

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

SAIDE BOTELLO-DESILVA,

Claimant,

vs.

IAC IOWA CITY LLC,

Employer,

and

AMERICAN ZURICH INS. CO.,

Insurance Carrier,
Defendants.

FILED

DEC 18 2015

WORKERS COMPENSATION

File No. 5047339

ARBITRATION DECISION

Head Note Nos.: 1402.40; 1803.1
2501; 2907; 3001

STATEMENT OF THE CASE

Saide Botello-Desilva, claimant, filed a petition in arbitration seeking workers' compensation benefits from IAC Iowa City, LLC, employer and American Zurich Insurance Company, insurance carrier, both as defendants. Hearing was held on September 24, 2015.

Saide Botello-Desilva, Kirk Dighton, and Jorge Rodriguez all testified live at trial. It should be noted that claimant testified via the use of a translator, Patricia Vargas-Ver Ploeg. Claimant opted to only have her testimony translated. Although the translator was present for the entire hearing, the remainder of the hearing was not translated. The evidentiary record also includes claimant's exhibits 1-32 and defendant's exhibits A-K. Unfortunately, the parties submitted duplicative exhibits; citation is only made to one set of any duplicative exhibits. The parties submitted a hearing report at the commencement of the evidentiary hearing. On the hearing report, the parties entered into certain stipulations. Those stipulations are accepted and relied upon in this decision. No findings of fact or conclusions of law will be made with respect to the parties' stipulations.

The parties requested the opportunity for post-hearing briefs, which were submitted on October 16, 2015.

ISSUES

The parties submitted the following issues for resolution:

1. Whether claimant sustained a scheduled member injury or an injury to her body as a whole.

2. Whether claimant's healing period has ended.
3. Whether claimant is an odd-lot employee.
4. What, if any, permanent partial disability benefits claimant is entitled to receive.
5. The appropriate gross weekly wages for purposes of rate calculation.
6. Whether claimant is entitled to payment of medical expenses.
7. Whether claimant is entitled to an award of penalty benefits.
8. Assessment of costs.

FINDINGS OF FACT

The undersigned, having considered all of the evidence and testimony in the record, finds:

The central dispute in this case is the nature and extent of injury claimant sustained on February 14, 2011. Claimant asserts that as a result of a February 14, 2011 work injury, she sustained an injury to her body as a whole. Claimant further contends that as a result of that injury she is an odd-lot employee. I find claimant failed to carry her burden of proof to show by a preponderance of the evidence that she sustained permanent injury beyond her right lower extremity.

On February 14, 2011, claimant, Saide Botello-Desilva, sustained a work injury. At hearing, claimant testified that on the date of the injury she slipped on a mat and fell, landing in the splits position. (Testimony) She said she was helped up by two co-workers. (Exhibit 26, page 24)

That same day Saide was seen at Mercy Occupational Health. The clinical notes indicate she reported she had "[t]wisted leg outward when she slipped." There is no mention in the records of Saide actually falling or landing in a "splits" position. She reported she had constant sharp pain in her right knee and back of her right thigh into her buttock. At one point, claimant rated her pain as 20 out of a possible 10. Another time she reported that pain on the outside of her knee was 7/10. The assessment was right knee strain. Claimant was placed in a hinged knee splint and given Toradol for pain. She was released to return back to work the next day, as long as she was able to alternate stand and sit. Additionally, she was to apply cold and heat that day and the next. She was given prescriptions for Naprosyn and Ultram. (Ex. 8, pp. 72-78) Saide returned on February 16, 2011 and was prescribed physical therapy. (Ex. 8, pp. 79-80)

Saide had her initial physical therapy evaluation on February 17, 2011. The note states she "reports injuring her right knee while working at IAC on 2/14/11. She reports she slipped on a floor mat. She stated her right knee 'twisted', but she did not fall." The therapist noted she had a mild antalgic gait. The assessment was mild right knee

strain; mild discomfort and muscle tightness over right low back and hip. The therapist thought she would progress well with therapy. (Ex. 27, p. 280)

The therapy note from February 24, 2011, indicates that she had attended three appointments and was reporting a decrease in her right knee pain. However, she was still having discomfort over the anterior and posterior lateral knee. A non-antalgic gait was noted. (Ex. 27, p. 281)

Saide continued to follow-up with Mercy Occupational Health. On February 25, 2011, she reported that her pain was constant, but better. She still had numbness and some sharp pains at times of walking. She had no pain while sitting. She reported that sometimes her right knee gave out while she was walking. Additional physical therapy was ordered. She was returned to work with restrictions. (Ex. 8, pp. 82-84)

On March 14, 2011, the physical therapist noted that Saide had been seen for a total of 7 visits. She continued to report pain over the patellar tendon and over the back of her knee over the distal hamstring and proximal gastroc musculature. She also reported continued tightness over the right posterior/lateral hip musculature. The therapist noted she had no antalgic gait. (Ex. 27, p. 282)

Saide returned to Mercy Occupational Health on March 22 and reported she was about the same. An MRI of her knee was ordered. (Ex. 8, pp. 86-88) The April 13, 2011, MRI revealed a full-thickness 3 millimeter cartilage defect in the central portion of the lateral femoral condyle. (Ex. 8, pp. 89-90) Saide was referred to an orthopedic surgeon. Her work restrictions remained unchanged. (Ex. 8, pp. 92-94)

On April 28, 2011, Saide was seen at Steindler Orthopedic Clinic in Iowa City; she saw Thomas R. Dean, P.A. According to the notes, she reported that she slipped on a mat at work in February; she did not fall, but caught herself, and in the process hurt her knee. She reported pain over the anterior medial and posterolateral aspect of her knee and pain in her buttock that radiated down the posterolateral aspect of her thigh to her lateral knee. Over the past several months her pain had improved. The impression was that she had a twisting injury to her right knee and with naproxen she was basically pain-free. She returned to her normal job duties. She reported continued pain. Physical therapy was recommended to work on her hamstrings and hip abductors. (Ex. 9, pp. 105-07)

Saide returned to Steindler on May 25, 2011 where she saw Cory G. Christiansen, M.D. Again, the notes reflect that she had slipped on a mat in February, but was able to catch herself. She reported she was back to work and was doing everything at work. The only time she noted pain was if she tried to hyperextend the knee. Due to the ongoing symptoms, claimant was given an injection into her right knee. (Ex. 9, p. 108) She continued to treat at the Steindler Clinic. By September of 2011, she continued to have right knee hamstring pain and wanted to undergo surgical treatment. However, she had a number of family things going on, so it was decided she would follow-up with Dr. Christiansen in one month's time. She was allowed to continue

working without restrictions. (Ex. 9, p. 11) At the October 19, 2011, visit she opted to proceed with surgery. (Ex. 9, pp. 112-14)

There was an almost four-month delay in obtaining the surgery. Despite testifying at hearing that she was in a great deal of pain, Saide does not remember delaying the surgery. (Testimony) On February 7, 2012, Dr. Christiansen performed a right knee ACL ganglion cyst excision and lateral femoral condyle chondroplasty. The operative note indicates she had a fairly large chondral defect in the posterior aspect of the lateral femoral condyle which was grade 3 to 4. (Ex. 9, pp. 115-116)

Following surgery, she continued to treat with Dr. Christiansen. She also attended physical therapy. She reported to Dr. Christiansen that the pain she was having in the anterior aspect of her knee directly behind the patella tendon was gone. She did continue to have pain over the lateral joint line and over the IT band, as well as over the medial portal site. She was kept completely off of work for a number of weeks. When the doctor saw her on April 25, 2012, he noted she could return to light duty work in two weeks. (Ex. 9, pp. 117-120)

On June 6, 2012, when Saide returned to see Dr. Christiansen, he noted that her knee seemed to be doing better, in fact the pain was basically gone. However, she had developed some other right hip and left ankle issues. She reported that in the process of doing therapy she developed some right trochanteric bursitis and pain around the lateral aspect of her left ankle. The doctor noted that she had been able to return to work, 8-hour shifts, but it did tend to exacerbate her hip pain. He felt it was really important for her to continue working, but that she should have an hourly work break as needed. Also, she should be able to ice her knee or hip as needed throughout the day. (Ex. 9, p. 121)

At the July 25, 2012 visit, Dr. Christiansen noted that Saide continued to have a "number of musculoskeletal complaints" including right-sided trochanteric bursitis, right anterior knee pain, as well as left ankle pain. The injection she received at the last visit helped and the sharp pain she had in her hip was gone. Saide reported to the doctor that she could live with the discomfort in her hip. Dr. Christiansen referred her to Peter B. Maurus, M.D. to see if he thought further work-up for her ankle was necessary. He released her to return to work without restrictions. (Ex. 9, pp. 122-123)

Saide saw Dr. Maurus on August 27, 2012. She reported that over the past several years she had increasing pain, stiffness, and swelling over the lateral ankle. Dr. Maurus noted signs of arthritic change. He recommended an MRI of her ankle. (Ex. 9, p. 124)

Dr. Christiansen's September 5, 2012, clinical notes indicate that Saide continued to have right-sided anterior knee pain, but the pain was now different. She also reported having problems with her hip and ankle and her knee swelled after being on her feet all day. She was working 40 hours per week. Dr. Christiansen noted that the injection he gave her for her knee did not provide any relief. He assumed that there was some scar tissue and perhaps some irritation of a branch of the saphenous nerve.

He recommended capsaicin topically to try to desensitize the nerve. She was to continue working 40 hours per week. (Ex. 9, p. 125)

On September 17, 2012, Dr. Christiansen sent a letter to the insurance representative. He noted that during Saide's June 6, 2012 visit, she reported pain in her lateral aspect of her left ankle in the process of working with physical therapy. However, it was his opinion that her ankle issues were chronic in nature. He did not have a specific causative event for the pain in her left ankle. He felt there was no direct correlation of her ankle pain to her initial work injury. (Ex. B, p. 36)

Saide returned to Dr. Christiansen on October 12, 2012, and reported she was extremely frustrated with her ongoing symptoms. She continued to have knee pain. She also reported pain in her buttock, shins, and left ankle. Additionally, she had calf cramping bilaterally. The doctor noted that she had not responded to intraarticular injection, topical medications, anti-inflammatories, or physical therapy and he really did not know what else to try. He referred her to pain specialist, Fred J. Dery, M.D. Dr. Christiansen also noted he felt she had some underlying depression. (Ex. 9, pp. 126-127)

On October 22, 2012, Dr. Christiansen wrote a letter to Primacor Rehabilitation. Dr. Christiansen opined that the femoral condyle lesion was the result of her injury on February 14, 2011. He did not feel that Saide had returned to baseline. He referred her to Dr. Dery, a pain specialist. Dr. Christiansen also stated, "I do believe that her right hip pin [*sic*] is related to her initial injury based on my initial consultation on April 28, 2011. She complained of right-sided buttock pain that radiated down the posterolateral aspect of her thigh to her knee. I diagnosed her with right hip abductor weakness at that time." (Ex. 1) With regard to her left ankle pain, he noted that she did not mention this pain during his initial consultation. He assumes that she had some pre-existing ankle instability prior to the injury, which was exacerbated by her physical therapy. (*Id.*)

On October 31, 2012, Saide saw Dr. Dery. She reported that her knee pain increased following the knee scope performed by Dr. Christiansen. She also said she had cramping in her right calf that started in the back of her right knee. The doctor examined Saide and was uncertain of the cause of her knee pain. He ordered an ultrasound to see if there was any type of cystic structure or abnormality. To address her discomfort he recommended a topical medication. (Ex. 9, pp. 128-130)

Saide returned to Dr. Dery on December 5, 2012. According to Saide, the cream made her skin numb, but did not give her any pain relief. The pain seemed to be coming up her leg into her right hip. Dr. Dery noted that the ultrasound report from November 19, 2012 was unremarkable. His impression was right knee pain of questionable etiology and right hip pain with mild osteoarthritis. He recommended a right intraarticular hip injection. (Ex. 9, pp. 131-133) The injection was performed on December 14, 2012. (Ex. 9, p. 134)

Saide returned to Dr. Dery on January 4, 2013, and reported 100 percent relief of her right hip and knee pain for the 2 days after the injection. Then approximately

75 percent of her pain returned. Dr. Dery ordered an MRI of her right hip and started her on gabapentin. (Ex. 9, pp. 135-136)

She returned to Dr. Dery on February 6, 2013. Because she was having side effects on gabapentin, she was switched to Lyrica. Dr. Dery indicated he did not feel there was any need for further imaging at that point. He felt her right hip pain would subside once her knee started feeling better and she was no longer changing her gait to compensate for the knee discomfort. (Ex. 9, pp. 137-138)

On January 18, 2013, Saide underwent an MRI of her hip. The study was unremarkable. (Ex. B, p. 41)

Dr. Dery saw Saide again on March 20, 2013. She reported that the Lyrica was not helping her pain as much as the gabapentin was and she was actually having worse side effects on the Lyrica. Dr. Dery felt her knee pain was more neuropathic than musculoskeletal in nature. Due to the problems with side effects, he switched her medication again, this time to Cymbalta. Dr. Dery opined that the knee pain she was experiencing was not from a pre-existing arthritic condition, but more likely from neuroma or other neurologic abnormality which occurred after the arthroscopy. (Ex. 9, p. 139)

On May 29, 2013, Saide saw Dr. Dery. She reported that the knee pain did not respond to the Cymbalta and that she had significant mood and cognitive side effects from the medication. The doctor noted that she continued to have hip pain, probably due to the way she was walking. He further opined that the gait abnormality was related more to her knee pain. Saide reported she wanted to work because she has a lot of bills to pay, but it was difficult for her to get through the day. He had no further conservative treatment to offer her and felt it was reasonable to obtain an MRI of her right knee. Dr. Dery noted that it would be reasonable for her to leave work early on rare occasions when her knee pain is preventing her from performing her work duties. (Ex. 9, p. 140)

On June 19, 2013, Saide saw Dr. Christiansen. According to the clinical notes, the MRI of her right hip was normal. However, the MRI of her right knee was consistent with a stress reaction. It was also noted that she had some mucoid degeneration of her ACL, but the doctor did not feel this would explain her knee pain. Dr. Christiansen opted to treat it as a stress reaction in the proximal tibia, sort of as a microfracture. She was placed on crutches, nonweightbearing in her right lower extremity for six weeks. She was to remain off work during that time. She was also prescribed physical therapy for hip abductor strengthening. (Ex. 9, p. 143)

Saide returned to see Dr. Christiansen on August 7, 2013. She reported that her knee pain was better, but she still experienced a cramping sensation in her lateral calf muscle. The duration of the cramping was diminishing. She also noted pain over her buttock, greater trochanter, and lateral thigh. She was given a trochanteric bursal injection. She was also instructed to discontinue her use of crutches. She was to

continue physical therapy and return to work performing sedentary activities. (Ex. 9, p. 145)

On August 29, 2013, Saide saw James M. Pape, M.D., who ordered an MRI of her lumbar spine. (Ex. 10, pp. 167-177) She returned to Dr. Pape on September 11, 2013. She continued to complain of right leg pain and cramping. Dr. Pape noted that the MRI did not show significant stenosis or neural impingement although there was a broad-based disc bulge at L5-S1 with some mild foariminal narrowing to the right. He thought it would be reasonable to consider an epidural injection. (Ex. 10, p. 180)

On October 24, 2013, Saide returned to Dr. Dery to discuss a spinal cord stimulator device for her pain issues. After discussing a trial stimulator with Dr. Dery, Saide opted to proceed with the necessary psych evaluation to determine if she was a candidate for a stimulator. (Ex. 9, pp. 147-150)

Saide underwent a psychiatric assessment on December 4, 2013 at Mercy Medical Center with Luke R. Hansen, Psy.D. The validity test results were within normal limits suggesting that she was honest, forthcoming, and not exaggerating or minimizing any mental health concerns. It was recommended that she proceed with the spinal cord stimulator trial. (Ex. 13, pp. 197-200)

On February 28, 2014, an MRI of Saide's thoracic spine was carried out. The image was unremarkable. (Ex. B, pp. 46-47)

On April 15, 2014, Saide was seen at Mercy Family Medicine of West Liberty ("Mercy Family") with complaints of right hip and mid and low back pain. The notes indicate that she was currently on light duty, sitting for 8 hours per day at work for the past 8 months. Saide's prior treatment records were not available for review. The assessment was lumbago. The treatment plan included Cyclobenzaprine and Tramadol. (Ex. 12, pp. 192-194)

Saide returned to Mercy Family on April 29, 2014, to follow-up on leg cramps. She reported that the Tramadol did help with her back pain, but she was having side effects. The clinical notes from this visit appear to span three pages, but the third page is not in evidence. Therefore, it is not known what the assessment or treatment plan was on this date. (Ex. 12, pp. 195-196)

The trial spinal cord stimulator began on June 3, 2014. (Ex. 9, p. 151) Saide returned to Dr. Dery on June 11, 2014 and reported that the stimulator helped out significantly with her leg pain. However, she was more concerned by the fact that she has a lot of soreness and stiffness in her back now. Dr. Dery's impression was equivocal spinal cord stimulator trial. He did not suggest permanent implantation of the device. (Ex. 9, pp. 152-153)

On June 18, 2014, claimant saw Ernest M. Perea, M.D. at the request of Dr. Dery. Dr. Perea noted that there had just been a recent trial of a stimulator (June 4, 2014 – June 6, 2014) and she was now complaining of severe thoracic back pain that

radiated up to her cervical spine and down her right hip into her lateral-right knee. She also complained of chronic spasm in her calf of the right lower extremity as well as the right thigh. Dr. Perea returned Saide to work with restrictions. (Ex. 8, pp. 94-97) She continued to be seen at Dr. Perea's office without much change. (Ex. 8, pp. 98-104)

On July 2, 2014, Dr. Dery saw Saide, who was reporting lower neck pain. She was also still experiencing cramping in her right leg and said her right hip hurt. She rated her pain as a constant 7/10, but while she had a leg cramp it was a 10/10. Dr. Dery's impression was right knee and leg pain secondary to work related injury. He also thought that she had a baseline of poor coping mechanisms. He recommended Saide see Dr. Reddy at the University of Iowa Hospitals and Clinics (UIHC) to discuss the potential of a peripheral nerve stimulator. Dr. Dery had nothing further to offer her. (Ex. 9, pp. 154-157)

On August 4, 2014, Saide was seen at the UIHC by Chandan G. Reddy, M.D. Saide reported that in February of 2011 she fell at work and did the splits. Since the time of the fall she had pain radiating from the buttock down the right leg to the foot. She also reported significant knee swelling. Additionally, Saide said that she had some mid thoracic pain which began after the trial spinal cord stimulator. She still experienced charley horses several times a day, which were quite painful and involved the hamstrings and the calf. Dr. Reddy's impression was possible piriformis syndrome with associated right-sided sciatica. Dr. Reddy referred Saide to Foad Elahi, M.D. at the pain clinic and to Ludwig Gutmann, M.D. in neurology for EMG and nerve conduction studies, especially focusing on the sciatic nerve on the right side. He also ordered an ultrasound of the sciatic nerve with Dr. Ohashi in the area of the piriformis muscle. (Ex. 11, pp. 182-184)

On August 21, 2014, Saide saw Dr. Gutmann. His impression was possible piriformis syndrome with associated right-sided sciatica. He recommended EMG and nerve conduction studies. The testing was conducted and the results were normal. (Ex. 29)

On October 9, 2014, Saide saw Elahi Foad, M.D. at the UIHC. The notes indicate an examination was conducted. Saide had multiple tenderness and Waddell's signs were positive. The notes indicate that her gait was normal. The doctor felt she may have a myofascial pain syndrome, but did not have a trigger point at the exam. They did not have any alternative management for her. The doctor noted that Saide was emotional and crying. The notes also indicate that although she was primarily Spanish speaking, she could communicate in English quite effectively. She was placed at maximum medical improvement (MMI). They recommended that her primary care physician treat her with medications and/or pain psychology for cognitive behavioral mechanisms. There was also a discussion about depression and mood disorder. He recommended continued use of the TENS unit. (Ex. 11, pp. 185-191)

Saide returned to Dr. Dery on October 22, 2014, complaining of persistent axial back pain in the thoracic spine and cramping in her right hip and knee. Dr. Dery noted that she did not appear to be in any significant distress while he spoke with her that day.

Dr. Dery examined her and noted no obvious objective findings. He felt she would be best served to pursue long-term pain psychology to learn how to better cope with her symptoms. He also recommended a functional capacity evaluation (FCE) to better delineate her restrictions. He felt she was at MMI pending completion of pain psychology. (Ex. 9, pp. 159-166)

Saide underwent an FCE on November 24, 2014 with E3 Work Therapy Services. The results were considered to be invalid due to inconsistent performance. The report noted that her high pain reports during and after the FCE were not consistent with the minimal pain behaviors. The testing also indicated that her gait pattern was smooth and fluid with no indication of antalgia. (Ex. I)

On November 25, 2014, Dr. Dery commented on her FCE results. He noted that it was an invalid test due to her failure to put forth appropriate and consistent effort. He felt she should pursue vocational rehabilitation to obtain gainful employment. He stated that she had purely subjective complaints without any objective findings. He felt she could benefit from pain psychology to learn how to cope with her discomfort. (Ex. B, p. 54)

On May 1, 2015, Saide saw Dr. Hansen; it had been a year and a half since her last visit with him. She reported that the trial spinal cord stimulator was not helpful. Since that time she struggled with significant pain. She reported that she was unable to work. However, she had learned some breathing techniques from her physical therapist which she has found helpful for severe pain. Dr. Hansen gave her a handout for mind body techniques to use for managing pain. (Ex. 28, p. 283)

On August 24, 2015, Saide returned to Dr. Hansen and reported that her pain had not significantly improved since her last visit. (Ex. 13, pp. 201-204)

On September 9, 2015, she reported to Dr. Hansen that since her last visit she had used relaxation techniques more regularly, but found that they caused her to fall asleep and the pain was not significantly improved. (Ex. 28, p. 287)

At the request of her attorney, claimant underwent an independent medical evaluation (IME) with Robin L. Sassman, M.D. on January 6, 2015. I note the report was not generated until May 14, 2015. The claimant's son was the interpreter for the examination. Dr. Sassman noted she was provided records that dated back to 2007. However, she did not review the records that she was provided, instead she reviewed an abstract of the records. The abstract is not in evidence.

Claimant reported to Dr. Sassman that she was walking on a floor mat when the mat slipped under her right foot, "[h]er right leg twisted and she 'did the splits'. She continued to work but noted pain on the outside of her knee that radiated to her right hip." (Ex. 4, p. 13) With regard to her symptoms at the time of the January 2015 examination, claimant reported that she had pain and a crackling sensation in her neck. She also noted an "electric shock" in her thoracic area. She reported pain in her buttock, which radiated to her right hip and down the right leg to her great toe, which

started in therapy. She also reported pain in her right knee anteriorly since surgery. She said that at times her right knee buckles and gives out, almost causing her to fall. She also reported pain in her left leg due to the fact that she must put all of her weight on her left side. She was performing exercises at home and utilizing a TENS unit. Additionally, she noted pain in her right knee as well as cramping in her leg. She also reported stabbing pain in her left ankle, an electrical shock that goes to her neck when she bends at the waist, and pain in her neck when she turns her head. According to the claimant, she has difficulty walking for more than 30 minutes. At the time of the exam, claimant said that her symptoms were worse than they were 1 year ago, 6 months ago, and 3 months ago. She only slept 4-5 hours per night due to muscle pain. She said she enjoys walking her husky dogs. (Ex. 4, p. 18)

Dr. Sassman conducted a physical examination which is set forth in her May report. She noted that the female was in no acute distress at the time of the examination. On the date of the January examination she exhibited a slight limp. Dr. Sassman's diagnosis was as follows: 1. Right knee trauma, 2. Right hip pain, 3. Left peroneal tendinopathy as a result of gait change due to #1 and #2, 4. Cervicalgia, 5. Thoracic pain, 6. Low back pain. The report states that #4, #5, #6 occurred after the placement and removal of the spinal cord stimulator. (Ex. 4, p. 21)

Dr. Sassman opined that the right knee trauma and right hip pain came about as a result of the February 14, 2011 work injury, when "Ms. Botello's right foot slipped on a mat and she 'did the splits'. In the process she twisted the right knee and hip." (Ex. 4, p. 21) Dr. Sassman felt that the left ankle pain was a result of the gait change that she believed was secondary to the right knee trauma. (Ex. 4, pp. 21-22) Regarding the cervical, thoracic, and lumbar spine pain, Dr. Sassman stated that they came about after the placement and removal of the spinal cord stimulator and therefore were a sequela of the work injury. (Ex. 4, p. 22)

Dr. Sassman recommended a second opinion from a pain management specialist and that she pursue vocational rehabilitation. She placed her at MMI as of January 6, 2015. Dr. Sassman assigned the following permanent impairment: 7 percent lower extremity impairment for the right knee; 10 percent lower extremity impairment for the right hip; no ratable impairment for the left ankle; 5 percent impairment whole person for the thoracic spine; and 5 percent impairment for the lumbar spine. Dr. Sassman noted that the overall combined value of the impairment was 19 percent whole person. (Ex. 4, pp. 22-23)

Dr. Sassman recommended limiting lifting, pulling, and carrying to 20 pounds rarely from floor to waist, waist to shoulder and over shoulder height. She recommended that she could occasionally sit, stand, and walk but she needed to change positions frequently due to her symptoms. Additionally, claimant should not bend, kneel, or crawl. Also, she should not use ladders or work at heights. Finally, she should not use vibratory tools or power tools as these may exacerbate her symptoms. (Ex. 4, p. 23)

After the FCE was conducted, Dr. Dery issued an impairment rating. He also noted due to her poor and inconsistent effort on the FCE he had trouble assigning accurate restrictions. However, he felt reasonable restrictions would include no lifting greater than 30 pounds, no repetitive kneeling/squatting for more than 20 minutes of every hour, the ability to sit (unload the legs) for 5 minutes when right knee pain limits any activity when she is on her feet with a reasonable estimation of no more than 10 minutes of sitting per hour, unrestricted use of the upper extremities and unrestricted seated table top activities. (Ex. 2, p. 2) Dr. Dery issued a second undated note to clarify his prior impairment rating. He stated that her impairment was not 4 percent whole-body; rather, it was 1 percent whole-body impairment. (Ex. 2, p. 3)

I also note that when Saide was questioned about her prior hip and knee problems she had no recollection of having had right hip pain for over one year. She also did not recall prior right knee pain. She does not recall if the pain just went away. (Testimony)

In the present case, defendants have stipulated that Saide sustained a compensable injury to her right lower extremity as a result of the February 14, 2011 work injury. Defendants have also stipulated that this injury caused temporary and permanent disability. However, defendants dispute any injury beyond the lower extremity. The first issue that must be determined is whether claimant sustained injury beyond her right lower extremity. After careful consideration of the live testimony and the record as a whole, I find that claimant has failed to carry her burden to show by a preponderance of the evidence that she sustained any permanent injury beyond the right lower extremity as a result of the work injury. There is simply a lack of objective findings to show that Saide sustained any permanent injury beyond her right lower extremity.

The only medical expert to assign any permanent disability beyond the right lower extremity is Dr. Sassman. She has opined that the right knee trauma and right hip pain came about as a result of the February 14, 2011 injury. I find that Dr. Sassman's opinions are based on an inaccurate history. Claimant testified that she slipped and fell and landed in the splits position. However, this history is not supported by the medical records that were generated close in time with the work injury. In fact, those records state she slipped and specifically deny any type of fall. Furthermore, Dr. Sassman seems to believe that Saide had no prior problems with her right hip or knee. However, a review of the evidence demonstrates this is not correct. In 2007, claimant had right hip and right knee pain. The notes indicate that she had the right hip and knee pain for over one year. (Ex. 1, pp. 1-2) Thus, Dr. Sassman either did not review or did not consider all of the evidence.

Dr. Sassman stated that the left ankle pain came about as a result of the gait change that Saide experienced secondary to the right knee trauma. Unfortunately, Dr. Sassman does not address the fact that claimant's gait is not consistent throughout the treatment records. While she does acknowledge that the surveillance from February of 2014 shows Saide walking up a flight of stairs with no apparent limp, she fails to explain how her left ankle pain was caused by an altered gait when there are

numerous places in the medical evidence that show a normal gait. (Ex. A, p. 26; Ex. B, p. 52; Ex. B, p. 36)

With regard to the cervical, thoracic, and lumbar spine pain, Dr. Sassman opined that the symptoms came about after the trial stimulator and therefore are a sequela of the work injury. However, Dr. Sassman does not provide any rationale for how the placement of leads at the T-8 level could cause cervical and lumbar pain or how it could lead to permanent impairment to the thoracic spine. Dr. Sassman fails to provide any explanation for her opinion. Additionally, the medical records do not support her opinion. When Saide was seen at the emergency room on September 24, 2013, she reported her back pain had been present for only six weeks, yet the leads were removed months before then. (Ex. A, p. 32) Dr. Sassman fails to explain why Saide's back symptoms improved after the leads were removed but then worsened in October of 2014.

I do not find the opinions of Dr. Sassman to be persuasive. Furthermore, the evidence as a whole does not support claimant's contentions that she sustained any permanent injury beyond her right lower extremity. Claimant has seen numerous physicians and undergone countless tests, yet there is simply a lack of objective evidence to explain or support Saide's subjective reports. I find that claimant has failed to show permanent injury beyond her right lower extremity.

Next, we turn to the issue of whether claimant's healing period has ended. Based on the opinions of Dr. Foad at the UIHC, I find that Saide reached MMI on October 9, 2014. (Ex. 11, p. 190) I find that Saide's healing period ended on October 9, 2014, when she was placed at MMI by Dr. Foad.

We now turn to the amount of permanency Saide sustained to her right lower extremity as a result of the work injury. With regard to impairment for claimant's right lower extremity, I find the opinions of Dr. Dery to be most persuasive. Because Dr. Dery treated Saide for over one year he had the advantage of seeing her on numerous occasions over a long period of time. I find the Saide has sustained 2 percent impairment of her right lower extremity as a result of the February 14, 2011 work injury. I further find that as a result of the work injury her permanent restrictions are those set forth by Dr. Dery. He felt reasonable restrictions would include no lifting greater than 30 pounds, no repetitive kneeling/squatting for more than 20 minutes of every hour, the ability to sit (unload the legs) for 5 minutes when right knee pain limits any activity when she is on her feet with a reasonable estimation of no more than 10 minutes of sitting per hour, unrestricted use of the upper extremities and unrestricted seated table top activities. (Ex. 2, p. 2) As a result of the work injury, I conclude that Saide is entitled to 2 percent impairment of her lower extremity. Thus, I find claimant is entitled to 4.4 weeks of permanent partial disability benefits. The commencement date for the permanent partial disability benefits is October 9, 2014.

Because claimant's injury is to a scheduled member the issue of odd-lot is moot.

The next issue to be addressed is the correct weekly workers' compensation rate. The parties stipulate that for rate purposes claimant was married and entitled to 3 exemptions on the date of the injury. The dispute centers on her average weekly wage at the time of the injury. Specifically, which weeks should be included in the calculation of the average weekly wage? Claimant contends her rate should be \$496.56 based on an average weekly wage of \$737.03. Defendants assert the correct rate is \$467.86 based on an average weekly wage of \$682.00.

A review of the rate calculations show there are actually only a few weeks in dispute. (Ex. 32 & Ex. K) Claimant worked 78 hours for the week ending February 13, 2011; defendants did not include this week. Defendants offer no explanation as to why this week should not be included in the rate calculation. I find that it is appropriate to utilize this week when calculating the average weekly wage.

Claimant only worked 33.7 hours the week ending November 7, 2011, and 38.5 hours the week ending October 3, 2011. Claimant contends that these weeks are not representative because they are below the 40 hours which were regular for claimant's union job. Defendants offer no explanation as to why these weeks should be included. Therefore, I find that these weeks should not be included in the calculation.

In order to include 13 weeks of wages, claimant included the week ending August 5, 2010, wherein she worked 44.5 hours. I find it is appropriate to include this week in the rate calculation.

I adopt claimant's rate calculation. Therefore, I find that claimant's average weekly wage is \$737.03. Because claimant was married and entitled to 3 exemptions, her weekly workers' compensation benefit amount is \$496.56.

Claimant is also seeking payment of past medical expenses as set forth in the highlighted portion of Exhibit 30. Claimant asserts these bills were incurred as a result of the work injury. Defendants are responsible for any expenses that were for services ordered by authorized medical providers. Defendants offer no explanation as to why they should not be responsible for these expenses. Based on my review of the evidence, it appears that all highlighted expenses were ordered by authorized medical providers. Therefore, defendants are responsible for those expenses.

Claimant is also seeking penalty benefits under Iowa Code section 86.13. Specifically, claimant is seeking penalty for unreasonable delays in the payment of healing period benefits. Claimant asserts that there was a delay in payment of benefits for June 24, 2014 through July 7, 2014; September 30, 2014 through November 10, 2014, and November 11, 2014 through December 22, 2014. Claimant testified that there were some unexplained delays in receipt of her weekly checks. Defendants did not offer any evidence to dispute these late payments. Defendants also did not offer any evidence as to why the delay was reasonable. It is not clear to the undersigned how long the weekly benefits were delayed. I find that 14 weeks of weekly benefits were unreasonably delayed and therefore defendants are subject to penalty as a result.

I find that a penalty in the amount of two thousand five hundred and no/100 dollars (\$2,500.00) is appropriate to deter future unreasonable delays in weekly payments.

Finally, claimant is seeking an assessment of costs as set forth in Exhibit 25. Because claimant prevailed on some of the issues in this matter, I find it is appropriate to exercise my discretion to award an assessment of certain costs. I find an assessment of the filing fee in the amount of \$100.00 is an appropriate cost under rule 876 IAC 4.33(7). Likewise, I find the cost of service via certified mail in the amount of \$12.96 is an appropriate cost under rule 876 IAC 4.33(3). I also find that the cost of the transcript of claimant's deposition is an appropriate cost under 876 IAC 4.33(1). Because claimant failed to show she sustained an injury to her body as a whole, I find that it is not appropriate to assess defendants the cost of the report from Lewis Vierling. Thus, defendants are assessed costs in the amount of \$231.91.

CONCLUSIONS OF LAW

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

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).

For the reasons set forth above, I conclude that claimant failed to carry her burden of proof to show by a preponderance of the evidence that she sustained any permanent injury beyond her right lower extremity.

Healing period compensation describes temporary workers' compensation weekly benefits that precede an allowance of permanent partial disability benefits. Ellingson v. Fleetguard, Inc., 599 N.W.2d 440 (Iowa 1999). Section 85.34(1) provides that healing period benefits are payable to an injured worker who has suffered permanent partial disability until the first to occur of three events. These are: (1) the worker has returned to work; (2) the worker medically is capable of returning to substantially similar employment; or (3) the worker has achieved maximum medical recovery. Maximum medical recovery is achieved when healing is complete and the extent of permanent disability can be determined. Armstrong Tire & Rubber Co. v. Kubli, Iowa App., 312 N.W.2d 60 (Iowa 1981). Neither maintenance medical care nor an employee's continuing to have pain or other symptoms necessarily prolongs the healing period.

Compensation for permanent partial disability shall begin at the termination of the healing period. Compensation shall be paid in relation to 500 weeks as the disability bears to the body as a whole. Section 85.34. As previously noted above, I concluded claimant's healing period ended when she was placed at MMI by Dr. Foad at the UIHC. Therefore, her permanent partial disability benefits shall commence on October 9, 2014.

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

Where an injury is limited to scheduled member the loss is measured functionally, not industrially. Graves v. Eagle Iron Works, 331 N.W.2d 116 (Iowa 1983).

The courts have repeatedly stated that for those injuries limited to the schedules in Iowa Code section 85.34(2)(a-t), this agency must only consider the functional loss of the particular scheduled member involved and not the other factors which constitute an "industrial disability." Iowa Supreme Court decisions over the years have repeatedly cited favorably the following language in the 66-year-old case of Soukup v. Shores Co., 222 Iowa 272, 277; 268 N.W. 598, 601 (1936):

[T]he legislature has definitely fixed the amount of compensation that shall be paid for specific injuries . . . and that, regardless of the education or qualifications or nature of the particular individual, or of his inability . . . to engage in employment . . . the compensation payable . . . is limited to the amount therein fixed.

Our court has even specifically upheld the constitutionality of the scheduled member compensation scheme. Gilleland v. Armstrong Rubber Co., 524 N.W.2d 404 (Iowa 1994). Permanent partial disabilities are classified as either scheduled or unscheduled. A specific scheduled disability is evaluated by the functional method; the industrial method is used to evaluate an unscheduled disability. Graves, 331 N.W.2d 116; 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).

When the result of an injury is loss to a scheduled member, the compensation payable is limited to that set forth in the appropriate subdivision of Code section 85.34(2). Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961). "Loss of use" of a member is equivalent to "loss" of the member. Moses v. National Union C. M. Co., 194 Iowa 819, 184 N.W. 746 (1921). Pursuant to Iowa Code section 85.34(2)(u) the workers' compensation commissioner may equitably prorate compensation payable in those cases wherein the loss is something less than that provided for in the schedule. Blizek v. Eagle Signal Co., 164 N.W.2d 84 (Iowa 1969).

Evidence considered in assessing the loss of use of a particular scheduled member may entail more than a medical rating pursuant to standardized guides for evaluating permanent impairment. A claimant's testimony and demonstration of difficulties incurred in using the injured member and medical evidence regarding general loss of use may be considered in determining the actual loss of use compensable. Soukup, 222 Iowa 272, 268 N.W. 598. Consideration is not given to what effect the scheduled loss has on claimant's earning capacity. The scheduled loss system created by the legislature is presumed to include compensation for reduced capacity to labor and to earn. Schell v. Central Engineering Co., 232 Iowa 421, 4 N.W.2d 339 (1942).

The right of a worker to receive compensation for injuries sustained which arose out of and in the course of employment is statutory. The statute conferring this right can also fix the amount of compensation to be paid for different specific injuries, and the employee is not entitled to compensation except as provided by statute. Soukup, 222 Iowa 272, 268 N.W. 598. Consideration is not given to what effect the scheduled loss has on claimant's earning capacity. The scheduled loss system created by the

legislature is presumed to include compensation for reduced capacity to labor and to earn. Schell v. Central Engineering Co., 232 Iowa 421, 4 N.W.2d 339 (1942).

The right of a worker to receive compensation for injuries sustained which arose out of and in the course of employment is statutory. The statute conferring this right can also fix the amount of compensation to be paid for different specific injuries, and the employee is not entitled to compensation except as provided by statute. Soukup, 222 Iowa 272, 268 N.W. 598. Pursuant to Iowa Code section 85.34(2)(o), for all cases of permanent partial disability compensation shall be paid for the lower extremity based on 220 weeks. Based on the above findings, I conclude claimant sustained 2 percent loss of her lower extremity and therefore, is entitled to 4.4 weeks of permanent partial disability benefits.

We now address the issue of rate. Section 85.36 states the basis of compensation is the weekly earnings of the employee at the time of the injury. The section defines weekly earnings as the gross salary, wages, or earnings to which an employee would have been entitled had the employee worked the customary hours for the full pay period in which the employee was injured as the employer regularly required for the work or employment. The various subsections of section 85.36 set forth methods of computing weekly earnings depending upon the type of earnings and employment.

If the employee is paid on a daily or hourly basis or by output, weekly earnings are computed by dividing by 13 the earnings over the 13-week period immediately preceding the injury. Any week that does not fairly reflect the employee's customary earnings is excluded, however. Section 85.36(6). Based on the above, I conclude claimant's average weekly wages at the time of the injury were \$737.07. Because claimant was married and entitled to 3 exemptions, the correct weekly workers' compensation rate in this case is \$496.56.

Claimant is also seeking payment of past medical expenses. The employer shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance, and hospital services and supplies for all conditions compensable under the workers' compensation law. The employer shall also allow reasonable and necessary transportation expenses incurred for those services. The employer has the right to choose the provider of care, except where the employer has denied liability for the injury. Section 85.27. Holbert v. Townsend Engineering Co., Thirty-second Biennial Report of the Industrial Commissioner 78 (Review-Reopening October 1975). Based on the above findings, I conclude defendants are responsible for the highlighted expenses set forth in claimant's Exhibit 30.

We now turn to the issue of penalty benefits for unreasonable delay in weekly compensation benefits. If weekly compensation benefits are not fully paid when due, section 86.13 requires that additional benefits be awarded unless the employer shows reasonable cause or excuse for the delay or denial. Robbennolt v. Snap-on Tools Corp., 555 N.W.2d 229 (Iowa 1996). Delay attributable to the time required to perform a reasonable investigation is not unreasonable. Kiesecker v. Webster City Meats, Inc.,

528 N.W.2d 109 (Iowa 1995). It also is not unreasonable to deny a claim when a good faith issue of law or fact makes the employer's liability fairly debatable. An issue of law is fairly debatable if viable arguments exist in favor of each party. Covia v. Robinson, 507 N.W.2d 411 (Iowa 1993). An issue of fact is fairly debatable if substantial evidence exists which would support a finding favorable to the employer. Gilbert v. USF Holland, Inc., 637 N.W.2d 194 (Iowa 2001).

An employer's bare assertion that a claim is fairly debatable is insufficient to avoid imposition of a penalty. The employer must assert facts upon which the commissioner could reasonably find that the claim was "fairly debatable." Meyers v. Holiday Express Corp., 557 N.W.2d 502 (Iowa 1996).

If the employer fails to show reasonable cause or excuse for the delay or denial, the commissioner shall impose a penalty in an amount up to 50 percent of the amount unreasonably delayed or denied. Christensen v. Snap-on Tools Corp., 554 N.W.2d 254 (Iowa 1996). The factors to be considered in determining the amount of the penalty include the length of the delay, the number of delays, the information available to the employer and the employer's past record of penalties. Robbennolt, 555 N.W.2d at 238. In the present case, I conclude that two thousand five hundred dollars and no/100 (\$2,500.00) is an amount sufficient to deter future unreasonable delays in payment of weekly benefits.

Finally, we address the issue of costs. All costs incurred in the hearing before the commissioner shall be taxed at the discretion of the commissioner. Defendants shall be responsible for costs as set forth in the above findings of fact.

ORDER

THEREFORE, IT IS ORDERED:

All weekly benefits shall be paid at the rate of four hundred ninety-six and 56/100 dollars (\$496.56).

Defendants shall pay claimant four point four (4.4) weeks of permanent partial disability benefits commencing on October 9, 2014.

All past due weekly benefits shall be paid in lump sum with applicable interest pursuant to Iowa Code section 85.30.

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


Defendants shall be responsible for past medical benefits under Iowa Code section 85.27 as set forth above.

Defendants shall pay penalty benefits in the amount of two thousand five hundred and no/100 dollars (\$2,500.00).

Defendants shall reimburse claimant's costs in the amount of two hundred thirty-one and 91/100 dollars (\$231.91).

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 18th day of December, 2015.


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