

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

DIXIE LACY,

Claimant,

vs.

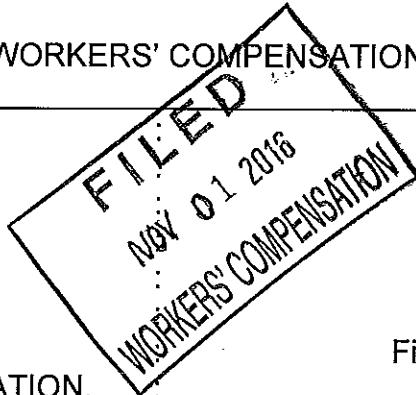
COUNTRY HAVEN CORPORATION,

Employer,

and

FIRST COMP. INSURANCE,

Insurance Carrier,
Defendants.



File No. 5052202

ARBITRATION

DECISION

: Head Note Nos.: 1402.40, 1801, 1801.1,
: 1803, 1804, 2501, 2701
:

STATEMENT OF THE CASE

Claimant Dixie Lacy ("Lacy") filed a petition in arbitration on February 6, 2015, alleging she sustained an injury to her body as a whole while working for the defendant, Country Haven Corporation ("Country Haven") on August 14, 2009. Country Haven, and the defendant, First Comp Insurance ("First Comp"), filed an answer on February 18, 2015. Lacy filed a motion to amend petition on October 27, 2015, alleging she sustained injuries to her body as a whole, including her head, neck, back, chest, bilateral ribs, abdomen, pelvis, bilateral lower extremities, and a mental sequela injury.

An arbitration hearing was held on July 5, 2016, at the Division of Workers' Compensation in Des Moines. Attorney James Neal represented Lacy. Lacy appeared and testified through video conference. Attorneys Abigail Wenninghoff and Robert Williams represented Country Haven and First Comp. Lizbeth Wilkinson, the administrator for Country Haven appeared and testified. Exhibits 1 through 22, and A through H were admitted into the record. The record was left open through July 26, 2016, for the receipt of post-hearing briefs. At that time the record was closed.

Before the hearing the parties prepared a hearing report listing stipulations and issues to be decided. Country Haven and First Comp withdrew all affirmative defenses.

STIPULATIONS

1. An employer-employee relationship existed at the time of Lacy's alleged injury.
2. Lacy sustained an injury on August 14, 2009, which arose out of and in the course of her employment.
3. If Lacy sustained a permanent disability, the alleged disability is an industrial disability.
4. At the time of the alleged injury Lacy was single and entitled to one exemption.
5. Although disputed, the medical providers would testify as to the reasonableness of their fees and/or treatment set forth in the listed expenses and defendants are not offering contrary evidence.
6. The costs listed in Exhibit 22 have been paid.
7. Country Haven and First Comp have agreed to pay the cost of Sunil Bansal, M.D.'s independent medical examination.

ISSUES

1. Did the alleged injury cause a temporary disability during a period of recovery?
2. Is Lacy entitled to temporary disability benefits from August 15, 2009 through November 28, 2010?
3. What is the appropriate rate?
4. Was Lacy underpaid weekly benefits?
5. Did the alleged injury cause a permanent disability?
6. If the alleged injury caused a permanent disability, is the commencement date for permanency November 29, 2010?
7. Is Lacy permanently and totally disabled?
8. What is the amount of the credit Country Haven and First Comp are entitled to?

9. Is Lacy entitled to recover the medical expenses set forth in Exhibit 21?
10. Is Lacy entitled to alternate medical care?
11. Is Lacy entitled to penalty benefits?
12. Should costs be assessed to either party?

FINDINGS OF FACT

Lacy was born in Creston, Iowa, and at the time of the hearing she was 69. (Transcript, page 16; Exhibit 7, page 35) Lacy graduated from high school in Winterset and attended one year of nursing school in 1969. (Tr., p. 17; Ex. 15, p. 118) In 1969, Lacy became a licensed practical nurse ("LPN") in Iowa. (Tr., p. 17; Ex. 17, p. 140) Lacy had not completed any additional training. (Tr. p. 17) As of the date of the hearing, Lacy's LPN license had expired. (Tr., p. 18) Lacy is a smoker. (Ex. F, p. 1)

In 1961 Horton Nursing Home hired Lacy as a nursing assistant. (Ex. 15, p. 120) In 1969, the name of the facility changed to Villa West. (Ex. 15, p. 120) Lacy worked as a LPN for Villa West from 1969 through 1973. (Ex. 15, p. 120) As a LPN, Lacy was responsible for passing medication and patient care. (Ex. 15, p. 120)

Summerset Haven Residential Care Facility hired Lacy as the director of nursing in 1975. (Exs. 15, p. 119; 17, p. 141) Lacy was responsible for passing medication, overseeing staff, arranging patient appointments, and patient charting. (Ex. 15, p. 119) Lacy worked for Summerset Haven Residential Care Facility until 1984. (Ex. 15, p. 119)

In April 1984, Country Haven hired Lacy as the director of nursing. (Tr., pp. 18-19; Exs. 15, p. 119; 17, p. 141) Country Haven serves individuals with mental illness and other cognitive disabilities. (Ex. 7, p. 35) Lacy earned \$14.00 per hour as the director of nursing. (Tr., p. 20) Lacy worked from 6:00 a.m. through 2:00 p.m. and she was on call 24 hours per day. (Tr., p. 19) Lacy regularly worked 80 hours every two weeks. (Tr., p. 20) Lacy was responsible for working on the floor, passing medication, visiting with the residents about their concerns, transporting residents to medical appointments, and supervising staff. (Tr., p. 21) Lacy testified her duties required her to maintain attention and focus all of the time. (Tr., p. 21)

Lacy experienced performance problems at work and Country Haven asked her to step down as the director of nursing in 2009. (Tr., pp. 21-22) When the Department of Inspections and Appeals ("DIA") conducted a survey of Country Haven in July 2009, DIA found that Lacy's LPN license had expired in April 2009. (Tr., p. 76) Country Haven had planned to have Lacy step down as the director of nursing in August 2009, after Country Haven hired a new director of nursing. (Tr., p. 85) During a period of transition until the new director of nursing was hired and oriented to the facility, Lacy continued to perform the director of nursing duties and her hourly wage remained the same. (Tr., p. 23)

On August 14, 2009, Lacy was involved in a multiple car accident on Interstate 80, while transporting a Country Haven resident from a doctor's appointment. (Tr., p. 25; Exs. 1, p. 1; 2, p. 4; 5, p. 11) Williams testified that at the time of Lacy's work injury Lacy was still the director of nursing. (Tr., p. 86) Lacy was driving the Country Haven van on Interstate 80 and rear-ended the vehicle in front of her, causing a chain reaction. (Tr., pp. 102-103)

Lacy was transported to the Nebraska Medical Center and admitted to the intensive care unit. (Exs. 1, p. 1; 3, p. 7) Medical staff documented Lacy was experiencing mental status changes with a "suspected closed head injury." (Ex. 2, p. 5) The emergency room physician ordered a head computerized tomography scan, and documented,

This study is notable for some traumatic subarachnoid blood in the sulci overlaying the posterior frontal lobe, primarily on the right side but also a little on the left. There is a small amount of hyperdensity in the interhemispheric fissure that is predominantly on the left and probably represents a small focus of contusion but could also be a focus of subarachnoid blood. There are no large hematomas or any evidence of midline shift. Basilar cisterns are patent and open. Ventricles have normal size and configuration.

(Ex. 3, p. 7) Lacy also received a cervical spine computerized tomography scan, and the physician noted Lacy's vestigial ribs at C7 "appeared to have minimally displaced fractures." (Ex. 3, p. 7) The physician believed Lacy had bilateral rib fractures, which were more obvious on the left and degenerative changes. (Ex. 3, p. 7)

Lacy had sustained a right knee laceration, which was closed with staples, and her right ankle was tender and swollen. (Ex. 4, p. 10) A maxillofacial computerized tomography scan showed "nondisplaced nasal fractures and rightward deviation of the nasal septum." (Ex. 5, p. 14) Emergency medical staff documented Lacy had a Glasgow Coma Scale score of 14, noting "[t]he patient loses 1 point due to verbal response, which is inappropriate. The patient's pupils are equal, round, reactive to light and accommodation." (Ex. 2, p. 4)

A follow-up head computerized tomography scan taken on August 18, 2009, revealed two "small petechial hemorrhages, left superior frontal gyrus, suggestive of grade 1 diffuse axonal injury as well as unchanged scattered acute subarachnoid hemorrhage." (Ex. 5, p. 11) As of August 19, 2009, hospital staff documented Lacy was "still in posttraumatic amnesia." (Ex. 5, p. 12) During her hospitalization the medical staff noted a computerized tomography scan revealed a "right hilar and suprahilar mass with postobstructive atelectasis and pneumonia concerning for malignancy." (Ex. 5, p. 14)

Lacy has no memory of the accident. (Tr., p. 25; Ex. 15, p. 121) Lacy remembers waking up in the hospital and feeling staples in her knee. (Tr., p. 25) Lacy

reported she sustained a head injury, injured her knee, injured her right ankle, and had trouble walking for several months. (Tr., pp. 25-26) Lacy did not have any prior head injuries or formal work restrictions before August 14, 2009. (Tr., p. 24)

Upon her discharge from the hospital on August 25, 2009, Lacy was diagnosed with a left rib fracture with a small medial pneumothorax, a right lung contusion, a nondisplaced nasal fracture, a frontal contusion with a small subarachnoid hemorrhage, a right knee laceration, a right hilar mass with mediastinal lymphadenopathy, an enlarged right thyroid, hyponatremia, restless leg syndrome, and a urinary tract infection. (Ex. 6, p. 31) Lacy was admitted to Immanuel Medical Center's Rehabilitation Unit the same date. (Ex. 5, p. 14) During her treatment at Immanuel Medical Center, Lacy's right ankle was placed in an air cast splint, and she received physical, occupational, and speech language therapy. (Exs. 5, pp. 15, 30)

On August 31, 2009, Richard Bowles, Psy.D., performed a neurocognitive behavioral status examination on Lacy. (Ex. 7, p. 34) Lacy reported she was experiencing problems with thinking, memory, word-finding, confusion, decreased reading comprehension, and processing, which she found frustrating. (Ex. 7, p. 35) Lacy reported she had no memory problems before the accident. (Ex. 7, p. 35) Lacy denied having problems with dizziness. (Ex. 7, p. 35)

Dr. Bowles documented Lacy had a history of depression related to the deaths of her husband and daughter, and other life events. (Ex. 7, p. 35) Lacy reported feeling "on edge and tense." (Ex. 7, p. 35) Dr. Bowles diagnosed Lacy with a depressive disorder by history, and made a provisional diagnosis of dementia due to a head injury. (Ex. 7, p. 36) Dr. Bowles noted he needed to rule out a cognitive disorder due to head trauma. (Ex. 7, p. 36)

Lacy was discharged on September 3, 2009. (Ex. 5, p. 16) Given the poor condition of her home Lacy could not return home and she was discharged to her family until she could secure a senior apartment. (Exs. 5, pp. 14-15; 17, p. 139) After her discharge, Lacy received physical therapy. (Exs. 5, p. 17; 8, p. 44)

Lacy attended an appointment with Maen Haddadin, M.D., on September 4, 2009. (Ex. 8, p. 44) Dr. Haddadin documented she believed Lacy was depressed from her concussion, and prescribed Pristiq 20 mg daily. (Ex. 8, p. 44)

On December 14, 2009, Dr. Bowles performed a neuropsychological evaluation of Lacy. (Ex. 7, p. 37) Dr. Bowles documented Lacy had been asked to step down as the director of nursing before her work injury because she could not keep up with required documentation. (Ex. 7, p. 38) Dr. Bowles opined Lacy's performance on the examination was mixed, concluded the results did not meet the criteria for dementia due to a lack of significant memory findings, and found her prognosis for further recovery was good. (Ex. 7, pp. 43-44) Dr. Bowles concluded "[f]rom a functional point of view, she is likely to be somewhat slower in completing tasks. However, memory *[sic]* should not present a major obstacle. Still, I would suggest minimizing distractions when she is

cooking –especially using the range.” (Ex. 7, p. 43) Dr. Bowles diagnosed Lacy with a cognitive disorder due to brain trauma, and a depressive disorder by history. (Ex. 7, p. 43) Dr. Bowles recommended Lacy be reevaluated one year from the date of her work injury. (Ex. 7, p. 43)

On December 15, 2009, Lacy attended an appointment with Amanda Mohler, M.D., a physical medicine and rehabilitation specialist. (Ex. 5, p. 17) Dr. Mohler documented Lacy had sustained a subarachnoid hemorrhage, a hemorrhagic contusion of the left frontal lobe, nondisplaced nasal fractures, a left first rib fracture, a left C7 rib fracture, and a right knee laceration in the accident. (Ex. 5, p. 17) Dr. Mohler noted imaging also showed degenerative changes in Lacy’s cervical, thoracic, and lumbar spines, and a right hilar and suprahilar mass with postobstructive atelectasis and pneumonia. (Ex. 5, p. 17) Dr. Mohler documented the lung mass was malignant and Lacy was receiving chemotherapy. (Ex. 5, p. 17) Lacy was living in an apartment and was driving locally. (Ex. 5, p. 17) Dr. Mohler restricted Lacy from work pending the results of a neuropsychological evaluation. (Ex. 5, p. 19)

Lacy received a driving evaluation. Dr. Mohler documented the evaluation showed Lacy’s vision was not within acceptable limits, and while she performed well on paper reaction, multi-tasking, and on simulator reaction time testing, she had difficulty with the remainder of the driving simulator tasks. (Ex. 5, p. 20) Dr. Mohler noted “[t]he neuropsychologic evaluation showed mixed results. She was within predicted range for immediate verbal memory, reading recognition and comprehension, computational math, problem-solving visual attention, attention span. She was in low average range on delayed verbal recall, visual construction. She is generally slow on tasks that required rapid processing of information.” (Ex. 5, p. 20) Based on the results, Dr. Mohler concluded Lacy could live independently, but recommended no driving until Lacy was evaluated by an ophthalmologist. (Ex. 5, p. 20) Dr. Mohler determined Lacy continued to be totally disabled from work through February 17, 2010. (Ex. 5, p. 22)

Following an evaluation by an ophthalmologist, Dr. Mohler found Lacy could begin driving locally only and restricted her from driving out of town. (Ex. 5, p. 23) Dr. Mohler determined,

From a brain injury standpoint, she is okay to initiate part-time work. At this time I would not recommend patient care and she cannot drive patients at work. We will see how she does with her initial return to work to see whether that can be advanced at all. However, it is also difficult that she is currently undergoing chemotherapy and I am not sure if she can be working from this standpoint. That will be deferred to her oncologist.

(Ex. 5, p. 23) Dr. Mohler documented Lacy could return to work on February 22, 2010, and restricted her to light duty with a lifting restriction of 20 pounds, with no patient care, and local driving only. (Ex. 5, p. 24) Dr. Mohler restricted Lacy to part-time work, three days per week, noting Lacy had poor endurance related to her chemotherapy. (Ex. 5, p.

25) Dr. Mohler continued with Lacy's restrictions through August 25, 2010. (Ex. 5, p. 29)

After her work injury, Lacy was diagnosed with small cell lung carcinoma, which was unrelated to her employment. (Tr., p. 27; Exs. 7, p. 41; F, p. 3) Lacy received chemotherapy from October 2009 through April 2010. (Tr., p. 28) Lacy testified while she was receiving chemotherapy she could not work. (Tr., p. 28)

Williams, the administrator for Country Haven, recalled a discussion about Lacy returning to work in February 2010. (Tr., p. 71) Williams testified Lacy had been diagnosed with lung cancer and was undergoing cancer treatment, so she did not return to work. (Tr., pp. 71, 82) However, Dr. Mohler documented on April 1, 2010, that Lacy had not returned to work because Country Haven did not "have any things that she could do." (Ex. 5, p. 25)

Country Haven and First Comp retained Terry Davis, M.D., J.D., to perform an independent medical examination of Lacy. Dr. Davis referred Lacy for a psychological evaluation with Rosanna Jones-Thurman, Ph.D. (Ex. D, p. 1) Lacy drove herself to the appointment in Omaha. (Ex. D, pp. 1, 3) Dr. Jones-Thurman opined Lacy's personality testing indicated a clinical profile within normal limits, but noted the results from her cognitive testing indicated some frontal lobe dysfunction and memory problems. (Ex. D, pp. 9-10) Dr. Jones-Thurman noted, "[i]t does not appear that Ms. Lacy has any major clinical diagnoses or issues that she did not have prior to her accident, such as anxiety and depression. However it does appear that she has had a possible head injury or head trauma, although it is also not clear if perhaps her depression and anxiety has exacerbated that." (Ex. D, p. 10)

Dr. Davis interviewed Lacy and reviewed her medical records and psychological testing records. (Ex. C, p. 1) During the interview Lacy reported that she first developed depression in 1977 when her daughter died at the age of seven. (Ex. C, p. 2) Given her history of depression Dr. Davis inquired whether Lacy had noticed any changes in her mood since her motor vehicle accident, and Lacy responded she had not, that her depression was the same before the accident as it has been since the accident. (Ex. C, p. 3)

Dr. Davis diagnosed Lacy with a cognitive disorder, not otherwise specified, related to the mild traumatic brain injury she sustained in the accident, and depressive disorder, not otherwise specified. (Ex. C, pp. 13-15) Dr. Davis opined Lacy's depression was well-controlled with her current medication and "[h]er records, evaluation, and testing do not indicate that her depression is causing any significant difficulty for her at this time." (Ex. C, p. 15)

Dr. Davis noted he could not say with an adequate degree of medical or psychiatric certainty whether Lacy could function adequately and safely as a LPN, but noted Lacy had a desire to return to work and he believed she could work in some capacity. (Ex. C, p. 16) Dr. Davis opined Lacy could gradually return to work with

supervision, and that "[h]er evaluation and testing do not indicate that she is totally and permanently disabled from working from a psychiatric standpoint." (Ex. C, pp. 16-17) Dr. Davis found Lacy could work four hours a day, two days per week, increasing to three, four, and five days, as tolerated, followed by a progression to full days. (Ex. C, p. 17) Dr. Davis imposed restrictions of no patient care without supervision, and no patient driving until Lacy completed a driving evaluation. (Ex. C, p. 17)

Lacy returned to light duty work on September 13, 2010. (Tr., pp. 27, 29, 68-69) Lacy could not recall Country Haven offering work to her before September 2010. (Tr., p. 31) When Lacy returned to work she did not engage in patient care. (Tr., p. 29) Lacy assisted with resident activities. (Tr., p. 30) Lacy worked with the residents on chair exercises, read stories to the residents, and helped with other activities. (Tr., p. 31) Lacy testified Country Haven offered her more work, but she could not tolerate working the additional hours because she had to build up her stamina. (Tr., p. 32)

In November 2010, Lacy applied for Social Security Disability Insurance ("SSDI") benefits. (Ex. H) Lacy testified she was approved for SSDI benefits in late 2010 or early 2011. (Tr., p. 44) At the time of the hearing Lacy was receiving retirement benefits through the Social Security Administration. (Tr., p. 44)

On December 9, 2010, Lacy sent Wilkinson a resignation letter because she did not feel competent to continue with her work duties. (Tr., p. 33; Ex. 18, p. 165) Lacy testified she did not believe she could control the residents, she did not have enough stamina, she did not want to transport the residents, she could not bathe the residents due to a lack of stamina, and "[she] was afraid to pass medications because of [her] poor concentration." (Tr., p. 33)

On December 13, 2010, Dr. Mohler issued an opinion, using Table 13-5 of the Guides to the Evaluation of Permanent Impairment (AMA Press, 5th Ed. 2001) ("AMA Guides"), placing Lacy at 0.5 for clinical dementia, which "places her in Class 1 according to Table 13-6 criteria for rating impairment related to mental status giving her a 10% impairment of the whole person secondary to her continued deficits in delayed memory, information processing, attention and problem solving." (Ex. 5, p. 30) Dr. Mohler noted, "I did place her at maximum medical improvement on November 29, 2010." (Ex. 5, p. 30)

On July 13, 2011, Lacy attended an appointment with Phillip Linquist, D.O., upon a referral from Dr. Haddadin. (Ex. F, p. 1) Dr. Linquist documented Lacy was "having problems with ringing in her ears, sounds like locusts, some occasional otalgia. She says this has happened fairly recently. It has not been a problem with her in the past." (Ex. F, p. 1) Dr. Linquist found "[s]o we got tinnitus. We feel it is secondary to TMJ and this might be related to her new dentures." (Ex. F, p. 1) The parties did not produce any follow-up records regarding the tinnitus.

On February 15, 2013, Lacy returned to Dr. Jones-Thurman for a psychological evaluation. (Ex. D, p. 11) Dr. Jones-Thurman noted Lacy had been diagnosed with a

cognitive disorder not otherwise specified, and found "[i]t does appear that many of her scores are similar to what they were before or perhaps somewhat better; the examiner would no longer give her that diagnosis." (Ex. D, p. 22)

Dr. Davis reviewed the results of Dr. Jones-Thurman's testing. (Ex. C, p. 19) Lacy informed Dr. Davis she tried to return to work at Country Haven in October 2010, assisting with resident activities, but resigned in December 2010 because she did not believe she could perform the work. (Ex. C, p. 2) Dr. Davis opined Lacy's cognitive disorder had resolved and she "does not have any identifiable impairment from an emotional, psychological, cognitive, or other psychiatric standpoint at this time." (Ex. C, p. 28) Dr. Davis noted, while Lacy has obsessive-compulsive and histrionic personality traits, the traits were not caused, aggravated, or exacerbated by August 2009 work injury. (Ex. C, p. 28) Dr. Davis found Lacy reached maximum medical improvement by at least February 15, 2013, and opined she does not have any work restrictions or limitations from a psychiatric standpoint related to the August 2009 work injury. (Ex. C, pp. 28-29)

Lacy attended an appointment with Michael Egger, M.D., with Waubonsie Mental Health Center, on May 14, 2014. (Ex. 10, p. 52) Lacy was familiar with Dr. Egger because she took patients from Country Haven to appointments at his office. (Ex. D, p. 3; Tr. pp. 50-51) Dr. Egger assessed Lacy with depression, a dysthymic disorder, and dysthymia (depressive neurosis). (Ex. 10, p. 52) Dr. Egger prescribed Requip, Amitriptyline, Escitalopram Oxalate, and Concerta. (Ex. 10, p. 53) Lacy attended regular appointments with Dr. Egger through May 5, 2016, and continued to take medication. (Ex. 10)

In October 2015, Dr. Bansal performed an independent medical examination of Lacy and diagnosed Lacy with head trauma, a traumatic brain injury with subarachnoid hemorrhage, memory loss, concentration impairment, dizziness, and tinnitus, nondisplaced nasal fractures and rightward deviation of the nasal septum, and a possible fracture of a rudimentary left C7 rib medially. (Ex. 12, p. 89) Dr. Bansal opined Lacy sustained "a severe head injury, resulting in a subarachnoid hemorrhage," which caused her to develop traumatic brain injury sequelae, including cognitive impairments, such as memory loss, and tinnitus. (Ex. 12, p. 90) Dr. Bansal placed Lacy at maximum medical improvement the date of his examination, on October 23, 2015. (Ex. 12, p. 91)

Dr. Bansal concluded Lacy suffers from a constellation of neurological impairments classified under the general descriptor, "traumatic brain injury." (Ex. 12, p. 91) Dr. Bansal noted the AMA Guides base neurological impairments on the clinical dementia rating scale ("CDR"). (Ex. 12, p. 91) Using Tables 13-5 and 13-6, of the AMA Guides, Dr. Bansal found "Lacy has mostly elements of Class I (CDR of 0.5)" and assigned a rating of five percent to the whole person. (Ex. 12, p. 91) Dr. Bansal noted Dr. Mohler had found a 10 percent whole person impairment in 2010, but it appeared Lacy had improved since that time, as evidenced by the psychological evaluation conducted by Dr. Jones-Thurman in 2013. (Ex. 12, p. 91) Dr. Bansal did not find Lacy has a ratable impairment for her back, neck, ribs, right knee, right ankle or neck. (Ex.

12, p. 92) Dr. Bansal opined from a cognitive standpoint, Lacy should avoid tasks that require sustained attention and concentration and deferred to any psychiatric/psychological based impairments/restrictions to a mental health specialist. (Ex. 12, p. 92)

Eva Christiansen, Ph.D., conducted a psychological evaluation of Lacy on October 23, 2015, November 3, 2015, and December 11, 2015. (Ex. 13) Dr. Christiansen interviewed Lacy and reported "[r]ecords as provided by Mr. Walker's office had mostly been reviewed prior to the interview; a few additional records were provided before the last session, medical records of Waubonsie Mental Health Center 06/03/15-8/31/15 and pharmacy records of Medicap Pharmacy, 01/18/12-11/02/15." Dr. Christiansen reported she administered the Intermediate Visual-Auditory Continuous Performance Test-2 ("IVA"). (Ex. 13, p. 95) Dr. Christiansen did not report administering any additional testing. (Ex. 13) Dr. Christiansen's bill notes her interview with Lacy lasted two hours, and she spent four hours reviewing records and preparing her report. (Ex. 22, p. 203) Dr. Christiansen's report does not indicate what records she reviewed other than the Waubonsie Mental Health Center and Medicap Pharmacy records.

Dr. Christiansen diagnosed Lacy with a mild neurocognitive disorder due to a traumatic brain injury, a persistent depressive disorder, and an unspecified anxiety disorder. (Ex. 13, p. 95) Dr. Christiansen found no indication of a neurocognitive disorder before the August 2009 work injury, but noted Lacy's depressive disorder was present as early as 40 years ago when her daughter died. (Ex. 13, p. 97) Dr. Christiansen noted Lacy's anxiety disorder symptoms may have been present in a less intense form at any time when she was depressed, but had become more prominent since her work injury. (Ex. 13, p. 97)

Dr. Christiansen opined the IVA results indicate Lacy has impairments with understanding and remembering instructions, maintaining attention, and concentration and pace. (Ex. 13, p. 98) Dr. Christiansen concluded Lacy does not have the stamina to work a 40-hour workweek or eight-hour day, she may not respond appropriately to criticism from supervisors because she may not comprehend what she is being told or remember it, and she has a reduced ability to learn and remember new material. (Ex. 13, p. 99) Dr. Christiansen did not note impairments with interacting with the general public or with coworkers related to Lacy's work injury. (Ex. 13, p. 98)

Given Lacy's psychological condition, Dr. Christiansen opined she could not return to her former employment because she could no longer transport residents, she has not maintained her "CDL certification," and she "lacks the ability to give adequate attention to multiple stimuli that is necessary for driving except under extremely familiar routes and locations." (Ex. 13, p. 98) Dr. Christiansen noted it would be difficult for Lacy to complete paperwork and to organize and prioritize tasks. (Ex. 13, p. 98) Dr. Christiansen opined Lacy's diagnoses are permanent and concluded Lacy is not capable of competitive employment because of the impact of her mental health

conditions. (Ex. 13, pp. 98-99) Dr. Christiansen noted Lacy can work in volunteer settings that are tolerant of her limitations. (Ex. 13, p. 99)

In January 2016, Lacy attended a vocational evaluation with Carma Mitchell, M.S., C.R.C. (Ex. 14) Mitchell opined Lacy continues to have a loss of stamina and problems with concentrating and completing tasks. (Ex. 14, p. 113) Mitchell concluded based on the limitations outlined by Dr. Christiansen regarding focus and pace, Lacy would not be able to sustain full-time competitive employment, representing a loss of 100 percent of her access to the labor market. (Ex. 14, p. 113)

Lacy attended a neuropsychological assessment at the University of Iowa Hospitals and Clinics ("UIHC") on January 14, 2016, with R.D. Jones, Ph.D. (Ex. E) The UIHC administered a clinical interview, ratings of speech and language, the Rosebaum Visual Acuity Screen, an orientation questionnaire, the Weschler Adult Intelligence Scale-IV, the Wide Range Achievement Test-4, the Rey Auditory Verbal Learning Test, the Complex Figure Test, the Benton Visual Retention Test, the Wechsler Memory Scales-III, Multilingual Aphasia Examination, Controlled Oral Word Association Test, Boston Diagnostic Aphasia Exam, Boston Naming Test, Complex Ideational Material, Facial Recognition, Trail Making Test, Wisconsin Card Sorting Test, Smell Identification Test, Beck Depression Inventory-II, Beck Anxiety Inventory, Minnesota Multiphasic Personality Inventory-2, Iowa Scales of Personality Change, Structured Inventory of Malingered Symptomatology, and Test of Memory Malinger. (Ex. E, pp. 3-4) UIHC staff also reviewed Lacy's medical and psychological records and her deposition. (Ex E, pp. 2-3)

Dr. Jones noted Lacy had improved over time as reflected in her medical records and neuropsychological testing on several prior occasions. (Ex. E, p. 5) Dr. Jones concluded:

In general, her recovery has been strong, and the residual neuropsychological deficits associated with the 2009 accident are minimal. Currently, she has mild weaknesses in spatial abilities, and a marked inability to smell (anosmia) both of which are consistent with her prior injury. From a psychological perspective, she has mild depression, which appears to be long-standing, and which predates the car accident by many years. On the other hand, performances were normal in most domains of cognitive function, including orientation, attention, language, memory, perception, and executive functions. Our diagnosis in this case is mild traumatic brain injury.

(Ex. E, p. 5) Dr. Jones further opined:

From a neuropsychological perspective, although she has very subtle signs of her prior brain injury, the data suggest that she should be able to work in some capacity. For example, on formal testing her memory, concentration, language, and cognitive speed are normal, and all of these

abilities could be utilized in a meaningful way in the context of employment. She continues to have dysthymia, but this does not appear to be related to the 2009 accident. Also of note, we would defer judgment about her physical condition and ability to work to experts in that field (e.g., physicians).

Ms. Lacy should be reassured that she has made an excellent recovery from the 2009 traumatic brain injury, and should be encouraged to be active to the extent medically indicated. Continued treatment of her dysthymic disorder is recommended, and in addition to pharmacotherapy, she may benefit from psychotherapy.

(Ex. E, p. 6)

On June 20, 2016, shortly before the hearing, Lacy's attorney sent Dr. Egger a letter, asking for his opinion regarding Lacy, and providing a form for Dr. Egger to check. (Ex. 10, pp. 64-67) Dr. Egger completed the form, but did not provide any comments on the form. (Ex. 10, pp. 64-65) Dr. Egger agreed that "[i]n addition to diagnoses of dysthymic disorder (depression) and social environment problems (anxiety), I treat Ms. Lacy for Vascular Dementia Secondary to Head Trauma as a result of the motor vehicle accident she was in on August 14, 2009. This diagnosis is similar to other diagnoses in the records such as Mild Neurocognitive Disorder due to Traumatic Brain Injury, Cognitive Disorder due to Brain Trauma, and Mild Traumatic Brain Injury." (Ex. 10, p. 64) Dr. Egger also checked he agreed to a reasonable degree of medical certainty that the motor vehicle accident "was a substantial causal or substantial contributing factor in the development of Vascular Dementia in Ms. Lacy." (Ex. 10, p. 64) Dr. Egger checked he agreed that to a reasonable degree of medical certainty, Ms. Lacy "has had a marked decrease in her memory, cognitive functioning, and concentration as a direct result of the head injury she sustained in the motor vehicle accident on August 14, 2009." (Ex. 10, p. 64) Dr. Egger noted he agreed Lacy had depression and anxiety prior to the work injury, he treated her for the conditions, and that her conditions worsened as a result of the work injury. (Ex. 10, p. 65) And Dr. Egger agreed that Lacy needs to take medications in the foreseeable future and that she would not be able to maintain competitive employment due to decreases in memory, cognitive function, and concentration as a direct result of the work injury. (Ex. 10, p. 65)

During her testimony, Lacy admitted she received treatment for depression before the August 2009 work injury, after her husband passed away, until the time of her work injury. (Tr., pp. 36-37) Lacy reported before her work injury she had not been treated for anxiety. (Tr., p. 37) During the hearing Lacy testified her depression is not worse than it was prior to her work injury, but her anxiety is worse. (Tr., p. 37) Lacy testified:

Well, like in new situations and driving. I can't drive very far and not by myself. I can't drive on highway – or freeways or interstates or cities.

Like I went out to California to visit my brother, and just – they have this new thing, a new way of getting your tickets at the airport and all that. And then I had to have a wheelchair because I didn't know my way around the airports and just things like those.

(Tr. p. 38) Lacy reported that before her work injury she did not have a difficult time getting around airports. (Tr., p. 38)

Lacy reads the newspaper, engages in housework, cooks, cares for her dog, and cares for her plants outside. (Tr., p. 42) Lacy testified her brain injury has affected her concentration, and reported "I can't stay on one task for long, and my memory. Those are two of the things. I just - I can't - - can't think of what else right now." (Tr., p. 39) Lacy has had to write notes to remember things since her injury. (Tr., p. 60) Lacy also alleges that since her injury, she has had balance problems and prior to her injury she did not. (Tr., pp. 55-56) Lacy enjoys gardening and visiting with her grandchildren. (Ex. 17, p. 144) During her deposition Lacy reported she speaks with her grandson in California once per week and keeps up "with him on Facebook." (Ex. 17, p. 144)

Lacy lived alone from 2010 until just recently in February 2016. (Tr., p. 59) Lacy testified she did not have any difficulty caring for herself or cooking prior to developing a recent lung condition. (Tr., pp. 59-60) An aide currently comes to Lacy's home to assist Lacy with bathing and light housework twice per week, a nurse comes in once per week to set up her medications, and a hospice nurse case manager visits Lacy once per month. (Tr., p. 42) Lacy reported the services she is receiving are "[b]ecause of the last hospitalization for the puncture in [her] lung." (Tr., p. 49)

Lacy does not believe she could return to her past work as a nurse because she is not dependable and does not believe she could keep track of patients' medications and diagnoses. (Tr., p. 45) Lacy also reports patient care would be difficult for her because she is not patient enough to work with patients. (Tr., p. 46)

During her deposition Lacy testified that she resigned in December 2010 because she could not do the work Country Haven expected of her and that she "just could not cope with being – with the patients and just was not physically able to." (Ex. 17, p. 141) Lacy reported that when she worked part of the day she was tired and worn out. (Ex. 17, p. 141) Lacy has not applied for work since December 2010 because she is tired and exhausted often and cannot guarantee she can be at work when expected. (Ex. 17, p. 141) Lacy noted that she has pain in her left hip, down her leg, and sciatic nerve pain. (Ex. 17, pp. 141-142)

Williams, Lacy's supervisor, does not recall Lacy complaining of a lack of focus or difficulty comprehending certain aspects of her job between September 13, 2010 and December 9, 2010. (Tr., pp. 63-64, 73-74) Williams reported that before her accident Lacy was having difficulty performing her job. (Tr., p. 75) Williams noted Lacy lacked attention to detail, failed to have physician orders signed, and failed to communicate and record medication changes on the medication administration record. (Tr., p. 75)

After Lacy's employment ended with Country Haven Lacy began volunteering at a meal site and with MATURA. (Tr., p. 46) At the meal site, Lacy carried trays for individuals and helped serve the meal. (Tr., pp. 46-47) MATURA collects clothing and used home goods. (Tr., p. 47) Lacy worked at MATURA a few days per week for two or three hours. (Tr., p. 47) Lacy reported her volunteer work at the meal site and MATURA required less concentration and focus than her work as a LPN and as the director of nursing. (Tr., p. 55) Currently Lacy does not have the stamina to work or volunteer because of her lung condition. (Tr., pp. 48-50) During her deposition Lacy reported she was volunteering at the senior meal site for one year helping serve food to older people and socializing with the people "sometimes five days a week and sometimes less" for approximately 90 minutes each day. (Ex. 17, p. 142)

Country Haven and First Comp paid Lacy temporary total disability benefits from August 15, 2009 through March 15, 2010, or 30.43 weeks, at the rate of \$344.14, totaling \$10,471.69, temporary partial disability benefits from March 16, 2010 through September 5, 2010, or 24.86 weeks, at the rate of \$271.49, totaling \$6,748.47, temporary partial disability benefits from September 6, 2010 through November 18, 2010, or 10.57 weeks, at the rate of \$242.16, totaling \$2,559.98, and permanent partial disability benefits from November 19, 2010 through May 7, 2014, totaling \$62,240.18. (Ex. A)

CONCLUSIONS OF LAW

I. Nature and Extent of the Injury

In her petition, Lacy avers she sustained a traumatic brain injury, injuries to her neck, back, chest, bilateral ribs, abdomen, pelvis, bilateral lower extremities, and a mental sequela injury. Country Haven and First Comp admit Lacy sustained a work injury, but deny she sustained a mental sequela injury, and deny she sustained a permanent impairment.

A. Nature of the Injury

The question of medical causation is "essentially within the domain of expert testimony." Cedar Rapids Cmty. Sch. Dist. v. Pease, 807 N.W.2d 839, 844-45 (Iowa 2011). The deputy commissioner, as the trier of fact, must "weigh the evidence and measure the credibility of witnesses." Id. The trier of fact may accept or reject expert testimony, even if uncontroverted, in whole or in part. Frye v. Smith-Doyle Contractors, 569 N.W.2d 154, 156 (Iowa Ct. App. 1997). When considering the weight of an expert opinion, the fact-finder may consider whether the examination occurred shortly after the claimant was injured, the compensation arrangement, the nature and extent of the examination, the expert's education, experience, training, and practice, and "all other factors which bear upon the weight and value" of the opinion. Rockwell Graphic Sys., Inc. v. Prince, 366 N.W.2d 187, 192 (Iowa 1985).

An injury to one part of the body can later cause an injury to another. Mortimer v. Fruehauf Corp., 502 N.W.2d 12, 16-17 (Iowa 1993) (holding a psychological condition can be caused or aggravated by a scheduled injury). The claimant bears the burden of proving the claimant's work-related injury is a proximate cause of the claimant's disability and need for medical care. Ayers v. D & N Fence Co., Inc., 731 N.W.2d 11, 17 (Iowa 2007); George A. Hormel & Co. v. Jordan, 569 N.W.2d 148, 153 (Iowa 1997). "In order for a cause to be proximate, it must be a 'substantial factor.'" Ayers, 731 N.W.2d at 17. A probability of causation must exist, a mere possibility of causation is insufficient. Frye, 569 N.W.2d at 156.

Dr. Bansal diagnosed Lacy with head trauma, a traumatic brain injury with subarachnoid hemorrhage, memory loss, concentration impairment, dizziness, and tinnitus, nondisplaced nasal fractures and rightward deviation of the nasal septum, and a possible fracture of a rudimentary left C7 rib medially. (Ex. 12, p. 89) Dr. Bansal did not find Lacy has a ratable impairment for her back, neck, ribs, right knee, right ankle or neck. (Ex. 12, p. 92) No expert in this case has provided a rating for Lacy's back, neck, ribs, right knee, right ankle or neck. Lacy has not established she sustained a permanent impairment related to these alleged injuries.

The record supports Lacy sustained a traumatic brain injury. The record does not support a finding that Lacy developed tinnitus as a result of the work injury. On July 13, 2011, Lacy attended an appointment with Dr. Linquist. (Ex. F, p. 1) Dr. Linquist documented Lacy was "having problems with ringing in her ears, sounds like locusts, some occasional otalgia. She says this has happened fairly recently. It has not been a problem with her in the past." (Ex. F, p. 1) Dr. Linquist found "[s]o we got tinnitus. We feel it is secondary to TMJ and this might be related to her new dentures." (Ex. F, p. 1) The parties did not produce any additional medical records regarding Lacy's tinnitus.

Dr. Davis opined Lacy's cognitive disorder resolved and she "does **not** have any identifiable impairment from an emotional, psychological, cognitive, or other psychiatric standpoint at this time." (Ex. C., p. 28) Dr. Bansal disagreed, finding Lacy sustained "a severe head injury, resulting in a subarachnoid hemorrhage," which caused her to develop traumatic brain injury sequelae, including cognitive impairments, such as memory loss, and tinnitus. (Ex. 12, p. 90)

Using Tables 13-5 and 13-6, of the AMA Guides, Dr. Bansal found "Lacy has mostly elements of Class I (CDR of 0.5)" and assigned a rating of five percent to the whole person. (Ex. 12, p. 91) Dr. Bansal noted Dr. Mohler had found a 10 percent whole person impairment in 2010, but it appeared Lacy had improved since that time, as evidenced by the psychological evaluation conducted by Dr. Jones-Thurman in 2013. (Ex. 12, p. 91) Dr. Bansal opined from a cognitive standpoint, Lacy should avoid tasks that require sustained attention and concentration and deferred to any psychiatric/psychological based impairments/restrictions to a mental health specialist. (Ex. 12, p. 92)

Dr. Egger has opined Lacy "has had a marked decrease in her memory, cognitive functioning, and concentration as a direct result of the head injury she sustained in the motor vehicle accident on August 14, 2009." (Ex. 10, p. 64) I do not find Dr. Egger's opinion persuasive. Dr. Egger did not provide a written report, but rather responded to a form letter, checking boxes following statements prepared by counsel. (Ex. 10, pp. 64-65) The form does not identify what medical records he has reviewed or what instruments he used in reaching his conclusions. (Ex. 10, pp. 64-65)

After reviewing a full battery of neuropsychological tests, Dr. Jones opined Lacy sustained a mild traumatic brain injury, noting "the residual neuropsychological deficits associated with the 2009 accident are minimal. Currently, she has mild weaknesses in spatial abilities, and a marked inability to smell (anosmia) both of which are consistent with her prior injury." (Ex. E, p. 5) Dr. Jones found Lacy's "performances were normal in most domains of cognitive function, including orientation, attention, language, memory, perception, and executive functions." (Ex. E, p. 5) The findings of Dr. Jones support Lacy has sustained a mild impairment related to the work injury.

The main dispute in this case involves Lacy's alleged mental health sequela. Drs. Christiansen and Egger have opined while Lacy had received treatment prior to her work injury, her work injury worsened her depression and she also now has anxiety. Drs. Davis and Jones have opined Lacy's depression and anxiety were preexisting and unrelated to the work injury. (Ex. E, pp. 5-6) I find the opinions of Drs. Davis and Jones more persuasive than the opinions of Drs. Christiansen and Egger. Dr. Christiansen administered one test to Lacy. It is also unclear what medical and psychological records Dr. Christiansen reviewed. Dr. Egger did not report what tests, if any, he administered on Lacy, and checked a form letter prepared by Lacy's attorney, without providing any clinical notations or opinions. In contrast, Dr. Davis relied on comprehensive neuropsychological testing performed by Dr. Jones-Thurman, and Dr. Jones at the UIHC also administered a battery of neuropsychological tests.

Lacy has received treatment for depression since 1977, following the death of her daughter. (Exs. 7, p. 35; 13, p. 97; C, p. 2) According to Dr. Egger's records, Lacy was also treated for anxiety before her work injury. (Ex. 10, p. 65) This is inconsistent with Lacy's testimony at hearing. When asked whether she had been treated for anxiety prior to her work injury Lacy responded, "[n]ot really, no. No." (Tr., p. 37)

Given Lacy's history of depression, Dr. Davis inquired whether Lacy had noticed any changes in her mood since her motor vehicle accident and Lacy responded she had not, that her depression was the same before the accident as it has been since the accident. (Ex. C, p. 3) During the hearing, Lacy admitted she received treatment for depression before the August 2009 work injury, after her husband passed away, until the time of her work injury. (Tr., pp. 36-37) Lacy testified her depression is not worse than it was prior to her work injury, but her anxiety is worse. (Tr., p. 37)

With respect to her anxiety, Lacy reported:

Well, like in new situations and driving. I can't drive very far and not by myself. I can't drive on highway – or freeways or interstates or cities.

Like I went out to California to visit my brother, and just – they have this new thing, a new way of getting your tickets at the airport and all that. And then I had to have a wheelchair because I didn't know my way around the airports and just things like those.

(Tr. p. 38) Lacy reported that before her work injury she did not have a difficult time getting around airports. (Tr., p. 38) Neuropsychological testing performed at the UIHC did not support a finding Lacy has an anxiety disorder, rather, the testing supports she has mild depression. (Ex. E, p. 5) The record evidence does not support Lacy sustained a mental health sequela injury. The record supports Lacy sustained a mild traumatic brain injury.

B. Extent of Disability

"Industrial disability is determined by an evaluation of the employee's earning capacity." Pease, 807 N.W.2d at 852. In considering the employee's earning capacity, the deputy commissioner evaluates several factors, including "consideration of not only the claimant's functional disability, but also [his] age, education, qualifications, experience, and ability to engage in similar employment." Swiss Colony, Inc. v. Deutmeyer, 789 N.W.2d 129, 137-38 (Iowa 2010). The inquiry focuses on the injured employee's "ability to be gainfully employed." Id. at 138.

The determination of the extent of disability is a mixed issue of law and fact. Neal v. Annett Holdings, Inc., 814 N.W.2d 512, 525 (Iowa 2012). Compensation for permanent partial disability shall begin at the termination of the healing period. Iowa Code § 85.34(2). Compensation shall be paid in relation to 500 weeks as the disability bears to the body as a whole. Id. § 85.34(2)(u). When considering the extent of disability, the deputy commissioner considers all evidence, both medical and nonmedical. Evenson v. Winnebago Indus., Inc., 818 N.W.2d 360, 370 (Iowa 2016).

Lacy contends she is permanently and totally disabled. Country Haven and First Comp aver Lacy has sustained no permanent disability. In Iowa, a claimant may establish permanent total disability under the statute, or through the common law odd-lot doctrine. Michael Eberhart Constr. v. Curtin, 674 N.W.2d 123, 126 (Iowa 2004) (discussing both theories of permanent total disability under Idaho law and concluding the deputy's ruling was not based on both theories, rather, it was only based on the odd-lot doctrine). Under the statute, the claimant may establish the claimant is totally and permanently disabled if the claimant's medical impairment together with nonmedical factors totals 100 percent. Id. The odd-lot doctrine applies when the claimant has

established the claimant has sustained something less than 100 percent disability, but is so injured that the claimant is "unable to perform services other than 'those which are so limited in quality, dependability or quantity that a reasonably stable market for them does not exist.'" Id. (quoting Boley v. Indus. Special Indem. Fund, 130 Idaho 278, 281, 939 P.2d 854, 857 (1997)). Lacy relies on the statute and not the odd-lot doctrine.

"Total disability does not mean a state of absolute helplessness." Walmart Stores, Inc. v. Caselman, 657 N.W.2d 493, 501 (Iowa 2003) (quoting IBP, Inc. v. Al-Gharib, 604 N.W.2d 621, 633 (Iowa 2000)). Total disability "occurs when the injury wholly disables the employee from performing work that the employee's experience, training, intelligence, and physical capacity would otherwise permit the employee to perform." IBP, Inc. v. Al-Gharib, 604 N.W.2d 621, 633 (Iowa 2000):

At the time of the hearing Lacy was 69. (Tr., p. 16) Lacy graduated from high school, attended one year of nursing school, and was a LPN. (Tr., p. 17; Ex. 15, p. 118; Ex. 17, p. 140) As of the date of the hearing, Lacy's LPN license had expired and she had not worked for more than five years. (Tr., p. 18) Lacy has no other formal training. Given her advanced age, retraining would be difficult.

Lacy is a smoker. (Ex. F, p. 1) Following her work injury, testing revealed Lacy had lung cancer. She currently cannot work due to another lung condition she developed in 2016. Before her work injury Lacy was unable to perform her duties as director of nursing and was going to be demoted after a new director of nursing was hired. While Lacy was unable to successfully perform the duties of director of nursing before her work injury, there is no evidence she could not perform the duties of a LPN before her work injury.

The record supports Lacy sustained a mild traumatic brain injury that has resulted in minor cognitive deficits. Following her work injury Lacy worked on activities with the residents and was paid at a reduced hourly rate of \$10.00 per hour. Lacy reported she could not work all of the hours offered by Country Haven due to a lack of stamina. After she resigned, Lacy volunteered part-time for a meal site and MATURA. She did not look for work. Lacy did not report any difficulties performing her volunteer work until her recent lung condition.

Lacy testified she reads the newspaper, engages in housework, cooks, cares for her dog, and cares for her plants outside. (Tr., p. 42) Lacy testified her brain injury has affected her concentration, and reported "I can't stay on one task for long, and my memory. Those are two of the things. I just – I can't – can't think of what else right now." (Tr., p. 39) Lacy has had to write notes to remember things since her injury. (Tr., p. 60) Lacy also alleges that since her injury, she has had balance problems, and prior to her injury she did not. (Tr., pp. 55-56) Lacy also enjoys visiting with her grandchildren. (Ex. 17, p. 144) During her deposition Lacy reported she speaks with her grandson in California once per week and keeps up "with him on Facebook" using a

computer. (Ex. 17, p. 144) Lacy lived alone from 2010 until just recently in February 2016. (Tr., p. 59) Lacy testified she did not have any difficulty caring for herself or cooking prior to developing a recent lung condition. (Tr., pp. 59-60)

The record does not support Lacy is permanently and totally disabled. Based on the industrial disability factors, I conclude Lacy has sustained a 20 percent permanent industrial disability.

II. Rate

The parties stipulated that at the time of her injury Lacy was single and entitled to one exemption. Lacy avers her gross earnings were \$573.92 per week and her weekly rate is \$364.26. Country Haven and First Comp contend Lacy's gross earnings were \$539.23 per week and her weekly rate is \$364.26. Country Haven and First Comp did not pay Lacy temporary and permanent benefits using the weekly rate of \$364.26.

Iowa Code section 85.36 sets forth the basis for determining an injured employee's compensation rate. Mercy Med. Ctr. v. Healy, 801 N.W.2d 865, 870 (Iowa Ct. App. 2011). The basis of compensation shall be the "weekly earnings of the injured employee at the time of the injury." Iowa Code § 85.36. "Weekly earnings means gross salary, wages, or 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, as regularly required by the employee's employer for the work or employment for which the employee was employed . . . rounded to the nearest dollar." Id.

Lacy was paid on an hourly basis. When an employee is paid on an hourly basis, the weekly earnings are computed "by dividing by thirteen the earnings, including shift differential pay but not including overtime or premium pay," the employee earned in the last 13 consecutive calendar weeks immediately preceding the injury. Id. § 85.36(6). Rule 876 Iowa Administrative Code 8.2, provides,

The word "overtime" as used in Iowa Code section 85.61 means amounts due in excess of the straight time rate for overtime hours. Such amount shall not be considered in determining weekly wages within Iowa Code section 85.36. Overtime hours at the straight time rate are included in determining gross weekly earnings.

Thus, under the administrative rule, overtime hours at the straight time rate are included in determining gross weekly earnings.

Country Haven and First Comp did not submit Lacy's payroll records at hearing. Lacy's Exhibit 20, is a summary of her earnings for the 12-week period before her work

injury, and the period covering the date of her injury.¹ Lacy reported her average weekly wage, including overtime hours, but excluding overtime pay totaled \$6,887.02, divided by 12, equals \$573.92, rounded to the next dollar is \$574.00. According to the 2009-2010 Ratebook, Lacy's weekly rate is \$364.26. <http://www.iowaworkcomp.gov/sites/authoring.iowadivisionofworkcomp.gov/files/09ratebookallpages.pdf>.

III. Temporary Benefits

A. Temporary Total Disability

Lacy seeks temporary disability benefits from August 15, 2009 through November 28, 2010. Country Haven and First Comp aver Lacy is not entitled to temporary total disability benefits for this period because they offered Lacy part-time work in February 2010 and Lacy did not return to work until September 2010 because of her lung cancer.

Iowa Code section 85.33 governs temporary disability benefits, and Iowa Code section 85.34 governs healing period and permanent disability benefits. Dunlap v. Action Warehouse, 824 N.W.2d 545, 556 (Iowa Ct. App. 2012). As a general rule, "temporary total disability compensation benefits and healing-period compensation benefits refer to the same condition." Clark v. Vicorp Rest., Inc., 696 N.W.2d 596, 604 (Iowa 2005). The purpose of temporary total disability benefits and healing period benefits is to "partially reimburse the employee for loss of earnings" during a period of recovery from the condition. Id. An award of healing period benefits or total temporary disability benefits is not dependent on a finding of permanent impairment. Dunlap, 824 N.W.2d at 556. The appropriate type of benefit depends on whether or not the employee has a permanent disability. Id. Lacy was paid temporary total and temporary partial disability benefits. Lacy seeks additional temporary total and temporary partial benefits in this case.

Iowa Code section 85.33(1) governs temporary total disability benefits as follows:

Except as provided in subsection 2 of this section, the employer shall pay to an employee for injury producing temporary total disability weekly compensation benefits, as provided in section 85.32, until the employee has returned to work or is medically capable of returning to employment substantially similar to the employment in which the employee was engaged at the time of injury, whichever occurs first.

¹ Lacy worked more than 13 weeks prior to the work injury. The parties produced 12 weeks of payroll records prior to the week of her injury, and the payroll records covering the date of her injury. Iowa Code section 85.36 provides, if an employee has been employed less than 13 calendar weeks immediately preceding the injury, then "the employee's weekly earnings shall be computed under subsection 6, taking the earning, including shift differential pay but not including overtime or premium pay, for such purpose to be the amount the employee would have earned had the employee been so employed by the employer the full thirteen calendar weeks immediately preceding the injury and had worked."

Under Iowa Code section 85.33(6), “‘employment substantially similar to the employment in which the employee was engaged at the time of the injury’ includes, for purposes of an individual who was injured in the course of performing as a professional athlete, any employment the individual has previously performed.”

After her work injury, Lacy was diagnosed with small cell lung carcinoma, which was unrelated to her employment. (Tr., p. 27; Exs. 7, p. 41; F, p. 3) Dr. Mohler documented Lacy could return to work on February 22, 2010, and restricted her to light duty with a lifting restriction of 20 pounds, with no patient care, and in-town driving only. (Ex. 5, p. 24) Dr. Mohler restricted Lacy to part-time work, three days per week, noting Lacy had poor endurance related to her chemotherapy. (Ex. 5, p. 25) Dr. Mohler continued with Lacy’s restrictions through August 25, 2010. (Ex. 5, p. 29)

Lacy received chemotherapy from October 2009 through April 2010. (Tr., p. 28) Lacy did not return to work until September 13, 2010. (Ex. 18, p. 154) Williams, the administrator for Country Haven, recalled a discussion about Lacy returning to work in February 2010. (Tr., p. 71) Williams testified Lacy had been diagnosed with lung cancer and was undergoing cancer treatment, so she did not return to work. (Tr., pp. 71, 82) Lacy also testified while she was receiving chemotherapy she could not work. (Tr., p. 28)

The record evidence does not establish Country Haven offered Lacy work consistent with her restrictions before First Comp sent Lacy a letter dated September 3, 2010. On April 1, 2010, Dr. Mohler documented Lacy had not returned to work because Country Haven did not “have any things that she could do.” (Ex. 5, p. 25) Dr. Mohler again documented on August 25, 2010, that Lacy had not returned to work, and “has not heard from her employer at all.” (Ex. 5, p. 29) The first document from Country Haven offering Lacy work is a letter from First Comp, notifying Lacy Dr. Mohler had released her to return to work four hours per day, three to five days per week, or 16 hours per week, and that she would be paid \$11.00 per hour. (Ex. 19, p. 166; Tr., pp. 29-30) Country Haven and First Comp have not proven Country View offered Lacy work before the September 3, 2010 letter. The record does not provide when the letter was delivered to Lacy. Lacy returned to work on September 13, 2013. I conclude Lacy is entitled to temporary total disability benefits through September 12, 2010, at the rate of \$364.26.

B. Temporary Partial Disability

Lacy alleges when she returned to work, she was underpaid temporary benefits. She seeks additional temporary partial disability benefits from September 13, 2010 through November 28, 2010. Lacy returned to work on September 13, 2013.

Permanent partial disability benefits begin on the employee’s return to work. Evenson, 818 N.W.2d 372. Lacy is not entitled to additional temporary partial disability benefits.

C. Credit for Temporary Benefits Paid

Country Haven and First Comp aver they are entitled to a credit for temporary benefits paid. Country Haven and First Comp paid Lacy temporary total disability benefits from August 15, 2009 through March 15, 2010, or 30.43 weeks, at the rate of \$344.14, totaling \$10,471.69, temporary partial disability benefits from March 16, 2010 through September 5, 2010, or 24.86 weeks, at the rate of \$271.49, totaling \$6,748.47, temporary partial disability benefits from September 6, 2010 through November 18, 2010, or 10.57 weeks, at the rate of \$242.16, totaling \$2,559.98, and permanent partial disability benefits from November 19, 2010 through May 7, 2014, totaling \$62,240.18. Thus, Country Haven and First Comp paid \$19,780.14 in temporary benefits.

Iowa Code section 85.34, provides, "[i]n the event weekly compensation under section 85.33 had been paid to any person for the same injury producing a permanent partial disability, any such amounts shall be deducted from the amount of compensation payable for the healing period." Country Haven and First Comp are entitled to a credit for temporary benefits paid to Lacy.

V. Penalty

Lacy contends she should receive penalty benefits because Country Haven and First Comp incorrectly determined her average weekly wage and rate, resulting in an underpayment of temporary total disability and temporary partial disability benefits of \$1,464.63, and underpaid permanent benefits. Country Haven and First Comp aver Lacy is not entitled to penalty benefits because Country Haven and First Comp complied with all notice requirements when discontinuing benefits, and a reasonable controversy existed regarding Lacy's ability to work and lack of permanent restrictions related to the work injury.

Under Iowa Code section 86.13(4), if there is a delay in payment absent "a reasonable or probable cause or excuse," the employee is entitled to penalty benefits, of up to 50 percent of the amount of benefits that were denied, delayed, or terminated without reasonable or probable cause or excuse. See also Christensen v. Snap-On Tools Corp., 554 N.W.2d 254, 260 (Iowa 1996) (citing earlier version of the statute). "The application of the penalty provision does not turn on the length of the delay in making the correct compensation payment." Robbennolt v. Snap-On Tools Corp., 555 N.W.2d 229, 236 (Iowa 1996). If a delay occurs without a reasonable excuse, the commissioner is required to award penalty benefits in some amount to the employee. Id.

The statute requires the employer or insurance company to conduct a "reasonable investigation and evaluation" into whether benefits are owed to the employee, the results of the investigation and evaluation must be the "actual basis" relied on by the employer or insurance company to deny, delay, or terminate benefits, and the employer or insurance company must "contemporaneously convey the basis for the denial, delay, or termination of benefits to the employee at the time of the denial,

delay, or termination of benefits.” Iowa Code § 86.13(4)(a). An employer may establish a “reasonable cause or excuse” if “the delay was necessary for the insurer to investigate the claim,” or if “the employer had a reasonable basis to contest the employee’s entitlement to benefits.” Christensen, 554 N.W.2d at 260. “A ‘reasonable basis’ for denial of the claim exists if the claim is ‘fairly debatable.’” Burton v. Hilltop Care Ctr., 813 N.W.2d 250, 267 (Iowa 2012). “Whether a claim is ‘fairly debatable’ can generally be determined by the court as a matter of law.” Id. The issue is whether the employer had a reasonable basis to believe no benefits were owed to the claimant. Id. “If there was no reasonable basis for the employer to have denied the employee’s benefits, then the court must ‘determine if the defendant knew, or should have known, that the basis for denying the employee’s claim was unreasonable.’” Id.

Benefits must be paid beginning on the 11th day after the injury, and “each week thereafter during the period for which compensation is payable, and if not paid when due,” interest will be imposed. Iowa Code § 85.30. In Robbennolt, the Iowa Supreme Court noted, “[i]f the required weekly compensation is timely paid at the end of the compensation week, no interest will be imposed As an example, if Monday is the first day of the compensation week, full payment of the weekly compensation is due the following Monday.” Robbennolt, 555 N.W.2d at 235. A payment is “made” when the check addressed to the claimant is mailed, or personally delivered to the claimant. Meyers v. Holiday Express Corp., 557 N.W.2d 502, 505 (Iowa 1996) (abrogated by Keystone Nursing Care Ctr. v. Craddock, 705 N.W.2d 299 (Iowa 2005) (concluding the employer’s failure to explain to the claimant why it would not pay permanent benefits upon the termination of healing period benefits did not support the commissioner’s award of penalty benefits)).

When considering an award of penalty benefits, the commissioner considers “the length of the delay, the number of delays, the information available to the employer regarding the employee’s injuries and wages, and the prior penalties imposed against the employer under section 86.13.” Schadendorf v. Snap-On Tools Corp., 757 N.W.2d 330, 336 (Iowa 2008). The purposes of the statute are to punish the employer and insurance company and to deter employers and insurance companies from delaying payments. Robbennolt, 555 N.W.2d at 237.

The record reflects Country Haven and First Comp promptly notified Lacy when her benefits would be reduced and the reasons for the reductions. (Ex. 19, pp. 166-167) Country Haven and First Comp also acknowledged that for the week of November 29, 2010 through December 6, 2010, Lacy had been underpaid \$101.98 and informed her she would receive a separate check for the underpayment. (Ex. 19, p. 167) On April 7, 2014, counsel for Country Haven and First Comp sent Lacy’s attorney a letter advising him that Lacy’s indemnity benefits would cease on May 7, 2014 because her clients had paid in excess of a 32% industrial disability despite the fact that Lacy has no permanent restrictions. (Ex. B) Country Haven and First Comp provided Lacy with written notice when reducing and discontinuing benefits. Lacy did not provide any correspondence or another exhibit disputing the rate calculation or alleging she was entitled to additional benefits prior to the hearing. Whether Lacy had sustained a

permanent impairment was fairly debatable. Lacy is not entitled to penalty benefits in this case.

VI. Medical Bills and Alternate Medical Care

Lacy seeks to recover medical bills totaling \$8,648.88, and medical mileage totaling \$1,539.65. (Ex. 21) The medical bills include reimbursement for medication and treatment for pain, anxiety, depression, nausea, diabetes, nitroglycerin, albuterol, and antibiotics after Lacy's discharge from the hospital. (Ex. 21, pp. 185a-198) Country Haven and First Comp aver Lacy is not entitled to reimbursement for health conditions unrelated to her work injury.

Under Iowa Code section 85.27, "[t]he employer, for all injuries compensable under this chapter or chapter 85A, shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance and hospital services and supplies therefor and shall allow reasonably necessary transportation expenses incurred for such services." Rule 876 Iowa Administrative Code 8.1(2) provides "transportation expense" includes "[a]ll mileage incident to the use of a prior auto" at the rate allowed by the Internal Revenue Service for the business standard mileage rate in effect on July 1 of each year.

The employer has the right to choose the provider of care, except when the employer has denied liability for the injury. Id.; Pirelli-Armstrong Tire Co. v. Reynolds, 562 N.W.2d 433, 436 (Iowa 1997). As analyzed above, Lacy has not established she sustained a mental health sequela injury as a result of the work injury. Likewise, medical bills for treatment and medication Lacy has received to treat her lung condition and other medical conditions unrelated to Lacy's work injury are not recoverable. Lacy is entitled to recover the cost of all causally related medical bills set forth in Exhibit 21.

Lacy seeks reimbursement for \$1,539.65 in medical mileage for attendance at appointments with authorized treating providers. (Ex. 21, pp. 181, 184-185) Lacy has provided an itemization of the mileage, including the dates, the addresses, and the distance traveled. Lacy has established a claim for medical mileage in the amount of \$1,539.65.

VII. Costs

Lacy seeks to recover the \$390.00 cost of the vocational expert report, the \$1,110.00 cost of Dr. Christiansen's examination, testing, and report, the \$64.00 cost of Lacy's deposition, and the \$100.00 filing fee, for a total of \$1,654.00. The workers' compensation commissioner has discretion to tax costs. Iowa Code § 86.40; Christensen, 554 N.W.2d at 262. 876 Iowa Administrative Code 4.33 outlines the costs that can be taxed, as follows,

Costs taxed by the workers' compensation commissioner or a deputy commissioner shall be (1) attendance of a certified shorthand reporter or

presence of mechanical means at hearings and evidential depositions, (2) transcription costs when appropriate, (3) costs of service of the original notice and subpoenas, (4) witness fees and expenses as provided by Iowa Code sections 622.69 and 622.72, (5) the costs of doctors' and practitioners' deposition testimony, provided that said costs do not exceed the amounts provided by Iowa Code sections 622.69 and 622.72, (6) the reasonable costs of obtaining no more than two doctors' or practitioners' reports, (7) filing fees when appropriate, (8) costs of persons reviewing health service disputes.

The administrative rule expressly allows for recovery of the deposition and filing fee.

In LeGrange v. Nash Finch Co., File No. 5043316, 2015 WL 4078549 (App. July 1, 2015), the commissioner found rule 876 IAC 4.33 allows for taxation of costs incurred in the hearing itself rather than reimbursement of fees and expenses incurred in an examination, and while this agency has previously held that functional capacity evaluations and vocational rehabilitation evaluations fall under rule 876 IAC 4.33, under Des Moines Area Reg'l Transit Auth. v. Young, 856 N.W.2d 383 (Iowa 2015), the allowable taxable costs are the reports themselves, and not the underlying examinations.

Mitchell's bill is itemized. (Ex. 22, p. 205) Mitchell documented she spent three hours preparing the report, at \$65.00 per hour. (Ex. 22, p. 205) Lacy is entitled to recover the \$195.00 cost of Mitchell's report. Dr. Christiansen's bill documents she spent four hours reviewing records and preparing the report. (Ex. 22, p. 203) Dr. Christiansen did not break down the time she spent preparing the report. (Ex. 22, p. 203) Lacy is not entitled to recover the cost of Dr. Christiansen's report under LaGrange.

ORDER

IT IS THEREFORE ORDERED, that:

Claimant's weekly rate is three hundred sixty-four and 26/100 dollars (\$364.26).

Defendants shall pay the claimant temporary total disability benefits from August 14, 2009 through September 12, 2010.

Defendants shall pay the claimant one hundred (100) weeks of permanent partial disability benefits at the rate of three hundred sixty-four and 26/100 dollars (\$364.26), commencing on September 13, 2010.

Defendants are entitled to a credit for benefits previously paid.

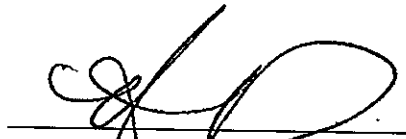
Defendants are responsible for all causally related medical bills.

Defendants shall pay the claimant medical mileage totaling one thousand five hundred thirty-nine and 65/100 dollars (\$1,539.65).

The one hundred and 00/100 dollar (\$100.00) filing fee, the sixty-four and 00/100 dollar (\$64.00) deposition, and the one hundred ninety-five and 00/100 dollar (\$195.00) vocational expert report are taxed to the defendants.

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

Signed and filed this 15th day of November, 2016.


HEATHER L. PALMER
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

Copies To:

James Neal
Attorney at Law
6611 University Ave., Ste. 200
Des Moines, IA 50324-1655
jneal@smalaw.net

Abigail Wenninghoff
Robert Williams
Attorneys at Law
17021 Lakeside Hills Plaza, Ste. 202
Omaha, NE 68130
wenninghoff@lkwfirm.com
robert@lkwfirm.com

HLP/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.