BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

MERCEDES M. THOMAS-WILSON,	:	File No. 5057149
Claimant,	:	
vs.	:	ARBITRATION
UFP TECHNOLOGIES, INC., d/b/a MOLDED FIBRE TECHNOLOGY,	:	DECISION
Employer,	:	
ZURICH AMERICAN INSURANCE CO.,	:	
Insurance Carrier Defendant.	:	Head Note Nos.: 1402.40, 1801.1, 1802, 2501, 2701, 2907, 3800

FILED
JAN 26 2018
WORKERS' COMPENSATION

STATEMENT OF THE CASE

Mercedes Thomas-Wilson, claimant, filed a petition in arbitration and seeks workers' compensation benefits from defendants, UFP Technologies, Inc., as the employer and Zurich American Insurance Company, as the insurance carrier. Hearing occurred before the undersigned on August 23, 2017, in Davenport.

The parties filed a hearing report at the commencement of the arbitration hearing. On the hearing report, the parties entered into various stipulations. All of those stipulations were accepted and are hereby incorporated into this arbitration decision. 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.

At the commencement of the arbitration hearing, the undersigned reviewed the hearing report with counsel on the record. Counsel were provided an opportunity to amend or add any additional disputed issues to the hearing report. Counsel did not identify any additional disputed issues to be decided by the undersigned at the time of hearing and the undersigned accepted the parties' hearing report. (Transcript, pages 4 through 9)

In her post-hearing brief, claimant advances and argues a claim for penalty benefits pursuant to Iowa Code section 86.13. The hearing report does not contain any reference to, or make any claim for, penalty benefits. Review of the original notice and petition demonstrates that no penalty claim was asserted therein. Counsel did not identify or assert a penalty claim at the time of the arbitration hearing.

Instead, it appears that claimant is attempting to raise and litigate a penalty benefit claim without proper notice of the claim and after the close of evidence. Defendants do not brief a penalty issue, nor does it appear they were aware a penalty claim was being asserted. Defendants certainly were not provided an opportunity to marshal and introduce evidence to respond to an undisclosed penalty benefit claim.

Iowa Code section 17A.12(2) requires that parties be given notice of disputed issues to be tried at a contested case proceeding. Obviously, this agency is bound by the provisions of the Iowa Administrative Procedure Act. Claimant has not complied with the provisions of Iowa Code section 17A.12(2) by providing notice of the intent to pursue a penalty benefit claim prior to the time of the trial.

Agency rule 876 IAC 4.2 specifically requires, "[e]ntitlement to denial or delay benefits provided in Iowa Code section 86.13 shall be pled." In this instance, claimant did not plead the claim for penalty benefits either in the original notice and petition or in the hearing report. Claimant has not complied with agency rule 876 IAC 4.2. Defendants were not given proper notice or opportunity to defend a penalty benefit claim until the close of evidence and submission of claimant's post-hearing brief.

Claimant argues in her post-hearing brief that the penalty claim should be permitted because it is mentioned in Claimant's Exhibit 5. Of course, placing something into an exhibit does not necessary put the opposing party on notice that the claim is being asserted. Negotiations occur before trial commences. Issues are withdrawn. Defendants are not obligated to read claimant or claimant's counsel's mind as to what claims are intended to be pursued but are not actually identified on the hearing report. More importantly, the undersigned reviewed the hearing report with counsel, on the record, at the commencement of the hearing.

The undersigned clearly attempted to define, clarify, and limit the disputed issues in this review of the hearing report. Changes were made to the hearing report during this colloquy. At the end of the discussion, the undersigned specifically asked counsel whether there were any additional disputed issued. Counsel confirmed for the undersigned that there were no additional disputed issues in the case. (Transcript, pages 8-9) The undersigned, and presumably defendants, relied upon counsel's representation in trying the case. Adding an issue after having denied further disputed issues and after the close of evidence is prejudicial to the defendants.

Claimant further argues that the penalty claim should be permitted because she could simply raise the penalty issue at a later date via a separate petition. The undersigned disagrees.

Agency rule 876 IAC 4.2 provides a mechanism in which claimant may bifurcate the penalty benefit claim for a later trial. Pursuant to that administrative rule, "claimant may bifurcate the denial or delay issue by filing and serving a notice of bifurcation at any time before a case is assigned for hearing." 876 IAC 4.2. Again, claimant is clearly not

in compliance with agency rule 876 IAC 4.2. Claimant made no attempt to identify the penalty benefit claim during the discovery phase of this case, let alone file a notice of bifurcation before the hearing assignment order was filed.

Claimant's assertion that she may unilaterally bifurcate the penalty issue and raise it at a later time is not well-founded in the existing rules and law governing cases before this agency. Moreover, a penalty benefit claim includes an evidentiary burden shifting in which defendants are required to produce evidence to demonstrate the basis(es) for their denial and evidence that they contemporaneously conveyed the basis(es) of denial to the claimant. Iowa Code section 86.13(4)(b)-(c). Requiring defendants to marshal and introduce evidence on a claim that was not identified prior to the close of evidence is prejudicial on its face. Therefore, I conclude that claimant's request to advance a penalty benefit claim after the close of evidence should be denied and that the penalty claim cannot be bifurcated, or raised and litigated at a later date.

Claimant had not obtained or produced treatment records, which were designated as "Claimant's Exhibit 9." Defendants did not object to the production of these records after the hearing. Claimant forwarded the proposed medical records, as well as a supplemental exhibit marked as "Claimant's Exhibit 9-1." Given the defendants' agreement, these records were noted to be received at the hearing, though not produced until after the arbitration hearing. For clarity purposes, Claimant's Exhibit 9 and 9-1 are formally received into the evidentiary record.

Defendants objected to evidence produced by claimant less than 30 days before trial. In an effort to hear the case on the merits and to avoid exclusion of evidence, the undersigned granted defendants additional time to obtain a medical expert report. Defendants obtained a medical report from Steven Rippentrop, M.D. and submitted that report as Defendants' Exhibit G on October 2, 2017. Exhibit G is formally received into the evidentiary record at this time.

The evidentiary record includes Joint Exhibits 1 through 4, Claimant's Exhibits 1 through 10 (including Exhibit 9-1), and Defendants' Exhibits A through G. The evidentiary record formally closed upon receipt of Defendants' Exhibit G on October 2, 2017.

Claimant testified on her own behalf. No other witnesses testified live at trial.

Counsel for the parties requested an opportunity to submit post-hearing briefs. Their request was granted. This case was considered fully submitted to the undersigned upon filing of the parties' post-hearing briefs on October 30, 2017.

ISSUES

1. Whether the August 21, 2014 work injury caused temporary disability and, if so, the extent of claimant's entitlement to temporary disability, or healing period benefits, including a claim for a running healing period.

2. Whether the August 21, 2014 work injury caused permanent disability and, if so, whether the claim for permanent disability is ripe for determination at this time or whether permanent disability should be bifurcated for determination at a later time.

3. The extent of claimant's entitlement to permanent disability, if any.

4. The proper commencement date for permanent disability benefits, if any.

5. Claimant's gross weekly earnings at the time of the August 21, 2014 work injury and the corresponding weekly worker's compensation rate at which benefits should be paid.

6. Whether claimant is entitled to reimbursement, direct payment to medical providers, or to be held harmless for past medical expenses contained in Claimant's Exhibit 9 and Claimant's Exhibit 9-1 and/or medical mileage contained in Claimant's Exhibit 5.

7. Whether claimant is entitled to ongoing and future medical treatment.

8. Whether costs should be assessed against either party.

FINDINGS OF FACT

Having considered all of the evidence and testimony in the record, recognizing that there may be competing or contradictory facts within this evidentiary record, I find the following facts:

Mercedes Thomas-Wilson sustained an injury to her left leg on August 21, 2014 while working for the employer, UFP Technologies, Inc. Ms. Thomas-Wilson was pulling a pallet up an incline when she felt a sharp pain shoot up her leg. She reported the injury to the employer on the same date.

The employer established and provided medical care. Claimant was ultimately referred to an orthopaedic surgeon, Suleman M. Hussain, M.D., for treatment. Dr. Hussain evaluated claimant several times, provided injections, but ultimately determined that surgical intervention was not necessary. Dr. Hussain released claimant from his care and declared maximum medical improvement on January 21, 2015. He imposed no permanent work restrictions. (Joint Ex. 3, p. 25) Dr. Hussain opined that

claimant sustained no permanent impairment as a result of the August 21, 2014 work injury. (Joint Ex. 3, p. 27)

Ms. Thomas-Wilson did not seek medical treatment for her left leg for approximately 18 months after her release from care by Dr. Hussain. However, she testified that she had ongoing symptoms in her left knee and especially in her left calf consistently after being released by Dr. Hussain. She testified that she did not obtain treatment for the injuries because she did not have health insurance during this period of time.

Defendants appropriately point out that claimant did not request a return evaluation by Dr. Hussain. They also point out that claimant had a routine physical in February 2015, approximately one month after Dr. Hussain released claimant, and she made no mention of any left leg symptoms during that physical examination. (Joint Ex. 4) Nevertheless, the subsequent physicians appear to have accepted claimant's history that she had ongoing symptoms after she was released by Dr. Hussain and I also found her testimony in this regard to be credible at the time of trial in spite of the discrepancy noted in the February 2015 physical.

The parties submitted a dispute about claimant's gross weekly earnings, which likely makes a difference with respect to my analysis regarding claimant's claim for healing period, or temporary partial disability, benefits. Specifically, the parties disputed claimant's gross weekly earnings at the time of the August 21, 2014 work injury.

Claimant contends that the gross earnings were $442.53 per week, although she submitted Claimant's Exhibit 10 at the time of hearing, asserting that the gross earnings were $440.18 per week. Defendants contend that the applicable gross earnings at the time of this work injury were $417.39 per week. (Defendants' Ex. F, p. 43) Review of the parties' respective calculations demonstrates that the parties concur which weeks of earnings should be included. Each party uses earnings for pay dates May 30, 2014 through August 22, 2014.

The parties differ on how those wages should be calculated, however. Claimant includes wages with a $1.00 per hour wage differential while defendants exclude the wage differential. Defendants contend that claimant includes overtime hours at the overtime wage premium rate. However, review of claimant's calculations demonstrates that claimant calculated overtime hours at the rate of $10.63, while defendants calculate all hours at the rate of $9.63 per hour.

The fighting difference between the parties is whether the $1.00 per hour shift differential should be included. This is really a legal dispute that will be resolved below. Claimant also appears to include all wages using the hourly rate of $10.63 per hour. It appears that claimant received a pay raise. Earnings on and before the pay date of July 3, 2014 were paid at an hourly rate of $10.50 (with the shift differential included). Earnings after the July 3, 3014 pay date were paid at the hourly rate of $10.63 (with the shift differential included).

Claimant's average gross weekly earnings should be calculated as follows:

Pay Date	Pay Rate	Regular Hrs	OT Hours	Total Hours	Gross Pay
5/30/14	$10.50	40.0	0.3	40.3	$423.15
6/6/14	$10.50	40.0	8.3	48.3	$507.15
6/13/14	$10.50	40.0	0	40.0	$420.00
6/20/14	$10.50	40.0	9.3	49.3	$517.65
6/27/14	$10.50	36.2	0	36.2	$380.10
7/3/14	$10.50	40.0	1.2	41.2	$432.60
7/11/14	$10.63	40.0	15.9	55.9	$594.22
7/18/14	$10.63	40.0	1.4	41.4	$440.08
7/25/14	$10.63	40.0	3.2	43.2	$459.22
8/1/14	$10.63	40.0	1.5	41.5	$441.15
8/8/14	$10.63	40.0	20.7	60.7	$645.24
8/15/14	$10.63	36.2	0	36.2	$384.81
8/22/14	$10.63	32.7	0	32.7	$347.60

Review of the parties' respective calculations demonstrates that neither party's calculations are accurate. Claimant's total gross earnings during the above 13-week period was $5,992.97 using just her "straight rate," plus shift differential. Therefore, I find that claimant's average gross weekly earnings at the time of her August 21, 2014 work injury were $461.00.

Claimant was off work from August 29, 2014 through September 3, 2014, as a result of the August 21, 2014 work injury. She returned to work on September 4, 2014 but only worked 3.6 hours on that date. Claimant returned to her full hours of work on September 5, 2014, although she worked a light duty assignment for a period thereafter. She testified that she lost 64 hours of overtime while working light duty. Records admitted suggest she may have only lost a maximum of 52 hours of overtime while working light duty.

Both parties argue the case based upon potential actual lost wages from lost overtime. Neither party argues this issue as a temporary partial disability issue or discusses whether claimant's actual wages were less than her gross average weekly wages before the injury. Claimant testified that her overtime hours varied week by week and could range from no overtime in a week to 20 hours per week. (Tr., p. 58) She asserts these overtime hours were lost in September and October 2014. Dr. Hussain did not release claimant to return to full duty work until November 5, 2014.

Review of claimant's wage records in September and October 2014 reveal that claimant earned less than her gross average weekly wage of $461.00 during the weeks ending September 6, 2014, September 20, 2014, October 4, 2014, and October 11, 2014. (Claimant's Exhibit 6, p. 18)

The week ending September 6, 2014, includes the days off immediately after the injury. Those days off will be awarded as healing period (temporary total disability).

The week ending September 20, 2014, claimant's gross earnings were $429.98, or a $31.02 reduction in earnings. The week ending October 4, 2014, claimant's gross earnings were $429.98, or a $31.02 loss of earnings. The week ending October 11, 2014, claimant's gross earnings were $425.20, or a $35.80 loss of earnings. (Claimant's Ex. 6, p. 18)

Ms. Thomas-Wilson urges that the issue of permanent disability is not ripe for determination. Claimant argues that she requires ongoing and future medical treatment and that she has not yet achieved maximum medical improvement. Therefore, claimant argues that the issue of permanent disability is not ripe for determination.

Review of the evidentiary record demonstrates that the treating surgeon, Dr. Hussain, opined claimant achieved maximum medical improvement on January 21, 2015. However, Dr. Hussain did provide an injection on that date, which presumably would not have immediate and permanent impact.

Steven A. Chandler, D.O., evaluated claimant for treatment purposes on April 24, 2017. Dr. Chandler opines that claimant's current symptoms are causally related to the work injury. Dr. Chandler did not provide an opinion about whether the treatment would result in improvement of claimants' functional disability or merely treat ongoing symptoms. Of course, Dr. Chandler also did not have the repeat MRI he recommended to assess this issue.

By contrast, defendants had claimant evaluated by Dr. Rippentrop, on September 21, 2017. Dr. Rippentrop opined that claimant does require additional medical treatment for maintenance of her symptoms from her August 21, 2014 work injury. However, Dr. Rippentrop also opines that claimant has achieved maximum medical improvement from the work injury. (Defendants' Ex. G, p. 49)

Considering the three physicians' opinions pertaining to ongoing treatment and maximum medical improvement, I note that Dr. Hussain was the treating orthopaedic surgeon. He had the best opportunity to evaluate claimant over time and certainly has the credentials to determine ongoing treatment needs. On the other hand, I do not necessarily accept Dr. Hussain's date of maximum medical improvement. Claimant also credibly testified that she has had ongoing symptoms ever since Dr. Hussain released her from his care.

Dr. Chandler evaluated claimant one time. He recommended additional diagnostic testing to determine if additional treatment is necessary. Although he opined that the ongoing symptoms are causally related to the work injury, Dr. Chandler did not specifically address whether the future treatment would improve claimant's functional impairment or address the issue of maximum medical improvement directly. To be fair, Dr. Chandler did not have an opportunity to review the repeat MRI and offer opinions before trial. However, I find his one-time evaluation, without the diagnostic testing results, to be less informed and less helpful than it could otherwise be.

By contrast, Dr. Rippentrop had access to the treatment records as well as the repeat MRI results performed shortly before trial. Dr. Rippentrop considered claimant's history, treatment history, as well as the repeat diagnostic testing. Dr. Rippentrop opined that claimant does require maintenance treatment that is related to the August 21, 2014 work injury. However, Dr. Rippentrop opines that claimant has achieved maximum medical improvement from the work injury.

Considering each of these opinions, I find that Dr. Rippentrop had the best and most reliable evidence available. His opinions are based upon the ongoing symptoms and treatment after Dr. Hussain declared maximum medical improvement. Dr. Rippentrop's opinions are also based upon the results of the recent MRI. Ultimately, I find Dr. Rippentrop's opinions to be most informed and most convincing in this evidentiary record. Therefore, I rely upon Dr. Rippentrop's opinions and find that claimant achieved maximum medical improvement from her work injury on or before August 21, 2015. (Defendants' Ex. G, p. 49)

Similarly, I accept Dr. Rippentrop's opinions pertaining to claimant's ongoing symptoms and impairment. Dr. Rippentrop opines that claimant has a seven percent permanent impairment of the left lower extremity as a result of the August 2014 work injury. (Defendants' Ex. G, p. 50) I note that claimant has been released to return to work without restrictions and has worked a few different jobs without restrictions since being released by Dr. Hussain. I find that the impairment rating offered by Dr. Rippentrop adequately and accurately assessed claimant's loss of function of the left leg. Therefore, I find that claimant has sustained a seven percent permanent impairment of the left leg as a result of the August 21, 2014 work injury.

Again, relying upon Dr. Rippentrop, I find that claimant's past medical expenses included in Claimant's Exhibit 9 and Claimant's Exhibit 9-1 are causally related to the August 21, 2014 work injury. Those charges appear to be reasonable and necessary.

Ms. Thomas-Wilson also seeks award of past medical mileage. Claimant provides calculations of that past mileage, including a request for interest. Reviewing of claimant's calculations, I find that claimant did attend the appointments identified in Claimant's Exhibit 5. Having found that treatment to be reasonable, necessary, and causally connected to the work injury, I find that the mileage required to attend those appointments was also reasonable, necessary, and incurred by claimant. I find the total miles calculated in Claimant's Exhibit 5 to be accurate and that claimant is entitled to reimbursement for 354 miles traveled.

Finally, claimant seeks an award of future medical treatment. Dr. Chandler and Dr. Rippentrop both agree that future medical treatment is indicated. I find that claimant is likely to need ongoing and future medical treatment for the symptoms in her left leg. I find that claimant requested return evaluation and treatment through Dr. Hussain. Defendants refused authorization for additional treatment through Dr. Hussain. Defendants have not authorized any alternate medical treatment or providers.

The treatment recommendations of Dr. Chandler appear reasonable and were corroborated by defendants' independent medical evaluator, Dr. Rippentrop. Therefore, I find that defendants have failed to authorize appropriate and reasonable care and that it is reasonable and appropriate that future care should continue through Dr. Chandler.

CONCLUSIONS OF LAW

The parties stipulate that claimant sustained a left leg injury that arose out of and in the course of claimant's employment with UFP Technologies, Inc. on August 21, 2014. (Hearing Report) The initial dispute in this case is whether claimant sustained temporary disability.

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

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

Lauridsen Foods, Inc., 525 N.W.2d 417 (Iowa 1994). Unrebutted expert medical testimony cannot be summarily rejected. Poula v. Siouxland Wall & Ceiling, Inc., 516 N.W.2d 910 (Iowa App. 1994).

In this case, I found that Ms. Thomas-Wilson was off work from August 29, 2014 through September 3, 2014. I also found that claimant worked light duty in the months of September and October 2014 and experienced reduction in earnings below her gross average weekly earnings, as will be discussed below. Therefore, I conclude that claimant has proven she sustained temporary disability.

In order to determine claimant's entitlement to temporary disability benefits, I need to calculate her applicable weekly worker's compensation rate. As noted in the findings of fact, the primary dispute between the parties as to the weekly rate is claimant's gross weekly earnings at the time of the work injury. The dispute debated by the parties is whether claimant's shift differential is included within the calculation of her gross earnings.

Iowa Code section 85.61(3) defines "gross earnings". The statute excludes irregular bonuses, retroactive pay, overtime, penalty, reimbursement of expenses or expense allowances, and the employer's contribution for welfare benefits. The statute does not exclude shift differentials from gross earnings.

Iowa Code section 85.36 explains the basis for computing the weekly rate. It provides that gross earnings are those "earnings of an employee to which such employee would have been entitled had the employee worked the customary hours for the full pay period in which the employee was injured." If claimant worked her customary hours, she received a shift differential. Payment and receipt of the shift differential represents the earnings to which claimant would have been entitled if she worked her customary hours. Therefore, noting that customary earnings are to be used and noting that Iowa Code section 85.61(3) does not specifically exclude shift differential pay, I conclude that claimant's gross earnings should be calculated using her hourly rate and including the shift differential pay. See Warner v. Pfizer Animal Health, File No. 5050507 (Arbitration Decision October 2015) (2015 WL 5922022).

Having included the shift differential and all hours worked during the 13-week period immediately preceding the August 21, 2014 work injury, I found that Ms. Thomas-Wilson had gross weekly earnings of $461.00 at the time of this work injury. The parties stipulated that claimant was single and entitled to only one exemption on the date of injury.

The weekly benefit amount payable to an employee shall be based upon 80 percent of the employee's weekly spendable earnings, but shall not exceed an amount, rounded to the nearest dollar, equal to 66-2/3 percent of the statewide average weekly wage paid employees as determined by the Department of Workforce Development. Iowa Code section 85.37.

The weekly benefit amount is determined under the above Code section by referring to the Iowa Workers' Compensation Manual in effect on the applicable injury date. Having found that claimant was single, entitled to one exemption and that her gross average weekly wage was $641.00, I utilize the Iowa Workers' Compensation Manual ("rate book") with effective dates of July 1, 2014 through June 30, 2015, and determine that the applicable weekly rate for claimant's weekly benefits is $396.87.

Claimant established that she was off work from August 29, 2014 through September 3, 2014, or six days. As will be discussed below, claimant has sustained permanent disability, therefore she is entitled to healing period benefits for these six missed days. Iowa Code section 85.34(1).

Ms. Thomas-Wilson also testified that she lost 4.4 hours of work at $10.63 an hour on September 4, 2014. This would be compensated as temporary partial disability. Temporary partial disability is compensated if there is a loss of earnings. In this instance, I will assume she would have worked 8 hours on September 4, 2014 at the hourly rate (with shift differential) of $10.63. She should have earned $85.04 on September 4, 2014. Instead, she worked only 3.6 hours and earned $38.27, resulting in lost wages totaling $46.77. Pursuant to Iowa Code section 85.33(4), temporary partial disability shall be 66.67 percent of the lost wages. Therefore, claimant has proven she is entitled to an award of $31.18 for lost wages on September 4, 2014.

Ms. Thomas-Wilson also seeks an award for her lost overtime hours in September and October 2014. There is no provision within the Iowa workers' compensation statute for direct reimbursement of lost wages or lost overtime. However, if an injured worker's healing period has not yet terminated and she earns less than her gross weekly wages at the time of the injury, she is compensated with temporary partial disability benefits pursuant to Iowa Code section 85.33(4).

In this instance, I found that claimant established she earned less than her gross weekly earnings on the weeks ending September 20, 2014, October 4, 2014, and October 11, 2014. For the week ending September 20, 2014, claimant established diminished earnings totaling $31.02. Accordingly, she is entitled to an award of temporary partial disability totaling $20.68 for the week ending September 20, 2014. Iowa Code section 85.33(4).

For the week ending October 4, 2014, claimant established diminished earnings totaling $31.02. Again, this entitles her to an award of temporary partial disability totaling $20.68 for this week. Iowa Code section 85.33(4).

For the week ending October 11, 2014, claimant established diminished earnings totaling $35.80. This entitles her to an award of temporary partial disability benefits totaling $23.87. Iowa Code section 85.33(4). In total, I conclude claimant has established entitlement to six days of healing period (temporary total disability) benefits and temporary partial disability benefits totaling $96.41.

The next disputed issue submitted by the parties is whether the August 21, 2014 work injury caused permanent disability and, if so, whether the permanent disability claim is ripe for determination or should be bifurcated for later determination. Claimant asserts that the permanent disability issue is not ripe for determination. However, as I review the medical evidence in this case, Dr. Hussain and Dr. Rippentrop both declare claimant to be at maximum medical improvement.

Dr. Chandler recommends potential future care, as does Dr. Rippentrop. However, no physician has opined that future care is intended to or expected to improve claimant's functional abilities or limitations. Dr. Rippentrop specifically rejects this theory and asserts that claimant requires future treatment to manage the symptoms of her injury but declares her to be at maximum medical improvement. This opinion is credible and I accepted Dr. Rippentrop's opinions in this case. Therefore, I found that claimant is at maximum medical improvement. Having reached that finding, I conclude that the permanent disability issue is ripe for determination and I decline claimant's request to bifurcate the permanent disability issue.

Under the Iowa Workers' Compensation Act, permanent partial disability is compensated either for a loss or loss of use of a scheduled member under Iowa Code section 85.34(2)(a)-(t) or for loss of earning capacity under section 85.34(2)(u). The extent of scheduled member disability benefits to which an injured worker is entitled is determined by using the functional method. Functional disability is "limited to the loss of the physiological capacity of the body or body part." Mortimer v. Fruehauf Corp., 502 N.W.2d 12, 15 (Iowa 1993); Sherman v. Pella Corp., 576 N.W.2d 312 (Iowa 1998). The fact finder must consider both medical and lay evidence relating to the extent of the functional loss in determining permanent disability resulting from an injury to a scheduled member. Terwilliger v. Snap-On Tools Corp., 529 N.W.2d 267, 272-273 (Iowa 1995); Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417, 420 (Iowa 1994).

With respect to the issue of permanent disability, I found the opinions of Dr. Rippentrop to be most convincing. Relying upon his opinion, I found that claimant sustained a seven percent functional impairment of the left leg. Therefore, I conclude that claimant has proven permanent disability equivalent to seven percent of the left leg.

Under Iowa's worker's compensation system, a leg is compensated using a 220-week schedule. Iowa Code section 85.34(2)(o). Having sustained only partial disability, claimant is entitled to a proportional award using the 220-week schedule. Iowa Code section 85.34(2)(v). Having found that claimant sustained a seven percent permanent disability of the left leg as a result of the August 21, 2014 work injury, I conclude that claimant is entitled to 15.4 weeks of permanent partial disability benefits. Iowa Code section 85.34(2)(o), (v).

Permanent disability benefits commence upon the termination of the initial healing period. Evenson v. Winnebago Industries, Inc., 881 N.W.2d 360 373-374 (Iowa 2016). In this case, claimant was off work between August 29, 2014 and September 4, 2014 and then returned to work. Claimant's initial healing period terminated on

September 4, 2014. Therefore, permanent partial disability benefits commence on September 5, 2014. Id.; Iowa Code section 85.34(2).

Claimant asserts a claim for interest. Claimant is clearly entitled to interest on all accrued and past-due weekly benefits. Iowa Code section 85.30. However, claimant's calculation of the weekly benefits due is not accurate. Similarly, claimant's assertion of interest on medical mileage or medical benefits is not accurate. Iowa Code section 85.30 only provides for payment of interest on past due weekly benefits (temporary partial disability, healing period, and permanent partial disability).

Claimant introduced claims for past medical expenses at Claimant's Exhibit 9 and Claimant's Exhibit 9-1. The employer shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance, and hospital services and supplies for all conditions compensable under the workers' compensation law. The employer shall also allow reasonable and necessary transportation expenses incurred for those services. The employer has the right to choose the provider of care, except where the employer has denied liability for the injury. Section 85.27. Holbert v. Townsend Engineering Co., Thirty-second Biennial Report of the Industrial Commissioner 78 (Review-Reopening October 1975).

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

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

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

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

In this case, I found that the medical expenses contained at Claimant's Exhibit 9 and Claimant's Exhibit 9-1 were reasonable, necessary, and causally related medical treatment. Therefore, I conclude that defendants should be ordered to reimburse claimant for any out-of-pocket expenses, pay any medical providers directly or reimburse any third party payers for those expenses, and to generally hold claimant harmless for the claimed past medical expenses.

Claimant also seeks an award of medical mileage. Claimant established entitlement to reimbursement for 354 miles of travel to attend medical appointments. Those medical appointments occurred from October 2014 through January 2015. The prevailing medical mileage reimbursement rate at that time was $0.56 per mile. Iowa Code section 85.27; 876 IAC 8.1. Claimant is entitled to medical mileage reimbursement totaling $198.24.

Ms. Thomas-Wilson also seeks an order for future medical care and requests that her current treating medical providers be designated as authorized medical providers. An application for alternate medical care is not automatically sustained because claimant is dissatisfied with the care he has been receiving. Mere dissatisfaction with the medical care is not ample grounds for granting an application for alternate medical care. Rather, the claimant must show that the care was not offered promptly, was not reasonably suited to treat the injury, or that the care was unduly inconvenient for the claimant. Long v. Roberts Dairy Co., 528 N.W.2d 122 (Iowa 1995).

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

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

"Determining what care is reasonable under the statute is a question of fact." Long v. Roberts Dairy Co., 528 N.W.2d 122, 123 (Iowa 1995).

In Pirelli-Armstrong Tire Co. v. Reynolds, 562 N.W.2d 433, 437 (Iowa 1997), the supreme court held that "when evidence is presented to the commissioner that the employer-authorized medical care has not been effective and that such care is 'inferior or less extensive' than other available care requested by the employee, . . . the commissioner is justified by section 85.27 to order the alternate care."

In this case, I found that claimant requested a return evaluation and treatment through Dr. Hussain after Dr. Hussain declared maximum medical improvement. Defendants denied the request for further treatment through Dr. Hussain. Similarly, defendants did not offer any alternate medical treatment for claimant's left leg.

Claimant has identified and commenced medical treatment through Dr. Chandler. Dr. Chandler has recommended additional medical treatment. Defendants' independent medical evaluator has confirmed that additional treatment is reasonable and necessary. Defendants have essentially offered no care, while claimant has identified reasonable and appropriate additional care that should be pursued. Therefore, I conclude that claimant has identified future medical care that is superior to the care (or lack of care) offered by defendants. I conclude that claimant's request for alternate medical care should be granted. Dr. Chandler shall be the authorized medical provider and defendants are obligated to pay for all causally related medical services provided by Dr. Chandler or at Dr. Chandler's recommendation or referral.

Finally, claimant also seeks assessment of her costs. Assessment of costs is a discretionary function of the agency. Iowa Code section 86.40. Claimant prevailed on the majority of the disputed issues. I conclude it is appropriate to assess claimant's costs in this case.

Ms. Thomas-Wilson seeks the cost of obtaining the MRI report ($32.29). I conclude that expense is reasonable and permissible pursuant to 876 IAC 4.33(6).

Claimant also seeks assessment for the expense ($375.00) of having Dr. Chandler review claimant's past medical expenses and author a written report. Dr. Chandler's invoice is attached to the statement of costs and the hearing report. Dr. Chandler's charges are for "Review of Medical Records & Medical Opinion." Dr. Chandler does not break down his costs between his review of the medical records and the expense of authoring his report.

In Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839 (Iowa 2015), the Iowa Supreme Court held that the physician's charges for authoring a written report in lieu of testifying could be assessed as a cost pursuant to 876 IAC 4.33(6). However, the Court held that the expenses relating to an examination or other charges were not appropriately assessed as costs. Dr. Chandler's invoice does not permit the undersigned to determine with any certainty the charges for drafting his report as opposed to reviewing medical records. The undersigned is not inclined to guess or

speculate as to those charges. Moreover, the undersigned did not rely upon Dr. Chandler's medical opinions in rendering this decision. Therefore, I conclude that the expenses related to Dr. Chandler's charges should not be assessed as costs.

ORDER

THEREFORE, IT IS ORDERED:

Claimant's request to assert a claim for penalty benefits is denied.

Claimant's request to bifurcate the permanent disability issue is denied.

Defendants shall pay claimant six (6) days of healing period benefits from August 29, 2014 through September 3, 2014.

Defendants shall pay claimant additional healing period benefits in the form of temporary partial disability benefits totaling ninety-six and 41/100 dollars ($96.41), as delineated in the conclusions of law section of this decision.

Defendants shall pay claimant fifteen point four (15.4) weeks of permanent partial disability benefits commencing on September 5, 2014.

All weekly benefits shall be paid at the rate of three hundred ninety-six and 87/100 dollars ($396.87) per week.

Defendants shall pay all accrued weekly benefits in lump sum with interest pursuant to Iowa Code section 85.30.

Defendants shall reimburse claimant for all out-of-pocket expenses, pay any outstanding charges directly to the medical providers, reimburse any third-party payers of the medical expenses, and otherwise hold claimant harmless against all medical expenses contained in Claimant's Exhibit 9 and Claimant's Exhibit 9-1.

Defendants shall reimburse claimant's medical mileage in the amount of one hundred ninety-eight and 24/100 dollars ($198.24).

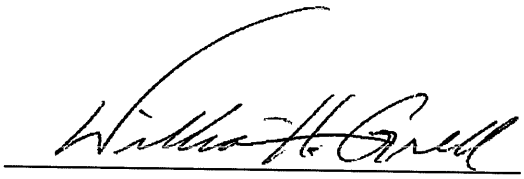
Claimant's request for alternate medical care is granted and Steven A. Chandler, D.O., shall be the authorized treating physician moving forward.

Defendants shall pay for all services rendered by Dr. Chandler or at Dr. Chandler's recommendation or referral.

Defendants shall reimburse claimant's costs totaling thirty-two and 29/100 dollars ($32.29).

Defendants shall file subsequent reports of injury (SROI) as required by this agency pursuant to rules 876 IAC 3.1(2) and 876 IAC 11.7.

Signed and filed this 26th day of January, 2018.



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