BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

MARY M. BUCHANAN,

Claimant,

vs.

PRESBYTERIAN HOMES & SERVICES, INC., d/b/a MILL POND,

Employer,

and

ZURICH NORTH AMERICA INSURANCE CO.,

Insurance Carrier,
Defendants.

File No. 5054053

ARBITRATION

DECISION

Head Note No.: 1803

STATEMENT OF THE CASE

Mary M. Buchanan, the claimant, seeks workers' compensation benefits from defendants, Presbyterian Homes & Services, Inc., d/b/a Mill Pond, the alleged employer, and its insurer, Zurich North American Insurance Co., as a result of an alleged injury on February 2, 2014. Presiding in this matter is Larry P. Walshire, a deputy Iowa Workers' Compensation Commissioner. An oral evidentiary hearing commenced on July 13, 2016, but the matter was not fully submitted until the receipt of the parties' briefs and argument on July 27, 2016. Oral testimony and written exhibits received into evidence at hearing are set forth in the hearing transcript.

Joint Exhibits are marked numerically (1-12). Claimant's exhibits were marked numerically (13-22). Defendants' exhibits were marked alphabetically (A-E). References in this decision to page numbers of an exhibit shall be made by citing the exhibit number or letter followed by a dash and then the page number(s). For example, a citation to claimant's exhibit 1, pages 2 through 4 will be cited as, "Ex 1-2:4" Citations to a transcript of testimony such as "Tr-4:5," either in a deposition or at hearing, shall be to the actual page number(s) of the original transcript, not to page number of a copy the transcript containing multiple pages.

The parties agreed to the following matters in a written hearing report submitted at hearing:

1. An employee-employer relationship existed between claimant and employer at the time of the alleged injury.

2. If the alleged work injury is found to have occurred and to be a cause of permanent disability, the type of disability is an industrial disability to the body as a whole.

3. At the time of the alleged injury, claimant was married.

4. The requested medical expenses submitted by claimant (Ex. 21) are fair and reasonable and causally connected to the medical condition(s) upon which the claim herein is based, but their causal connection to any work injury remains an issue to be decided herein.

ISSUES

At hearing, the parties submitted the following issues for determination:

I. Whether claimant received an injury arising out of and in the course of employment;

II. The extent of claimant's entitlement to weekly temporary total or healing period benefits, temporary partial disability benefits and permanent disability benefits;

III. The extent of claimant's entitlement to medical benefits; and

IV. The extent of claimant's entitlement to penalty benefits for an unreasonable delay or denial of weekly benefits pursuant to Iowa Code section 86.13.

FINDINGS OF FACT

In these findings, I will refer to the claimant by her first name, Mary, and to the defendant employer as Mill Pond.

From my observation of her demeanor at hearing including body movements, vocal characteristics, eye contact and facial mannerisms while testifying in addition to consideration of the other evidence, I found Mary credible.

At the time of hearing, Mary was 44 years old. She is married and has four grown children. (Ex. 15-223) She currently resides in Urbandale, Iowa with her husband, daughter, and granddaughter. (Ex. 20-6) At the time of her alleged injury, her son was 18 and attending school and her daughter was 20. She did not claim any of her children or grandchild on her tax returns. (See also Tr-18:20)

Mary graduated from Hoover High School in Des Moines, Iowa in 1990. (Ex. 14-214) After graduation, she attended two years at Drake University in Des Moines, Iowa taking general courses with a plan to go into elementary education. (Id.) Mary did not complete her degree. (Tr-20; Ex. 14-214) In 2005 Mary received training, to pass medication, through the Des Moines Area Community College ("DMACC") in Ankeny, Iowa. (Ex. 14-214) She also completed 150 hours of advanced training, again through DMACC, as a certified nursing assistant ("CNA") in 2010, and eventually obtained her Associates Degree in 2013. (Id.) Mary decided not to pursue further education to become a nurse following her injury due to outstanding student loan debt and the concern that she would be unable to perform the required duties of a nurse following her February 2, 2014 work injury. (Ex. 14-214; Ex. 20-32:36; Tr-20:21)

Mary's employment history consists primarily of positions as a waitress, office helper, and CNA and home health aide. While in high school, Mary worked as a part-time waitress at a Pizza Hut and as an office helper for a shared office doing basic filing, billing, and recordkeeping. (Ex. 15-227) In 1992, she spent the summer working with a road crew for the Department of Transportation. (Id.) In the fall of 1992, she worked as a nanny for two-year-old triplets. (Id.) Mary was a stay-at-home parent from 1993 to 2005, with the exception of the summers of 1997 and 1998 when she worked as a field inspector for Asgrow Seed. (Id.) Mary re-entered the workforce in 2005 to work as an Overnight Monitor for Good Connections, a group home in Boone, Iowa. (Ex. 15-226) From 2006 to 2009, she had overlapping positions as a Support Community Service Provider for Genesis Development, a group home, and a Home Health Aid for Wesley Life Home Health Care. (Id.) From 2008 to 2012, she also worked as a Community Support Service Provider for Lutheran Services in Ames, Iowa. (Id.) In 2010, this position overlapped with seasonal positions with 3M, Lowe's Garden Center, and Professional Homes. (Id.) From 2011 to 2012, she also worked as a CNA for Westhaven Community. (Ex. 15-225)

In August of 2012, Mary began working full-time as a CNA at Mill Pond, another nursing home facility. (Ex. 17-254; Ex. 16-245) She performed the typical duties of a CNA in the care and feeding of residents, including transporting them to and from bathrooms and food service rooms. Such work required standing and/or walking for long periods of time up to the entire shift, lifting or moving up to 50 pounds for up to the entire shift, and lifting or moving up to100 pounds, with the use of an assistive device, for up to a third of the shift as necessary to move and position residents. (Ex. 17-252) Mary routinely worked two double shifts and one single shift per week for a total of 40 hours per week. (Tr-39) She continued to work for Mill Pond until December of 2014. (Ex. 9-145; Ex. 20-23) At that time, she was under physician restrictions due to her injury. (Id.) Because the employer denied that her foot injury was work-related, they were unwilling to accommodate her restrictions and told her that she could not return to work until she was released to full-duty status by her own physician. (Ex. 9-145; Ex. 20-23)

Mary also assisted her brother on a handful of occasions, as a cook for Woody's Pickle Shack between 2013 and 2015. (Ex. 14-217; Ex. 15-235)

In this proceeding, Mary is claiming an initial left foot/ankle injury on February 2, 2014 and sequelae injuries to the low back following her return to work after her foot/ankle injury. There also is evidence of a sequelae injury to the right foot/ankle, but that is not asserted in this proceeding as it was not plead.

Mary has a history of plantar fasciitis in the left foot that required surgery in 2007. Mary states that it took approximately a year to fully recover from this procedure. (Tr-23:24) During a November 6, 2008 visit, Scot Thiel, M.D., Mary's family doctor, notes her previous surgery on her left foot for plantar fasciitis and differentiates the pain, on this date, as being located between the third and fourth metatarsal of her left foot. (Ex-1a) Dr. Thiel ordered an x-ray, which showed no fractures, prescribed anti-inflammatories and referred her to podiatry. She was seen again by Dr. Thiel, on April 28, 2008, for left ankle pain. (Ex. 3-23) Dr. Thiel again noted the history of plantar fasciitis surgery but noted that her "post-surgical areas [were] symptom free." (Id.) Unlike the plantar fasciitis, her pain on this date was on the anterior medial aspect of her left ankle. (Id.) Dr. Thiel treated Mary conservatively by having her continue the anti-inflammatories she was already taking and start a home stretching program. (Id.) There is no evidence that Mary was treated for left ankle/foot symptoms after April 28, 2008 until her February 2, 2014 injury.

Mary's medical history regarding her right foot and ankle includes a right ankle sprain in October of 2000, which was treated with a temporary brace, ice, and anti-inflammatories. (Ex. 1-1) There is no other evidence of right ankle pathology prior to the injury at issue in this case.

Mary also has a long history of back problems. Mary has received chiropractor care since she was 21 years old. (Ex. 2-5-22cc; Ex. 20-37; Tr-22:23) She testified these chiropractic visits were largely for maintenance of her intermittent back and neck pain, and her history of migraine headaches. (Tr-22) Claimant repeatedly reported to her chiropractor, Zach Weisbrod, D.C., that lifting, twisting, and standing aggravate her low back pain. (Ex 2-13:22cc) Between May 7, 2010 and December 9, 2013 (the last visit prior to the alleged injury in this case), Mary reported pain levels of 4-7/10 (10 being the highest or unbearable pain) for an average pain level of 5. (Ex. 2-13:22q) After the alleged injury until August 18, 2014, she reported to Dr. Weisbrod pain levels of 3-4/10 for an average pain level of 4. (Ex. 2-22t:22cc) There are no reports in evidence of chiropractic care after August 18, 2014.

On December 8, 2013, Mary asserts that she suffered a back injury while working for Mill Pond. (Ex. 17-267; Ex. 4-32) She was treated conservatively by occupational physician, Nicholas Bingham, M.D. (Ex. 4-26:31) She told the doctor that she developed left shoulder and low back pain after trying to get a very heavy patient out of the sling for a Hoyer lift and the patient had his arm over her shoulder and

slumped down. (Ex. 4-26). Later in her deposition, she testified she and a co-worker slid a patient to the end of a bed using a soaker pad. (Ex. 20-295) Dr. Bingham opined the injury was work related and treated Mary until January 27, 2014, at which time he placed Mary at maximum medical improvement ("MMI") and released her to full duty. (Ex. 4-32) Mary at that time reported no further low back problems. Her range of motion in the lumbar spine and her gait were within normal limits. (Id.) Mary dropped her claim for additional benefits for this work injury prior to hearing.

The remaining injury claim in this proceeding involves a left foot condition allegedly occurring on the morning of February 2, 2014. Mary asserts that she was working a double shift at this time performing duties as a shower aid. (Tr-30:31; Ex. 20-14:15) This required her to use the Hoyer lift to transport several residents from their beds or wheelchairs to the shower, and back again. (Id.) In order to transport patients in the Hoyer lift, she explained that she planted her feet shoulder width, or more, apart while using her body to turn the patients in the lift. (Id.) She states that she transported approximately 10 patients in the course of the morning of February 2, 2014. (Id.) While performing these tasks, Mary testified that she felt a sudden onset of constant burning and throbbing pain in the left ankle below the ankle bone which wrapped around the bottom of her heel and went up her leg. (Id.) Mary stated it was not unusual for her to have achy feet at the end of a double shift, but this pain was different due to its sudden onset and the fact that it happened so early into her shift. (Id.) Mary adds that this pain caused her to limp from that day forward. (Id.)

Mary did not immediately report the injury to her employer. She testified that she did not because she could not pinpoint any specific action she had done that morning, which might have caused an injury. (Tr-33:34) She also assumed the pain would resolve on its own. (Id.)

Defendants point out that Mary saw her chiropractor, Dr. Weisbrod, on February 5, 2014 and again on February 18, 2014 and the chiropractor did not mention any left foot or ankle pain or limp in his office notes. It was not until March 11, 2014 that Dr. Weisbrod noted left foot pain. However, after reviewing Dr. Weisbrod's notes from February 2006 thru August 2014, the only time the doctor noted left foot pain was on March 11, 2014, despite Mary's well documented left foot problems since 2007. (Ex. 2) Typically, only neck and back pain was noted and addressed, except on two occasions Dr. Weisbrod mentioned some right foot pain.

When her left foot/ankle pain did not resolve after the February 2014 event, Mary sought treatment from her family doctor, Dr. Thiel, on April 28, 2014. (Ex. 1-2; Tr-33:34) Dr. Thiel's office note indicates the pain came on suddenly, had been present for approximately two months, and was located in a different location than her prior plantar fasciitis. (Ex. 1-3) However, Dr. Thiel diagnosed Mary with heel pain consistent with plantar fasciitis. (Ex. 1-3:4; Tr-86)

Mary disagreed with Dr. Thiel's assessment that this was plantar fasciitis, and went to see her podiatrist, Charles Gilarski, D.P.M., for a second opinion. (Ex. 20-17; Tr-34, 86)

Dr. Gilarski's office notes June 4, 2014 state that Mary complained of a left foot problem which began 7-10 days ago. Dr. Gilarski also diagnosed plantar fasciitis, according to his office notation. (Ex. 3-24) However, Mary testified that Dr. Gilarski told her that she had a torn tendon in the foot from overworking the tendon and advised her to obtain a different job to get off of her feet. However, he did not impose a formal work restriction. (Tr-35) Mary said that she told Mill Pond's director of nursing what the doctor said and was told to just keep her informed. Mary said that she then began looking for other jobs. (Tr-36:37, 88) Mary attempted to have Dr. Gilarski change his diagnosis in that the prior plantar fasciitis was on the interior side of her foot and the current pain was on the outer side. (Tr-37) But, the doctor refused stating that the location of the pain would not change his diagnosis of plantar fasciitis. (Ex. 3-25)

Following her evaluation by Dr. Gilarski, Mary continued to work her full shifts and she states that her pain continued to increase. (Ex. 20-19) In August of 2014, she spoke with Amber Rogers and Rebecca Campbell, Mill Pond's director of nursing and head of human resources respectively, about the pain and her need for intermittent breaks to ice her foot, at which point her shifts were changed from double shifts to single shifts and her weekly hours reduced from 40 to 32 in order to see if the pain would improve. (Tr-35-37; Ex. 20-19:20) When asked if she wanted to turn this into workers' compensation, Mary initially declined due to Dr. Gilarski's assessment. (Tr-40)

When her reduced work scheduled failed to improve her left foot symptoms, Mary finally completed an incident report at Mill Pond on October 28, 2014 stating that in February 2014, she had a sudden onset of continuance pain in the foot, but she could not remember what she was doing before this occurred. (Ex. 17-278) Mill Pond then referred Mary to Dr. Bingham who had seen her for her shoulder and back issues in December 2013. In his office note of October 29, 2014, Dr. Bingham noted that Mary began having left foot pain in February 2014 and was told by her podiatrist to change jobs and lose weight and she did not want to leave her CNA work. (Ex. 4-34) Dr. Bingham stated that the causality of her pain was undetermined, "for now", as he was awaiting receipt of her prior medical records, but noted the mechanics of operating the Hoyer lift "would seem to place lateral stress on the foot." (Id.) Dr. Bingham assigned activity restrictions against using the Hoyer lift, prescribed anti-inflammatories, and requested a follow up in two weeks, at which time he would determine if a referral was warranted. (Id.)

On November 3, 2014, defendants sent Mary a letter indicating they had been unable to reach her in order to discuss her claim and asking her to contact them. (Ex. 16-243a)

On November 12, 2014, Dr. Bingham noted Mary had experienced some improvement since she was not using the Hoyer lift. (Ex. 4-36) Dr. Bingham was able to review some of Mary's past podiatry medical records, but not those from her family doctor. He found the notes of Dr. Gilarski at odds with what Mary states she was told by the doctor. He states that Mary was upset that he had records prior to February 2014. However, he found these past records to not have much bearing on her present foot condition. (Id.) He continued her restrictions while still awaiting receipt of the remaining records stating that causation is still undetermined. (Id.)

On November 24, 2014, defendants sent Mary a second letter stating that they were unable to speak with her and therefore had to base their decision to deny her claim based on the medical records reviewed to date. (Ex. 16-243c)

On November 26, 2014, Mary continued to report improvement from not maneuvering the Hoyer lift. She reported no pain during her shift the previous day and no pain upon waking up that morning. (Ex. 4-37a) Dr. Bingham stated he still had not received the records from Dr. Thiel, but determined that Mary needed evaluation by a podiatrist. (Ex. 4-37a) At the November 26, 2014, Dr. Bingham released Mary to full-duty, but stated if her symptoms return or worsen, the restriction of no use of a Hoyer lift would be reinstated. (Ex. 4-37a; Tr-44) On the work release form after this visit, Dr. Bingham checked marked a box indicating the foot problem was work related. (Ex. 3-38)

On November 29, 2014, during her first shift after being released to full duty, Mary states that her use of the Hoyer lift caused her pain to return to the point that she was unable to perform patient transfers. (Ex. 20-23; Tr-44) She then contacted Dr. Bingham's office and her former restriction against use of the lift was reinstated with an added restriction effective December 3, 2014 to avoid activities that put lateral stress on the foot. (Ex. 4-39) He again noted on the work release form that Mary's foot condition was work related. Mill Pond then sent Mary home with instruction that she could not return until she was released by her own doctor. (Ex. 20-23; Tr-46:47) Mary never returned to work at Mill Pond after November 29, 2014.

Upon referral by Dr. Bingham, Mary was seen on December 3, 2014 by podiatrist, Dana Plew D.P.M. (Ex. 5-40; Ex. 20-24) Mary told Dr. Plew that her foot pain started suddenly at work while using a lift to move a resident about ten months earlier. (Id.) Dr. Plew diagnosed peroneal tendonitis and ordered an MRI. (Ex. 5-41) The MRI of Mary's foot and ankle showed a split tear of the peroneus longus tendon on the left ankle. (Ex. 5-42:44) Dr. Plew's assessment on December 15, 2014 was a "nontraumatic rupture of other tendon." (Ex. 5-45) Dr. Plew provided a Cam boot to be worn 24 hours a day, with the exception of showering, and a note to remain off of work along with FMLA paperwork. (Id.) Dr. Plew indicated, on the FMLA form dated December 23, 2014, that Mary had been dealing with the ankle injury for ten months. (Ex. 5-48; Ex. 20-14) Dr. Plew assigned work restrictions of no lifting over five pounds, no twisting, and no standing longer than two hours at a time. (Ex. 5-49)

On January 26, 2015, Dr. Plew instructed Mary to be weight bearing in the Cam boot, applied kinesio tape, and recommended isometric peroneal exercises. (Ex. 5-50) On February 23, 2015, Dr. Plew ordered physical therapy and advised Mary to continue to wean herself off of the Cam boot. (Ex. 5-51) Mary attended eight physical therapy visits, between March 6 and April 14, with intermittent complaints of increased pain and soreness. (Ex. 6-60:72) On her follow up with Dr. Plew dated April 15, 2015, Mary stated she was in extreme pain following "wobble board" exercises at physical therapy and had been back in the Cam boot for the weekend. (Ex. 5-53) Dr. Plew ordered a second MRI and advised Mary to return to physical therapy while awaiting the MRI results. (Ex. 5, p. 53) Mary attended three more physical therapy visits while awaiting the MRI results. (Ex. 6, pp. 73-75) The MRI, performed on April 17, 2015, showed a new stress fracture of the medial cuneiform, at which point Dr. Plew referred Mary to Dr. Julie Albrecht for a surgical consultation and discontinued her physical therapy. (Ex. 5-54; Ex. 20-25; Ex. 6-76)

On July 20, 2015, Dr. Plew provided an opinion statement in which she opined that tears in the peroneal tendon can happen instantaneously (as the result of one wrong step) or develop gradually over time (as the result of severe tendonitis that an individual continues to walk on). (Ex. 5-57) Dr. Plew further opined that Mary's peroneal tendon tear likely occurred on February 2, 2014, when she was working as a shower aid and first noticed the pain while transferring patients. (Ex. 5-58) In addition, Dr. Plew opined that it is more probable than not that Mary's continued work duties at Mill Pond in the six months following the incident, worsened or aggravated her left peroneal tendon tear. (Ex. 5, p. 58)

Dr. Plew did not assign work restrictions during his treatment because Mary was not working at the time. (Ex. 5-58:59) However, Dr. Plew opined that appropriate work restrictions during the period he treated her would have included: no use of the mechanical lift, avoiding activities that put stress on the lateral left foot, and requiring the use of a Cam boot throughout her work shifts. (Ex. 5-59) Dr. Plew opined that Mary's 2007 surgery for plantar fasciitis is independent of her peroneal tendon tear as the two are unrelated conditions. (Ex. 5-59) Furthermore, in her opinion, Mary had not reached MMI as of her last visit of April 15, 2015 when Dr. Plew referred her to Julie Albrecht, D.P.M., for a surgical consultation. (Ex. 5, p. 59)

On April 29, 2015, Dr. Albrecht evaluated Mary and recommended proceeding with surgical intervention because she had received a "gamut of conservative options with no improvement." (Ex. 7-113:115) She supplied Mary with an ankle brace. (Id.) On May 28, 2015, Dr. Albrecht performed a peroneus brevis tendon repair, peroneal longus debridement and tendon repair, and tenosynovectomy of the left ankle. (Ex. 7-118)

On June 2, 2015, Dr. Albrecht prescribed pain medications and gave Mary instructions to remain non-weight bearing with the Cam boot. (Ex. 7-120) Mary received physical therapy between July 6 and July 27, 2015 and reported slow but steady improvement in her ankle symptoms. (Ex. 6-78:90) On July 29, 2015, Mary was

scanned for custom orthotics and was instructed to use the lace-up brace when walking on uneven surfaces, and was encouraged to finish her prescribed course of physical therapy. (Ex. 7-124) On August 14, 2015, the custom orthotics were dispensed. (Ex. 7-126) On September 9, 2015, records show that Mary's shoe gear failed and she received a cortisone injection to the left subtalar joint. Mary subsequently reported that she had no pain relief from the cortisone injection and NSAIDs were again prescribed. (Ex. 7-128) On November 3, 2015, Mary reported that the ankle pain remained unimproved after the cortisone injection and anti-inflammatories. Dr. Albrecht diagnosed synovitis and tenosynovitis of the left ankle and foot in addition to the torn tendon. (Ex. 7-129) Mary was instructed to proceed with the orthotics and contact the office if symptoms persisted for possible phonophoresis of the ankle joint. (Id.)

On December 7, 2015, Mary reported to Dr. Albrecht that her ankle pain was about the same. (Ex. 7-130) The doctor advised her to continue in her shoe gear and orthotics. (Id.) On February 8, 2016, Mary complained her orthotics hurt her feet and she was unable to wear them all day as instructed. (Ex. 7-131) Dr. Albrecht prescribed a new anti-inflammatory and advised continued use of the orthotics. (Id.) On March 15, 2016, Mary reported bilateral foot pain which she attributed to the orthotics. (Ex. 7-132) Dr. Albrecht again diagnosed Mary with synovitis and tenosynovitis and recommended a change to the prescribed anti-inflammatories and orthotics. (Ex. 7-132)

On March 28, 2016, Mary reported to Dr. Albrecht her pain had increased and her feet felt as if they were "broken." (Ex. 7, p. 133) She again stated that she was unable to continue wearing her orthotics, and had been walking on the balls of her feet with her toes pulled up in order to get some relief. (Ex. 7-133) In addition, Mary noted the pain was now worse on her right side than her left with a pain rating of 8/10. (Ex. 7-133) Dr. Albrecht diagnosed primary osteoarthritis of the bilateral feet and ankles in addition to synovitis and tenosynovitis of the left foot/ankle. (Ex. 7-133)

On May 24, 2016, Mary reported that her pain rapidly flared back up after coming off of the Naproxen. (Ex. 7-133c) Mary indicated she was working a waitressing job at Hy-Vee, which was all she felt qualified for at the time. (Ex. 7-133c) Dr. Albrecht added a heel lift to her bilateral orthotics and advised her to resume the Naproxen. (Ex. 7-133c) In addition, Dr. Albrecht advised Mary to remain off work for four weeks and discussed that, due to Mary's chronic foot issues, she may be better suited for sit down duty. (Id.) On June 21, 2016, Mary returned with complaints that her foot pain had not improved with the Naproxen, physical therapy, or changes to her orthotics. (Ex. 7-136a) Dr. Albrecht again reiterated that a sit down job would be easier on her feet. (Id.)

On June 13, 2016, Dr. Albrecht submitted an opinion statement regarding Mary's condition. Dr. Albrecht agrees with Dr. Plew's assessment that Mary's left peroneal tendon tear likely occurred in February of 2014 when she felt a sharp pain in her left foot while transferring residents in a Hoyer lift. (Ex. 7-134) Dr. Albrecht further agrees that the CNA duties Mary performed for Mill Pond in February 2014 and the months following the initial incident worsened or aggravated her left peroneal tendon tear and limb pain. (Id.) Regarding Mary's ongoing pain in the left ankle, Dr. Albrecht stated she

may have been predisposed to an arthritic problem but walking poorly aggravates the joint. (Ex. 7-135) She opined that Mary's ongoing left ankle pain was causally related to the original left peroneal tendon tear. Dr. Albrecht opined that Mary's left subtalar joint synovitis and the left peroneal tendon rupture go hand in hand and synovitis was directly and causally related to the left peroneal tendon rupture and was treated with therapy, orthotics, and injections. (Ex. 7, p. 135)

Mary now complains of symptoms in both ankles with the right ankle pain being in the same joint as the left foot. (Ex. 7-135) Dr. Albrecht opined that she was predisposed for an arthritic or mechanical problem, however, the left peroneal tendon tear caused her to walk with a disturbed gait for an extended period of time which was a factor in the onset of her right ankle pain. (Id.) Dr. Albrecht's current diagnosis is synovitis of her fourth and fifth metacuboid joints (also known as the Lisfranc joints) bilaterally for which she continues to receive treatment. (Ex. 7-136) Dr. Albrecht opined Mary will likely require daily anti-inflammatories for the rest of her life to treat her ongoing synovitis. (Ex. 7-136)

Dr. Albrecht placed Mary at maximum medical improvement (MMI) with regard to her tendon tear on or about September 28, 2015, or four months post-op. (Ex. 7-136) Regarding Mary's left synovitis, the doctor opines she reached MMI on December 7, 2015 and she reached MMI regarding the bilateral synovitis following a month of physical therapy, which concluded just before the date of hearing. (Ex. 7, p. 136) Dr. Albrecht assigned permanent restrictions of avoiding prolonged standing, stating Mary would be better suited for a sit-down job, in addition to pushing, pulling, and lifting restrictions of no greater than 30-50 pounds. (Id.)

As noted in Dr. Albrecht's opinion statement, Mary suffered an altered gait over an extended period of time following her left peroneal tendon tear and subsequent surgical repair. (Ex. 7-135) Mary testified that she had an altered gait due to the limp following her injury and, later, due to the difference in leg length caused by the Cam boot. (Tr-49:50, 57:59) She further testified she was using an ill-fitting scooter, following the tendon repair, as she did not have the money to purchase one on her own and had to borrow one from a friend. (Tr-53) This caused a further altered gait as her left hip was raised higher than the right, due to the improper scooter height. (Id.) Due to this altered gait, Mary experienced an exacerbation of her low back pain for which she sought care on July 7, 2015, from Patrick Kasper, PA-C. (Ex. 8-137) Mary stated she had been recovering from ankle surgery and attributed the exacerbation of her low back pain to her limp. (Ex. 8-137) Mr. Kasper diagnosed Mary with back pain and recommended a course of muscle relaxers. (Ex. 8-139) On August 11, 2015, Mary reported that her back pain was unimproved by the muscle relaxers, home exercises, and ice. (Ex. 8-140) She again attributed her back pain to her limp. (Ex. 8, p. 140) Mr. Kasper referred Mary to physical therapy and recommended she continue her home exercise program and Aleve. (Ex. 8-142) She had six physical therapy appointments for her low back pain between August 18 and September 14, 2015. (Ex. 6-91:109) During these visits, the physical therapist noted an "analgesic gait." (Ex. 6-92, 102)

On September 11, 2015, Mary sought further treatment for her back pain from Megan Bradley, ARNP. (Ex. 10-150) Ms. Bradley diagnosed low back pain without sciatica and prescribed more physical therapy and muscle relaxer. (Ex. 10-152) On February 9, 2016, Mary reported that her back pain was consistently present and rated it at a 3/10, increasing to 10/10 with prolonged standing. (Ex. 10-157) Mary attributed the exacerbation of her back pain to her ankle injury and the extended period in her Cam boot. (Ex. 10-157) On February 9, 2016, a lumbar x-ray which showed degenerative disc disease, greatest at L5-S1, with lower lumbar facet arthritis and mild endplate hypertrophic spurring. (Ex. 10-159) A follow up MRI completed February 16, 2016, showed moderate bilateral facet joint osteoarthritic changes at the L4-L5 level. Ms. Bradley then referred Mary to Central States Medicine for pain management. (Ex. 11-162)

On March 3, 2016, Mary saw Andrzej Szczepanek, M.D., a pain management specialist for her low back pain. (Ex. 11-163) The pain is listed as being located in the midline lumbar region and bilaterally with the left being worse than the right and reported as moderately impairing her functional abilities and sleep. (Ex. 11, p. 163) Dr. Szczepanek diagnosed sacroiliitis, osteoarthritis of the lumbar spine, lumbar and/or sacral osteoarthritis, and arthropathy of the lumbar facet joint and administered a left sacroiliac joint injection. (Ex. 11-166) On March 24, 2016, Mary reported improvement of her symptoms following the joint injection. (Ex. 11, p. 169) Dr. Szczepanek advised Mary to continue with her home exercise program and to return if she experienced any problems. A left medial branch block was scheduled. (Ex. 11-170:171) On March 29, 2016, Dr. Szczepanek administered a left L3, L4 medial branch and L5 dorsal primary ramus block. (Ex. 11, pp. 172-74) Mary reported 70 percent pain relief, following the procedure, and Dr. Szczepanek noted improved range of motion of the lumbosacral spine. (Id.) Dr. Szczepanek opined the procedure was successful and scheduled a follow up appointment in one week to confirm. (Id.)

On April 12, 2016, Mary underwent a confirmatory procedure of the left medial branch block with Dr. Szczepanek. (Ex. 11-175) Following this procedure, Mary reported 100 percent improvement of her symptoms, and Dr. Szczepanek again noted improvement in her lumbosacral range of motion. (Ex. 11-177) Based on Mary's two successful diagnostic blocks, Dr. Szczepanek recommended a radiofrequency ablation be scheduled. (Ex. 11-177, 178) The recommended radiofrequency ablation was performed on May 3, 2016. (Ex. 11-179) Mary testified that she has obtained relief of her back pain from these procedures and at the time of hearing, her feet are now the most restrictive. (Tr-63)

After leaving Mill Pond on October 29, 2014, Mary was off work until sometime in October 2015. (Tr-65, 95) She worked part-time, from October 2015 to January 2016, as a home attendant for Caring Hearts in West Des Moines, Iowa, but Mary could not recall the specific date she started at Caring Hearts. (Tr-65; Ex. 14-217:218; Ex. 15-235) In addition, she held a part-time waitressing position with Hy-Vee in Urbandale, Iowa, from October 31, 2015 until May of 2016 when Dr. Albrecht advised that she should remain off work for four weeks due to her increased foot pain. (Ex. 7-133c; Ex.

15-235; Ex. 18-287; Tr-68) Mary states that she was forced to resign from her waitressing position due to her pain. (Tr-68) Mary is now privately employed to care for an elderly woman to assist with basic tasks like administering medications and assisting in overnight trips to the bathroom three nights a week. (Tr-69:70)

On August 26, 2015, at the request of defendants, Mary was evaluated by Charles Mooney, M.D., an occupational medicine physician. Dr. Mooney opined that there is no evidence that an injury occurred on February 2, 2014 and, instead, her tendon tear is "consistent with a chronic instability of the ankle." Dr. Mooney states that a sudden onset of pain in her left foot and continuous pain since is not supported by the records of Dr. Thiel and Dr. Gilarski. (Ex. A, p. 9) Dr. Mooney further opined that claimant's ongoing back symptoms would not be related to the alleged acute injury of February 2, 2014. However, he did state that the low back problems are not uncommon with individuals who have a prolonged immobilization of the lower extremity. (Id.)

At the request of her attorney, Mary was evaluated on June 3, 2016 by Sunil Bansal, M.D., another occupational medicine physician. (Ex. 12-182-209) He first opined that he agrees with Dr. Bingham that she fully recovered from her back injury in December 2013 and had no permanent restrictions or impairment from that injury. (Ex. 12-199:201)

Regarding the left peroneal tendon tear and synovitis, Dr. Bansal opined that the mechanism of planting her feet and twisting while pushing a Hoyer lift would cause stretching and injury to the peroneal tendons from the traction pressure. (Ex. 12-201) Furthermore, Dr. Bansal stated the chronological sequence of events and mechanism of injury provided are consistent with the development of Mary's symptoms. (Ex. 12-205) Dr. Bansal further stated he agrees with Dr. Plew and Dr. Albrecht that Mary's continued work as a CNA for Mill Pond, following the initial incident, worsened or aggravated her left peroneal tendon tear and limb pain. (Ex. 12-206:207) Dr. Bansal placed Mary at MMI for her foot injury as of March 28, 2016, the date of her last appointment with Dr. Albrecht, and assigned a lower extremity impairment of 11 percent which correlates to a 4 percent impairment of the whole body, according to the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition (AMA Guides). (Ex. 12-202) Dr. Bansal imposed permanent restrictions of no prolonged walking more than 30 minutes at a time along with instructions to avoid multiple steps, stairs, uneven terrain, or ladders, and states she may require subtalar arthrodesis in the future if her post-traumatic arthritis worsens. (Id.)

Dr. Bansal also opines that Mary's foot injury on February 2, 2014 was a substantial contributing factor in the development of her current low back pain due to her altered gait which is a permanent problem because the altered gait is the result of a permanent ankle injury. (Ex. 12-204) He opined that Mary's back condition reached MMI on February 9, 2016 and this conditions constitutes a 3 percent permanent partial impairment to the body as a whole under the AMA Guides, Fifth Edition. (Id.) For the back condition, he recommends no lifting over 20 pounds occasionally and no lifting over 10 pounds frequently. (Ex. 12-205)

At the request of her attorney, Mary's vocational status was evaluated by Carma Mitchell, M.S. a vocational rehabilitation consultant. According to her uncontroverted opinions, the restrictions by Drs. Albrecht and Bansal is a cause of a 64.2 percent loss of access to the labor market.

Ultimate Findings:

I find that on or about February 2, 2014, Mary suffered a left foot/ankle injury consisting of a torn ligament and later on synovitis in the left ankle/foot which arose out of and in the course of her employment over a period of time. A manifestation date of February 2, 2014 is reasonable as this was the date Mary first noticed her pain. Mary initially was not aware of the mechanism of injury due to physician's failing to properly diagnose her injury. This led Mary to provide somewhat inconsistent histories to initial physicians as to the cause of the pain. The initial diagnosis of plantar fasciitis by Drs. Thiel and Gilarski was incorrect as demonstrated by a subsequent MRI. The injury was eventually correctly diagnosed and treated by Drs. Bingham and Albrecht. I disagree with Dr. Mooney that a history of sudden onset of pain and continuous pain thereafter is supported by the office notes of Dr. Thiel. I find the history of only recent onset by Dr. Gilarski as inconsistent with the notes of Dr. Thiel and claimant's credible testimony. As it turns out, Mary was correct in her disagreement with the assessments by Drs. Thiel and Gilarski. I find Mary's explanation for her delay in reporting the work injury credible in that she was initially relying on the views of her doctors at the time.

I find that as a result of her February 2, 2014 work injury, Mary has suffered a 11 percent permanent partial impairment to her left leg which converts to a 4 percent whole person impairment as opined by Dr. Bansal and permanent restrictions of avoiding prolonged standing and pushing, pulling, and lifting no greater than 30-50 pounds as opined by Dr. Albrecht and further restrictions from Dr. Bansal of no prolonged walking more than 30 minutes and avoid multiple steps, stairs, uneven terrain, or ladders. Dr. Albrecht did not provide a percentage rating. These opinions are based on a correct assessment of the injury. Dr. Mooney did not believe there was an injury based on the incorrect views of Drs. Thiel and Gilarski.

I find as a sequelae of her left foot injury, Mary has suffered a permanent injury to her low back from her altered gait due to an aggravation of a prior, long standing arthritic condition of the low back. This condition constitutes a cause of a 3 percent permanent partial impairment to the body as a whole, and permanent activity restrictions of no lifting over 20 pounds occasionally and no lifting over 10 pounds frequently. Although Dr. Mooney did not believe there was an initial foot injury, he admitted that gait and subsequent back problems are not uncommon. Essentially, her foot and back problems has limited her employment to sedentary work.

Mary's combined permanent impairment from her initial leg injury and her sequelae back injury is 7 percent to the body as a whole using the Combined Values Chart on page 606 of the AMA Guides, Fifth Edition.

Mary did not achieve maximum medical improvement from her leg and back injuries until February 9, 2016 as opined by Dr. Bansal.

Although Mary is only employed as a part-time home health care aid, her current employment is not representative of her current earning capabilities. Mary has not shown by the evidence that she is unemployable or that suitable sedentary work is not available to her.

However, given her restrictions, age, education and work experience, she is prohibited from nursing assistant jobs, the occupation for which she is best suited. Her age limits her ability to retrain.

From examination of all of the factors of industrial disability, it is found that the work injury of February 2, 2016 was a cause of a 65 percent loss of earning capacity.

Mary left Mill Pond due to Dr. Bingham's restrictions never to return on November 29, 2014. From sometime in August 2014 to the time she left Mill Pond, she was working fewer hours than she was at the time of the injury. After leaving Mill Pond she was employed in various capacities beginning in October 2015 until she reached MMI on February 9, 2016. While there are some wage records from Mill Pond in evidence, Mary stated that she also worked part-time for her brother between 2013 and 2015. There are no wage records for her post Mill Pond employments. Therefore, I am unable to find what Mary's actual weekly earnings were between August 2014 and October 29, 2014 and from October 2015 to February 9, 2016 for the purpose of calculating permanent partial disability benefits.

I find that Mary was off work completely due to her work related injuries from October 30, 2014 until October 1, 2015, a total of 48.143 weeks.

Mary's uncontroverted testimony establishes that she was married and supported her son, daughter and grandchild at the time of her work injury.

I find that the unpaid medical expenses listed in Exhibit 21 which total $3,572.48 constituted fees and charges for reasonable and necessary treatment of the work injury of February 2, 2014.

CONCLUSIONS OF LAW

I. 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 Elec. 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.

When the injury develops gradually over time, the cumulative injury rule applies. The date of injury for cumulative injury purposes is the date on which the disability manifests. Manifestation is best characterized as that date on which both the fact of injury and the causal relationship of the injury to the claimant's employment would be plainly apparent to a reasonable person. The date of manifestation inherently is a fact based determination. The fact-finder is entitled to substantial latitude in making this determination and may consider a variety of factors, none of which is necessarily dispositive in establishing a manifestation date. Among others, the factors may include missing work when the condition prevents performing the job, or receiving significant medical care for the condition. For time limitation purposes, the discovery rule then becomes pertinent so the statute of limitations does not begin to run until the employee, as a reasonable person, knows or should know, that the cumulative injury condition is serious enough to have a permanent, adverse impact on his or her employment. Herrera v. IBP, Inc., 633 N.W.2d 284 (Iowa 2001); Oscar Mayer Foods Corp. v. Tasler, 483 N.W.2d 824 (Iowa 1992); McKeever Custom Cabinets v. Smith, 379 N.W. 2d 368 (Iowa 1985).

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

In the case sub judice, I found that claimant carried the burden of proof and demonstrated by the greater weight of the evidence that she suffered a cumulative trauma injury on February 2, 2014 arising out of and in the course of employment with Mill Pond. I also found as a result of the initial injury, a sequelae injury to her low back. Iowa has a long history of compensating sequelae injuries which began with the Iowa Supreme Court's classic holding in Oldham v. Scofield & Welch, 222 Iowa 764, 266 N.W. 480 (1936). See also, Workers' Compensation, Iowa Practice 15, (2014-2015), section 4:4. The Court stated as follows in Oldham:

> If an employee suffers a compensable injury and thereafter suffers further disability which is the proximate result of the original injury, such further disability is compensable. If an employee suffers a compensable injury and thereafter returns to work and, as a result thereof, his first injury is aggravated and accelerated so that he is greater disabled than before, the entire disability may be compensated for.

Oldham, 222 Iowa 764 at 767, 266 N.W. 480 at 481 (1936).

II. 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).

A treating physician's opinions are not to be given more weight than a physician who examines the claimant in anticipation of litigation as a matter of law. Gilleland v. Armstrong Rubber Co., 524 N.W.2d 404, 408 (Iowa 1994); Rockwell Graphic Systems, Inc. v. Prince, 366 N.W.2d 187, 192 (Iowa 1985).

The extent of claimant's entitlement to permanent disability benefits is determined by one of two methods. If it is found that the permanent physical impairment or loss of use is limited to a body member specifically listed in schedules set forth in one of the subsections of Iowa Code section 85.34(2)(a-t), the disability is considered a scheduled member disability and measured functionally. If it is found that the permanent physical impairment or loss of use is to the body as a whole, the disability is unscheduled and measured industrially under Iowa Code subsection 85.34(2)(u). Graves v. Eagle Iron Works, 331 N.W.2d 116 (Iowa 1983); Simbro v. DeLong's Sportswear, 332 N.W.2d 886, 887 (Iowa 1983); Martin v. Skelly Oil Co., 252 Iowa 128, 133; 106 N.W.2d 95, 98 (1960).

Industrial disability was defined in Diederich v. Tri-City R. Co., 219 Iowa 587, 593; 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. However, consideration must also be given to the injured worker's medical condition before the injury, immediately after the injury and presently; the situs of the injury, its severity, and the length of healing period; the work experience of the injured worker prior to the injury, after the injury, and potential for rehabilitation; the injured worker's qualifications intellectually, emotionally and physically; the worker's earnings before and after the injury; the willingness of the employer to re-employ the injured worker after the injury; the worker's age, education, and motivation; and, finally the inability because of

the injury to engage in employment for which the worker is best fitted, Thilges v. Snap-On Tools Corp., 528 N.W.2d 614, 616 (Iowa 1995); 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).

Although the initial injury was a scheduled injury to the leg, that injury later was a cause of low back injury resulting in a permanent impairment to the body as a whole. Iowa has adopted the majority view set forth by Professor Arthur Larson in his treatise on workers' compensation law concerning "spill-over" effects of a scheduled injury. Larson states that if the effects of the loss of the member extend to other parts of the body and interfere with their efficiency, the schedule allowance for the lost member is not exclusive. 4-87 Larson's Workers' Compensation Law Section 87.02. Therefore, various spill-over conditions resulting from a scheduled injury are now compensated industrially in this state. Collins v. Department of Human Services, 529 N.W.2d 627, 629 (Iowa App. 1995); Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660-664 (1961); (regional pain syndrome formerly called Sudeck's atrophy, causalgia or reflex sympathetic dystrophy (RSD); Blacksmith v. All-American, Inc., 290 N.W. 2d 248 (Iowa 1980) (phlebitis); Mortimer v. Fruehauf Corp., 502 N.W.2d 12, 17 (Iowa 1993) (psychological or mental conditions); Dowell v. Wagner, 509 N.W. 2d 134, 136 (Iowa 1993) (phantom pain); and; Enteshamfar v. UTA Engineered Systems Div., 555 N.W.2d 450 (Iowa 1996) (tinnitus). In each of these cases, this agency and the courts rejected the argument that these complications or effects which extend beyond the initial location of the injury were anticipated in the schedule.

Pursuant to Iowa Code section 85.34(2)(u) , Iowa has adopted the so-called "fresh start rule." Industrial loss now is no longer a measure of claimant's disability from all causes after which we then apportion out non-work causes and leave in work related causes under the full responsibility rule. The percentage of industrial loss now is the loss of earnings capacity from what existed immediately prior to the work injury. This means that an already severely disabled person before a work injury can have a high industrial loss because the loss is calculated in all cases from whatever his earning capacity was just before the injury and what it was after the injury, not the loss as compared to a healthy non-disabled person. In other words, all persons, start with a 100 percent earning capacity regardless of any prior health or disability conditions. The rationale for this approach is that an employer's liability for workers' compensation benefits is dependent upon that person's wages or salary. Consequently, the impact, if any, of any prior mental or physical disability upon earning capacity is automatically factored into a person's wages or salary by operation of the competitive labor market and there is no need to further apportion out that impact from any workers' compensation award. Roberts Dairy v. Billick, 861 N.W.2d 814 (Iowa 2015); Steffan v. Hawkeye Truck & Trailer, File No. 5022821 (App. September 9, 2009).

Loss of access to the labor market is often of paramount importance in determining loss of earning capacity, although income from continued employment should not be overlooked in assessing overall disability. Ellingson v. Fleetguard, Inc.,

599 N.W.2d 440 (Iowa 1999); Bearce v. FMC Corp., 465 N.W.2d 531 (Iowa 1991); Collier v. Sioux City Community School District, File No. 953453 (App. February 25, 1994); Michael v. Harrison County, Thirty-fourth Biennial Rep. of the Industrial Comm'r, 218, 220 (App. January 30, 1979).

Although claimant is closer to a normal retirement age than younger workers, proximity to retirement cannot be considered in assessing the extent of industrial disability. Second Injury Fund of Iowa v. Nelson, 544 N.W.2d 258 (Iowa 1995). However, this agency does consider voluntary retirement or withdrawal from the work force unrelated to the injury. Copeland v. Boones Book and Bible Store, File No. 1059319 (App. November 6, 1997). Loss of earning capacity due to voluntary choice or lack of motivation is not compensable. Id.

Assessments of industrial disability involve a viewing of loss of earning capacity in terms of the injured workers' present ability to earn in the competitive labor market without regard to any accommodation furnished by one's present employer. Quaker Oats Co. v. Ciha, 552 N.W.2d 143, 158 (Iowa 1996); Thilges v. Snap-On Tools Corp., 528 N.W.2d 614, 617 (Iowa 1995).

In the case sub judice, I found that claimant suffered a 65 percent loss of her earning capacity as a result of the work injury. Such a finding entitles claimant to 325 weeks of permanent partial disability benefits as a matter of law under Iowa Code section 85.34(2)(u), which is 65 percent of 500 weeks, the maximum allowable number of weeks for an injury to the body as a whole in that subsection.

Claimant's entitlement to permanent partial disability also entitles her to weekly benefits for healing period under Iowa Code section 85.34 for his absence from work during a recovery period until claimant returns to work; until claimant is medically capable of returning to substantially similar work to the work she was performing at the time of injury; or, until it is indicated that significant improvement from the injury is not anticipated, whichever occurs first.

In this case, claimant never returned to similar work. I found that claimant did not reach MMI until February 9, 2016. However, she returned to part-time work in October 2015. I found she was off work due to her work injury from October 30, 2014 through October 1, 2015, a total of 48.143 weeks. Healing period benefits shall be awarded accordingly.

Claimant may be eligible for temporary partial disability benefits due to her reduced hours after the initial injury and her part-time work before she reached MMI. However, the record presented did not allow me to make findings as to her actual earnings each week, which is necessary to calculate temporary partial disability benefits pursuant to Iowa Code section 85.33(4). Consequently, such benefits cannot be awarded.

The dispute on rate only involves claimant's entitlement to exemptions as claimant in her post hearing brief stipulated to gross weekly earnings of $355.83 at the time of the injury.

This agency for many years has held that entitlement to exemptions in weekly rate determinations is governed solely by payroll withholding rules under the Internal Revenue Code and applicable regulations. Iowa Code section 85.61(6) & (9), Keeling v. Cedar Rapids Community Schools, File No. 891809 (App. February 26, 1993); see also Iowa Workers' Compensation Law and Practice, section 12.2, p. 128.

I found that claimant was married and supported three dependents. However, she stated that her children claimed themselves as dependent so they could obtain larger refunds. I assume her daughter claimed her child. Under IRS rules, claimant would not be allowed to claim these exemptions. Therefore, claimant is entitled to a total of two exemptions for herself and her husband for purposes of calculating her weekly rate of compensation. Using the commissioner's published rate booklet for an injury in February 2014, claimant is entitled to a weekly rate of $252.51.

III. Pursuant to Iowa Code section 85.27, claimant is entitled to payment of reasonable medical expenses incurred for treatment of a work injury. Claimant is entitled to an order of reimbursement if he/she has paid those expenses. Otherwise, claimant is entitled only to an order directing the responsible defendants to make such payments directly to the provider. See Krohn v. State, 420 N.W.2d 463 (Iowa 1988).

In the case at bar, I found that the requested medical expenses in Exhibit 21 were incurred for reasonable and necessary treatment of the work injury. They shall be awarded.

IV. Claimant seeks additional weekly benefits under Iowa Code section 86.13 (4), That provision states that if a delay in commencement or termination of benefits occurs without reasonable or probable cause or excuse, the industrial commissioner shall award extra weekly benefits in an amount not to exceed 50 percent of the amount of benefits that were unreasonably delayed or denied if the employee demonstrates a denial or delay in payment or termination of benefits and the employer has failed to prove a reasonable or probable cause or excuse for the denial, delay or termination of benefits. (Iowa Code section 85.13(4)(b)) Iowa Code section 86.13(4)(c) provides that a reasonable or probable cause or excuse must satisfy the following requirements:

(1) The excuse was preceded by a reasonable investigation and evaluation by the employer or insurance carrier into whether benefits were owed to the employee;

(2) The results of the reasonable investigation and evaluation were the actual basis upon which the employer or insurance carrier contemporaneously relied to deny, delay payment of, or terminate benefits;

(3) The employer or insurance carrier contemporaneously conveyed the basis of the denial, delay in payment, or termination of benefits to the employee at the time of the denial, delay or termination of benefits.

The employer has the burden to show a reasonable and probable cause or excuse. A "reasonable basis" for denial of the claim exists if the claim is "fairly debatable." City of Madrid v. Blasnitz, 742 N.W.2d 77, 83 (Iowa 2007); Christensen v. Snap-on Tools Corp., 554 N.W.2d 254 (Iowa 1996); Robbennolt v. Snap-on Tools Corp., 555 N.W.2d 229 (Iowa 1996)

In this case, the claim was denied benefits in a letter to claimant dated November 24, 2014 on the basis of defendants' investigation and claimant's failure to respond to inquiries. (Ex. 16-243c) The results of the investigation were not disclosed. Presumably, this was based on the views of the two initial physicians, Drs. Thiel and Gilarski. However, their own authorized physician, Dr. Bingham at that time clearly indicated he felt her problems were work related and defendant did not explain to claimant why they rejected his views. Another letter was sent to claimant in January 2015 stating that the claim is denied and again no reasons for the denial were provided to claimant. (Ex. 16-243d) Defendants assert a lack of causation issue, but there is no evidence of any further investigation until they requested an evaluation by Dr. Mooney December 2013.

I hold that the initial denial was unreasonable because it failed to comply with Iowa Code section 85.13 which requires that claimant be notified of the results of a supposed investigation. I hold that this failure continued until claimant's attorney received responses from defendants as to the reasons for their denial in late 2015. At any rate, continued reliance on the views of Drs. Thiel and Gilarski to deny the claim on causation was unreasonable after the MRI revealed a torn tendon and Dr. Plew provided a diagnosis of a torn tendon on December 15, 2014, rendering any prior diagnosis invalid. However, the causation issue became fairly debatable after Dr. Mooney issued his views on August 26, 2015. Consequently, defendants unreasonably withheld benefits between the date of injury and August 26, 2015. Also, Dr. Mooney's views cannot be used to show the reasonableness of defendants' prior denial of weekly benefits. No longer can employers use a subsequent investigation to justify a prior denial or delay of weekly benefits. Pettengil v. American Blue Ribbon Holdings, LLC, File No. 5038552 (Remand Dec. on Orders from the Court of Appeals, March 29, 2016).

Consequently, defendants unreasonably withheld temporary partial disability benefits after claimant's hours were reduced. However, I was unable to determine the amount of such benefits and consequently cannot award a penalty this denial. Defendants also unreasonably withheld healing period benefits from October 30, 2014 until Dr. Mooney's report on August 26, 2015. This denial of benefits totals 43 weeks at the weekly rate of $252.51. Without interest, the total amount of the denial is the sum of $10,857.93. Given a broad nature of failure to comply with Iowa Code section 86.13, the maximum penalty of 50 percent shall be assessed: $5,428.97.

ORDER

1. Defendants shall pay to claimant three hundred twenty-five (325) weeks of permanent partial disability benefits at a rate of two hundred fifty-two and 51/100 dollars ($252.51) per week from October 2, 2015.

2. Defendants shall pay to claimant healing period benefits from October 30, 2014 through October 1, 2015, a total of 48.143 weeks at the rate of two hundred fifty-two and 51/100 dollars ($252.51) per week.

3. Defendants shall pay to claimant a penalty of five thousand four hundred twenty-eight and 97/100 dollars ($5,428.97) for their unreasonable denial of benefits for this work injury.

4. Defendants shall pay the medical expenses listed in Exhibit 21. Defendants shall reimburse claimant for her out-of-pocket medical expenses and shall hold claimant harmless from the remainder of those expenses.

5. Defendants shall pay accrued weekly benefits in a lump sum.

6. Defendants shall pay interest on unpaid weekly benefits awarded herein pursuant to Iowa Code section 85.30.

7. Defendants shall pay the costs of this action pursuant to administrative rule 876 IAC 4.33, including reimbursement to claimant for any filing fee paid in this matter.

8. Defendants shall file subsequent reports of injury (SROI) as required by our administrative rule 876 IAC 3.1(2).

Signed and filed this 22nd day of August, 2016.

LARRY WALSHIRE
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

Copies to:

Jean Mauss
Attorney at Law
6611 University Ave, Ste. 200
Des Moines, IA 50324-1655
jmauss@msalaw.net

Caitlin R. Kilburg
Attorney at Law
1225 Jordan Creek Pkwy, Ste. 108
West Des Moines, IA 50266
ckilburg@scheldruplaw.com

LPW/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.