

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

ANITA GUMM,  
Claimant,

vs.

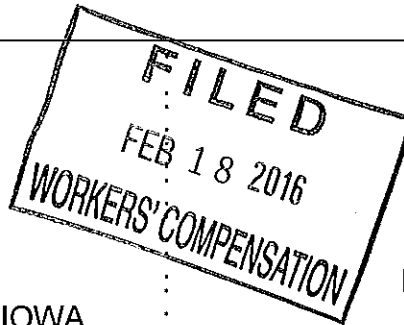
EASTER SEAL SOCIETY OF IOWA,  
INC.,

Employer,

and

ACCIDENT FUND INSURANCE CO.,

Insurance Carrier,  
Defendants.



File No. 5047205

ARBITRATION  
DECISION

Head Note No.: 1108

ANITA GUMM,  
Claimant,

vs.

EASTER SEAL SOCIETY OF IOWA,  
INC.,

Employer,

and

AMERICAN COMPENSATION INS. CO.  
and SFM INS. CO.,

Insurance Carrier,  
Defendants.

File No. 5047206

ARBITRATION  
DECISION

Head Note No.:1100; 1108

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

ANITA GUMM, (NONPARTY),

Claimant,

vs.

ACCIDENT FUND INS. CO,

Insurance Carrier,

and

AMERICAN COMPENSATION INS. CO.  
and SFM INS. CO,

Insurance Carrier,  
Defendants.

File No. 5047206

IOWA CODE SECTION 85.21

CONTRIBUTION DECISION

Head Note No.: 4200

STATEMENT OF THE CASE

Claimant, Anita Gumm, filed two petitions in arbitration seeking workers' compensation benefits from Easter Seal Society of Iowa, Inc., (Easter Seals), as employer, and the insurance carrier responsible on each stipulated or alleged date of injury. In File No. 5047205, claimant's claim rests in a stipulated work injury sustained on October 28, 2008 while Easter Seals was insured by Accident Fund Insurance Company of America (Accident Fund). In File No. 5047206, claimant claims she sustained a cumulative injury due to her continued employment activities at Easter Seals following the stipulated October 28, 2008 injury. Claimant has pleaded three potential injury dates in connection with File No. 5047206: March 6, 2012 and May 16, 2013, during the period Easter Seals was insured by American Compensation Insurance Company (American Comp); and January 15, 2014, during the period Easter Seals was insured by SFM Insurance Companies (SFM).

In File No. 5047206, Accident Fund paid medical benefits for claimant pursuant to a consent order approved by this agency on April 11, 2014. On March 11, 2015, Accident Fund filed a petition for contribution against codefendants American Comp and SFM pursuant to Iowa Code section 85.21. Although the petition was filed only one day prior to the scheduled evidentiary hearing in the arbitration matter, the three codefendants agreed to proceed to hearing in one consolidated hearing.

This matter came on for hearing before Deputy Workers' Compensation Commissioner, Erica J. Fitch, on March 12, 2015, in Des Moines, Iowa. The record in this case consists of claimant's exhibits 1 through 13, defendants Easter Seals and Accident Fund's exhibits AA through GG, defendants Easter Seals and American

Comp's exhibits AAA through DDD, defendants Easter Seals and SFM's exhibits A through E, and the testimony of the claimant. The parties submitted post-hearing briefs, the matter being fully submitted on April 13, 2015.

### ISSUES

In File No. 5047205 (Date of Injury: October 28, 2008):

The parties submitted the following issues for determination:

1. Whether claimant is entitled to payment of medical expenses at Exhibit 12;
2. Whether claimant is entitled to reimbursement of Dr. Sassman's independent medical evaluation pursuant to Iowa Code section 85.39; and
3. Specific taxation of costs.

The stipulations of the parties in the hearing report are incorporated by reference in this decision.

In File No. 5047206 (Date of Injury: March 6, 2012, May 16, 2013, and/or January 15, 2014):

The parties submitted the following issues for determination:

1. Whether claimant sustained a cumulative injury arising out of and in the course of her continued employment at Easter Seals after the stipulated right ankle fracture of October 28, 2008;
2. If claimant sustained a cumulative injury, on what date did the injury manifest;
3. Whether the cumulative injury was a cause of temporary disability and if so, claimant's entitlement to temporary disability benefits from October 23, 2013 through January 10, 2014 and March 1, 2014 through July 13, 2014;
4. Whether the cumulative injury is a cause of permanent disability;
5. The extent of claimant's permanent disability, including whether the injury is a scheduled member or unscheduled disability;
6. The commencement date for permanent partial disability benefits;
7. Whether claimant is entitled to payment of various medical expenses set forth in Exhibit 12;
8. Whether claimant is entitled to reimbursement of Dr. Sassman's independent medical evaluation pursuant to Iowa Code section 85.39;
9. Specific taxation of costs;
10. Whether insurance carrier, American Comp, is entitled to payment of a portion of the cost of Dr. Barp's deposition from insurance carriers Accident Fund and/or SFM;
11. The extent of credit due pursuant to Iowa Code section 85.34(7); and

12. Whether insurance carrier, Accident Fund, is entitled to contribution for medical expenses paid by Accident Fund, pursuant to Iowa Code section 85.21.

#### FINDINGS OF FACT

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

Claimant's testimony was consistent as compared to the evidentiary record and her deposition testimony. Her demeanor at the time of evidentiary hearing gave the undersigned no reason to doubt claimant's veracity. Claimant is found credible.

Claimant was 63 years of age at the time of hearing. She resides in Des Moines, Iowa with her husband. Claimant attended high school through the 9<sup>th</sup> grade, after which she dropped out. She did not subsequently obtain a GED or participate in any college coursework. (Hearing Transcript pages 23-25) Claimant's work history consists of laundry work, housekeeping, and janitorial tasks. (Hrg. Tr. pp. 25-29; Ex. BB, p. 3) She began work at Easter Seals in April 2008 as a janitor. (Ex. B, p. 1) The Easter Seals job description requires a janitor to bend, stoop, twist, and lift, as well as move a minimum of 80 pounds. (Ex. 1, p. 85; Ex. B, p. 3; Ex. DD, p. 1)

While at work on October 28, 2008, claimant slipped on dewy grass and fell. (Hrg. Tr. p. 33; Ex. 5, pp. 4-5) She was transported to the emergency room at Lutheran Hospital, where Dr. Abassi reduced an ankle fracture and referred claimant to podiatrist, Eric Barp, D.P.M. (Ex. 1, p. 1) Claimant was evaluated by Dr. Barp of the Iowa Clinic, who assessed a right trimalleolar ankle fracture – dislocation. That same day, Dr. Barp performed open reduction and internal fixation (ORIF) of the fracture. (Ex. 1, pp. 1-4)

Post ORIF surgery, claimant continued to follow up with Dr. Barp throughout a recuperation period which included time off work and use of a cam boot and crutches. (Ex. 1, pp. 10-13) At follow up on December 11, 2008, Dr. Barp opined claimant was doing very well and had radiographically healed. (Ex. 1, p. 13) On January 15, 2009, Dr. Barp placed claimant at maximum medical improvement (MMI) and released claimant without restrictions. At that time, he also discharged claimant from care, but noted claimant may require surgical removal of hardware at some point. (Ex. 1, pp. 16-18) Dr. Barp subsequently opined claimant sustained a permanent impairment of 17 percent lower extremity as a result of the October 28, 2008 injury. (Ex. 1, p. 20)

Claimant testified when she returned to work, she was not in pain. However, claimant testified she did not perform the heavy tasks of her job and received assistance from a coworker. (Ex. 5, pp. 6-7) Despite release from care, claimant returned to Dr. Barp on February 9, 2009 with reports of pain and swelling of the ankle. Dr. Barp noted claimant reported being on her feet all day. X-rays demonstrated a well-aligned and well-healing trimalleolar fracture. He ordered a course of physical therapy. (Ex. 1, pp. 22-23) After completing physical therapy, claimant returned to Dr. Barp on

April 7, 2009. She reported she had resumed full activity without pain or discomfort of the ankle. Accordingly, Dr. Barp discharged claimant from care. (Ex. 1, p. 26)

Accident Fund paid claimant 37.4 weeks of permanent partial disability benefits, representing Dr. Barp's 17 percent lower extremity impairment rating. (Ex. 10, p. 1; Ex. E, p. 5) Payment logs reveal the last check for such indemnity benefits was issued by Accident Fund on May 21, 2010. (Ex. E, p. 2; Ex. FF, p. 2)

On April 22, 2010, claimant returned to Dr. Barp with complaints of right ankle pain and stiffness. X-rays revealed a well-healed fracture, but issues with implanted screws backing out of place. (Ex 1, p. 27) Dr. Barp performed hardware removal surgery on May 3, 2010. (Ex. 1, pp. 30-31, 33-35) Post surgery, claimant was off work for a period, but was released to return to work without restrictions on May 19, 2010. (Ex. 1, pp. 35, 38) On June 22, 2010, claimant returned to Dr. Barp in follow up. At that time, she noted a complaint of ankle pain which came and went, currently at a level 6 on a 10-point scale. Dr. Barp opined claimant was doing well and discharged her from care. (Ex. 1, p. 39) Dr. Barp opined claimant sustained no further permanent impairment as a result of the hardware removal surgery. (Ex. 1, p. 41)

On January 30, 2012, claimant returned to Dr. Barp with complaints of right foot pain between the second and third toes. Dr. Barp noted the pain was random in nature and without known injury. X-rays of the right foot revealed no bony pathology and Dr. Barp assessed capsulitis of the second metatarsophalangeal joint. He recommended use of Mobic and a bunion splint. (Ex. 1, p. 42) Dr. Barp subsequently opined claimant's toe complaints could be coincidental or could be due to claimant's altered gait putting more pressure or strain on the joints. (Ex. 4, p. 9)

On March 6, 2012, claimant returned to Dr. Barp with complaints of right ankle pain. Claimant indicated the ankle hurt the longer she was "up walking on it through out the day." She relayed sometimes dragging her foot behind her as it hurt to bear weight on the foot. (Ex. 1, p. 44) Dr. Barp performed an intraarticular ankle injection and cautioned claimant might require an ankle arthroscopy. (Ex. 1, pp. 44-45)

Claimant returned to Dr. Barp on April 3, 2012 and reported receiving some relief from the ankle injection. However, she expressed complaints of continued intermittent ankle pain which could be so severe as to stop claimant from walking. Dr. Barp recommended right ankle arthroscopy. (Ex. 1, p. 46)

Claimant proceeded with right ankle arthroscopy on April 11, 2012. Dr. Barp identified a diagnosis of synovitis of the right ankle. The operative record states claimant suffered with posttraumatic arthritis of the ankle following ORIF and had developed synovitis. (Ex. 1, pp. 50, 52) Post arthroscopy, claimant was initially limited in her activities, wearing a cam boot and engaging in weight bearing as tolerated. (Ex. 1, pp. 49, 55) Dr. Barp released claimant to return to work without restrictions May 3, 2012. (Ex. 1, p. 56)

On June 1, 2012, claimant returned with Dr. Barp with complaints of continued tenderness, soreness, and swelling. Dr. Barp ordered an NSAID. Claimant expressed interest in pursuing "disability" and Dr. Barp advised her to follow up on that issue with her personal physician. (Ex. 1, p. 58) On July 17, 2012, claimant returned to Dr. Barp, who noted claimant was pain free and doing very well. He again released claimant without restrictions. (Ex. 1, p. 59) Dr. Barp subsequently opined claimant had done quite well and healed completely, thus warranting no additional rating of permanent impairment. (Ex. 1, p. 62)

On May 16, 2013, claimant returned to Dr. Barp with complaints of ankle pain and the record noted the duration of such complaints as 3 to 4 months. X-rays revealed degenerative joint disease of the ankle. Dr. Barp performed an ankle injection. He also noted claimant might require an ankle arthrodesis at some point in the future. (Ex. 1, pp. 63-64) At that time, Dr. Barp noted claimant "would like to file for disability." Dr. Barp indicated he was unsure if claimant would qualify for disability based upon her ankle. (Ex. 1, p. 64)

On May 29, 2013, claimant presented to Family Medicine – Pleasant Hill (Family Medicine) and was seen by personal physician, Timothy Vermillion, D.O. Claimant expressed complaints of right ankle pain. Dr. Vermillion noted claimant had fractured her ankle at work in 2008 and continued "to have ankle pain with walking, standing and working as she is always on her feet at work." (Ex. 2, p. 1) The two discussed the impact a fusion surgery would have upon claimant. With respect to claimant's inquiry regarding disability, Dr. Vermillion indicated he was unable to opine claimant was significantly disabled at that point in time. (Ex. 2, p. 3)

Claimant returned to Dr. Barp on June 27, 2013. She reported receiving some pain relief with ankle injection, but continued complaints of intermittent right ankle pain. Dr. Barp noted claimant might require a repeat injection at some point in the future. (Ex. 1, p. 65)

On August 2, 2013, claimant returned to Dr. Barp with complaints of ankle pain for 1 to 1<sup>1</sup>/<sub>2</sub> weeks. Due to these continued pain complaints, Dr. Barp ordered a CT of the ankle and opined claimant might require ankle arthrodesis. (Ex. 1, p. 66) Claimant underwent the CT on August 8, 2013; the radiologist opined results revealed a healed trimalleolar fracture with probable associated posttraumatic degenerative manifestations. (Ex. 1, p. 67) Dr. Barp reviewed the CT on August 19, 2013 and opined it demonstrated degenerative joint disease of the ankle joint. He recommended ankle arthrodesis, but stated claimant needed to cease smoking prior to surgery. (Ex. 1, p. 70)

On August 28, 2013, claimant provided Easter Seals with her notice of intent to retire effective February 28, 2014. (Ex. B, pp. 1-2)

Claimant returned to Dr. Barp on October 1, 2013 and reported she had successfully ceased smoking. Accordingly, Dr. Barp recommended proceeding with surgery. (Ex. 1, p. 73) Dr. Vermillion performed a preoperative physical on October 16, 2013, at which time he noted claimant worked as a custodian and her right ankle "is screaming" at the end of a day. (Ex. 2, p. 4) Dr. Vermillion ultimately cleared claimant for surgery. (Ex. 2, p. 6)

On October 23, 2013, Dr. Barp performed arthroscopic right ankle arthrodesis with fluoroscopy for a noted diagnosis of right ankle arthritis. The indications portion of the operative note states claimant "suffered a trimalleolar ankle fracture dislocation resulting in ORIF which secondarily resulted in DJD of her ankle." (Ex. 1, p. 79) Post operatively, claimant was restricted from working and advised to perform no weight-bearing on the right leg, making use of crutches and/or a walker. (Ex. 1, p. 77) Dr. Barp eventually weaned claimant to use of an AFO brace. (Ex. 1, p. 89) At follow up on January 10, 2014, claimant reported some continued complaints of stiffness, but no pain. She also reported improved stability with use of the ankle brace. Dr. Barp opined claimant continued to heal nicely; he released claimant to return to work under restrictions of a 4 to 5 hour workday, effective January 13, 2014. (Ex. 1, pp. 90, 92)

Following surgery, claimant was off work from surgery on October 23, 2013 through January 10, 2014. During this period, claimant's time off was protected as FMLA leave. (Ex. 1, pp. 81-84; Ex. B, pp. 6-7; Ex. BBB, pp. 10-12) From January 13 through January 24, 2014, claimant worked partial days on six occasions, took one day of sick leave, and received one day of paid holiday time. (Ex. B, pp. 6-7; Ex. BBB, pp. 10-12)

On January 24, 2014, claimant returned to Family Medicine and was seen by personal physician, Bradley Meyer, D.O. At that time, claimant complained of left knee, low back and shoulder pain. Claimant related her shoulder pain to lifting at work. Claimant's husband related claimant's knee pain to claimant favoring her left leg post-fusion. Dr. Meyer noted claimant had a history of some low back pain, but the pain had worsened following claimant's return to work two weeks prior. (Ex. 2, p. 7) X-rays revealed degenerative changes of the lumbar spine and a normal left knee. (Ex. 2, pp. 9-10) Due to the results of bilateral shoulder x-rays, the radiologist recommended follow up axillary views of the shoulders. (Ex. 2, pp. 10-11)

Following examination, Dr. Meyer assessed shoulder pain, for which he recommended additionally imaging; lumbago, to which spondylolisthesis contributed; and left knee pain as a result of osteoarthritis. (Ex. 2, pp. 12-13) Dr. Meyer expressed belief "much" of claimant's pain was due to compensation for the splint on her right ankle. (Ex. 2, p. 13) Dr. Meyer performed an injection of claimant's left knee and authored a note excusing claimant from work from January 24, 2014 through February 16, 2014. (Ex. 2, pp. 8, 14)

Subsequent axillary x-rays of the bilateral shoulders on January 27, 2014 revealed no fracture, dislocation or malalignment. (Ex. 2, p. 17)

On February 7, 2014, claimant returned to Dr. Meyer. Claimant reported resolution of left knee pain following injection and improvement of bilateral shoulder pain. She reported her back pain remained the same as at the time of the January 24, 2014 evaluation. Dr. Meyer noted claimant reported not suffering with back pain prior to returning to work while wearing a splint. (Ex. 2, p. 15)

Dr. Meyer opined claimant's left knee pain had resolved following injection and her bilateral shoulder pain/tendonitis had improved, with claimant denying an injection. He assessed ankle joint pain and lumbago. Dr. Meyer indicated claimant's prior back x-rays revealed degenerative changes. He opined the lumbago would likely worsen with claimant's abnormal gait and would likely continue to flare with work activities. Accordingly, Dr. Meyer opined physical therapy was unlikely to help as claimant would continue to limp, and claimant may want to consider taking extended time off. (Ex. 2, pp. 15, 19)

On February 14, 2014, claimant returned to Dr. Barp. Dr. Barp noted claimant had seen Dr. Meyer, who referred claimant for a physical therapy order due to low back and knee pain secondary to gait changes. (Ex. 1, p. 94) Claimant reported her ankle felt good, but her knee and low back were painful. Dr. Barp opined these complaints were likely due to gait changes associated with her ankle condition. Dr. Barp ordered a course of physical therapy and imposed work restrictions of no mopping and no lifting over 5 pounds. (Ex. 1, pp. 95-97)

Claimant testified she provided her work restrictions to Easter Seals and was advised she was unable to continue working, as she could not complete her duties. (Hrg. Tr. p. 44) At some point after returning to work in early 2014, claimant testified she attempted to rescind her notice of retirement. Defendants declined to allow claimant to rescind her notice. (Hrg. Tr. pp. 44-45; Ex. 5, p. 10) For the period of January 27 through February 28, 2014, claimant utilized sick time, vacation, and personal time. (Ex. B, pp. 6-7; Ex. BBB, pp. 10-12) Claimant's last date of employment at Easter Seals took place on February 28, 2014. (Hrg. Tr. pp. 67, 73) Thereafter, claimant applied for unemployment benefits, but was denied on two occasions. (Ex. 6)

Claimant's counsel authored a letter to Dr. Barp, setting forth various opinions and asking Dr. Barp to check yes or no in response. Dr. Barp issued his answers on February 25, 2014. Dr. Barp agreed claimant had a good recovery following the October 30, 2008 ORIF surgery. He also agreed the removal of hardware procedure was anticipated following the ORIF. (Ex. 1, p. 99) Dr. Barp checked "yes" to the following two statements:

After returning to work in May of 2010, [claimant's] custodial work for Easter Seals substantially aggravated her right ankle condition, resulting in the need for her surgery on 04/18/2012.



...

After returning to work in May of 2012, [claimant's] custodial work for Easter Seals substantially aggravated her right ankle condition, resulting in the need for her surgery on 10/23/2013.

(Ex. 1, p. 99)

Dr. Barp also agreed claimant's right ankle condition resulted in knee and back pain, for which Dr. Barp had recommended physical therapy. Accordingly, he agreed claimant's knee and back pain were causally related to claimant's custodial work at Easter Seals. (Ex. 1, p. 100)

Following receipt of Dr. Barp's February 25, 2014 answers, Accident Fund ceased paying claimant's medical expenses and treatment, citing Dr. Barp's opinion claimant sustained a new injury in May of 2012. (Ex. AA, pp. 2-4) As a result, various expenses from claimant's treatment with Dr. Barp during the year 2014 remain unpaid, totaling \$594.00. (Ex. 12)

On February 28, 2014, claimant filed two original notice and petitions. File No. 5047205 was assigned to the stipulated slip and fall injury on October 28, 2008. In response to claimant's request for indemnity benefits, Accident Fund claimed her claim was barred by the statute of limitations pursuant to section 85.26. (Ex. C, p. 3) File No. 5047206 was assigned to alleged cumulative injury manifesting on March 6, 2012, May 16, 2013, and/or January 15, 2014, due to continued work activities. Claimant subsequently identified the March 6, 2012 and May 16, 2013 dates reflected dates work activities resulted in development of pain. (Ex. BB, p. 5) She further stated the January 15, 2014 date reflected the end of claimant's exposure to aggravating activities, as the last date claimant worked for Easter Seals. (Ex. BB, p. 5)

On March 11, 2014, claimant returned to Dr. Barp with complaints of tenderness "all over" her ankle. Dr. Barp also noted minimal swelling of the ankle. Claimant related she had as yet been unable to perform physical therapy for her back, as the workers' compensation carrier had denied payment thereof. (Ex. 1, p. 102) Dr. Barp opined claimant continued to heal, yet noted claimant suffered from back pain and was frustrated with her condition. Dr. Barp opined claimant's back pain stemmed from her ankle condition. He recommended claimant return for follow up in three months. (Ex. 1, p. 103)

At some point during this approximate time frame, claimant applied for Social Security Disability Benefits. Claimant received notice of approval and began receiving such benefits in April 2014, with a monthly benefit rate of \$661.00. (Ex. 7, p. 1)

On April 7, 2014, Accident Fund filed application and consent orders against American Comp for the alleged March 6, 2012 and May 16, 2013 dates of injury and SFM for the alleged January 15, 2014 date of injury. All were granted by this agency on April 11, 2014. (Ex. EE, pp. 1-3)

Counsel for SFM authored a letter to Dr. Barp dated May 5, 2014, in follow up of a conversation which took place on April 22, 2014. In the letter, counsel set forth the following definition:

A cumulative injury occurs or 'manifests' when the Claimant, as a reasonable person, would be plainly aware (1) that he or she suffers from a condition or injury, and (2) that the condition or injury was caused by the Claimant's employment. Upon the occurrence of these two circumstances, the injury is deemed to have occurred.

(Ex. 1, p. 104)

Against the backdrop of that definition, counsel purported to summarize the opinions set forth by Dr. Barp in the conversation:

1. [Claimant] did not sustain any new cumulative trauma work injury on or about January 15, 2014. [Claimant] presented with longstanding ankle problems resulting in ankle arthrodesis on October 23, 2013. [Claimant] sustained no new condition or injury as a result of her employment, and her employment did not substantially aggravate, accelerate, or light up her right ankle condition at any time after the October 23, 2013 surgery.
2. Based upon the above definition of when a cumulative injury occurs, it is your opinion that [claimant] sustained a significant injury to her right ankle suffering a trimalleolar ankle fracture dislocation in October of 2008. An anticipated consequence of that injury and subsequent surgery is development of joint arthritis, a condition that is progressive in nature. Based upon your review of [claimant's] job description at Easter Seal Society of Iowa, Inc., it is your opinion that the substantial and precipitating cause of [claimant's] ongoing ankle pain complaints was her 2008 slip and fall injury. Subsequent surgeries were necessary due to the development of arthritis and were necessary in order to diminish ongoing symptoms caused by the natural progression of the underlying degenerative arthritis.
3. [Claimant's] custodial work at Easter Seal Society including but not limited to walking, would likely cause pain. However, [claimant's] work did not cause any permanent injury or aggravation of [claimant's] ankle condition, nor did her work activities in any way accelerate the preexisting osteoarthritis in her ankle, nor was it the cause of any permanent aggravation. [Claimant's] work caused pain but did not cause any new injury to her ankle, and her medical care as well as her ongoing symptoms are a direct result of her October 2008 work injury.

(Ex. 1, p. 105)

Dr. Barp signed the letter, indicating his agreement on May 5, 2014, with the caveat that claimant's work at Easter Seals "certainly could aggravate her ankle symptoms." (Ex. 1, p. 106)

On May 23, 2014, claimant applied for work at Elim Care, Inc./Valley View Village (Valley View). On her application, claimant expressed interest in housekeeping and laundry positions. (Ex. GG, p. 1) She requested only part-time hours, indicating she was "semi retired" from Easter Seals. (Ex. GG, p. 2)

On June 12, 2014, claimant returned to Dr. Barp and complained of occasional pain of the right ankle. Claimant indicated she was capable of going two days without using her ankle brace, but then needed to reapply the brace. (Ex. 1, p. 107) X-rays of the ankle revealed a healing arthrodesis. Dr. Barp opined claimant continued to heal and should follow up in six months. (Ex. 1, p. 108)

Valley View hired claimant to perform housekeeping, effective July 14, 2014. (Ex. 9, p. 1) She is required to clean rooms and public restrooms, but described her duties as lighter than those at Easter Seals. Claimant explained she is not required to be on her feet as long, as she is encouraged to sit and converse with residents. She testified she cleans 7 to 10 resident rooms per day and is permitted to sit and speak with each resident. Claimant also testified the sweeping/mopping is lighter in nature and the garbage she removes weighs less than that at Easter Seals. (Hrg. Tr. pp. 52-53; Ex. 5, pp. 8-9, 12) As of the date of evidentiary hearing, claimant remained employed at Valley View and testified she had no intention of quitting her employment. (Claimant's testimony)

Claimant retained Robin Sassman, M.D., to perform an independent medical evaluation (IME). On September 12, 2014, claimant's counsel authored a letter to Dr. Sassman, acknowledging claimant had undergone several surgeries following the October 2008 fracture. Counsel represented claimant made a "good recovery" and was able to perform full duty until ankle pain returned on May 6, 2013 and claimant underwent surgery on October 23, 2013. Counsel also represented claimant then developed back and bilateral knee pain, received restrictions, and was unable to return to work. (Ex. AAA, p. 2)

On October 15, 2014, claimant presented for IME with board certified occupational and environmental medicine physician, Dr. Sassman. Following records review, history and examination, Dr. Sassman issued a report of her findings and opinions dated December 31, 2014. In her discussion of claimant's medical history, Dr. Sassman noted claimant sustained an October 2008 fracture with ORIF, followed by increased pain and hardware removal in 2010. (Ex. 3, pp. 2-3) Dr. Sassman noted claimant underwent arthroscopy in April 2012, with claimant feeling the ankle "completely healed" thereafter. Dr. Sassman's notes also indicate on August 19, 2013,

Dr. Barp recommended ankle arthrodesis and "subsequently opined to the insurance company that the need for the surgery was related to the original work injury." Claimant ultimately underwent arthrodesis on October 23, 2013. (Ex. 3, p. 4)

During interview, claimant complained of pain of the right ankle and very little range of motion due to the fusion. Claimant also expressed complaints of bilateral knee pain and low back pain. (Ex. 3, p. 6) Claimant underwent x-rays of the right ankle and bilateral knees. The radiologist observed no acute findings on the ankle x-rays and bilateral degenerative joint disease and osteopenia of the knees. (Ex. 1, pp. 109-110)

Following records review, interview and examination, Dr. Sassman assessed a right trimalleolar ankle fracture, status post ORIF, hardware removal, arthroscopy, and arthrodesis; low back pain; and bilateral knee pain. (Ex. 3, p. 18) Dr. Sassman opined claimant had a long history of right ankle problems dating to 2008. However, after arthroscopy in 2012, Dr. Sassman opined claimant did well for a significant period, even feeling as if the ankle healed completely. She noted claimant did not seek additional ankle care until May 2013. Dr. Sassman opined due to the "significant gap in care" and claimant's reports of doing well in this timeframe, claimant's "work in May of 2013 was a substantial aggravating factor in her right ankle symptoms" and resulted in claimant's need for arthrodesis. (Ex. 3, p. 8)

With respect to claimant's bilateral knee and low back pain, Dr. Sassman opined the symptoms came about as a result of the gait change that resulted from the arthrodesis procedure. Dr. Sassman acknowledged claimant likely had preexisting degenerative changes of the right knee, but opined the gait change brought symptoms to the bilateral knees. Dr. Sassman opined claimant's low back symptoms were musculoskeletal in nature and also resulted from the gait change. She explained claimant's pain and changed range of motion following the arthrodesis changed the manner in which claimant carried herself and "subsequently resulted in aggravation of these other areas." (Ex. 3, p. 9)

Dr. Sassman recommended claimant undergo a short course of physical therapy, pursue orthopedic evaluation and possible injections of the bilateral knees, and follow up with Dr. Barp with respect to the right ankle. As claimant had not undergone these treatments, Dr. Sassman opined claimant had not achieved MMI; however, if the treatments were not pursued, Dr. Sassman opined claimant would have achieved MMI one year following arthrodesis, October 23, 2014. (Ex. 3, p. 9)

In discussion of the extent of claimant's permanent impairment relative to the right ankle, Dr. Sassman opined claimant sustained ratable permanent impairment due to gait change, the ankle fracture, decreased right ankle range of motion, and degenerative changes of the right ankle. She ultimately based claimant's right ankle impairment upon range of motion deficits and opined a 29 percent lower extremity impairment. Dr. Sassman also opined claimant warranted permanent impairment ratings of 7 percent of each the right and left lower extremity for degenerative changes of the bilateral knees. Dr. Sassman combined the impairments for a total lower

extremity impairment of 39 percent, the equivalent of a 16 percent whole person rating. Dr. Sassman also opined claimant fell within DRE Lumbar Category II, with a 5 percent whole person impairment for her back condition. Dr. Sassman combined the whole person ratings to a total 20 percent body as a whole impairment. (Ex. 3, p. 10)

Dr. Sassman also recommended permanent restrictions of limiting lifting, pushing, pulling and carrying to 5 pounds occasionally from floor-to-waist, waist-to-shoulder, and over the shoulder; no walking on uneven surfaces or use of ladders; rare use of stairs; and sitting, standing and walking occasionally, but with the ability to change positions due to symptoms. (Ex. 3, p. 10)

At evidentiary hearing, claimant was asked questions with respect to Dr. Sassman's history of claimant's complaints. Specifically, counsel for American Comp asked a series of questions, with claimant replying, as follows:

Q. Now, [Dr. Sassman] wrote in her report that 'Ms. Gumm underwent right ankle arthroscopy in April 2012 and had approximately a nine-month time frame when she did well. In fact, Ms. Gumm states that she felt like the ankle had completely healed.'

Did you tell Dr. Sassman that you thought your ankle had completely healed after the arthroscopic surgery in April 2012?

A. I don't remember saying that.

Q. I mean, you don't think it had completely healed, do you?

A. No.

Q. In fact, isn't it true, ma'am, that you were having problems with the right ankle since the very first time you got injured in 2008?

A. Yeah.

Q. And, indeed, when you saw Dr. Barp on June 1, 2012, you said that you were having continued soreness and tenderness with the right ankle.

A. Uh-huh.

Q. Correct?

A. Yes.

(Hrg. Tr. pp. 63-64)

On December 16, 2014, claimant returned to Dr. Barp for follow up. Claimant denied pain of the ankle, but reported complaints of stiffness and reduced range of motion. Dr. Barp noted no noticeable swelling. He also indicated claimant reported wearing the brace for one year, as he had recommended. (Ex. 1, p. 111) X-rays revealed a healed ankle arthrodesis. Dr. Barp opined claimant's right ankle looked "very good." He acknowledged claimant complained of a painful area laterally, and

recommended she apply a topical. He released claimant to follow up as needed. (Ex. 1, p. 112) Dr. Barp also authored a statement opining claimant met the definition of a handicapped person by Department of Transportation standards. (Ex. 1, p. 113)

Dr. Barp sat for a deposition on March 2, 2015. Dr. Barp testified he provided care of claimant throughout the course of her right ankle treatment. Dr. Barp indicated claimant originally presented with a fracture which he surgically treated via ORIF; he opined claimant reached MMI from this condition on January 15, 2009. (Ex. 4, p. 2) Dr. Barp testified claimant's fracture was not a simple fracture, but also involved a dislocation of the ankle joint. He testified "whenever you have a dislocation of an ankle joint such as she did, that's going to cause that posttraumatic arthrosis." Dr. Barp explained arthrosis and degenerative joint disease are used interchangeably, as references to a loss of cartilage of the ankle joint. (Ex. 4, p. 3) Dr. Barp opined while claimant had a good recovery post ORIF, claimant would ultimately develop arthritis at some point in the future. (Ex. 4, p. 8)

Dr. Barp testified in May of 2010, due to claimant's pain complaints, he removed the hardware placed in claimant's ankle as part of the ORIF procedure. He related this procedure to the May 2008 work injury. (Ex. 4, p. 2)

Thereafter in March 2012, claimant returned to Dr. Barp and complained of right ankle pain which hurt the longer she walked. (Ex. 4, p. 3) Dr. Barp opined he performed arthroscopy on claimant's ankle in April 2012 in order to clean scar tissue or synovitis out of the joint. (Ex. 4, p. 4) Dr. Barp stood by his prior statement opining that claimant's custodial work after returning to work in May 2010 substantially aggravated her right ankle condition, resulting in claimant's need for surgery in April 2012. (Ex. 4, p. 10) Dr. Barp was asked if this type of complaint, ankle pain with prolonged walking, was an expected consequence of the May 2008 injury and surgery, to which he testified:

Yeah. That certainly can be. Whenever you have a fracture as she did, and the arthritis or [degenerative joint disease] or however you want to describe that, I mean, the more she's on it it, the worse it's going to hurt or it can hurt.

(Ex. 4, p. 3)

With respect to the role claimant being on her feet, at home or work, played in claimant's condition, Dr. Barp opined if a person with arthritis spends a great amount of time on their feet, it "certainly can exacerbate those symptoms." In follow up, Dr. Barp was asked if anything about claimant being on her feet substantially altered or changed the natural progression of claimant's condition. In response, Dr. Barp opined the greater the time a person uses the ankle, the faster the progression will be to becoming more arthritic, in contrast to a person who is seated at home with the ankle elevated. However, Dr. Barp opined the development of arthritis of the ankle was a natural

consequence of the October 2008 injury and resultant surgery, regardless of whether a patient returned to work. (Ex. 4, p. 3)

When claimant returned to Dr. Barp on May 16, 2013, she complained of ankle pain. While the record included a reference to pain for a three to four month period, Dr. Barp believed this was an error, as claimant had suffered with pain since 2008. (Ex. 4, pp. 4, 6) He, however, acknowledged there were periods when claimant did not suffer with pain. (Ex. 4, pp. 8-9) Dr. Barp opined after claimant broke her ankle, the ankle was never truly the same. (Ex. 4, p. 5) At the time of the May 2013 appointment, nothing in claimant's right ankle treatment to date led Dr. Barp to believe the complaints were related to anything but the October 2008 work injury. He opined however, that claimant's work activities of being on her feet would have resulted in an exacerbation of claimant's symptoms. (Ex. 4, p. 4)

When asked if the time claimant spent on her feet changed the expected progression of her ankle condition, Dr. Barp opined a person being on their feet throughout the day "could speed up the progress of her developing arthritis of that ankle joint." He opined he was "assuming" claimant being on her feet led to development of arthritis more quickly in her ankle, yet indicated many factors play a role in the speed in which any given patient develops arthritis. (Ex. 4, p. 4) He identified factors of a patient's body mass index, fracture pattern, degree of fracture and dislocation, success of repair, history, and being on one's feet using the ankle, as having bearing on the speed of development of arthritis. (Ex. 4, pp. 4-5, 7, 10, 12) Dr. Barp explained any activities that required use of the ankle, as opposed to a sedentary office job, had the potential to substantially aggravate the right ankle condition. He opined a patient with a custodial position "is going to have more symptoms associated with their arthritis than that person who's sitting at a desk all day and not using that ankle as much." (Ex. 4, p. 10) He further opined a person being on their feet for 8 hours per day, 40 hours per week "certainly could" speed up the arthritic changes of the ankle, a scenario he believed occurred in claimant's case. (Ex. 4, p. 11) However, he also agreed the act of getting out of bed each day to dress for work would be a factor that could accelerate the need for a fusion. (Ex. 4, p. 13) In summary, Dr. Barp agreed a scenario of increased activity will speed up the arthritic process and need for surgery:

[T]he more mileage you put on that ankle, the quicker it's going to accelerate the process of arthritis.

(Ex. 4, p. 13)

Dr. Barp indicated he ultimately performed arthrodesis, or fusion, of claimant's right ankle joint in October 2013. When asked if fusion was an expected consequence of the October 2008 injury, ORIF procedure, and resultant degenerative joint disease, Dr. Barp testified he always informs patients with fractured ankles that they will develop posttraumatic arthrosis. Dr. Barp indicated the question arises with respect to which of those patients will require an arthrosis or ankle replacement. In claimant's case, Dr. Barp opined the ankle arthrodesis "certainly was a result of [claimant's] 2008 fracture."

(Ex. 4, p. 5) He also agreed either surgical procedure would be a natural sequela of the 2008 work injury. (Ex. 4, p. 6) He indicated the injections claimant underwent prior to fusion were purely temporary in nature, with the goal being to "kick the can down the road." (Ex. 4, p. 7)

However, Dr. Barp also stood by his prior statement in which he opined claimant's custodial work after she returned to work in May 2012 substantially aggravated the right ankle condition and resulted in the need for surgery. (Ex. 4, p. 10) Dr. Barp opined if a person with ankle arthritis walks on that ankle throughout the day at work, as opposed to sitting at a desk: "I think the more they walk, the more that can certainly aggravate the ankle arthritis causing pain." (Ex. 4, p. 5) Dr. Barp expressed belief claimant proceeded to arthrodesis a little faster than an average patient. (Ex. 4, p. 10) Dr. Barp opined claimant would have developed arthritis and required arthrodesis regardless of if she returned to work. He also agreed claimant's return to work may or may not have played a role in how quickly claimant required fusion surgery. Yet, he opined claimant spending time on her feet did substantially change the progression of her condition. (Ex. 4, p. 6) Dr. Barp ultimately indicated that from a medical standpoint, he did not differentiate in use of terms such as "exacerbate" and "aggravate." (Ex. 4, p. 10)

He further opined it was likely for a patient who underwent arthrodesis to develop an altered gait. He related claimant's right knee and back pain to claimant's work due to the development of this altered gait. (Ex. 4, pp. 11-12)

Dr. Barp reviewed two paragraphs of Dr. Sassman's IME report; specifically, he reviewed Dr. Sassman's opinions on causation. He expressed agreement that claimant's work in May 2013 was a substantial aggravating factor and resulted in claimant's need for arthrodesis. He also agreed altered gait could result in bilateral knee and low back pain. After viewing these two paragraphs in isolation, Dr. Barp expressed agreement with the causation opinions expressed. (Ex. 4, p. 12)

Dr. Barp's deposition was requested and noticed by counsel for American Comp. American Comp paid the \$1,500.00 minimum fee associated with deposing Dr. Barp for one hour. For each 30 minute period beyond the base one hour, the Iowa Clinic charged an additional \$1,000.00. (EX. DDD, p. 1) Iowa Clinic records indicate the base hour was exceeded by an additional 60 minutes, leading to a charge of an additional \$2,000.00. (Ex. DDD, p. 4) Upon receipt of the additional charge, counsel for American Comp authored a letter to the attorneys of record for Accident Fund and SFM. Counsel for American Comp requested each insurance carrier pay \$1,000.00 of the additional charge, as counsel for each insurance carrier had posed questions and due to a purported delay resulting from a "situation" with counsel for SFM. (Ex. DDD, p. 5)

Review of the deposition transcript reveals the deposition commenced at 10:12 a.m. and concluded at 11:30 a.m. (Ex. 4, pp. 1, 13) Questioning by counsel for American Comp covered pages 4 through 21 and 47 through 50 of Dr. Barp's deposition



transcript. Questioning by counsel for SFM was limited to pages 22 through 28. Questioning by counsel for Accident Fund covered pages 29 through 47.

By post hearing brief, counsel for American Comp represented the additional charge by The Iowa Clinic was \$1,000.00 for the additional 30 minutes of deposition testimony. Accordingly, counsel requested \$500.00 from each Accident Fund and SMF, as counsel for each insurance carrier questioned Dr. Barp.

On March 11, 2015, Accident Fund filed a section 85.21 contribution action against SFM and American Comp.

At the time of evidentiary hearing, claimant admitted to suffering with right ankle problems since sustaining the fracture in 2008. (Hrg. Tr. p. 70) She agreed the severity of her pain has varied day to day since 2008 depending on the amount of time she was on her feet. (Hrg. Tr. p. 84) Claimant testified she continues to suffer with daily right ankle pain, but she is "learning to live with it and to try to overcome it." (Hrg. Tr. p. 47) Pain symptoms worsen with walking, but claimant refuses to take prescription pain medications. She also wears her ankle brace approximately four times per month when the ankle pain flares, as she believes the brace provides stability and comfort. (Hrg. Tr. pp. 46-47)

Claimant continues to complain of back pain. She described the pain as more general in nature and admitted it does not impact her daily activities. (Hrg. Tr. pp. 80-81; Ex. 5, pp. 10-11) Claimant also complained of right knee pain which comes and goes. In the event the pain reaches a high level, claimant testified she pursues a knee injection. (Ex. 5, pp. 10-11) Claimant testified she suffers with equivalent symptoms in her bilateral knees, with pain occurring on a daily basis. However, her symptoms do not impact her activities of daily living. (Hrg. Tr. pp. 47-48, 80-81) She testified she is attempting to live with her pain levels. (Hrg. Tr. p. 49) At evidentiary hearing, claimant denied any knee or back pain prior to fusion surgery on October 23, 2013. Claimant testified she associates her knee and back complaints with the change in gait which resulted after this surgery. (Hrg. Tr. pp. 23-25, 66, 73; Ex. 5, pp. 6-7)

After considering all of the evidence presented, the undersigned finds claimant failed to prove by a preponderance of the evidence that her continued work duties at Easter Seals after the October 28, 2008 resulted in a cumulative injury. Rather, claimant sustained a significant fracture to her right ankle on October 28, 2008; although claimant successfully returned to work, her ankle condition required ongoing care. While it is true the ongoing care did not persist at regular intervals, the care was regular enough in frequency to warrant four surgeries and one injection of the ankle over a five-year period.

Claimant relies upon the medical opinions of Dr. Barp and Dr. Sassman in support of her contention her ongoing work duties resulted in a material aggravation of claimant's condition such that would warrant a finding of a cumulative injury. Dr. Sassman opined claimant's work in May of 2013 was a substantial aggravating factor in

claimant's right ankle symptoms and need for surgery. However, Dr. Sassman's opinion is flawed as she based her opinion in significant part upon the "significant gap in care" from arthroscopy in 2012 to seeking care in May 2013. Dr. Sassman indicated during this period, claimant did well and felt her ankle healed completely. This history is incorrect and inconsistent with claimant's own testimony, as claimant did not recall expressing this sentiment to Dr. Sassman, testified she never felt as if her ankle healed completely, and admitted to ongoing problems with her ankle dating to the fracture event in 2008. As Dr. Sassman's opinion is based upon an inaccurate history, the opinion is entitled to no weight.

Claimant also relies upon the opinion of Dr. Barp, who opined claimant's return to work after hardware removal surgery in May 2010 substantially aggravated her right ankle condition and resulted in the need for surgery in April 2012. Dr. Barp similarly opined claimant's return to work after the April 2012 surgery substantially aggravated claimant's right ankle condition and resulted in the need for fusion surgery in October 2013. The essence of Dr. Barp's opinion is that the amount of time claimant spent on her feet at work would have resulted in increased symptomatology and potentially hastened the development of arthritis.

However, Dr. Barp also opined given the severity of claimant's fracture-dislocation, she would inevitably develop posttraumatic arthritis at some point in the future. He was unable to state with certainty that claimant's work activities, in fact, hastened the development of arthritis and sped the need for surgery. He also acknowledged multiple factors play a role in the pace of development of arthritis, including the patient's body mass index, fracture pattern, degree of fracture and dislocation, success of repair, history, and time spent using the ankle.

Dr. Barp's opinion relies upon a common-sense argument, that a person with an arthritic joint will have greater problems with the joint if the joint is stressed than would a person who minimally uses the joint. This form of opinion is insufficient for claimant to rely upon in establishing she suffered a cumulative work injury following the right ankle fracture. Dr. Barp's opinion does not establish claimant suffered disability gradually, reaching an injurious condition at some later point. Rather, Dr. Barp's opinion confirms claimant suffered an injury and disability, and through further work activities, the disability increased.

The Iowa Supreme Court addressed this distinction in the case of Ellingson v. Fleetguard, Inc., 599 N.W.2d 440 (Iowa 1999). The Court held:

To the extent that the evidence reveals a subsequent aggravation of Ellingson's January 4, 1985 injury, this is a relevant circumstance in fixing the extent of her permanent disability. Aggravating work activities were doubtless a causal factor with respect to the total degree of disability that she exhibited at the time of the hearing. It is clear, however, that she may not establish a cumulative-injury claim by merely asserting that her disability immediately following the January 4, 1985 injury was increased

by subsequent aggravating work activities. That circumstance only serves to increase the disability attributable to the January 4, 1985 injury. To show a cumulative injury she must demonstrate that she has suffered a distinct and discreet disability attributable to post-1985 work activities rather than as an aggravation of the January 4, 1985 injury. In presenting that claim to the commissioner, she could only prevail if the commissioner, as primary fact finder, found that a factual basis for a cumulative-injury disability existed.

(Ellingson v. Fleetguard, Inc., 599 N.W.2d 440, 444 (Iowa 1999) (overruled on other grounds by Waldinger Corp. v. Mettler, 817 N.W.2d 1 (Iowa 2012))).

Claimant has failed to prove she sustained a cumulative work injury after returning to work subsequent to the October 28, 2008 fracture. Claimant has not shown she suffered a "distinct and discreet" disability attributable to the post-fracture work activities. Her continued work activities may have played a role in aggravating the right ankle condition and resulted in the need for further treatment, however, by the standard of the Ellingson case, this form of aggravation is insufficient. Claimant suffered a significant fracture-dislocation and developed the inevitable posttraumatic arthritis that would be expected from such an injury. As a result of the arthritic condition, claimant required arthroscopy, arthrodesis, and more conservative treatment of the right ankle. These procedures represent sequelae of the original October 28, 2008 injury, not distinct cumulative injuries. Claimant also developed bilateral knee and back complaints as a result of an altered gait following arthrodesis; these complaints also reflect sequelae of the original October 28, 2008 injury and are not distinct cumulative injuries.

#### CONCLUSIONS OF LAW

In File No. 5047205 (Date of Injury: October 28, 2008):

The first issue for determination is whether claimant is entitled to payment of medical expenses at Exhibit 12.

The party who would suffer loss if an issue were not established has the burden of proving that issue by a preponderance of the evidence. Iowa R. App. P. 6.14(6).

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).

As set forth *supra*, the undersigned found claimant's ongoing right ankle, bilateral knee, and low back complaints represented sequela injuries of the original October 28, 2008 work injury. Accordingly, Easter Seals and Accident Fund, the insurer on the October 28, 2008 date of injury, remain responsible for causally related reasonable and necessary medical treatment. The outstanding medical bills denoted in Exhibit 12 pertain to ongoing care of these conditions by Dr. Barp; Easter Seals and Accident Fund are responsible for payment of these expenses. Easter Seals and Accident Fund also remain responsible for providing reasonable and necessary care related to the original October 28, 2008 injury and the following sequela injuries into the future.

The next issue for determination is whether claimant is entitled to reimbursement of Dr. Sassman's independent medical evaluation pursuant to Iowa Code section 85.39.

Section 85.39 permits an employee to be reimbursed for subsequent examination by a physician of the employee's choice where an employer-retained physician has previously evaluated "permanent disability" and the employee believes that the initial evaluation is too low. The section also permits reimbursement for reasonably necessary transportation expenses incurred and for any wage loss occasioned by the employee attending the subsequent examination.

Defendants are responsible only for reasonable fees associated with claimant's independent medical examination. Claimant has the burden of proving the reasonableness of the expenses incurred for the examination. See Schintgen v. Economy Fire & Casualty Co., File No. 855298 (App. April 26, 1991). Claimant need not ultimately prove the injury arose out of and in the course of employment to qualify for reimbursement under section 85.39. See Dodd v. Fleetguard, Inc., 759 N.W.2d 133, 140 (Iowa App. 2008).

Although Dr. Barp was an employer-retained physician who evaluated the extent of claimant's permanent disability, the undersigned does not find claimant is entitled to reimbursement of Dr. Sassman's IME report. Defendants last paid indemnity benefits on May 21, 2010. Accordingly, the statute of limitations with respect to further benefits ran as of May 21, 2013 pursuant to Iowa Code section 85.26. Section 85.26 states an original proceeding for benefits shall not be maintained if not commenced within three years of the last payment of weekly compensation benefits. Claimant did not initiate a contested case until February 2014, over six months after the applicable statute of limitations had run. Although defendants Easter Seals and Accident Fund do remain responsible for medical expenses pursuant to section 85.27, the IME reimbursement claimant seeks is pursuant to section 85.39. Accordingly, claimant is not entitled to reimbursement for the IME benefit, as the statute of limitations bars an action for further benefits.

The final issue for determination is a specific taxation of costs pursuant to Iowa Code section 86.40 and rule 876 IAC 4.33. Claimant requests taxation of the costs of: \$100.00 filing fee; \$6.69 service fee; \$250.00 for report of Dr. Barp; \$104.10 for claimant's deposition transcript; \$81.60 for Dr. Barp's deposition transcript; and the IME

expense of Dr. Sassman in the amount of \$2,634.40. Claimant prevailed against Easter Seals and Accident Fund with respect to establishing these defendants' responsibility for medical expenses. The costs of \$100.00 filing fee; \$6.69 service fee; \$250.00 for report of Dr. Barp; \$104.10 for claimant's deposition transcript; and \$81.60 for Dr. Barp's deposition transcript are all allowable costs and are taxed to defendants, Easter Seals and Accident Fund. Claimant is not permitted to receive reimbursement for the full cost of Dr. Sassman's IME as a practitioner's report under rule 4.33. Rather, the Iowa Supreme Court has ruled only the portion of the IME expense incurred in preparation of the written report can be taxed. Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839 (Iowa 2015). Dr. Sassman's bill itemization fails to identify what portion of her fee is attributable solely to report preparation. Accordingly, no portion of Dr. Sassman's IME fee is taxed to defendants Easter Seals and Accident Fund.

In File No. 5047206 (Date of Injury: March 6, 2012, May 16, 2013, and/or January 15, 2014):

The first issue for determination is whether claimant sustained a cumulative injury arising out of and in the course of her continued employment at Easter Seals after the stipulated right ankle fracture of October 28, 2008.

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.

A personal injury contemplated by the workers' compensation law means an injury, the impairment of health or a disease resulting from an injury which comes about, not through the natural building up and tearing down of the human body, but because of trauma. The injury must be something that acts extraneously to the natural processes of nature and thereby impairs the health, interrupts or otherwise destroys or damages a part or all of the body. Although many injuries have a traumatic onset, there is no requirement for a special incident or an unusual occurrence. Injuries which result from cumulative trauma are compensable. Increased disability from a prior injury, even if brought about by further work, does not constitute a new injury, however. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); Ellingson v. Fleetguard, Inc., 599 N.W.2d

440 (Iowa 1999); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995); McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985). An occupational disease covered by chapter 85A is specifically excluded from the definition of personal injury. Iowa Code section 85.61(4) (b); Iowa Code section 85A.8; Iowa Code section 85A.14.

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).

As found *supra*, claimant failed to prove by a preponderance of the evidence that she sustained a cumulative injury arising out of and in the course of her continued employment at Easter Seals after the stipulated right ankle fracture of October 28, 2008. Rather, the undersigned found claimant's complaints represented sequela of the original fracture. As claimant failed to prove she sustained a cumulative work injury due to her ongoing work duties at Easter Seals, defendant Easter Seals and carriers American Comp and SFM are not responsible for temporary or permanent disability benefits.

The next issue for determination is whether claimant is entitled to payment of various medical expenses set forth in Exhibit 12. The requested medical expenses relate to treatment of sequela injuries tied to the original injury of October 28, 2008. As such, medical expenses remain the responsibility of defendants Easter Seals and Accident Fund.

The next issue for determination is whether claimant is entitled to reimbursement of Dr. Sassman's independent medical evaluation pursuant to Iowa Code section 85.39.

In order for claimant to successfully receive reimbursement of an IME pursuant to section 85.39, there must first be an evaluation by an employer-retained physician. Although Dr. Barp was retained to provide care of claimant's ankle condition and evaluated claimant's permanent disability, Dr. Barp's medical treatment was causally related to the October 28, 2008 fracture injury and his permanent impairment opinion was also rendered with respect to the fracture itself and the sequela which followed. At

no time did Easter Seals, through insurance carriers American Comp or SFM, retain a physician to consider and opine as to claimant's permanent disability relative to the cumulative injury claim at issue in File No. 5047206. Based on these unique facts, claimant is not entitled to reimbursement of the IME cost of Dr. Sassman under section 85.39.

The next issue for consideration is a specific taxation of costs. The costs of filing fee, service fee, report of Dr. Barp, deposition transcript of Dr. Barp, and deposition transcript of claimant were taxed as costs in File No. 5047205 to defendants Easter Seals and Accident Fund. Taxation of these costs in File No. 5047206 is therefore, moot. Taxation of a portion of the cost of Dr. Sassman's IME was rejected in connection with File No. 5047205 and fails under the same logic in File No. 5047206.

Although claimant's request for taxation of costs against defendants Easter Seals, American Comp, and SFM in File No. 5047206 is denied, a dispute also exists amongst the insurance carriers, American Comp, SFM, and Accident Fund. Defendant Easter Seals, through counsel for American Comp, requested and noticed the deposition of Dr. Barp. Counsel for Easter Seals, through Accident Fund and SFM, both participated in the deposition of Dr. Barp. The deposition exceeded the allotted one hour by 30 minutes. Review of the transcript reveals of the 50-page deposition, counsel for American Comp questioned for approximately 22 pages, SMF for approximately 7 pages, and Accident Fund for approximately 19 pages. Additionally, there is evidence the deposition began late, causing 12 minutes of delay, as a result of technical difficulties surrounding the appearance of counsel for SFM.

These intertwined claims proceeded to consolidated hearing. The deposition of Dr. Barp was used by the undersigned in consideration of both files. Counsel for all three insurance carriers utilized the noticed deposition, with counsel for Accident Fund questioning to nearly the same extent as counsel for American Comp. While counsel for SFM asked significantly fewer questions, delay associated with counsel's appearance impacted the amount of time the base allocation was exceeded. Under these facts, it is only reasonable for Accident Fund and SFM to share in the cost of Dr. Barp's deposition. As an additional \$1,000.00 fee was incurred as a result of time overage, \$500.00 of this cost is taxed to defendant Accident Fund and \$500.00 of this cost is taxed to defendant SFM.

The next issue for determination is the extent of credit due pursuant to Iowa Code section 85.34(7). Although listed as at issue on the hearing report, the parties represented this issue could be resolved amongst the parties once the underlying arbitration decisions were entered. Accordingly, no determination is required on this issue.

The final issue for determination is whether insurance carrier, Accident Fund, is entitled to contribution for medical expenses paid by Accident Fund, pursuant to Iowa Code section 85.21. As the undersigned has determined claimant's ongoing need for medical attention reflects sequela of the October 28, 2008 fracture injury, Easter Seals

and Accident Fund are responsible for the medical expenses incurred in treatment of the conditions. As Accident Fund is properly responsible for the expenses, Accident Fund is not entitled to contribution from American Comp or SFM with respect to the medical expenses incurred.

ORDER

THEREFORE, IT IS ORDERED:

In File No. 5047205 (Date of Injury: October 28, 2008):

Defendants Easter Seals and Accident Fund shall pay claimant's prior medical expenses submitted by claimant at the hearing as set forth in the decision.

Defendant shall file subsequent reports of injury as required by this agency pursuant to rule 876 IAC 3.1(2).

Costs are taxed to defendants pursuant to 876 IAC 4.33 as set forth in the decision.

In File No. 5047206 (Date of Injury: March 6, 2012, May 16, 2013, and/or January 15, 2014):

Claimant shall take nothing by way of indemnity benefits or medical benefits.


Claimant's request for taxation of costs is denied as set forth in the decision.

Defendants Accident Fund and SFM shall each reimburse defendant American Comp in the amount of five hundred and no/100 dollars (\$500.00).

Defendant Accident Fund is not entitled to contribution from defendants American Comp or SFM pursuant to section 85.21.

Defendants Easter Seals, American Comp and SFM shall file subsequent reports of injury as required by this agency pursuant to rule 876 IAC 3.1(2).

Signed and filed this 18<sup>th</sup> day of February, 2016.

  
ERICA J. FITCH  
DEPUTY WORKERS'  
COMPENSATION COMMISSIONER



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EJF/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.