant's Exhibits 1 – 14 and Defendants' Exhibits A – C and F - I.

ISSUES

For File No. 5062477 (Date of alleged injury August 18, 2015)

1. Whether claimant sustained an injury on August 18, 2015 which arose out of and in the course of employment;

2. Whether the alleged injury is a cause of temporary disability and, if so, the extent;

3. Whether the alleged injury is a cause of permanent disability and, if so;

4. Whether the alleged disability is a scheduled member disability or an unscheduled disability;

5. The extent of claimant's disability:
6. The commencement date for any permanent partial disability benefits;
7. Whether claimant provided timely notice under Iowa Code section 86.23;
8. Whether claimant is entitled to payment of medical expenses;
9. Whether claimant is entitled to alternate medical care and future medical expenses.
10. Whether claimant is entitled to payment of an independent medical examination;
11. Assessment of costs.

For File No. 5062478 (Date of alleged injury October 9, 2015)

1. Whether claimant sustained an injury on August 18, 2015 which arose out of and in the course of employment;
2. Whether the alleged injury is a cause of temporary disability and, if so, the extent;
3. Whether the alleged injury is a cause of permanent disability and, if so;
4. Whether the alleged disability is a scheduled member disability or an unscheduled disability;
5. The extent of claimant's disability:
6. The commencement date for any permanent partial disability benefits;
7. Whether claimant provided timely notice under Iowa Code section 86.23;
8. Whether claimant is entitled to payment of medical expenses;
9. Whether claimant is entitled to alternate medical care and future medical expenses.
10. Whether claimant is entitled to payment of an independent medical examination;
11. Assessment of costs.

STIPULATIONS

The parties filed hearing reports at the commencement of the arbitration hearing. On the hearing reports, 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.

FINDINGS OF FACT

The deputy workers' compensation commissioner having heard the testimony and considered the evidence in the record finds that:

Pamela Carrow was 65 years old at the time of the arbitration hearing. Claimant did not graduate from high school. Claimant did obtain a GED. (Transcript, page 30; Exhibit 1, page 3) Claimant said that over her life she has had 20 – 30 different jobs including being a manager of a grocery store and as an assistant manager for a convenience store. (Tr. p. 31) A complete vocational history is part of the vocational evaluation performed by Carmen Mitchell, C.D.M.S., C.R.C and in claimant's answers to interrogatories. (JEx. 15, pp. 248, 250; Ex. 1, pp. 6, 7)

Claimant's last day at Hy-Vee was October 9, 2015. She had not worked since that day. (Tr. p. 31)

Claimant testified that up until her foot injury on August 18, 2015 she was able to go fishing, work around the house and perform yard work. Since her injury she has had her husband help her with laundry, dishes, cooking and cleaning. (Tr. pp. 32, 33)

Claimant testified that prior to the August 18, 2015 incident she injured her foot when her X-ACTO knife fell on her foot on December 31, 2014. (Tr. p. 34) Claimant went to the emergency department, received stiches and was released. (Tr. p. 35)

Claimant saw a podiatrist, Joshua Modlin, D.P.M. in June 2015 for the cut on her foot. (Tr. p. 36) Dr. Modlin diagnosed hammertoe and performed surgery on June 26, 2015. (Tr. pp. 37, 38) Claimant returned to work at Hy-Vee on July 30, 2015. (Tr. p. 40) Claimant was provided a CAM boot after her surgery and said she was told to limit her walking and not to stand more than 10 minutes at work. Claimant was provided a stool to sit on at the pay station at Hy-Vee. (Tr. p. 39)

Claimant began her work for Hy-Vee in March 2008 at the Fleur Drive location in Des Moines, Iowa. (Ex. H, p. 27) On August 18, 2015 claimant was working for Hy-Vee. Claimant said that she moved her foot off a ledge she was resting her foot on, which caused her toes to bend back, and she said she heard a crack. (Tr. p. 44) Claimant testified as to how she injured her foot,

> A. I was sitting down, and I have a ledge right there at the bottom where my register is and – because that's where I was resting my feet. And then I had a customer come towards me, and my foot slid off and caused my toes to bend back, and you heard a crack when it did.

(Tr. p. 44) Claimant said she was wearing her CAM boot at the time of her injury. (Tr. p. 47) In further explanation of her injury while wearing her CAM boot claimant said

> A. Yeah, it comes out far enough that, you know, your toes is just slightly exposed; so when my foot came off the edge, it was like it bent that piece back and my toes with it at the same time. There's not supposed to be no flexibility to it, but with the pressure sliding off like that.

(Tr. p. 48) Claimant testified she told Sheila McGuire, the human resources manager at the Hy-Vee she was working at at the time of her injury. Claimant said Ms. McGuire was on lunch and was purchasing some items when she told her she injured her foot, and Ms. McGuire asked her if she could finish the shift. (Tr. p. 46) Claimant admitted at the hearing that in her deposition she said she had telephoned Ms. McGuire. (Tr. p. 78) The defendants asserted that the first time they knew claimant was claiming a work injury was October 13, 2016. (Ex. A, pp. 1, 2)

In her deposition claimant described how she injured her foot on August 18, 2015 as follows,

> A. I was standing waiting on the customer. My foot – I had a ledge there. My foot slipped off, bending the toes back, causing them to rebreak [sic]. And I continued to stay at work until the end of my shift.

(Ex. H, p. 61) Claimant said in her deposition she called Ms. McGuire and told her she had injured her toes and claimant said that Ms. McGuire asked her if she could finish her shift. (Ex. H, p. 66) Claimant also said in her deposition that she reported the August 18, 2015 injury as a work injury after she found out that she was going to have some toes amputated. (Ex. H, pp. 68, 69)

Claimant finished her shift that day. (Tr. p. 46) Claimant did not fill out any paperwork about the incident. (Tr. p. 49)

Claimant said she went to Dr. Modlin on August 19, 2015 and was told that she fractured two toes that he had previously performed surgery on. (Tr. p. 50) I find that August 18, 2015 is the manifestation date for the alleged work injury.

Claimant testified at the hearing she did not remember telling Dr. Modlin that she injured her foot with her CAM boot off and that she injured her foot while getting up from her left foot and left knee and caught her toes on the floor. (Tr. p. 84) Claimant

continued to work at Hy-Vee until October 8, 2015. (Ex. H, p. 29) Claimant had foot surgery on October 9, 2015 and had two toes removed. (Tr. pp. 51, 52) Claimant continued to have foot pain after the surgery and has not been released to return to work. Claimant said that she has difficulty lifting due to her wrist and putting pressure on her feet. She attributed her back pain to her foot injury. (Tr. pp. 55, 56)

Claimant applied for and received both short and long-term disability through policies that were available through her employment at Hy-Vee. Claimant received short-term disability before her August 18, 2015 incident. (Ex. F, p. 11) Claimant has had workers' compensation claims in the past. In 1987 she had a carpel tunnel injury, and she had a dental injury in 1995. She has had three foot/ankle injuries in May 1991, September 1991 and September 1992. (Tr. p. 59) Claimant had a right foot and ankle injury with surgery while she was working for the Des Moines Public Schools. (Ex. H, p. 43) In 1997 claimant had a claim against a convenience store due to low back pain. (Tr. p. 62; Ex. H, p. 9) Claimant was provided sedentary restrictions after this injury. (Tr. p. 64) Claimant has also had a workers' compensation claim against the Des Moines Register in the 90's. (Tr. p. 61)

Claimant had some prior claims concerning Hy-Vee. In 2009 she had a claim for dermatitis, in 2012 when milk crates fell on her, and a fall in 2012. (Tr. p. 61)

On March 11, 2015 Dr. Modlin first performed surgery on claimant in order to correct a hammertoe problem. In the second surgery Dr. Modlin amputated two of claimant's toes. (Ex. H, p. 54) Claimant said she had restrictions after her first toe surgery of no more standing than 10 minutes per hour, and that claimant should sit the rest of the hour and that she should limit her walking. (Ex. H, pp. 55. 56)

Claimant agreed that Dr. Modlin had discussed the possibility of having to amputate two of her toes on July 27, 2015. (Tr. p. 77)

Claimant told Craig Rypma, Ph.D., that she was wearing her CAM boot when she injured her foot on August 18, 2015. (JEx. p. 195) On April 24, 2017 Sarah Garcia LISW, wrote that claimant had fallen off a chair and shattered her foot. (JEx. 10, p. 188) 188; Tr. p. 80) Claimant testified that she told the short or long-term disability providers for Hy-Vee that her August 18, 2015 injury was not work related and acknowledged that if she had told them it was work related she would not be eligible for the short and long-term disability payments. (Tr. pp. 90, 100, 102, 107)

Claimant has not looked for work since she stopped working for Hy-Vee. She stated that her doctors have not released her to return to work. (Ex. H, p. 22.

Michael Carrow, claimant's husband testified. Mr. Carrow stated he did the heavy work around the home. (Tr. pp. 117, 118) Mr. Carrow said he learned that claimant had been injured when he came home from work. (Tr. p. 119) Mr. Carrow went to Dr. Modlin the next day. Mr. Carrow said that Dr. Modlin was concerned, as he had previously performed foot surgery. (Tr. p. 120) Mr. Carrow was asked if he

reported his wife's work injury to Hy-Vee. Mr. Carrow testified that he spoke to Tom Noll and Jamie Stephens about the health status of claimant. (Tr. p. 121) Mr. Noll stocked shelves. (Tr. p. 121) Mr. Stephens was a store manager. Mr. Carrow said that he complained to Mr. Stephens about claimant exceeding her restrictions at Hy-Vee and that Mr. Carrow said he told Mr. Stephens that he blamed Hy-Vee for having claimant work beyond her restrictions and for claimant re-injuring herself at work. (Tr. p. 125)

Sheila McGuire, Human Resource Manager at Hy-Vee testified. Ms. McGuire said that Hy-Vee filed a first report of injury after Hy-Vee received the original petition in October 2016. (Tr. p. 129) Ms. McGuire said that claimant did not report an August 18, 2015 work injury to her. (Tr. p. 130) Ms. McGuire testified that she was aware that Mr. Carrow had talked to Mr. Stephens abut claimant's restrictions not being followed. (Tr. p. 132) Ms. McGuire said that Mr. Stephens never mentioned to her that claimant had a work-related injury. (Tr. p. 132) Ms. McGuire testified that she does not recall claimant calling her on the phone or telling her in person about the August 18, 2015 foot injury. (Tr. pp. 133, 134)

Dr. Modlin was deposed on October 18, 2017. (Ex. I) Dr. Modlin was aware of the January 2015 incident when an X-ACTO knife fell and cut the dorsal portion of claimant's left foot. Dr. Modlin saw claimant on March 11, 2015. (Ex. I, p. 8: JEx. 7, p. 113) Claimant had concerns of pain in the dorsal part of her foot as well as the plantar portion of her left foot. Dr. Modlin stated that claimant previously had a diagnosis of peripheral neuropathy and fibromyalgia in both feet. (Ex. I, p. 9; JEx. 7, pp. 118, 119) On May 29, 2015 Dr. Modlin reviewed an MRI and noted claimant's second and third digits on her left foot were dislocated with related plantar plate rupture that will require arthroplasties. (JEx. 7, p. 122) On June 26, 2015 Dr. Modlin performed surgery to fix scar tissue caused by the X-ACTO knife injury, emergency room surgery, and to correct painful dislocated hammertoes digits two and three on the left foot. (Ex. I, p. 13) On June 26, 2015 Dr. Modlin operated on claimant's left foot. His postoperative diagnosis was

1. Painful scar adhesion, dorsal left foot.

2. 2. Painful dislocated toes, left foot, digits 3 and 4.

(JEx. 5, p. 46) Dr. Modlin saw claimant on July 2, 2015, one week after surgery, and recorded in his notes that claimant was to remain non-weight bearing (NWB) for the next three to four weeks and always keep her CAM boot on. (Ex. I, pp. 15, 16; JEx. 7, pp. 124, 125) On July 13, 2015 Dr. Modlin saw claimant again. He continued the NWB and to wear the CAM boot, added no ambulation, and allowed her to return to work. (Ex. I, p.18; JEx. 7, p. 126) On July 27, 2015 Dr. Modlin wrote claimant had reported minimal ambulation on the left foot. (JEx. 7, p. 130) Dr. Modlin testified claimant could do minimal weight bearing; however, his preference was no weight bearing. (Ex. I, p. 19) During the July 27, 2015 visit Dr. Modlin discussed with claimant the possibility that amputation of her left third toe could occur. (Ex. I, p. 20) Dr. Modlin provided restrictions of

A. Okay. "No more than 10 minutes weight bearing per shift. Must be allowed to wear postoperative boot for all weight bearing and sit while working. Please clock patient in for her to limit excess weight bearing."

(Ex. I, p. 20; JEx. 7, p. 133) Dr. Modlin agreed that he had noted as of July 27, 2015 that claimant's third left toe was "drifting" despite the surgery and amputation might be necessary. (Ex. I, pp. 21, 22; JEx. 7, pp. 131, 132) Dr. Modlin saw claimant on August 19, 2015; the day after the alleged work injury of August 18, 2015.

Dr. Modlin responded to a series of questions by defendants' counsel concerning how he was told the August 18, 2015 incident to claimant's left foot happened as follows;

Q. Is this the only note that you have where Ms. Carrow told you about an injury involving her toes:

A. Yes.

Q. Would you read from your history from the patient there, "She relates that yesterday" – what did she tell you about how she hurt her toes?

A. Did you just want me to read this of just –

Q. Yup. Yeah, go ahead and –

A. Yeah. "She relates that yesterday she had her boot off and was on her left foot and left knee when in getting up she caught her left second and third toes on a surface of the floor which caused extreme dorsiflexion," bending back, "to occur to the left second and third toes at" these big knuckles here.

Q. And at the joints that had been straightened –

A. Correct.

Q. – or corrected:

Did Ms. Carrow ever tell you that she caught her toes on anything other than the surface of the floor?

A. No. And I kept trying to ask if there was something specific, because it seems hard to catch something on the flat surface, but that's all I got from here was it was just the floor.

Q. She didn't tell you that she caught them on a workstation?

A. Huh-uh.

Q. Is that a no?

A. No. Sorry.

Q. Or a table?

A. No.

Q. Or something else?

A. No.

Q. And in your description it sounds like she was on the floor when this occurred?

Q. Yes.

Q. And she clearly told you that she had her boot off?

A. Yes.

Q. And she told you that her toes did not bend upward, but instead bent backward?

A. Yes.

Q. She didn't tell you that she caught her left foot on the edge of a counter, did she?

A. No.

Q. She didn't tell you that her foot slipped off a ledge 3 inches high?

A. No.

Q. She didn't tell you that she had her boot on when this injury occurred?

A. No.

Q. And she didn't tell you that she fell off a chair when this injury occurred?

A. No.

. . . .

Did Ms. Carrow report to you some trauma at home?

A. Not that I know of.

Q. I did note that your office note of August 19, 2015, indicates that that incident which occurred when she had her boot off and was on the floor – you don't indicate whether that occurred at home or at work, do you?

A. No.

(Ex. I, pp. 22 – 25, 27) Dr. Modlin noted of claimant's August 19, 2015 visit,

> She relates that yesterday she had her boot off and was on her left foot and left knee when in getting up she caught her left 2nd, and 3rd toes on a surface of the floor with [sic] caused extreme dorsiflexion to occur to the left 2nd and 3rd toes at the MTPJ. She relates acute pain at this time and noted that her left 2nd and 3rd toes were looking "dislocated" and she attempted to tape these two toes into a more corrected position. She returned to her cam walking boot at that time and resumed taking postoperative pain medications at this time with moderately [sic] pain control.

(JEx. 7, p. 134) Dr. Modlin noted that the prior implants placed in the left second and third MTPJs noted to facture and dislocated through distal plantarolateral second, third proximal phalanges and proximal plantaromedial left second, third metatarsal bases. (JEx. 7, p. 136) Dr. Modlin allowed claimant to return to work with minimal weight bearing at no more than 15 minutes per 8-hour shift and to wear her boot at all times. (JEx. 7, pp. 136, 140)

On September 10, 2015 claimant and Dr. Modlin agreed to amputation of claimant's second and third left toe. (JEx. 7, p. 144) Dr. Modlin performed an amputation of claimant's second and third toes on her left foot on October 10, 2015. (Ex. I, p. 29) In an undated letter to the Social Security Administration Dr. Modlin wrote,

> Patient will be unable to lift or carry items in a work environment at this time due to ongoing left foot pain/collapse from this time forward. Patient is only able to stand for approximately 10-16 minutes at a time, even with AFO device, due to ongoing pain to the left lower extremity. This also affects her ability to walk for longer period of time as well. Other activities such as stopping, climbing, kneeling, crawling are unable to be performed in our requirement at this time due to worsening left lower extremity. Patient has no restrictions on handling packages in a sitting environment, seeing, hearing, speaking but is limited and traveling at this time due to device that has to be used on the left lower extremity.

> Patient's long-term prognosis to her left lower extremity is very poor, given with use of AFO device for the rest of her lift. Patient's poor medical history, clinical findings, diagnosis can all be noted from prior clinical visit notes.

(JEx. 7, p. 161) In a letter with a facsimile date of September 21, 2017, Dr. Modlin wrote,

> The proposed work restrictions that were put in place pursuant to corrective surgery of her left foot were 6-8 weeks limited weightbearing in a cam walking boot to allow for adequate time of implants to correct deformities of the left foot. These restrictions were reasonable and necessary following any implant-type corrective surgery and is the standard of care for this type of surgery. Following surgery and with these restrictions in place her postoperative course was uneventful. Following surgery though I was contacted by her Worker's Compensation representative who sent me a list of restrictions that could be put in place that would allow Pamela to return to work earlier than we had planned for. I discussed this option with Pamela at this time and she was in agreement with returning to work as long as restrictions that I had specified: minimal weightbearing to include no more than 10 minutes weightbearing per hour worked and being able to sit in [sic] a stool while at work. Following one week patient related that these terms were not being met but she continued working at that time. Accident occurred 8/18/18 and although surgical correction was still continuing to heal and may not have healed adequately if accident were prevented, but accident did occur while in a postoperative period while postoperative instructions were in place. I believe that this work injury materially aggravated her condition to such a point that ongoing healing postoperatively was not an option and directly caused her toe amputations.
>
> Based on my last evaluation of Ms. Carrow her current diagnoses of lower extremities are as follows: Status post amputation of let 2nd and 3rd toes, Type II diabetes with peripheral neuropathy, PAD, bilateral lower extremities, Venous stasis, bilateral lower extremities, Onychodystrophy X 5, Heloma Dura X 3, bilateral feet, Difficulty walking/ambulation.

(JEx. 7, p. 168)

On December 15, 2015 Glenn Hockett, M.D. wrote a note that claimant was unable to work due to foot pain. (JEx. 5, p. 56) On December 8, 2015 claimant saw Dr. Hockett for chronic neuropathic pain in the left foot. Dr. Hockett's assessment and plan was,

Diagnoses and associated orders for this visit:

Pain in left foot

- gabapentin (NEURONTIN) 300 mg capsule; Take 1 capsule by mouth 2 (two) times daily.

Acquired hypothyroidism

- TSH; Future.

(JEx. 5, p. 62)

On January 25, 2016 claimant saw Dr. Hockett for her left foot pain and also acute cervical radicular pain, which he presumed to be due to degenerative cervical disease. (JEx. 5, p. 65) Dr. Hockett continued claimant's excuse from any work activity based upon her left foot and her cervical radicular pain on February 24, 2016. (JEx. 5, pp. 67, 72) On July 25, 2016 Dr. Hockett wrote,

> Pamela Carrow was seen today for follow up of her chronic neuropathic left foot pain, and left cervical radicular pain. She remains completely disabled from any work activity.
>
> It is my medical opinion that Pamela Carrow is permanently disabled. She is unable to resume any work activities.

(JEx. 5, p. 77)

On July 18, 2016, Chandan Reddy, M.D. at the University of Iowa Hospitals and Clinics' (UIHC) impression was "Cervical spondylosis with radiculopathy." (JEx. 9, p. 186) Dr. Reddy said an anterior cervical discectomy and fusion (ACDF) could be considered, but claimant did not want to proceed. (JEx. 9, p. 186)

On April 24, 2017 claimant saw Sarah Garcia, LISW for counseling for depression. Ms. Garcia recorded in her notes regarding claimant's foot injury

> She [claimant] states toes had to be removed after she returned to work too early from a broken foot and fell off a chair and shattered the already broken bones in her toes so they had to be removed. She also states she has to have another surgery on her neck but does not want to do this.

(JEx. 10, p. 188) An evaluation by Dr. Rypma on September 8, 2017 recited the medical history that after foot surgery in June 2015 claimant reinjured her foot on August 19 [sic], 2015 while at work and claimant was not wearing a boot at the time. (JEx. 11, p. 195) Dr. Rypma found that claimant was depressed and that her return to

work at Hy-Vee where she reinjured herself exacerbated her psychological conditions. (JEx.11, p. 199)

A functional capacity examination (FCE) was performed on August 16, 2017. The FCE concluded claimant met the criteria for sedentary work based upon the Revised Dictionary of Occupational Titles. (JEx. 12, p. 203)

Michael Lee, D.P.M. performed an independent medical examination (IME) of claimant on August 24, 2017. Dr. Lee wrote that claimant bent her toes back at work which caused Dr. Modlin to recommend additional surgery. (JEx, 13, p. 212) Dr. Lee's assessment was,

1. Status post amputation of the second and third digits after hammertoe correction surgery, which failed to maintain correction of the hammertoe deformities.

2. Chronic pain issues, only minimally attributable to her foot pain. It would appear that most of her pain issues are related to her low back and cervical neck region.

(JEx. 13, p. 221) Dr. Lee wrote,

> Interestingly, on July 27, 2015, Ms. Carrow was seen for follow-up four weeks status-post hammertoe correction "third and fourth toes" and Dr. Modlin states in his treatment, "discuss possible need in the next few months following adequate healing time to probably fuse the third MTPJ and/or amputate the third toe should the pain worsen or if plantar drifting is continually noted and pain worsens with the drift." It was not until the next visit, on August 9, 2015, that Ms. Carrow came in relating recent new trauma to the left foot. At that visit, she related that she had her boot off and was on her left foot and left knee and when getting up, she caught her left second and third toes [sic] a surface of the floor, which caused extreme dorsiflexion to occur to the left second and third toes at the MTPJ. She related acute pain at that time and noted that her left second and third toes were looking dislocated. She attempted to tape these two toes into a more corrected position. She returned to her Cam boot at that time and resumed taking postoperative pain medication. This injury, according to Ms. Carrow, occurred at work; however, I have some concerns as to whether or not this injury truly caused her toes and the correction to be lost, as Dr. Modlin was indicating such loss of correction even before the injury was reported or occurred. This leads me to have some concerns regarding the original correction of the deformities and whether or not loss of correction was inevitable or had occurred prior to said work injury.

(JEx.13, pp. 221, 222)

Jacqueline Stoken, D.O. performed an IME on September 11, 2017. Dr. Stoken reviewed claimant's left foot injury as well as back conditions. Dr. Stoken's impressions were,

1. History of hammer toe deformity.

2. Status post work injury 11/06/12 with lumbar compression fracture of L3.

3. Status post left dorsal foot laceration on 1/01/15.

4. Status post left toe hammer toe correction.

5. Status post scar resection with adhesion to extensor tendon, left foot. Painful dislocated hammer toes, digits 2 and 3, on 6/26/15 done by Dr. Joshua Modlin. Postoperative diagnosis painful scar adhesions, dorsal left foot. Painful dislocated toes, left foot, digits 3 and 4.

6. Status post work injury 8/18/15 with fracture of 2nd and 3rd toes of left foot.

(JEx. 14, p. 234) Dr. Stoken stated,

> The work injury of 8/18/15 with fracture of the 2nd and 3rd toes, the amputation of the 2nd and 3rd toes and the chronic foot pain are causally related to the work incident referenced in the worker compensation Petition. The low back pain is materially aggravated by the work incident referenced in the worker compensation Petition.

(JEx. 14, p. 235) Dr. Stoken provided a 4 percent impairment rating for the foot injury and an 8 percent impairment rating for the back injury. (JEx. 14, p. 235) Dr. Stoken agreed with the limitation found in the August 16, 2017 FCE.

Lynn Nelson, M.D. performed an IME on October 5, 2017. Dr. Nelson agreed that claimant's low back pain may have been exacerbated by wearing a CAM boot. He was unable to state within a reasonable degree of medical certainty that it did. He also opined that there were no cumulative injuries through October 9, 2015. (JEx. 16, p. 270)

Ms. Mitchell provided a vocational evaluation on September 20, 2017. Ms. Mitchell wrote, "It was during this employment [Hy-Vee], that Ms. Carrow fractured the 2nd and 3rd toes on her left foot on August 18, 2015. While sitting on a stool at work she got up and caught her left foot causing her toes to bend backwards." (JEx. 15, p. 250) Ms. Mitchell opined claimant was limited to sedentary work due to physical limitations and with her psychological limitations she had lost 100 percent access to the labor market. (JEx. 15, p. 255)

On October 20, 2017 Dr. Stoken was requested to consider Dr. Nelson's October 10, 2017 opinion as to whether claimant's cervical and lumbar problems may have been aggravated by her work at Hy-Vee. Dr. Stoken opined that claimant's low back pain was materially aggravated due to the fact claimant had to wear a CAM boot. (JEx. 14, p. 245)

Claimant's past medical conditions are relevant to her current claim. In 1998 Robert Bennett, M.D. provided a report to the Missouri Department of Vocational Rehabilitation concerning whether claimant could continue to work in a convenience store. Dr. Bennett noted claimant had early degenerative joint disease in her back, which would cause problems with standing and heavy lifting. (JEx. 1, p. 1) An IME of April 19, 1999 found claimant had bilateral carpel tunnel that resulted in permanent disability, permanent disability for right ankle surgery, as well as chronic low back pain. (JEx. 3, p. 14) In 2007 claimant had trigger point injections to the upper thoracic and cervical areas. (JEx. 4, p. 19) In November 2011 claimant had right L3 transforaminal epidural steroid injection. (Ex. 4, p. 20) On April 3, 2013 Timothy Walsh, M.D. diagnosed claimant with,

1. Left shoulder pain.
2. Left hand pain.
3. Cervical and lumbar pain.
4. Cervical and lumbar degenerative disk disease.
5. Cervical and lumbar spondylosis.
6. Status post L3-L4 fracture, status post vertebroplasty.
7. Status post traumatic fall on 11/06/12.

(JEx. 4, p. 26)

On August 20, 2010 claimant presented to Elizabeth Jauron, M.D. of Family Medicine Northwest Des Moines with pain in both feet. From the records it appears that this provider became a member of UnityPoint Health system. Dr. Jauron assessed claimant with plantar fasciitis and tendonitis. (JEx. 5, p. 30) On October 3, 2012, John Piper, M.D. wrote Dr. Jauron and stated that claimant had pretty clear-cut radicular symptoms in the C6 distribution and also ulnar nerve-like symptoms. He thought surgery could be an option in the future. (JEx. 6, p. 111) On January 8, 2015 claimant had five stiches removed from her left foot at Family Medicine Northwest after the X-ACTO knife incident. (JE. 5, p. 42)

Claimant has requested certain medical costs and medical mileage, as set forth in Claimant's Exhibits 12 and 13. Claimant has also requested costs in the amount of $8,187.50. (Ex. 14, p. 120)

Based upon claimant's physical, (feet and back), and psychological limitations claimant is unable to work at this time.

RATIONALE AND CONCLUSIONS OF LAW

The defendants have asserted that the claimant failed to provide notice within 90 days of the injury and both files should be dismissed for lack of notice.

Iowa Code section 85.23 requires an employee to give notice of the occurrence of an injury to the employer within 90 days from the date of the occurrence, unless the employer has actual knowledge of the occurrence of the injury.

The purpose of the 90-day notice or actual knowledge requirement is to give the employer an opportunity to timely investigate the facts surrounding the injury. The actual knowledge alternative to notice is met when the employer, as a reasonably conscientious manager, is alerted to the possibility of a potential compensation claim through information which makes the employer aware that the injury occurred and that it may be work related. Dillinger v. City of Sioux City, 368 N.W.2d 176 (Iowa 1985); Robinson v. Department of Transp., 296 N.W.2d 809 (Iowa 1980).

Failure to give notice is an affirmative defense which the employer must prove by a preponderance of the evidence. DeLong v. Highway Commission, 229 Iowa 700, 295 N.W. 91 (1940).

Claimant's testimony at the hearing and in her deposition was inconsistent as to how and to whom she provided notice. Claimant's testimony that she provided notice to Hy-Vee of a work injury is not credible. Claimant's husband's testimony was credible and unrefuted that he told the store manager that claimant claimed her August 18, 2015 injury was work related. Defendants' affirmative defense for lack of notice fails.

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

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).

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

When the injury develops gradually over time, the cumulative injury rule applies. The date of injury for cumulative injury purposes is the date on which the disability manifests. Manifestation is best characterized as that date on which both the fact of injury and the causal relationship of the injury to the claimant's employment would be plainly apparent to a reasonable person. The date of manifestation inherently is a fact based determination. The fact-finder is entitled to substantial latitude in making this determination and may consider a variety of factors, none of which is necessarily dispositive in establishing a manifestation date. Among others, the factors may include

missing work when the condition prevents performing the job, or receiving significant medical care for the condition. For time limitation purposes, the discovery rule then becomes pertinent so the statute of limitations does not begin to run until the employee, as a reasonable person, knows or should know, that the cumulative injury condition is serious enough to have a permanent, adverse impact on his or her employment. Herrera v. IBP, Inc., 633 N.W.2d 284 (Iowa 2001); Oscar Mayer Foods Corp. v. Tasler, 483 N.W.2d 824 (Iowa 1992); McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985).

While a claimant is not entitled to compensation for the results of a preexisting injury or disease, its mere existence at the time of a subsequent injury is not a defense. Rose v. John Deere Ottumwa Works, 247 Iowa 900, 76 N.W.2d 756 (1956). If the claimant had a preexisting condition or disability that is materially aggravated, accelerated, worsened or lighted up so that it results in disability, claimant is entitled to recover. Nicks v. Davenport Produce Co., 254 Iowa 130, 115 N.W.2d 812 (1962); Yeager v. Firestone Tire & Rubber Co., 253 Iowa 369, 112 N.W.2d 299 (1961).

The record as to how claimant injured her left foot on August 18, 2015 is confusing. Claimant stated at the hearing she was wearing her CAM boot and bent back her toes on a ledge. Dr. Modlin's notes state that claimant was not wearing her CAM boot and that she was on her left foot and left knee and when getting up she caught her left second and third toes. As this record is the most contemporaneous record, the day after claimant's injury, I find that it is the most credible. This conflicts with claimant's testimony that she was wearing the CAM boot and bent her toes on a ledge. Given the inconsistent testimony of claimant I do not find claimant's testimony credible. Additionally, Dr. Lee questions claimant's work injury as well.

Dr. Stoken assumed claimant had a work injury on August 18, 2015 and did not question causation. The record shows claimant injured her foot on August 18, 2015; however, claimant has failed to prove the injury arose out of and in the course of her employment with Hy-Vee.

There is no convincing evidence that claimant had a cumulative injury to her foot due to her work at Hy-Vee. I find the opinion of Dr. Nelson most convincing on this issue.

Claimant has significant limitations and disabilities; however, she has not carried her burden of proof that her foot injury arose out of and in the course of her employment.

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).

There is no evidence in the exhibits that provides information as to whether defendants or claimant requested the IME by Dr. Lee. Dr. Stoken performed her IME on September 11, 2017 at the request of the claimant. Dr. Nelson performed his IME on October 5, 2017 at the request of the defendants. Claimant obtained Dr. Stoken's IME before the defendants had retained a physician who provided a rating. As such, no award for IME costs can be awarded under Iowa Code 85.39.

As claimant has not prevailed in this case I decline to award claimant costs and alternate medical care.

ORDER

For file 5062477:

The claimant shall take nothing.

For file 5062478:

The claimant shall take nothing.

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

Signed and filed this 15th day of August, 2018.

JAMES F. ELLIOTT
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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JFE/sam

Right to Appeal: This decision shall become final unless you or another interested party appeals within 20 days from the date above, pursuant to rule 876-4.27 (17A, 86) of the Iowa Administrative Code. The notice of appeal must be in writing and received by the commissioner's office within 20 days from the date of the decision. The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday. The notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 1000 E. Grand Avenue, Des Moines, Iowa 50319-0209.