BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

LEANNE GARCIA, Claimant, vs. JBS USA HOLDINGS, INC./JBS USA LLC/SWIFT PORK CO., Employer, and AMERICAN ZURICH INSURANCE CO., Insurance Carrier, Defendants.	File No. 5063049 ARBITRATION DECISION Head Note Nos.: 1100; 1106; 1108.5; 1803.1; 1803; 2502

FILED
APR 19 2018
WORKERS' COMPENSATION

STATEMENT OF THE CASE

Leanne Garcia, claimant, filed a petition in arbitration seeking workers' compensation benefits against JBS USA Holdings, Inc./JBS USA LLC/Swift Pork Co., employer, and American Zurich Insurance Co., insurer, for an alleged work injury dated September 23, 2016.

This case was heard on March 2, 2018, in Des Moines, Iowa. The case was considered fully submitted on March 23, 2018, upon the simultaneous of filing of briefs.

The record consists of Joint Exhibits 1-15 and the testimony of the claimant.

ISSUES

1. Whether claimant sustained an injury arising out of and in the course of employment;

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

3. The extent of claimant's industrial disability;

4. Whether claimant is entitled to payment of any out-of-pocket medical expenses;

5. Whether claimant is entitled to the costs of Dr. Manshadi's report assessed as a cost.

STIPULATIONS

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

While the parties do not agree claimant sustained a compensable injury, they do stipulate that if a compensable injury is found and permanent benefits are awarded those benefits shall commence on January 28, 2017.

They further agree claimant was single and entitled to two exemptions at the time of the alleged injury and that her gross weekly earnings were $860.68 per week. Based on the foregoing numbers the weekly benefit rate is $535.05.

FINDINGS OF FACT

Claimant was a 26 year-old person at the time of the hearing. Claimant has a high school diploma. After high school, she began working as a courtesy clerk at a grocery store. Her duties included lifting groceries, bagging groceries, and for a short period of time, performed cashiering responsibilities. The heaviest item weighed approximately 75 pounds such as bags of dog food. She then moved to Iowa and briefly took a server position. In 2012, she obtained a position with the defendant employer. She initially worked the line packaging bacon and monitoring sliced meat. She then transitioned into a Quality Assurance position. Claimant testified that working the line was more physical. Her current position requires her to walk around the plant checking for hygiene and safety. Her job entails approximately 30-45 minutes of sit down work using her computer to fill out paperwork while the rest of the time is spent walking the plant.

Her past medical history is significant for diagnosis and treatment of fibrodysplasia. (See e.g. JE 1) Fibrodysplasia is an uncommon bone disorder wherein fibrous tissue develops in the place of normal bone and marrow. (JE 7:115) The irregular tissue can weaken resulting in fractures, deformities, functional impairment and pain. Id. Individuals contracting this disease can opt to replace the fibrous tissue with normal bone or use hardware to strengthen the weakened or deformed areas. Id.

On September 5, 2012, claimant sought treatment for pain in her right lower leg. (JE 1:1) It was discovered she had sustained a stress fracture in her right tibia, likely as a result of the fibrodysplasia. (JE 2:7) It did not heal well and after a year of pain, claimant opted for surgical placement of a tibial nail to strengthen the right tibia. (JE

2:14-15) Claimant went through a healing process and by November 4, 2014, she reported doing well and wanted to resume full activities. (JE 2:20) She had occasional discomfort but it did not limit her. Id. She was released to full duty work on November 4, 2014, by her treating physician, Joseph A. Buckwalter, M.D. (JE 2:24) Claimant had no further complaints in her lower extremities. Her co-worker, Kody Upton, testified that once in a while he observed claimant walk with a limp prior to the fall. (JE 15:183)

On September 23, 2016, claimant fell while at work in the walkway of the smokehouse. Mr. Upton described the process the meat goes through before being transferred to the smokehouse.

> A. They pump raw bellies through brine machines, and those raw bellies go through the machine, and they get pumped with brine and then the workers will take hangers and put them on basically giant metal racks. And there's quite a bit of time where the bellies drip with brine. There's also – right where they hang them, there's a container that gets filled with brine a lot of the time, just it stays there so long that they drip so much. And then they usually go from curing to the smokehouse. And that whole time that they are hanging from curing to the smokehouse, they are constantly dripped with brine. And then a lot of time there's also fat on the floor too from the bellies.

(JE 15:177) The pork bellies are hung on a rack and transported down the walkway in question via a track system in the ceiling. A rack would hold around 72 pork bellies at once and a full rack is moved through every five to ten minutes. Mr. Upton testified that the only time the floor in that area would be dry is if no one worked for a full 24 hours. (JE 15:178) At times, salt will be placed on the floor to help the forktrucks grip the surface, but because of the brine and belly fat on the floor, "there's only so much that you can do." (JE 15:178) At no time while claimant worked would the floor be dry according to Upton. Id. Upton had slipped multiple times but never hurt seriously enough to report an incident to the in-house nurse. Id.

The defendant employer's Health Notes record nursing staff "Called to Smoke House. Upon arriving found EE laying on floor screaming and holding up and around her right leg." (JE 3:25) A backboard was fetched and emergency services was called. Id. The nursing staff also recorded claimant as stating "I have a rod in my lower leg and screws in my ankle and knee. I ate at 7:30 this morning. My leg has been hurting for a while. I slipped in brine. I didn't fall off anything." (JE 3:25)

Claimant disagreed with these written comments at hearing. Claimant testified at hearing that her hair and clothes were wet. The nursing notes record claimant as dry. (JE 3:25) Emergency services do not make a note of whether claimant was wet or dry, only that the claimant was in extreme pain. (JE 4:27) Claimant disputes that she stated that her leg had been hurting for a while.

On the way to the hospital, the paramedics administered three doses of morphine. (JE 4:27)

The Emergency Room report documents claimant's account as "walking across the floor that had brine on it. Slipped and fell." (JE 5:31) In a history and physical conducted prior to surgery that day, Richard Beaty, D.O. wrote, "The patient was at work today, slipped on a wet floor, twisted her leg, felt a crack before her leg gave out and she landed on the ground." (JE 5:46) Claimant disagrees that she told anyone her leg "cracked" before she fell.

In a statement given to her employer on the same day, claimant reported "walking in the walkway between Smokehouse & Curing et [sic] slipped on flr brine. It's always very slippery there et [sic] I've almost fallen on numerous occasions." (JE 13:136) The subsequent investigative report states, "The area of injury does have brine mixture on it that flows to a drain. No standing liquid on the floor, just residual liquid. The floor has a texture on it and is not slick." (JE 13:137) The report went on, "Employee stated that she heard a crack before her leg gave out and she fell to the floor. After further evaluation by a medical doctor it was discovered that the employee has Fibrous Dysplasia in the right and left legs and that being the reason for the bones breaking." (JE 13:137) Teri Hoag, an employee of defendant, documented that "Employee states she slipped on brine causing her to fall." (JE 13:142)

From the initial statements at the scene of the fall to the testimony at hearing, claimant consistently reported slipping and falling on the slick floor. Further defendants' own inspection documented residual liquid. Mr. Upton also testified the surface was always wet, slick, and that he has slipped many times. It is found that the floor was wet and slippery at the time claimant fell on September 23, 2016.

Claimant is a credible and reliable witness. Her statements to the court were straightforward. She had an even-keeled demeanor. She did not shift in her seat nor did she evade questioning. Her reports of slipping and falling on brine was consistent throughout all the medical records. Medical record notes are not infallible. Claimant was subject to cross examination whereas Dr. Beaty was not. Therefore, her recollection and testimony are given greater weight. It is further found that claimant did not tell anyone that she felt a crack in her leg before it gave out.

X-rays revealed a comminuted subtrochanteric fracture of the right femur. (JE 5:40) There was some discussion that the fracture may have been the result of the fibrous dysplasia. Id. Surgery took place immediately which involved inserting a pin into the right femur as well as two screws. (JE 5:48) This procedure was conducted by Richard T. Beaty, D.O. Id. Claimant was discharged with crutches on September 26, 2016. (JE 5:56)

Her care was then taken over by Bradley A. Scott, D.O. (See JE 5:50) On her third post-operative day, Dr. Scott noted that the pain in her right hip had improved. (JE 5:51)

In her medical history form filled out on January 11, 2017, for physical therapy, claimant questioned whether her genetic condition was somehow to blame for the fall. (JE 5:58) She also stated that her current symptoms included pain in the right thigh, hip and lower back. Id. She alleviated her pain by laying on her back but standing and sitting for long periods of time worsened her pain. Id.

She attended multiple therapy sessions from January 11, 2017, through June 15, 2017. (JE 5:62-86) She exhibited pain, diminished range of motion, and loss of strength in the right hip and right knee. She had pain in the lateral hip and trochanter. (JE 5:60) She walked with a limp and had difficulty moving up and down steps and lifting. (JE 5:62) She used assistive devices to ambulate. (JE 5:64) On January 19, 2017, the therapist noted that "Without any device she has more of a waddling or side shifting type of gait and drags right foot on floor occasionally." (JE 5:64) By January 25, 2017, claimant had dispensed with the use of an assistive device but she continued to have pain in the hip. (JE 5:65) While walking on the treadmill, claimant had a tendency to lean to the right. (JE 5:65)

The pain in the right hip continued throughout therapy. (JE 5: 69, 70, 71) The therapist noticed that she had "a slight trunk deviation to the right but not noticeable up ambulation and trendelenburg in the right LE single leg stand." (JE 5:71) The Trendelenburg gait continued throughout therapy. (See JE 5:77)

While she improved from therapy, from a functional standpoint she still walked with a mild limp and had difficulty squatting or lifting any weight off the floor. (JE 5:86) She had pain and weakness in the hip. (JE 5:85)

She also had ongoing pain for which Dr. Scott treated with hydrocodone. (JE 6:108) She reported that working had increased her pain and discomfort. (JE 6:110)

There are three main disputes in this case. The first is whether claimant's fall was idiopathic. The second is whether claimant's pre-existing condition was the cause of her fall or fracture or both. Finally, whether any work injury on September 23, 2016, involved the hip or back.

Dr. Scott provided opinions via a checklist letter authorized by counsel for the defendants. (JE 7:114) He agreed claimant suffered from fibrous dysplasia and explained the disease. (JE 7:114-15) He acknowledged claimant had fibrous dysplasia in her right femur and left leg but that radiographic evidence points to the disease in the right lower extremity as more serious than the left lower extremity. (JE 7:115)

He would not opine as to whether claimant's fracture was the result of her disease or whether it was the result of the fall. (JE 7:116) He went so far as to agree that it was impossible for him to state which theory, both plausible, was correct because he was not present at the fall. Id. Regardless of the cause, he believed claimant was at maximum medical improvement (MMI) as of August 29, 2017, and he recommended no further treatment. Id. He maintained she should not work more than 9 hours per day,

limit lifting to 20 pounds and pushing and pulling of rolling carts to 50 pounds to avoid reinjury due to her dysplasia. (JE 7:117) He assessed a 7 percent lower extremity impairment as he did not believe the injury migrated to her hip or back. (JE 7:117)

However, the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition suggests a much higher impairment rating given claimant's objective signs of injury. For instance, an antalgic limp is a 7 percent whole person impairment rating per the Guides while a diagnosis including a positive Trendelenburg sign and moderate to advanced osteoarthritis of the hip is a 10 percent whole person impairment. (Guides at 529, Table 17-5). For weakness and reduced range of motion, claimant could have been entitled to 8 percent impairment rating due to the inability to abduct her hip after 29 physical therapy visits. (JE 5:85) (Guides, p. 537, Table 17-9).

In a subsequent checklist letter, Dr. Scott further opined that the September 2016 fracture did not materially aggravate nor was it a significant factor in causing any permanent impairment or need for restrictions to claimant's hip or back. (JE 8:123)

Claimant retained the services of Farid Manshadi, M.D., a physiatrist, to conduct an IME and render an opinion. (JE 11) Dr. Manshadi examined claimant and reviewed her medical records. (JE 11:129) During the examination, claimant expressed pain in her right hip between a 2 and 3 on a 10 scale while at rest and increasing to 6 or 7 out of 10 while walking.(JE 11:131) She was unable to squat or lie on her right side. Id. She also told Dr. Manshadi that she began to develop right-sided low back pain following surgery. (JE 11:131)

During Dr. Manshadi's examination, she had reduced range of motion on her right hip, lumbar region along with tenderness to palpation over the lumbosacral spinous process. (JE 11:131) There was muscle atrophy evident when comparing the right thigh to the left. Id. Her gait was antalgic with Trendelenburg character to it. Id.

Dr. Manshadi concluded claimant sustained a right hip comminuted subtrochanteric fracture as a result of the fall and the resulting weakness, atrophy, reduced range of motion and abnormal gait resulting in low back pain all arise from the fall. Id. The fracture was to her right femoral shaft and not her hip.

Dr. Manshadi further opined that the fall was a substantial contributing factor in causing the comminuted fracture to the right femur. Id. While he acknowledged her genetic condition, he noted that the MRI of the entire right leg performed at the University of Iowa on September 10, 2013, showed a lesion around the distal right femur but no such lesion around the right proximal femur which was involved in the fracture. (JE 11:132) He also relied on claimant's assertion that she did not tell Dr. Beaty there was a crack in her leg before the fall and that she had near falls before due to the wetness of the floors and suffered no prior cracks or fractures that she was aware of. Id. Further, he wrote that "the type of fracture that she [claimant] sustained (comminuted fracture) is more likely to be a result of an impact rather than a pathological fracture." (JE 12:135)

He assessed a whole person impairment of 25 percent due to the following:

> I also believe that Ms. Garcia has partial permanent impairment as a result of this work injury of 09/23/16. I used the American Medical Association's Guides to the Evaluation of Permanent Impairment, 5th Edition, Chapter 17. Ms. Garcia does have reduced right hip range of motion as well as atrophy of the right hip in comparison to the left. As such, I used Table 17-8, Page 532 of the American Medical Association's Guides to the Evaluation of Permanent Impairment, 5th Edition, and as such I assign twenty-seven (27) percent impairment of the right lower extremity due to weakness of the right hip abduction, and seventeen (17) percent impairment of the right lower extremity due to weakness of the right hip extension, or fifteen (15) percent impairment of the whole person for weakness of the right hip abduction and seven (7) percent impairment of the whole person for weakness of the right hip extension. Then using the Combined Values Chart, Page 604, the total impairment would be twenty-one (21) percent impairment of the whole person.
>
> Ms. Garcia also has low back pain with reduced range of motion. As such, I used the American Medical Association's Guides to the Evaluation of Permanent Impairment, 5th Edition, Chapter 15, Page 384, Table 15-3 and she falls under five (5) percent impairment of the whole person.

(JE 11:132)

Defendants take exception to both the 21 percent impairment for the weakness of abduction and extension of her right hip and the 5 percent impairment for the low back. The AMA Guides cites 5 percent impairment for the low back as appropriate if clinic history and examination findings are compatible with specific injury. (Guides, p. 384, Table 15-3) Findings may include asymmetric loss of range of motion. Id. Claimant has had a Trendelenburg gait since she was ambulatory following surgery. A 5 percent impairment rating is not sufficient to call into question Dr. Manshadi's credibility or reliability as it is consistent with the Guides.

He agreed with the work restrictions recommended by Dr. Scott. (JE 12:135) Claimant has not sought out treatment for her low back, leg or hip. Claimant testified at hearing that she did not want to incur new medical bills. Currently, she owes $2,937.66 in out-of-pocket expenses for medical treatment for the fracture and follow-up treatment.

Claimant has returned to her pre-injury job but complains of constant pain in her right lower extremity, hip and back. Because of this pain and the fracture, claimant reports reduced range of motion and strength in her lower right extremity, right hip and back.

She has difficulty standing walking and squatting. She takes one hydrocodone a day that is prescribed by Dr. Scott. When she gets home from work, she sits down to rest. Ordinary activities of daily living are impacted by her injury. She has pain walking up and down the stairs, getting in and out of a car, carrying groceries, caring for her son and doing housework. She does do laundry, vacuum and sweep, but her fiancé helps carrying the laundry basket up and down the stairs. She cannot lay on her right side. She has moved from a house with no stairs to a new house with stairs.

She intends to continue in her current employment.

CONCLUSIONS OF LAW

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

Claimant is seeking permanent disability benefits arising out of a fall at work in a walkway where pork bellies were hung and cleaned. Defendants argue that this fall was idiopathic.

In Iowa, the general rule is that idiopathic injuries, or injuries personal to an employee, are not compensable. This is because an injury must occur without the course of employment.

The Supreme Court has identified these idiopathic arguments as part of the "arising out of" clause. See Miedema v. Dial Corp., 551 N.W.2d 309, 311 (Iowa 1996) (finding that "[i]njuries that occur in the course of employment or on the employer's premises do not necessarily arise out of that employment.")

In order for an injury to be compensable in Iowa, there must be "a connection between the injury and the work." Meyer v. IBP, Inc., 710 N.W.2d at 221 (Iowa 2006). That connection is established by showing the injury arose out of and in the course of the worker's employment. Iowa Code § 85.31(1) (2001); Meyer, 710 N.W.2d at 220.

The Supreme Court further clarified in Lakeside Casino v. Blue, 743 N.W.2d 169 (Iowa 2007), that the element of "arising out of" requires proof of a causal connection between the conditions of employment and the injury.

> "In other words, the injury must not have coincidentally occurred while at work, but must in some way be caused by or related to the working environment or the conditions of [the] employment." [Miedema, 551 N.W.2d at 311]; accord McIlravy v. Ins. Co., 653 N.W.2d 323, 331 (Iowa 2001) (stating injury "must be related to the working environment or the conditions of employment"); Griffith v. Norwood White Coal Co., 229 Iowa 496, 502, 294 N.W.741, 744 (1940) (stating "injury arises out of the employment if it can reasonably be said to result from a hazard of the employment").

Lakeside Casino v. Blue, 743 N.W. 2d 169, 175-176 (Iowa 2007). The court in Blue went on to clarify that the focus should be whether "'the nature of the employment exposes the employee to risk of such an injury.'" Blue, 743 N.W.2d at 174 (quoting Hanson v. Reichelt, 452 N.W.2d 164, 168 (Iowa 1990)).

This case is not similar to McIlravy v. North River Ins. Co., 653 N.W. 2d 323, 327 (Iowa 2002) wherein the Supreme Court ruled that there is no inherent risk in walking on a flat surface. While the walkway in the Smokehouse was flat, it was wet and littered with belly fat making the surface slick to walk on. Salt was regularly placed on the floor so that machines, such as forklift trucks, could grip the surface. At no time during a working day is the surface upon which claimant fell dry. This was the testimony of both the claimant and her co-worker, Kody Upton. Both witnesses were subject to cross examination and both testified consistently throughout their questioning that the surface was wet, slick and often treated with salt.

It is found that this was not an idiopathic fall, but rather a fall that that was caused by the work conditions—conditions that are unique to the defendant employer's workplace and not ordinarily encountered in a day-to-day routine outside of work. The slickness of the surface upon which claimant fell exposed the claimant to a risk of injury.

The next question is whether claimant's fibrodysplasia was the cause of claimant's injury and/or fall or whether it was the slickness of the floor.

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

Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995). Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417 (Iowa 1994). Unrebutted expert medical testimony cannot be summarily rejected. Poula v. Siouxland Wall & Ceiling, Inc., 516 N.W.2d 910 (Iowa App. 1994).

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

There are two expert opinions in this case. The first is from Dr. Scott who took over claimant's care after her emergency surgical care. He did not opine that the fracture was not caused by the fall but that it would be impossible for him to differentiate between causes because he was not present at the time of her fall. Dr. Scott would not hypothesize what was the cause of her fall and fracture based on the testimony of the claimant or even her historical accounts. He agreed that either cause—the fall or the disease—was plausible.

Dr. Manshadi was selected by the claimant to provide an independent medical examination and subsequent opinion. He opined that the fracture was caused by her losing her footing on a slick surface. He based this on three factors—claimant's account, that the fibrodysplasia in the area where she suffered the fracture was not as severe as in the area she had a previous fracture and that her comminuted fracture was of the type that would more likely be caused by an impact injury rather than a pathological disease.

While Dr. Scott is a qualified doctor who treated claimant to the best of his ability, it is Dr. Manshadi's opinions that are given greater weight in this decision, despite Dr. Manshadi's incorrect recitation that claimant sustained a right hip fracture.

Dr. Manshadi buttressed his opinion by relying on claimant's account which the undersigned deemed credible as well as comparing and contrasting the 2016 fracture with the 2012 fracture. The 2012 fracture was a stress fracture which caused claimant increasing pain over a period of a year. This pain was alleviated by the insertion of a tibia rod. Additionally, Dr. Manshadi pointed out that the fibrous dysplasia in the MRI

was more significant around the distal right femur than the right proximal femur which was involved in the fracture.

Dr. Scott's opinion was that it was impossible to tell which of the two plausible theories were the cause but the standard in this cause is more likely than not. Further, the cause need only be a substantial factor not the sole and only cause.

Therefore it is found that claimant's comminuted fracture suffered on September 23, 2016, arose out of and in the course of her employment.

Claimant also asserts that she is suffering low back and hip pain on the right as a result of the left leg fracture.

Claimant began reporting hip pain mere days after her surgery. This hip pain continued throughout claimant's treatment with Dr. Scott and through her four months of physical therapy. Throughout her recovery and after, claimant walked with an antalgic gait, likely due to the pain and weakness in her right extremity gravitating into the hip. Dr. Scott's opinion that the September 2016 fracture did not materially aggravate nor was it a significant factor in causing any permanent impairment or need for restrictions to claimant's hip or back is not consistent with the medical records, therapy he ordered, or even treatment he recommended. The physical therapy records recorded hip pain and claimant's antalgic gait throughout treatment. The medical records and claimant's own testimony is consistent with Dr. Manshadi's opinions and therefore his opinions regarding the causation between claimant's back and hip complaints are adopted.

It is found that claimant's back and hip pain developed as a result of the fracture and continues to have adverse effects on claimant's day-to-day activities.

Since claimant has an impairment to the body as a whole, an industrial disability has been sustained. Industrial disability was defined in Diederich v. Tri-City R. Co., 219 Iowa 587, 258 N.W. 899 (1935) as follows: "It is therefore plain that the legislature intended the term 'disability' to mean 'industrial disability' or loss of earning capacity and not a mere 'functional disability' to be computed in the terms of percentages of the total physical and mental ability of a normal man."

Functional impairment is an element to be considered in determining industrial disability which is the reduction of earning capacity, but consideration must also be given to the injured employee's age, education, qualifications, experience, motivation, loss of earnings, severity and situs of the injury, work restrictions, inability to engage in employment for which the employee is fitted and the employer's offer of work or failure to so offer. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963); Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961).

Compensation for permanent partial disability shall begin at the termination of the healing period. Compensation shall be paid in relation to 500 weeks as the disability bears to the body as a whole. Section 85.34.

Dr. Scott assigned a 7 percent lower extremity impairment but no impairment for the hip or low back. He recommended work restrictions of no work more than 9 hours per day, limit lifting to 20 pounds and pushing and pulling of rolling carts to 50 pounds to avoid reinjury due to her dysplasia. Dr. Manshadi adopted the same recommendations but opined claimant sustained a 25 percent whole person impairment. The restrictions recommended by Dr. Scott are not consistent with the lower extremity impairment rating he assigned.

While claimant is working the same job as she did prior to the injury, both experts agree she needs to limit herself while working. Claimant testified that work is tiring. It requires her to walk several hours per day. She still has pain, reduced strength and some reduced range of motion. She takes one pain pill a day and needs help at home with some of her household chores. She cannot squat and has difficulty with a lateral step-up. As a result of the foregoing, it is determined claimant has sustained a 25 percent whole person impairment as a result of the fracture, hip pain, and low back pain.

Defendants denied compensability of claimant's injury and therefore did not pay for claimant's medical bills. "If the employee establishes the compensability of the injury at a contested case hearing, then the statutory duty of the employer to furnish medical care for compensable injuries emerges to support an award of reasonable medical care the employer should have furnished from the inception of the injury had compensability been acknowledged." Bell Bros. Heating v. Gwinn, 779 N.W. 2d 193 (Iowa 2010). Defendants cannot raise the authorization defense as they have denied liability. Iowa Code § 85.27. Claimant is entitled to the out-of-pocket medical expenses itemized in a list attached to the hearing report and any future medical expenses associated with the fracture and sequelae arising out of the September 23, 2016, work injury.

Claimant also seeks reimbursement of the report of Dr. Manshadi as a cost. The Supreme Court in Young distinguished between an examination and report in determining what was reimbursable under Iowa Code section 85.39. Des Moines Area Reg'l Transit Auth. v. Young, 867 N.W.2d 839, 847 (Iowa 2015). Under Young, if an examination is reimbursable under Iowa Code § 85.39 then it cannot be reimburse under 876 IAC 4.33. Young, 867 N.W.2d at 847. This leaves the report by independent medical examiners in limbo. There is a split among the agency and it would be useful if the Supreme Court would clarify whether the report generated from an Iowa Code section 85.39 examination can be reimbursed under 876 IAC § 4.33. Until that time, however, I will continue to abide under the guidelines that the only method for reimbursement of an IME is under Iowa Code section 85.39. Claimant's request for reimbursement of the report costs of Dr. Manshadi is denied.

ORDER

THEREFORE, it is ordered:

That defendants are to pay unto claimant one hundred twenty-five (125) weeks of permanent partial disability benefits at the rate of five hundred thirty-five and 05/100 dollars ($535.05) per week from January 28, 2017.

That defendants shall pay accrued weekly benefits in a lump sum.

That defendants shall pay any out-of-pocket expenses incurred by claimant for treatment of her work injury and sequelae.

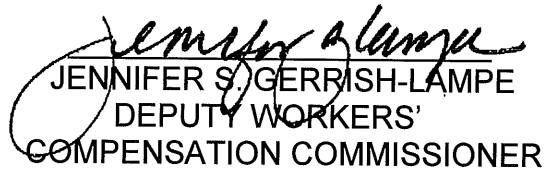
That defendants shall pay for any future medical care to treat claimant's compensable injury.

That defendants shall pay interest on unpaid weekly benefits awarded herein as set forth in Iowa Code section 85.30.

That defendants are to be given credit for benefits previously paid.

That the defendants shall pay the costs but for the report of Dr. Manshadi.

Signed and filed this 19th day of April, 2018.



JENNIFER S. GERRISH-LAMPE
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

Copies to:

Robert J. Legislador
Attorney at Law
1636 42nd St. NE
Cedar Rapids, IA 52402
rlegislador@jllawplc.com

Jennifer A. Clendenin
Attorney at Law
100 Court Ave. Ste. 600
Des Moines, IA 50309-2200
jclendenin@ahlerslaw.com

JGL/kjw

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.