BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

YADIRA SOLIS, Claimant, vs. SIMPLY SAID, LLC, Employer, and FARM BUREAU PROPERTY & CASUALTY INSURANCE COMPANY, Insurance Carrier, Defendants.	FILED FEB 16 2017 WORKERS COMPENSATION	File No. 5053727 ARBITRATION DECISION Head Note Nos.: 1802, 1803

STATEMENT OF THE CASE

Yadira Solis, claimant, filed a petition in arbitration seeking workers' compensation benefits from defendants, Simply Said, LLC, the employer, and their workers' compensation insurance carrier, Farm Bureau. The arbitration hearing was held on September 27, 2016, in Sioux City, Iowa.

Claimant and Mr. Jeff Buckner, of Farm Bureau, provided testimony at the hearing. The evidentiary record also includes Joint Exhibits 1-16 which were admitted into evidence without objection.

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.

Counsel for the parties submitted post-hearing briefs on November 14, 2016, and the case was considered fully submitted on that date.

ISSUES

The parties submitted the following disputed issues for resolution:

1. Whether claimant is entitled to healing period benefits for the period of June 5, 2014 through June 4, 2015.

2. Whether claimant is entitled to permanency benefits, and if so, the extent thereof, if any.

3. A determination of the proper commencement date for permanency benefits. Claimant asserts that date is June 5, 2015.

4. Whether claimant is entitled to alternate medical care under Iowa Code section 85.27.

FINDINGS OF FACT

At the time of the hearing, claimant, Yadira Solis, was 33 years old. (Transcript page 24) The parties have stipulated that claimant sustained an injury that arose out of and in the course of her employment with defendant employer on June 5, 2014. (Hearing Report, p. 1) Claimant stated that the injury occurred when she was walking at work and slipped and fell on a wet tile floor. (Tr. p. 9) She twisted her right foot and landed on her right side. (Tr. p. 10) She felt pain in her low back, her right side and her right foot, and experienced swelling in her right ankle. (Tr. p. 10; Exhibit 10, p. 11)

Claimant stated in answers to interrogatories that she had no other injuries or ailments to the parts of her body affected by this injury, either before or after this work injury. (Ex. 10, pp. 20, 29) However, claimant had injured her right ankle about one month prior to the work injury. At that initial injury, she was placed in a walking boot. (Ex. 2, p. 1; Ex. 15, p. 1)

Prior to her work injury, claimant attended high school in Rio Grande City, Texas, and completed the 11th grade in 2001. (Tr. p. 10; Ex. 11, p. 19) She did not graduate from high school and did not pursue additional formal education. (Id.)

Before working for defendant employer, claimant performed seasonal agricultural work in North Dakota. (Tr. p. 22) At hearing, claimant described hoeing weeds from the fields and a job that required miles of walking. (Id.) At her deposition, claimant stated that she worked during the harvest and stated "I didn't do much field work at all." (Ex. 13, p. 37) In her deposition, claimant described "sitting on top of the machine moving controls. And we dump the trucks for the beets to go on a pile." (Ex. 13, pp. 37-38) She further stated that this was a seasonal job that she did for two weeks out of the year. (Ex. 13, p. 38) She also worked for about three months in a laundry facility at a nursing home. (Tr. p. 23)

Claimant worked from 2009 through 2014 for the defendant employer, Simply Said, LLC. (Ex. 10, p. 18) Claimant worked production for Simply Said, LLC, which required her to stand at a table, and tear excess material from paper or cardboard that came out of a machine that produced stickers or wall designs. (Tr. p. 8; Ex. 13, p. 15)

Claimant said that she was terminated from her job with Simply Said, LLC, about a month after the work injury. (Tr. p. 28) She testified that "I was going to go just talk to them. I wasn't going to go to work. Ryan comes out of the building and tells me

that . . . there was nowhere for me. He didn't let me go in the building. That there was nowhere for me [*sic*] comfortable to be in that building." (Tr. pp. 28-29) She explained that she understood that not having a place for her that was "comfortable," meant that she no longer had a job. (Tr. p. 29)

Jeff Buckner, a workers' compensation specialist for Farm Bureau, testified that he handled this claim. (Tr. p. 64) In the process of handling this claim, he had conversations with the employer and with the claimant. (Tr. pp. 65-66) Mr. Buckner testified that claimant told him that she continued to work after the injury occurred. (Tr. p. 66) She was then off work for one week from July 3, 2014 to July 10, 2014. (Ex. 2, p. 19; Tr. p. 69) Mr. Buckner testified that the employer was providing accommodations for claimant following the injury. (Tr. pp. 65-68) However, Mr. Buckner testified that it was relayed to him by the employer that claimant had been in an argument or a disagreement with the employer and she stopped coming to work. (Tr. p. 68) The defendant denied that she was fired. (Id.) He also testified that claimant told him that she "couldn't work because of her – her injury." (Tr. p. 70) He admitted that claimant never told him that she had "quit" her job. (Tr. p. 71)

Mr. Buckner agreed that one week of temporary total disability benefits was paid for the period of July 3 through July 10, 2014. (Tr. p. 69) However, when he was asked to explain why the payment was not made until about five months after it was due, he responded that there was some confusion or miscommunication between himself and the employer concerning the dates that were owed. (Tr. p. 73)

After her separation from employment with Simply Said, LLC, in July 2014, claimant testified in her deposition that she worked for about 10 to 12 days in North Dakota during the potato harvest that fall. (Ex. 13, pp. 27-28) While performing this job she stood next to a conveyor and pulled out rotten potatoes and clumps of dirt. (Id.) Claimant noted an increase in her back pain from doing this job, which she reported to her physical therapist on October 6, 2014. (Ex. 2, p. 83) On September 2, 2014, claimant relayed to her physical therapist that her pain was improving, reporting it to be in the range of 5-6/10, which she "reports that its [*sic*] not that bad." (Ex. 2, p. 78) Then in December 2014, Simply Said, LLC, called claimant and asked her to come and work for a few weeks to help them through a busy time, which she did. (Ex. 13, pp. 26-27) There was no indication that claimant had any difficulty performing her job at that time, although she did not feel that she was treated well by the employer. She was given a temporary work table and chair next to a wall and was told not to talk to anyone. (Ex. 12. p. 26)

Claimant began working for Central Lyon School District in Rock Rapids, Iowa in August, 2015, as an ESL helper. She continued in that employment at the time of the hearing. (Tr. pp. 20-22) Claimant works in an elementary school, translating for children that do not speak English and helping students with homework. (Tr. p. 21)

Following the work injury on June 5, 2014, claimant received medical treatment at Sanford Clinic, where her injury was described as an inversion injury of the right ankle. (Ex. 2, p. 1) The medical record noted that she "is able to bear weight directly

after the injury." (Id.) Also, it is states that, "[s]he sprained this ankle one month ago as well." (Id.) The note provides that "[s]he injured it 5/5 and had a walking boot but had improved from this injury." (Id.) Claimant's ankle was placed in an ace wrap and it was noted that she still had the boot from her injury a month earlier and she was encouraged to wear it for the following week. (Ex. 2, p. 1) The X-ray indicated no fractures. (Ex. 2, pp. 1-2) She was returned to "sit down work for the next week." (Ex. 2, p. 1)

On June 13, 2014, claimant was seen primarily for back pain at the Sanford Clinic, although she continued to have right foot and knee pain. (Ex. 2, p. 5) She advised the clinic that she would like to have an x-ray of her back. (Id.) She was instructed to use heat and over-the-counter Motrin. It was also suggested "she not work for a few days." (Id.)

On June 16, 2014, claimant returned to the clinic where her pain was noted to be "moderate" and "localized along the lower back." (Ex. 2, p. 7) She was prescribed Flexeril and Ultram and it was recommended that she: rest her back as much as practical; use ice and heat; and it was recommended that claimant have "work modifications." (Id.)

On July 2, 2014, claimant complained of continued low back pain, and reported having a lot of difficulty working. Claimant indicated that it was difficult for her to stand or sit for long periods of time, and that Tramadol and Flexeril made her tired and impacted her work performance. Claimant was then taken off work entirely for one week. (Ex. 2, p. 19)

On July 9, 2014, claimant was kept off work until she could be seen by the workers' compensation physician. (Ex. 2, p. 24)

On July 23, 2014, claimant was seen by Douglas Martin, M.D. of Unitypoint Clinic, for "consultation purposes." (Ex. 4, p. 1) He notes that claimant had two separate incidents of injury. The first was in May, 2014, which resulted in an inversion ankle sprain. The second was in June, 2014, which was this work injury. (Id.) The x-rays of claimant's ankle and her low back showed no significant abnormalities. (Id.) Claimant was reporting "a considerable amount of problem with back spasms" and finds it difficult to remain sitting, standing or lying down for any length of time. (Id.) Dr. Martin started claimant on Celebrex and tizanidine and Ultracet. (Ex. 4, p. 3) She was also assigned restrictions for her return to work of: ten pounds material handling; no bending, twisting or squatting; alternate sitting, standing, and walking as necessary. (Id.) Dr. Martin stated that claimant's condition was consistent with the fall injury in June, 2014. (Id.)

From July 1, 2014 through October 17, 2014, claimant underwent 20 treatments of physical therapy. (Ex. 2, pp. 8-92) At the conclusion of physical therapy, it was noted that claimant continued to have pain in her right low back that goes up her back when irritated and she had pain along her right hip. (Ex. 2, p. 92) The pain was indicated to increase to 9-10/10. (Id.) Claimant was "discharged from PT due to minimal progress being made." (Id.) It was recommended that she receive further

diagnostic testing "to diagnose what is causing [her] pain to continue to be so high in nature." (Id.)

The physical therapy records give the reader some pause. On August 1, 2014, the therapist recorded that, claimant "seems to demonstrate inconsistencies during session with gait and ability to get up from chair, no hands required to get up from thera ball. Pt was able to ascend/descend stairs alternating pattern without railing." (Ex. 2, p. 42) In several locations, the therapist notes that claimant needed verbal cueing to participate and to attain proper exercise performance. (Ex. 2, pp. 47, 48, 51)

On August 6, 2014, claimant was seen by Dr. Martin who noted that claimant reported some degree of improvement from physical therapy and she was sleeping better. (Ex. 4, p. 4)

On September 3, 2014, claimant is seen by Dr. Martin and again noted some relief with physical therapy, "although she is still having some degree of trouble." (Ex. 4, p. 5) She was taken off Ultracet and instructed to take Tylenol as needed for pain. (Id.)

On October 1, 2014 Douglas Martin, M.D., recorded that claimant had been out of the county for some time and she was not having active treatment. (Ex. 2, p. 82) He also notes that she is out of her medication, but overall "thinks that things are pretty stable" compared to her last visit in the beginning of September. (Id.) She received refills of Celebrex and tizanidine and she was to return to therapy. (Id.)

Also, as stated above, claimant testified in her deposition that she worked for about 10 to 12 days in North Dakota during the potato harvest in the fall of 2014. (Ex. 13, pp. 27-28) Following this work, claimant noted an increase in her back pain, which she reported to her physical therapist on October 6, 2014. (Ex. 2, p. 83) In early September, 2014, claimant had described her back pain as "not that bad." (Ex. 2, p. 78)

Dr. Martin recorded on October 29, 2014, that claimant's symptoms were continuing to wax and wane. Dr. Martin, upon a review of the physical therapy note stated that "unfortunately, the physical therapist has put in this lady's brain that she needs to have advanced diagnostic imaging." (Ex. 4, p. 6) Dr. Martin went on to state that "[u]nfortunately, I think we are going to have to pursue with MRI imaging study of the lumbosacral spine to put this issue to bed." (Id.)

On November 6, 2014, claimant underwent a lumbar MRI, ordered by Dr. Martin. (Ex. 3, pp. 1-2) The MRI showed primarily "[m]ild facet degenerative changes L4-5 and L5-S1. Otherwise negative." (Ex. 3, p. 2)

On December 3, 2014, Dr. Martin reviewed the MRI scan, which he described as showing "no significant concern of any structural anomaly." (Ex. 4, p. 8) He then found that claimant had reached maximum medical improvement (MMI) and recommended a functional capacity evaluation (FCE). (Id.)

On December 9, 2014, claimant underwent an FCE. (Ex. 5, p. 1) The range of motion measurements were considered invalid, based on the assertion that claimant's "lumbar spine movement patterns improved significantly during distraction activities." (Ex. 5, p. 2) The report also notes that claimant's physical demand level is "Non-Classified," stating that claimant:

> [W]as unable to perform material handling activities with weights greater than 5 lb. The results of the Functional Capacity testing suggest that Ms. Solis has a greater material handling ability than he [*sic*] demonstrated today. The results will not provide an accurate aid in determination [*sic*] this patient [*sic*] return to work abilities.

(Ex. 5, p. 7) The report further states that, "Ms. Solis did exhibit distracted movement patterns throughout the Functional Capacity Evaluation. Ms. Solis [*sic*] trunk movement patterns improved with distraction." (Ex. 5, p. 4) Claimant testified that she was not attempting to influence the results of the FCE by giving less than full effort. (Tr. p. 45) The FCE also indicated that claimant "passed 13/28 validity criteria during the static strength test, 46%, suggesting invalid results, which cannot be used to help understand his [*sic*] functional ability." (Ex. 5, p. 4) Under the pain replication testing, "Ms. Solis demonstrated a non-organic pain response during which he [*sic*] was unable to consistently replicate two levels of force based on his [*sic*] pain perception. The result of the pain replication test is invalid." (Id.)

On January 28, 2015, claimant was seen again by Dr. Martin. He found that under the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, claimant would be in DRE Category I for the lumbar spine and he assigned zero percent impairment and no permanent restrictions. (Ex. 5, p. 41) Dr. Martin noted that it did not seem that claimant was continuing with her home exercises as instructed. (Ex. 5, p. 40) He suggested that claimant use over-the-counter anti-inflammatories or acetaminophen, as needed and he encouraged her to do home exercises, including walking and getting in a pool for activity. (Id.)

On February 26, 2016, Thomas Ripperda, M.D. issued a report following an independent medical evaluation (IME). (Ex. 6, p. 1) Dr. Ripperda confirmed that claimant "is not undergoing a home exercise program." (Ex. 6, p. 3) Claimant reported to Dr. Ripperda that "[s]he does not believe that she was ever instructed in a home exercise program or told to continue with her exercises that she was doing in therapy." (Id.) However, as stated above, On January 28, 2015, Dr. Martin had encouraged claimant to continue with home exercises. (Ex. 5, p. 40) Dr. Martin also previously encouraged claimant to follow through with her home exercise program on October 29, 2014 and again on December 3, 2014, stating that "[w]e have encouraged her to continue with an exercise based program that has been shown to her." (Ex. 4, pp. 7-8)

Dr. Ripperda found that as a result of her June 5, 2014 work injury, claimant sustained injury to her right ankle, which improved. (Ex. 6, p. 7) He also opined that claimant sustained "either a right SI joint traumatic dysfunction secondary to her fall . . . [or a] cluneal nerve irritation across the posterior iliac crest or a combination of the two."

(Ex. 6, p. 7) Dr. Ripperda stated that although sufficient time had elapsed to allow for MMI, he "would recommend further treatment and recommend holding off on assessment for maximum medical improvement at this point in time." (Id.) Dr. Ripperda recommended: right sacroiliac injections or oral steroid burst to try to calm down the SI joint and potentially improve any cluneal nerve irritation; utilizing some medications to assist with the neuropathic symptoms; and, noted that an SI joint locking belt may also provide some relief of symptoms. (Ex. 6, p. 8) Dr. Ripperda recommended these interventions before placing claimant at MMI. (Ex. 6, p. 9) Nevertheless, Dr. Ripperda considered the question of permanent impairment, stating that "[i]t is possible that she could fit within a DRE lumbar category 2 and qualify for some permanent impairment. However, I feel that additional treatment could improve her current symptom complaints . . . ." (Ex. 6, p. 7) Dr. Ripperda then opines that claimant sustained a five percent whole person impairment based on the assumption of claimant being classified in the DRE Category II concerning the lumbar spine per the AMA Guides. (Ex. 6, p. 8) Dr. Ripperda assigned no permanent restrictions stating that concerning "both the two above symptom complaints including SI joint dysfunction and cluneal nerve irritation, neither of these requires permanent restrictions." (Id.)

Concerning permanency, Dr. Ripperda stated it is "possible," not probable that claimant may be in the DRE Category II. (Ex. 6, p. 7) I find the treating physician, Dr. Martin, has provided the more persuasive opinion concerning MMI and permanency, having had multiple opportunities to examine and evaluate the claimant. Also, I find that the mere "possibility" that claimant may be placed in the DRE Category II for the lumbar spine is not sufficient to allow claimant to establish a permanent functional impairment.

Claimant testified that she is not currently receiving medical treatment for her work injury since being released by Dr. Martin in January 2015, except for maintaining a prescription for medication, which appears to have been started on May 11, 2016. (Tr. pp. 25-26; Ex. 15, p. 38) It appears that claimant had no treatment for her back pain following her release by Dr. Martin on January 28, 2015 until May 11, 2016, when she reported to the Sanford Medical Center that she was having back pain. It is noted that "[s]he states she had been getting along okay, until this past week. She has had increased pain radiating into her buttocks. She has been using Ibuprofen with no relief." (Ex. 15, p. 38) At that time, she was started on Mobic, Flexeril and tramadol and told to "[r]eturn if no improvement." (Id.) She did return on June 13, 2016, due to a cough, shortness of breath and an infected tooth, but did not discuss any back pain. (Ex. 15, p. 39)

Claimant testified at hearing that her pain has stayed the same since her injury. (Tr. p. 18; Ex. 13, p. 33) However, she told Dr. Ripperda that "[h]er pain has improved from her initial injury." (Ex. 6, p. 2) She advised Dr. Ripperda that her pain had reduced from 10/10 to 5-8/10. (Id.) Claimant testified that she believes her physical limitations have also stayed the same since the injury and that she cannot perform a job that requires her to be on her feet for long periods due to pain in her back and shooting pains down her leg. (Tr. p. 19) However, she advised Dr. Ripperda that "[s]he has not reported any significant activity change from prior to the injury to after." (Ex. 6, p. 2)

She advised Dr. Ripperda that she avoids running, biking and dancing due to fear of pain, but admits that she did not regularly engage in those activities prior to the work injury. (Id.)

Claimant stated at hearing that she wanted to try the treatment options suggested by Dr. Ripperda, which includes a right sacroiliac joint injection. (Tr. p. 26) The undersigned notes that claimant was previously offered a right sacroiliac joint injection by Dr. Martin, which she refused, in August, 2014. (Ex. p. 4)

I find that claimant's hearing testimony concerning her symptoms differed from the symptoms she described in her medical records. Claimant testified at hearing that shortly after the injury, her pain level was such that she "couldn't even stand" and "couldn't walk." (Tr. p. 14) However, the medical record from June 6, 2014, which discussed only her right ankle pain, states that she "is able to bear weight directly after the injury." (Ex. 2, p. 1) Further, the records that discuss claimant's back pain on June 13, 2014, describe "[m]ild spasm and tenderness on the right side of [her] back," and on June 16, 2014, her pain is described as "moderate." (Ex. 2, pp. 6-7)

Claimant described at hearing being fitted with a walking boot for her right ankle injury, but did not disclose in testimony that she already had the walking boot due to a prior right ankle injury one month earlier. (Tr. p. 13; Ex. 2, p. 1)

When claimant was asked via interrogatory to state whether she had previously sustained an injury to any part of her body affected by this work injury, claimant responded: "None." (Ex. 10, p. 20) That response was not accurate based on the right ankle injury she sustained one month prior. (Ex. 2, p. 1)

At the FCE, claimant exhibited distracted range of motion that was greater than her tested range of motion, which among other discrepancies led to a finding that the FCE was invalid. (Ex. 5, pp. 2, 4, 7)

Claimant was not progressing in physical therapy and the therapist suggested that she receive more diagnostic testing. Although Dr. Martin, the treating orthopedist doubted the necessity of an MRI, he nevertheless requested the same. (Ex. 4, p. 6) As he suspected, the MRI results were essentially negative and did not provide any insight into claimant's continued complaints of pain. (Ex. 3, p. 2)

I find that claimant's long gap in treatment from January, 2015 through May 2016 is contradictory to her testimony that she had severe back pain from this injury that has gone unchanged. I further find that neither the x-rays nor the MRI indicated any objective basis for her ongoing complaints of pain.

In consideration of whether or not claimant has carried her burden of proving that she sustained a permanent injury, such that an assessment of industrial disability should be made, both Dr. Martin and Dr. Ripperda agree that claimant should be assigned no permanent restrictions. Dr. Martin assigned a zero percent permanent

impairment. Dr. Ripperda stated that claimant could "possibly" qualify in the DRE Category II of the lumbar spine under the AMA Guides, which he then relied upon to assign a five percent body as a whole impairment. However, relying on a mere "possibility" is insufficient to carry her burden of proof of establishing permanency. I find that based primarily upon the opinions of Dr. Martin, the treating physician, that claimant has failed to carry her burden of proof to establish a permanent injury related to this work injury.

Having found that claimant has failed to establish permanency, the question of proper commencement date for permanent partial disability benefits is moot.

Concerning the issue of healing period, claimant asserts that healing period is owed for the period of June 5, 2014 through June 4, 2015, stating in her answers to interrogatories that one year is "the appropriate healing period." (Ex. 10, p. 24) However, I find that there is no particular event or occurrence related to June 4, 2015, such as: a return to work; designation of MMI; or indication that claimant is medically capable of returning to substantially similar employment that she was engaged in at the time of the injury. Further I find that there is evidence in the record that claimant returned to work immediately after the injury occurred and continued working for the period from June 5, 2014 through July 2, 2014. (Ex. 2, p. 19; Tr. p. 69)

I find that the employer was accommodating claimant's condition as reported by claimant to her medical providers on July 2, 2014. At that time, claimant told her physical therapist that she was working and was "allowed to sit as needed" and she "can also go home if pain increases." (Ex. 2, p. 9) Claimant reported that she was working about four hours per day under these accommodations. (Ex. 2, p. 9)

I further find that claimant was taken off work by Brenda Vis, PA on July 2, 2014 for one week and was off work from July 3, 2014 through July 10, 2014. (Ex. 2, p. 19) I find that claimant was paid for this week of temporary total disability, albeit several months after it was due. (Tr. pp. 69, 72)

I find that claimant was then continued off work by Ms. Vis on July 9, 2014, "until she is seen by the work comp physician." (Ex. 2, p. 24) Claimant was seen by Dr. Martin on July 23, 2014. (Ex. 4, p. 1) At that time, she was returned to work by Dr. Martin with restrictions of "10 pounds material handling with no bend, twist or squat, and instructions to alternate sit, stand and walk as necessary." (Ex. 4, p. 3) There is no evidence that defendant paid temporary benefits for the period of July 11, 2014 through July 23, 2014.

After this two week period off work, claimant returned to speak to her employer. She stated that she "didn't go back to work because . . . I wasn't doing well." (Ex. 13, p. 25) Claimant stated that they wanted her to stand on the concrete floor and she could not stand or sit for long. She inquired about doing secretarial or administrative type work, including answering phones, and was told that she would not be permitted to answer phones because her accent was difficult to understand. (Ex. 13, pp. 25-26)

Claimant did not explain how sitting while answering phones would be easier on the claimant's back than being allowed to alternate between sitting and standing as needed while doing her regular job, which she had been permitted to do in the past. (Ex. 2, p. 9) Also, claimant testified at hearing that she understood that she was not qualified to work in an office as an administrative assistant or to perform clerical work. (Tr. pp. 25, 60-61) Claimant then also stated that although she thought she was capable of obtaining the necessary education to perform clerical work, that she would not be able to do clerical work because her back hurts. (Tr. p. 61)

I find that the greater weight of the evidence presented, supports the conclusion that the employer provided accommodations for claimant's restrictions prior to July 3, 2014, and continued to offer accommodations in the production area after claimant was allowed to return to work with restrictions on July 24, 2014. However, claimant sought a specific accommodation to work in the office, which was not allowed. Claimant did not believe that she could continue in the production position due to her back pain and chose to stop working.

I find that claimant is entitled to temporary total disability benefits from July 3, 2014 through and including July 23, 2014.

Concerning alternate medical care, I find that at this time the employer is not offering any care. I further find that claimant continues to complain of pain and that the care proposed by Dr. Ripperda is reasonable. In fact, the same right sacroiliac joint injection was previously offered by the treating physician, Dr. Martin. (Ex. 4, p. 4) Therefore, I find that defendants' failure to provide care is unreasonable and that defendants should be ordered to provide the reasonable medical care recommended by Dr. Ripperda in his IME report of: right sacroiliac joint injection of oral steroid bust; utilization of gabapentin, Lyrica or a tricyclic antidepressant; and, an SI joint locking belt. (Ex. 6, p. 8)

CONCLUSIONS OF LAW

The first issue in this case is whether claimant has proven that she sustained a permanent injury such that an assessment of industrial disability related thereto should occur.

The party who would suffer loss if an issue were not established ordinarily has the burden of proving that issue by a preponderance of the evidence. Iowa Rule of Appellate Procedure 6.14(6)(e).

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

The question of causal connection is essentially within the domain of expert testimony. The expert medical evidence must be considered with all other evidence introduced bearing on the causal connection between the injury and the disability. Supportive lay testimony may be used to buttress the expert testimony and, therefore, is also relevant and material to the causation question. The weight to be given to an expert opinion is determined by the finder of fact and may be affected by the accuracy of the facts the expert relied upon as well as other surrounding circumstances. The expert opinion may be accepted or rejected, in whole or in part. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); IBP, Inc. v. Harpole, 621 N.W.2d 410 (Iowa 2001); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995). Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417 (Iowa 1994). Unrebutted expert medical testimony cannot be summarily rejected. Poula v. Siouxland Wall & Ceiling, Inc., 516 N.W.2d 910 (Iowa App. 1994).

When an expert opinion is based upon an incomplete history, the opinion is not necessarily binding upon the commissioner. The commissioner as trier of fact has the duty to determine the credibility of the witnesses and to weigh the evidence, together with the other disclosed facts and circumstances, and then to accept or reject the opinion. Dunlavey v. Economy Fire & Casualty Co., 526 N.W.2d 845 (Iowa 1995).

As stated above I have found that claimant has failed to carry her burden of proof concerning the establishment of a permanent injury and therefore is not entitled to receive industrial disability benefits.

The next issue for consideration is temporary benefits.

When an injured worker has been unable to work during a period of recuperation from an injury that did not produce permanent disability, the worker is entitled to temporary total disability benefits during the time the worker is disabled by the injury. Those benefits are payable until the employee has returned to work, or is medically capable of returning to work substantially similar to the work performed at the time of injury. Section 85.33(1).

I have found above that claimant was taken off work by the treating medical provider from July 3, 2014 through and including July 23, 2014, and chose not to return to work thereafter despite the employer's provision of accommodations.

I therefore conclude that defendants are obligated to pay temporary total disability benefits from July 3 2014 through and including July 23, 2014.

The next issue is claimant's request for alternate care under Iowa Code section 85.27.

Where an award for payments or agreement for settlement for benefits has been made, an employee may bring an action seeking a determination and order as to the employee's entitlement to medical treatment pursuant to section 85.27 at any time. Likewise, if an employer makes weekly indemnity benefits to the employee and does

not file a denial of liability with the commissioner and mail notice of that denial to the employee, both within six months of the commencement of weekly benefits, then the employee may bring an action seeking medical benefits under section 85.27 at any time. Iowa Code section 85.26(2).

Under Iowa law, the employer is required to provide care to an injured employee and is permitted to choose the care. Pirelli-Armstrong Tire Co. v. Reynolds, 562 N.W.2d 433 (Iowa 1997).

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

By challenging the employer's choice of treatment – and seeking alternate care – claimant assumes the burden of proving the authorized care is unreasonable. See Iowa R. App. P. 14(f)(5); Long v. Roberts Dairy Co., 528 N.W.2d 122 (Iowa 1995). Determining what care is reasonable under the statute is a question of fact. Id. The employer's obligation turns on the question of reasonable necessity, not desirability. Id.; Harned v. Farmland Foods, Inc., 331 N.W.2d 98 (Iowa 1983). In Pirelli-Armstrong Tire Co., 562 N.W.2d at 433, the court approvingly quoted Bowles v. Los Lunas Schools, 109 N.M. 100, 781 P.2d 1178 (App. 1989):

> [T]he words "reasonable" and "adequate" appear to describe the same standard.
>
> [The New Mexico rule] requires the employer to provide a certain standard of care and excuses the employer from any obligation to provide other services only if that standard is met. We construe the terms "reasonable" and "adequate" as describing care that is both appropriate to the injury and sufficient to bring the worker to maximum recovery.

The commissioner is justified in ordering alternate care when employer-authorized care has not been effective and evidence shows that such care is "inferior or less extensive" care than other available care requested by the employee. Long; 528 N.W.2d at 124; Pirelli-Armstrong Tire Co.; 562 N.W.2d at 437.

I have found above that defendants are not currently offering any care and that the same is unreasonable under the present circumstances. Claimant continues to complain of pain and Dr. Ripperda has suggested medical treatments that may improve

or finally eliminate claimant's symptoms. The sacroiliac injection was previously offered by Dr. Martin to address similar complaints and cannot be said to be unreasonable. The treatment recommendations proposed by Dr. Ripperda in his IME report are found to be reasonable and defendants are ordered to authorize the same.

The issue of determining the PPD commencement date is moot, having found that claimant is not entitled to permanency benefits.

ORDER

THEREFORE, IT IS ORDERED:

Defendants shall pay temporary total disability benefits for the period of July 3, 2014 through and including July 23, 2014.

Defendants shall be entitled to credit for all weekly benefits paid to date.

All weekly benefits shall be paid at the stipulated rate of one hundred thirty-three and 52/100 dollars ($133.52) per week.

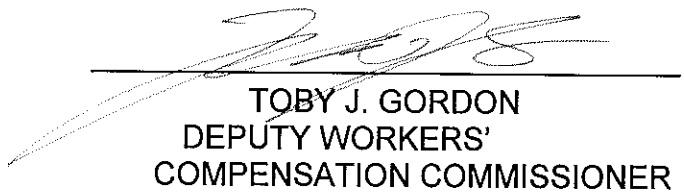
All accrued benefits shall be paid in a lump sum.

Defendants shall pay interest on any accrued weekly benefits pursuant to Iowa Code section 85.30

Defendants shall authorize the medical treatment recommended by Dr. Ripperda in paragraph 7, page 8, of his IME report dated February 26, 2016, which is contained in Joint Exhibit 6.

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

Signed and filed this 16th day of February, 2017.



TOBY J. GORDON
DEPUTY WORKERS'
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TJG/srs

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.