BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

MARGARET E. DEBOER,

Claimant,

vs.

HYVEE, INC.,

Employer,

and

EMC INSURANCE COMPANIES,

Insurance Carrier,
Defendants.

File No. 5061529

ARBITRATION

DECISION

Head Note Nos.: 1108, 1803

STATEMENT OF THE CASE

Claimant, Margaret Deboer, filed a petition for arbitration seeking workers' compensation benefits from HyVee, Inc., the employer and EMC Insurance Companies, the insurance carrier.

The matter came on for hearing on December 5, 2017, before Deputy Workers' Compensation Commissioner Joseph L. Walsh in Sioux City, Iowa. The record in the case consists of Claimant's Exhibits 1 through 25 and 27 through 34; Defense Exhibits A through F; as well the sworn testimony of claimant, Margaret Deboer, and defense witnesses, Cara Grave and Bobbi Kanigatter. Marcia Mahon was appointed as the court reporter for the proceedings. The parties briefed this case and the matter was fully submitted on January 12, 2016.

ISSUES AND STIPULATIONS

The following issues and stipulations were submitted.

The parties have stipulated to several matters in this case. The stipulations presented in the hearing report are accepted and are binding upon the parties.

It is stipulated that claimant suffered an injury which arose out of and in the course of employment on February 3, 2016. The parties stipulated that this work injury is a cause of some permanent disability. The primary issue is the extent of the

claimant's entitlement to permanent partial disability. It is stipulated that claimant is entitled to permanent disability benefits and that her disability is industrial. The defendants dispute that claimant has suffered any permanent traumatic brain injury. The parties dispute the appropriate commencement date for permanent disability benefits.

There is also a dispute regarding the appropriate gross wages at the time of injury. Claimant alleges her gross earnings at the time of injury were $429.95 per week. The defendants contend her gross wages were $373.40 per week. The parties stipulated to the remaining elements comprising claimant's rate of compensation. Affirmative defenses have been waived.

The claimant seeks payment of medical expenses as set forth in Claimant's Exhibit 30. The defendants have not stated any specific dispute with these expenses, although it is noted that they just received the documentation. The claimant also seeks reimbursement for her independent medical evaluation as set forth in Claimant's Exhibit 20, page 25.

FINDINGS OF FACT

Margaret Deboer lives in Sheldon, Iowa. She is separated with three grown children. At the time of hearing, she was 59 years old. She graduated from high school and has approximately three years of secondary education, but no degree. She testified that her computer skills are quite limited. She does not use a smart phone, for example. She tried to get one and found it too complicated. (Transcript, pages 11-13)

Ms. Deboer testified live and under oath at hearing. She presented as a credible witness. Her testimony was generally consistent with the documentary evidence in the record. There was nothing about her demeanor which caused me any concern regarding her truthfulness.

Ms. Deboer has a varied work history. She has worked at Staples as a screen printer and HyVee as a checker. In the past, she held a cosmetology license and worked as a cosmetologist, including running her own business. She has worked in education as a bus driver, as well as a teacher's aide. She has worked in assembly (office furniture), in addition to Fleetguard. She has cared for children at a daycare and she has worked as a bartender. In 2016, Ms. Deboer held three jobs, all of them part-time. She worked at Christian Retirement Home doing laundry and dining room work. She tended bar at the Eagles. And she worked at HyVee as a checker.

Ms. Deboer has been treated for depression in the past. She was deemed, however, to be in remission from this condition.

Claimant's Exhibit 33, page 1 contains a summary of Ms. Deboer's earnings for the various employers in question, supported by her 2015 Federal Tax Return. (Claimant's Exhibit 33, p. 2) Her returns demonstrate annual earnings from the three

sources in the amount of $18,670.00. She included unreported tip income in her summary prepared by counsel. (Cl. Ex. 1, p. 2) She testified that she averaged around $236.00 per month in tips working 10 to 12 hours per week. Her hourly rate for the Eagles was $8.50 per hour. The dispute concerning her gross wages is whether her unreported tip income should be included in her gross wages. She testified that she used all of her income from the Eagles to pay specific bills (van payment, electric/water bills). There is no corroborating documentation of her tip earnings in the record.

On February 3, 2016, Ms. Deboer appeared for work. She was walking to the store entrance when she slipped and fell on the ice, hitting the back of her head and shoulders. (Tr., p. 23) The employer prepared a First Report of Injury which was mistakenly entered into the record of evidence. Under Iowa Code section 86.11, this report should not have been accepted as evidence. "The report to the workers' compensation commissioner of injury shall be without prejudice to the employer or insurance carrier and shall not be admitted in evidence or used in any trial or hearing or before any . . . deputy workers' compensation commissioner except as to the notice under section 85.23." Iowa Code Section 86.11 (2017). Notice is not an issue in this case. Consequently, I have not reviewed or considered this report in this decision. The claimant testified that she did report the injury, and I believe her.

Ms. Deboer was transported by ambulance to Sanford Sheldon Medical Center. She was diagnosed with a closed head injury and neck pain. The medical note confirms the claimant's explanation of the injury. (Cl. Ex. 3, p. 1) She was provided with diagnostic treatment including a CT scan and ultimately sent home with medications and told to follow up with her primary care provider in a day or two. (Cl. Ex. 3, p. 2) She did. She saw Ryan Becker, M.D., on February 5, 2016. She reported having throbbing pains when working (at Christian Retirement Home). (Cl. Ex. 2, p. 7) Dr. Becker diagnosed whiplash injuries and neck pain and started her on physical therapy, heat compression and continuous range of motion exercises. (Cl. Ex. 2, p. 8) Dr. Becker placed her on light-duty at that time, recommending she not lift more than 20 pounds or 10 pounds frequently.

On February 18, 2018, Ms. Deboer was evaluated by Josephine Dunn-Junius, M.D. Dr. Dunn-Junius diagnosed neck pain, post-concussion syndrome and shoulder injury. (Cl. Ex. 5, p. 2) Physical therapy did not begin until February 19, 2016. (Cl. Ex. 6, p. 1) The physical therapy was fairly aggressive. Her last physical or occupational therapy appointment was on June 15, 2017.

On March 7, 2016, while working at HyVee, Ms. Deboer became dizzy and was transported by ambulance to the emergency room again. (Cl. Ex. 7) Thereafter, Dr. Becker re-evaluated and documented her complaints of dizziness and fogginess, poor balance as well as right occipital and shoulder pain. In April 2016, Dr. Becker referred her for a neurological evaluation. "Her persistent/refractory symptoms of fatigue, fogginess, balance problems are likely secondary to the concussion/mild TBI." (Cl. Ex. 2, p. 13)

Ms. Deboer followed up with Dr. Becker through all of 2016 and through March 2017. During this time, he treated her for a variety of symptoms and conditions related to her traumatic brain injury (TBI), including psychiatric conditions, primarily mood changes, anxiety and depression. (Ex. 2, pp. 14-38) Several other physicians evaluated Ms. Deboer thereafter for various conditions and symptoms, including Thomas Boetel, D.O., Susan Assam, M.D., James Won, M.D., DeeJay Donlin, Ph.D., and Ricky Jensen, M.D. These specialists evaluated and treated her various symptoms which increased over time. The primary modalities of treatment were medications, injections and physical or occupational therapy. In February 2017, she also underwent vestibular treatment for benign paroxysmal positional vertigo (BPPV). (Cl. Ex. 6, pp. 9-10) A number of tests were performed by these physicians as well, including x-rays, brain MRI and audiology testing.

In September 2016, Dr. Donlin, a psychiatrist, diagnosed major depressive disorder and generalized anxiety disorder. (Cl. Ex. 13, p. 5) Dr. Donlin continued to treat Ms. Deboer through May 2017, ultimately concluding that her condition significantly impairs her social emotional, interpersonal, educational and vocational functioning. (Cl. Ex. 13, p. 32)

Throughout this period of time, Ms. Deboer continued to suffer from headaches and light-headedness (causing falls or near falls at her various jobs, particularly at the nursing home). In May 2017, Dr. Jensen diagnosed sensorineural hearing loss and balance disorder. The testing showed "weakness in her right balance organ," which was most likely permanent and related to her head trauma. (Cl. Ex. 15, p. 3) The only treatment available was continued therapy.

None of the treating physicians placed any formal or specific permanent medical restriction on Ms. Deboer. She has continued to work in multiple jobs doing the same type of work she had been doing prior to her injury. Nevertheless, her work history has been a mess since her work injury, which has undoubtedly caused additional stressors in her life.

Ms. Deboer quit her job as a bartender at the Eagles in June 2016, in part due to the fact that a great deal of bending was required and in part due to a personality conflict with her new manager. She eventually accepted a new bartending position at a small pub in Ashton, Iowa. She ultimately left that position as well, primarily due to the commute. Thereafter, she accepted a position with a floral shop, Country Florist. She enjoyed this work and felt she was good at it. She was terminated from the retirement home where she worked in February 2017. She testified that she had an episode at work where she got light-headed and nearly fainted. Shortly thereafter she was terminated. She testified that the retirement home told her she was terminated due to the fact she had secured new employment with the florist. Ms. Deboer clearly believes she was terminated because of the syncopal episode she had at work. While there is no way to know the exact motive of this employer (who is not even a party to this case), the termination does appear suspicious. In any event, Country Florist subsequently cut her hours, and a short time later, she quit.

Ms. Deboer testified that, at some point, Dr. Assam and Dr. Becker encouraged her to apply for Social Security Disability, which she did. She was still working while she applied. Her application was ultimately denied by the Social Security Administration. "We have determined that your condition is not severe enough to keep you from working. We considered the medical and other information, your age, education, training, and work experience . . ." (Cl. Ex. 28)

In September 2017, Ms. Deboer was hired by Prairie view Campus as a feeding assistant to residents. On October 13, 2017, Prairie View terminated Ms. Deboer. A note from Prairie View's personnel file documents this termination.

> Sandy & I spoke with Maggie today about our concerns with the dishonesty on her job physical questionnaire.
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> I told her that we had received some information and that my conversation w/her when she mentioned applying for disability, lead us to review her application.
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> I explained that on her employee physical form she did not disclose any problems w/feet, problems w/her back, problems w/arthritis, past injuries that required a physician or past surgeries and yet she mentioned applying for disability. She responded, but I didn't get approved, to which I asked but wouldn't you have to have a reason to even apply, she said yes.
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> I explained that the fact that she was not truthful with us and not forth coming with any information that may affect her employment placement we were letting her go. I explained that it is the facility's policy to terminate any applicant/employee whom it has been discovered has not been truthful and forthcoming on their application process.

(Def. Ex. E, p. 11) I have reviewed the claimant's full job physical questionnaire, as well as all of the personnel-related documents contained in Defendants' Exhibit E and I find no evidence that there that Ms. Deboer lied about anything. At best, it appears Prairie View's termination of Ms. Deboer was a result of poor or sloppy personnel practices. At worst, it may have been disability discrimination.[1]

Under a category entitled "Psychological", Ms. Deboer checked that she had no concerns with "sense of urgency" or her ability to "work closely with others." (Def. Ex. E, p. 10) These appear to be perfectly honest answers. The reality is Ms. Deboer has consistently worked through all of her psychological and physical symptoms since her

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[1] The Americans with Disabilities Act, as well as the Iowa Civil Rights Act, prohibit discrimination on the basis of a person's disability or perceived disability. Again, it is noted that Prairie View is not a party to this case. It has no way to present additional evidence defending its decision. Based upon the documentation before me in this record, however, I find no evidence of dishonesty whatsoever.

injury. She has never required restrictions or accommodations, of any kind, in any job she has held. I simply can find no answers on these forms which appear dishonest. Based upon Ms. Deboer's testimony concerning this separation, it appears the employer believed she must have lied about something since she had applied for Social Security Disability. Prairie View's own documentation, however, belies this point. In any event, she was terminated from this position which paid about $9.50 per hour.

Just prior to hearing, Ms. Deboer obtained employment for Sanford Sheldon Hospital in housekeeping. She testified she was hired to work 72 hours every two weeks and her goal was to begin CNA classes in January 2018. At the time of hearing, claimant was working at Sanford and Hy-Vee.

It is also noted, since her injury, Ms. Deboer has applied for numerous other jobs which she felt she could perform at Hy-Vee, such as front end manager and customer service. She has been unable to advance despite reasonable efforts to secure a better job with more hours. She testified that she works multiple jobs to make ends meet; however, she would prefer to devote more of her work time and energy to HyVee. For their part, HyVee has no issues with Ms. Deboer's work performance and she appears to be a valuable and valued employee.

In addition to the treatment providers' records, there are numerous expert opinions in the record. Tony Larson, Psy.D, prepared a psychological report on behalf of the Social Security Administration (SSA) in June 2017. A number of tests were performed, including memory testing. Dr. Larson opined that Ms. Deboer suffered from (1) major depressive disorder, (2) social anxiety disorder, (3) panic disorder, (4) generalized anxiety disorder and (5) mild neurocognitive disorder due to traumatic brain injury. (Cl. Ex. 27, pp. 3-4) He found these conditions did in fact impact her employability, just not enough to find her totally disabled under SSA guidelines. He pointed to her most significant diagnoses from a vocational standpoint as being "anxiety and neurocognitive symptoms". (Cl. Ex. 27, p. 5)

> Overall, there appear to be definite memory deficits for Margaret. On the other hand, she should be able to understand and carry out most instructions, interact appropriately with others in most instances, exercise proper judgment, and remain flexible in the workplace. Finally, Margaret should be able to handle funds.

(Cl. Ex. 27, pp. 5-6) I find the psychological medical opinions of Dr. Larson to be highly credible.

The defendants had Ms. Deboer evaluated by Renee Hudson Psy.D, in October 2017. Neuropsychological testing was performed. Dr. Hudson reviewed appropriate medical history and performed a valid examination. Her opinion was that Ms. Deboer suffered from depression since 2006. She further opined that while she would not specifically dispute the diagnosis of anxiety, she did not find it compelling, nor did she relate it specifically to the fall at work. "It is very unlikely there is permanent cognitive

impairment due to the fall on 02/03/2016." (Cl. Ex. 18, p. 2) "She will need continued treatment for depression, a pre-injury condition, but as mentioned previously improvement in her employment status and related financial stability will likely improve her emotional well-being." (Cl. Ex. 18, p. 2) A number of functional impairments, however, were noted in her neuropsychological testing. (Cl. Ex. 18, pp. 4-6)

Douglas Martin, M.D., also evaluated Ms. Deboer for the defendants in November 2017. Dr. Martin opined that the slip and fall incident did lead to a concussive episode and some neck and headache symptoms. "I do think that the fall probably created an issue with the vestibular system of the right side." (Cl. Ex. 19, p. 11) He assigned a 5 percent whole body impairment rating for vestibular condition. (Cl. Ex. 19, p. 12) He did not recommend any permanent restrictions. (Cl. Ex. 19, p. 12)

Finally, claimant was evaluated by a physician of her choosing in November 2017, Kunal Patra, M.D., a board certified psychiatrist. Dr. Patra thoroughly reviewed claimant's entire medical history including her mental health history, in addition to performing an evaluation. Dr. Patra diagnosed major depressive disorder (moderately severe intensity); mild neurocognitive disorder due to traumatic brain injury; personality change; and generalized anxiety disorder. She causally connected all of these conditions to the February 3, 2016, fall at work. (Cl. Ex. 20, pp. 13, 16, 18-19) Dr. Patra meticulously documented the symptoms caused by these conditions, opining that she reached maximum medical improvement in January 2017. (Cl. Ex. 20, p. 22) He opined that she suffered rather significant impairment from these conditions.

> Based on my clinical evaluation on 11/16/2017 along with review of medical and psychiatric records, Ms. Deboer is left with significant sequelae from the multiple psychiatric issues she suffers from at this time leading to permanent impairment.

(Cl. Ex. 20, p. 22) For major depression, anxiety and personality change, Dr. Patra rated her permanent impairment in the mild to moderate range "when viewed in the context of her functioning in the four areas namely activities of daily living, social functioning, concentration, persistence/pace, and adaptation to workplace demands." (Cl. Ex. 20, p. 23) For her mild neurocognitive disorder, he opined she suffered a 20 percent whole person impairment, "straddling between Class 1 and Class 2 level of impairments." (Cl. Ex. 20, p. 23)

Dr. Patra also opined that while Ms. Deboer had a clinical history of depression dating back to 2004, her condition had been in remission, as evidenced in her medical records. When asked about medical restrictions, Dr. Patra outlined a number of difficulties Ms. Deboer encounters or is likely to encounter in the competitive workplace; however, he declined to place any specific restrictions on her. (Cl. Ex. 20, p. 23)

At hearing, Ms. Deboer testified the ways in which her injury has adversely impacted her life. She testified she suffers from memory problems which interfere with both her work and her activities of daily living. She is unable to multitask. She testified that she suffers from anxiety and panic attacks, as well as dizziness.

Defendants called two witnesses at hearing, Bobbi Grave and Bobbi Kanengieter, both current HyVee management level employees. They provided testimony that Ms. Deboer is able to perform all of the work assigned to her without difficulty or limitation. By their testimony, Ms. Deboer does not appear to be having any difficulty whatsoever as a result of her work injury. These witnesses are generally credible. Ms. Deboer did receive a pay increase of $.25 per hour following her injury. (Def. Ex. A)

CONCLUSIONS OF LAW

The first question is whether the admitted February 3, 2016 injury is a cause of permanent disability, and if so, the extent of such disability. Defendants have admitted a permanent disability which their physicians characterized as a "vestibular condition" which causes her to lose balance. Claimant contends her injury also substantially contributed to her development of mental conditions. The issue is whether the injury substantially caused her various mental diagnoses.

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

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

When an injury occurs in the course of employment, the employer is liable for all of the consequences that "naturally and proximately flow from the accident." Iowa Workers' Compensation Law and Practice, Lawyer and Higgs, section 4-4. The Supreme Court has stated the following. "If the employee suffers a compensable injury and thereafter suffers further disability which is the proximate result of the original injury, such further disability is compensable." Oldham v. Scofield & Welch, 222 Iowa 764, 767, 266 N.W. 480, 481 (1936). The Oldham Court opined that a claimant must present sufficient evidence that the disability was naturally and proximately related to the original work injury.

While a claimant is not entitled to compensation for the results of a preexisting injury or disease, its mere existence at the time of a subsequent injury is not a defense. Rose v. John Deere Ottumwa Works, 247 Iowa 900, 76 N.W.2d 756 (1956). If the claimant had a preexisting condition or disability that is materially aggravated, accelerated, worsened or lighted up so that it results in disability, claimant is entitled to recover. Nicks v. Davenport Produce Co., 254 Iowa 130, 115 N.W.2d 812 (1962); Yeager v. Firestone Tire & Rubber Co., 253 Iowa 369, 112 N.W.2d 299 (1961).

It is well-settled in Iowa that when physical trauma causes or aggravates a mental condition which increases or prolongs disability, all disability, including the effects of the nervous disorder, is compensable. Gosek v. Garmer & Stiles Co., 158 N.W.2d 731,733 (Iowa 1968). No special legal causation test showing unusual stress is required in such cases. See generally, Lawyer & Higgs, Iowa Workers' Compesation Law and Practice (2nd ed.), sections 4-6, p. 31).

The issue is whether claimant's diagnoses of depression, anxiety and cognitive impairment are causally connected to her work injury.

There are conflicting medical experts in this record. Dr. Hudson performed neuropsychological testing and concluded that "it is very unlikely there is permanent cognitive impairment due to the fall on 02/03/2016." (Cl. Ex. 18, p. 2) She opined that the depression was a preexisting condition, although she did not address the appropriate legal standard for medical causation, and while she did not specifically dispute the diagnosis of anxiety, she was not particularly concerned about it. Dr. Patra's conclusions were more thorough and more consistent with the other medical evidence, including the notes of Dr. Jensen, Dr. Donlin, Dr. Becker, Dr. Dunn-Junius and Dr. Larson. Using appropriate causation standards, Dr. Patra concluded that "Ms. Deboer is left with significant sequelae from the multiple psychiatric issues she suffers from at this time leading to permanent impairment." (Cl. Ex. 20, p. 22) He rated each of those conditions and causally connected the ratings to the injury. I agree with Dr. Patra, that prior to claimant's work injury, her depression was in remission. This is well-documented in her PHQ scores both before and after the injury.

I do agree, to some extent, with the defendants' concerns that Dr. Patra overstated the severity of some of claimant's symptoms as set forth on pages 10 and 11 in its brief. For example, Dr. Patra stated Ms. Deboer is unable to work any difficult jobs other than a checker at Hy-Vee. (Cl. Ex. 20, p. 3) As the defendants note, Dr. Patra makes a number of factual findings similar to this. Notwithstanding the adjectives used by Dr. Patra, it appears that he was merely expressing the claimant's opinion that she is struggling performing difficult jobs. I find that Ms. Deboer is able to work. She is able to perform work activities, without restrictions, and, for the most part, she appears to the rest of the world as though she is healthy. These factors though, really are more relevant to the assessment of the extent of her disability. The greater weight of evidence supports a finding that the claimant does have these conditions and they were substantially caused or materially aggravated by her work injury.

For these reasons, I find the claimant has met her burden that her injury is a proximate cause of disability, including her mental diagnoses.

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

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

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

I find that the claimant has suffered a 35 percent loss of earning capacity as a result of her work injury. Claimant was 59 years old as of the date of hearing. She has some college and she is bright. Her past work history is varied; however, at the time of her hearing, most of her relevant work experience was in low-income, service sector employment. She works several part-time jobs to survive: retail at a grocery store and housekeeping. She has also supplemented her income with bartending. She has had a cosmetology license in the past.

As a result of the work injury, Ms. Deboer now has a vestibular condition in her ear and a mild traumatic brain injury. These conditions cause forgetfulness, loss of balance and syncopal (fainting/light-headedness) incidents. Her depression was substantially aggravated by the fall and she now has anxiety. All of these conditions combined cause a rather significant permanent functional impairment. Nevertheless, Ms. Deboer is highly motivated, in part due to financial anxiety or a fear of not being able to pay her bills. She has no formal restrictions. She is able to maintain essentially all of the jobs which she held prior to the work injury. She does not have a documented loss of actual earnings as a result of her work injury. To suggest, however, that her work injury has not impacted her ability to earn wages in the competitive job market, would be inaccurate.

Her physical and mental impairments undoubtedly impact her effectiveness as an employee in the competitive job market. Her work history since the accident has been challenging. She had her hours cut at a floral shop without explanation to the point she had to quit. She was let go from her job with a nursing home allegedly because she accepted a job with the floral shop, even though she had always held multiple jobs. This termination occurred shortly after she had a fainting or light-headedness issue at work where an ambulance had to be called. She was terminated from another employer after it learned she had applied for Social Security Disability, even though there was no actual evidence that she lied about anything. It is noted that there is still a stigma on people in society who suffer from mental disabilities.

I find that the claimant is, in fact, struggling in her vocational life. She testified that her treating physicians advised her to apply for Social Security Disability. While some of her descriptions of her abilities to Dr. Patra, and other providers as well as her testimony may be somewhat overstated, I have no doubt that she is truly struggling to hold her work life together and get by. This fact is quite well documented in claimant's treatment notes. At hearing she testified regarding an incident in her most recent job where she had difficulty remembering her way around and what task she was working on. The fact is, she has done it. She has shown great motivation and perseverance in order to accomplish this. She has proven that she can succeed. In all likelihood, it is better for the claimant in light of her conditions, to continue working. The fact that she has succeeded nevertheless precludes a finding of a high industrial disability award.

Having considered all of the factors of industrial disability, I find the claimant has suffered a 35 percent loss of earning capacity as a result of her work injury. Based upon this finding, I conclude that she is entitled to 175 weeks of compensation at the appropriate weekly rate of compensation.

The next issue is the claimant's 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. Iowa Code section 85.27 (2017).

Claimant is entitled to an order of reimbursement only if she has paid treatment costs; otherwise, to an order directing the responsible defendants to make payments directly to the provider. See, Krohn v. State, 420 N.W.2d 463 (Iowa 1988). Defendants should also pay any lawful late payment fees imposed by providers. Laughlin v. IBP, Inc., File No. 1020226 (App., February 27, 1995).

Claimant has submitted medical expenses in the form of a medical bill summary in Claimant's Exhibit 30. She has requested medical mileage as well. (Cl. Ex. 31) The claimant's medical expense summary is comprehensive, although it also documents bills which were paid without incident.

I find that the claimant has met her burden of proof as it relates to the following dates of service:

10/13/16	Sanford Sheldon Clinic-Dr. Becker	$251.00
12/29/16	Sanford Sheldon Clinic-Dr. Becker	$171.00
4/24/17	Sanford Outpatient Rehabilitation	$671.00
5/19/17	Sanford Sheldon Medical Center-PT	$1,060.00
5/16/17	Sanford ENT Clinic-Dr. Jensen	$176.00
5/16/17	Sanford Audiology Clinic	$211.00
5/24/17	Sanford Outpatient Rehabilitation-OT	$259.84

(Cl. Ex. 30, pp. 1-3) These appear to be outstanding bills, and the provider should be paid directly all portions except any out-of-pocket amounts paid by claimant. For the remainder of the dates of service in Claimant's Exhibit 30, I find claimant has failed to meet her burden of proof that she is entitled to these expenses.

For example, a number of the expenses summarized are for prescriptions. I find that the claimant has failed to meet her burden of proof that these prescription expenses are causally connected to her work injury. Based upon the summary in evidence it is unclear which doctor prescribed the medication or what the medication is even for. While I have some familiarity to know, for example, that Amitriptyline can be prescribed to treat depression or mood problems, there may be other uses for the medication. I have made an effort to connect the prescriptions with specific treatment in the medical notes. This time consuming effort was largely fruitless. While it is very possible that many of these prescriptions were for the treatment of claimant's physical or mental conditions, there is simply not enough evidence in the record to make such a specific

finding. Other listed expenses have similar causation issues which lead the undersigned to conclude the claimant has failed to meet her burden of proof. I do find that the claimant is entitled to medical mileage for all of her causally-connected treatment as set forth in this decision.

The next issue is the appropriate rate of compensation.

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 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.

Iowa Code section 85.36(9) (2017) states:

> 9. If an employee earns either no wages or less than the usual weekly earnings of the regular full-time adult laborer in the line of industry in which the employee is injured in that locality, the weekly earnings shall be one-fiftieth of the total earnings which the employee has earned from all employment during the twelve calendar months immediately preceding the injury.
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> a. In computing the compensation to be allowed a volunteer fire fighter, emergency medical care provider, reserve peace officer, or volunteer ambulance driver the earnings as a fire fighter, emergency medical care provider, reserve peace officer, or volunteer ambulance driver shall be disregarded and the volunteer fire fighter, emergency medical care provider, reserve peace officer, or volunteer ambulance driver, shall be paid an amount equal to the compensation the volunteer fire fighter, emergency medical care provider, reserve peace officer, or volunteer ambulance driver would be paid if injured in the normal course of the volunteer fire fighter's, emergency medical care provider's, reserve peace officer's, or volunteer ambulance driver's regular employment or an amount equal to one hundred and forty percent of the statewide average weekly wage, whichever is greater.
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> b. If the employee was an apprentice or trainee when injured, and it is established under normal conditions the employee's earnings should be expected to increase during the period of disability, that fact may be considered in computing the employee's weekly earnings.
>
> c. If the employee was an inmate as defined in section 85.59, the inmate's actual earnings shall be disregarded, and the weekly compensation rate shall be as set forth in section 85.59.

In this case, Ms. Deboer worked three part-time jobs. Her total reported income in 2015, for these three jobs was $18,670.00. (Cl. Ex. 33, p. 2) Claimant testified that, in her position as a bartender, she also earned tip income which is not reported. It was also not documented anywhere. She received cash. I believe Ms. Deboer. I believe she received cash tips as a bartender. The trickier question is how much she received. She presented evidence that she earned a little over $2,800.00 in cash tips over the course of 2015. Her method of estimation was not particularly compelling. Nevertheless, her own estimate averages out to around $55.00 per week. She testified she worked 10 to 12 hours per week at the Eagles. While this would be a much easier case if there were some type of documentation of the income, the greater weight of evidence supports the inclusion of some tip income. While I find her precise method of estimating her tip income to be somewhat unusual, ultimately I find her estimate of $55.00 per week to be a modest and reasonable estimate. Consequently, I adopt the claimant's calculation of gross wages set forth in Claimant's Exhibit 33 to be the best evidence in the record of her gross wages.

The final issue is whether claimant is entitled to IME expenses under 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).

I find claimant is entitled to the itemized independent medical evaluation expenses outlined in Claimant's Exhibit 34.

ORDER

THEREFORE IT IS ORDERED:

Defendants shall pay the claimant one hundred seventy-five (175) weeks of permanent partial disability benefits at the rate of four hundred twenty-nine and 95/100 dollars ($429.95) per week from February 3, 2017.

Defendants shall pay accrued weekly benefits in a lump sum.

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

Defendants shall pay the medical expenses as set forth in the body of this decision

Defendants shall reimburse the IME expense of Dr. Patra in Claimant's Exhibit 34.

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

Costs are taxed to defendants.

Signed and filed this 5th day of December, 2018.

JOSEPH L. WALSH
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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JLW/sam

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.