

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

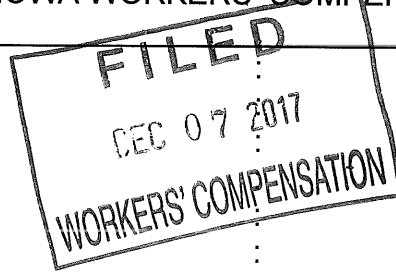
THERESSE R. KOLLS,

Claimant,

vs.

LOWE'S HOME CENTERS, INC.,

Employer,
Self-Insured,
Defendant.



File No. 5062056

ARBITRATION

DECISION

Head Note Nos.: 1402.30, 1402.40,
2501, 2701, 2907, 3001, 4000.2

STATEMENT OF THE CASE

Theresse Kolls, claimant, filed a petition in arbitration and seeks workers' compensation benefits from defendant, Lowe's Home Centers, Inc., as the self-insured employer. Hearing was held on July 11, 2017.

The parties filed a hearing report at the commencement of the arbitration hearing. On the hearing report, the parties entered into various stipulations. All of those stipulations were accepted and are hereby incorporated into this arbitration decision and no factual or legal issues relative to the parties' stipulations will be raised or discussed in this decision. The parties are now bound by their stipulations.

The evidentiary record includes Claimant's Exhibits 1 through 37, and Defendant's Exhibits A through H. Defendant objected to Claimant's Exhibit No. 11, pages 29-33 as untimely. Defendant was provided additional time to obtain rebuttal evidence, which was introduced by defendant as Exhibit H. Exhibit H is officially received into the evidentiary record.

Claimant testified on his own behalf. Defendant called Tom Romold to testify.

At the conclusion of the arbitration hearing, counsel for the parties requested the opportunity to file post-hearing briefs. Their request was granted and the parties filed their briefs simultaneously on July 25, 2017, at which time the case was considered fully submitted.

ISSUES

The parties submitted the following disputed issues for resolution:

1. Whether claimant is entitled to temporary total disability, or healing period, benefits between November 12, 2015 and January 14, 2016.
2. Whether claimant is entitled to permanent disability benefits and, if so, the nature of that permanent disability as a scheduled or unscheduled injury.
3. If claimant is entitled to permanent disability, the extent of claimant's entitlement to permanent disability benefits.
4. If claimant is entitled to permanent disability benefits, the proper commencement date for permanent disability benefits.
5. Whether claimant is entitled to one or two exemptions for purposes of calculating her weekly benefit rate, and the corresponding applicable weekly workers' compensation benefit rate.
6. Whether claimant is entitled to payment, reimbursement, or satisfaction of past medical expenses and medical mileage contained at Claimant's Exhibits 31 through 35.
7. Whether claimant is entitled to alternate medical care for future medical care.
8. Whether claimant is entitled to reimbursement of her independent medical evaluation fees contained at Claimant's Exhibit 14, pursuant to Iowa Code section 85.39 and/or 876 IAC 4.33(6).
9. Whether costs should be assessed against either party.

In her post-hearing brief, Ms. Kolls asserts a request for penalty benefits. No request for penalty benefits was asserted on the hearing report or at the commencement of hearing when the undersigned reviewed the hearing report with counsel. Claimant did not preserve a penalty claim at the time of the arbitration hearing. It would be prejudicial to defendant to consider a penalty claim after the conclusion of trial and the close of evidence. Therefore, claimant's request for penalty benefits will not be considered.

FINDINGS OF FACT

The undersigned, having considered all of the evidence and testimony in the record, recognizing that there may be competing or contradictory facts within this evidentiary record, I find the following facts:

Theresse Kolls is a 45-year-old woman, who lives in Sioux City. Ms. Kolls graduated from high school, but has a learning disability and specifically has difficulties with reading comprehension. Since high school, claimant has obtained a certified nursing assistant certification. She has worked with her ex-husband performing painting and cleanup for construction contractors. She has worked for Building Center

performing event set up for weddings, cage fights, and similar events. Ms. Kolls has worked for FEMCO as a line leader in a manual labor job in which she also supervised six people. Ms. Kolls also worked at Bomgaars in a manual labor job within the shipping department.

In March 2012, Ms. Kolls began working for the employer in this case, Lowe's. She was hired initially as a seasonal worker but later hired on a full-time basis. She earned \$10.78 per hour at Lowe's and worked in receiving and stocked the show floor. She was required to pull product from the store room and was required to lift large items such as doors, which would weigh between 50-100 pounds. She walked and stood approximately 90 percent of her work time at Lowe's.

On June 27, 2013, Ms. Kolls was unloading carpet from a fork truck. After completing the unload project, she was removing the carpet mast from the fork truck and attempting to install the forks back onto the fork truck. Unfortunately, when she attempted to reinstall one of the forks, it disengaged from the fork truck and fell onto Ms. Kolls' right foot.

Needless to say, claimant experienced immediate pain in her right foot and testified that she was not able to walk. Lowe's sent claimant for medical care, and conservative care was attempted. Unfortunately, Ms. Kolls' foot did not respond to the conservative care and she was later referred to a foot surgeon, Kham Vay Ung, D.P.M. Dr. Ung evaluated claimant in October 2013 and noted that she continued to exhibit a swollen right foot and complained of excruciating pain.

Timothy C. Fitzgibbons, M.D. had previously treated Ms. Kolls for a prior right foot injury in 2008. Specifically, Ms. Kolls sustained a fracture in her right foot while working at Femco in 2008. Dr. Fitzgibbons performed surgery in July 2008 for that injury and later released claimant to return to work without restrictions. Unfortunately for claimant, that prior injury continued to cause some problems.

Dr. Fitzgibbons recommended another surgery for claimant's right foot. However, she requested to treat closer to her home and the prior worker's compensation carrier transferred her care to a podiatrist, Dr. Ung.

Dr. Ung performed surgery on claimant's right foot in November 2009. Claimant testified that she "did great" after the November 2009 surgery with Dr. Ung. She returned to work without restrictions, at that time pulling product at Bomgaars. Ms. Kolls testified that she would experience some minor cramping sensations in her right ankle while working at Lowe's before the June 2013 injury but those symptoms did not stop her from performing the full range of duties at Lowe's. Nevertheless, claimant required ongoing injections into her right foot as a result of ongoing symptoms. She received an injection in March 2013, three months before the work injury at Lowe's.

Then, following the June 2013 foot injury at Lowe's, claimant was referred back to Dr. Ung for evaluation. Dr. Ung recorded significant reports of pain, but attempted

conservative measures for claimant's right foot. Unfortunately, Ms. Kolls continued to experience symptoms in her right foot, and subsequent x-rays demonstrated the development of degenerative changes and post-traumatic arthritis. An MRI in November 2014 demonstrated a large osteochondral defect and osteonecrosis involving the talar dome in claimant's right foot, as well as defects adjacent to the calcaneus and marrow edema throughout the talus.

Dr. Ung performed yet another surgery on claimant's right foot in February 2015, including an exostectomy with resection of bone along the right talonavicular cuneiform bone and metatarsocuneiform bone, along with performing a fusion at the Lisfranc joint. (Claimant's Exhibit 8) This surgery did not resolve all of claimant symptoms and Dr. Ung returned claimant for yet another foot surgery in November 2015. (Claimant's Ex. 13)

Defendant points out that in March 2015, Dr. Ung noted claimant was "completely pain free" and that she experienced "complete healing status post ostectomy with arthrodesis at the right first and second Lisfranc joint and the first M-C joint on 02/13/15." (Claimant's Ex. 2, p. 77) Indeed, it appears that the fusion at the Lisfranc joint was successful.

However, defendant's reading of the March 5, 2015 office note from Dr. Ung is not the entire story portrayed or relayed by the note. At that same visit, claimant "continued to complain about increasingly more noticeable swelling and pain at the right ankle, and she pointed at the posterior aspect of the right heel at the retrocalcaneal space." (Ex. 2, p. 76) Claimant attended the March 5, 2015 office visit with Dr. Ung and wanted to "discuss about future treatment plan." (Ex. 2, p. 76)

Dr. Ung noted during his examination on March 5, 2015 that the fusion had successfully healed. However, he also noted that "[d]irect palpation into the retrocalcaneal space elicits sharp painful response from the patient and it is still swollen." (Ex. 2, p. 76) This clearly appears to be a problem that was ongoing and not something that developed spontaneously in March 2015. Dr. Ung noted pain with range of motion in the subtalar joint and noted edema in that area. Dr. Ung's evaluation on March 5, 2015 was not a "clean bill of health" for claimant's right foot. (Ex. 2, p. 76)

Defendant had claimant reevaluated by Dr. Fitzgibbons pertaining to causal connection of claimant's ongoing symptoms after March 5, 2015. Dr. Fitzgibbons ultimately opines, "The cause of the patient's right talus problems, for which she's having probably most of her problems now, were related to the incident at work that occurred in 2008. The problems with the midfoot, for which she had a midfoot fusion done in 2015 by Dr. Ung, were caused by the injury at Lowe's in 2013." (Ex. 1, p. 30)

Dr. Fitzgibbons offers his opinions from an advantageous position, having treated claimant after the 2008 injury and then having seen her after the 2013 injury. However, I have concerns about Dr. Fitzgibbons' analysis of the causation issue.

Dr. Fitzgibbons notes that he requires a follow-up CAT scan, which was never conducted or provided to Dr. Fitzgibbons. (Claimant's Ex. 1, p. 31) Dr. Fitzgibbons also notes, "when Dr. Ung then sees her in 2015, he works with her and eventually recommends that she have a midfoot fusion, which she does have eventually in 2015. Unfortunately, as she goes through 2015, she starts to have more problems and so in the fall of 2015, he starts thinking about addressing other issues." (Claimant's Ex. 1, p. 30) As noted above, claimant did not "start" to have more problems after the March 5, 2015 examination. She clearly had ongoing problems at Dr. Ung's March 5, 2015 evaluation. It appears to me that Dr. Fitzgibbons was under the impression or assumption that claimant's symptoms after the initial 2015 surgery were resolved and that she later developed new symptoms. This is a flawed history or understanding that damages the credibility of Dr. Fitzgibbons' causation opinion.

Nevertheless, Dr. Fitzgibbons' opinions are bolstered by another orthopaedic surgeon, Bryan Den Hartog, M.D. Dr. Den Hartog performed a record review of claimant's medical records and authored a report on September 2, 2016. (Defendant's Ex. B) Dr. Den Hartog opined that claimant "sustained a Lisfranc's injury from the work-related incident on June 27, 2013. There is no evidence on the MRI scan, that was done about 3 weeks after that injury, of any new injury or aggravation of any old injury to the ankle or forefoot. There was, however, evidence on the MRI scan of a new injury to the Lisfranc's joint at that time. The only objective evidence there is of a new injury to her right foot was in the Lisfranc's joint only." (Defendant's Ex. B, p. 1) Dr. Den Hartog further opined, "there was no aggravation of a preexisting condition on June 27, 2013 of the ankle or the forefoot. The only injury that is objectively shown on the MRI scan was to her midfoot at Lisfranc's joint." (Defendant's Ex. B, p. 1)

As a board-certified orthopaedic surgeon, Dr. Den Hartog's opinions are entitled to significant consideration and carry some weight. However, again, I have difficulties accepting Dr. Den Hartog's causation opinions. Dr. Den Hartog completely rules out an ankle injury occurring on June 27, 2013. (Defendant's Ex. B, p. 2) Yet, photographs of claimant's foot on the date of injury and shortly after the date of injury demonstrate trauma, swelling, and bruising to the ankle area as well as the midfoot. Similarly, Dr. Den Hartog offers no explanation of the ongoing symptoms reported in Dr. Ung's office note on March 5, 2015. Dr. Den Hartog offers no explanation why the edema noted by Dr. Ung in March 2015 is not an objective finding of injury to something other than the midfoot area. Ultimately, I do not find either Dr. Fitzgibbons or Dr. Den Hartog's opinions to be as credible as other evidence in this record.

Instead, I find claimant to be credible when she described her ability to work without restrictions before the June 27, 2013 work injury at Lowe's and the effects and symptoms she described after that injury. I specifically rely upon the opinions of Mark C. Taylor, M.D., who performed an independent medical evaluation of claimant on October 18, 2016. (Claimant's Ex. 14)

I acknowledge that Dr. Taylor is not an orthopaedic surgeon or a podiatrist. However, it appears that Dr. Taylor had a full medical history available to him when

evaluating claimant and the causation issue. Dr. Taylor appears to have had a good grasp of claimant's pre-existing injury, surgeries, and condition. Dr. Taylor reviewed the reports and opinions of Dr. Den Hartog as well as Dr. Fitzgibbons and acknowledged those contrary opinions. However, Dr. Taylor explained that:

The midfoot is particularly important as far as not only stabilizing portions of the foot, including the arch, but also in the overall gait pattern. As a result of her crush injury, her gait pattern was further impaired and she had an extended period of time where she either had an altered gait or was using some form of boot, such as the Cam Walker. Therefore, in my opinion, although there were pre-existing defects, it appears that there was a material aggravation of the pre-existing condition in that the osteochondral defect expanded. This could also be viewed as an 'acceleration.' Prior to the crush injury, she was reportedly doing well and had remained stable and had returned to full-duty work including physically-demanding work with heavy lifting and spending substantial amounts of time on her feet. She was able to fully squat and she has still been unable to return to her baseline. Therefore, this could be viewed as an aggravation or an acceleration. In other words, but for the crush injury, it was unlikely that Ms. Kolls would have required the extent of treatment that she needed after the crush injury.

(Claimant's Ex. 14, pp. 11-12) Dr. Taylor also noted the photographs of claimant's foot and the swelling and redness over claimant's foot and ankle demonstrated in those photos.

Dr. Taylor's opinion appears to consider evidence (such as photographs) that was not considered by Dr. Den Hartog. Claimant testified that she showed the photographs to Dr. Fitzgibbons. However, his report does not discuss the photographs or the injuries depicted therein. It does not appear that Dr. Fitzgibbons gave the photographs much weight or consideration in formulating his causation opinion.

Dr. Taylor's opinion appears consistent with the testimony given by claimant, which I found to be credible. Dr. Taylor's opinions make common sense and explain the temporal development of increased symptoms and need for additional treatment of areas of claimant's foot and ankle other than merely the midfoot. I find Dr. Taylor's explanation to be reasonable, logical, credible and convincing.

Similarly, Dr. Ung noted in his treatment notes that claimant has a "[h]istory of forklift crush injury to the right midfoot on 06/27/13; at this time, resulting in chronic painful posttraumatic arthritis." (Claimant's Ex. 2, p. 80) He also noted that claimant has an "[o]steochondral painful lesion with sinus tarsi syndrome of the right foot as seen on MRI on 10/09/14; had been progressively and worsening aggravated since injury in June 2013." (Claimant's Ex. 2, p. 80)

I accept the opinions of Dr. Taylor and Dr. Ung that claimant sustained an aggravation of her underlying foot conditions as a result of June 27, 2013, right foot crush injury at Lowe's. That aggravation accelerated claimant's need for additional treatment in areas of her foot and ankle other than merely the midfoot fracture. As such, I find that claimant has proven by a preponderance of the evidence that she sustained a midfoot fracture on June 27, 2013 and that the crush injury aggravated her underlying foot conditions such that she required ongoing and acceleration of the need for treatment of her foot and ankle. I specifically find that all of the medical treatment and expenses sought by claimant are related to the June 27, 2013 work injury at Lowe's.

Unfortunately, Ms. Kolls also experienced an increase and aggravation of some underlying depression she had as a result of the June 27, 2013 work injury. Realistically, there are only two opinions pertaining to claimant's depression and causal connection to her foot conditions. Claimant's personal physician, Kristi D. Walz, M.D., opines that claimant's depression worsened as a result of her foot conditions. (Claimant's Ex. 3, p. 25) Similarly, the mental health professional, Beth E. Harms, LISW, treating claimant's depression in a clinical setting also opined that her depression was worsened, or causally related to, her foot issues. (Claimant's Ex. 11, p. 32)

Although client's family physician and treating mental health counsel did not specifically attempt to parse out how much of claimant's depression was related to the 2008 injury versus the 2013 injury, having found that the 2013 work injury at Lowe's caused a material aggravation of claimant's foot conditions, I find that it also caused a material aggravation and worsening of her underlying depression. This is also supported by the fact that claimant's medication dosage for depression has increased since the June 27, 2013 incident. (Claimant's Ex. 3, p. 25)

Having found that the June 27, 2013 injury caused a permanent injury to claimant's foot, a permanent and material aggravation of her foot and ankle, and a permanent and material aggravation of claimant's underlying depression, I must determine the extent of the impact of these permanent injuries on claimant's future earning capacity. Claimant has obviously attempted to move on with her life.

Ms. Kolls has found employment since the June 27, 2013 work injury. She has worked in a desk job performing telephone calls to phone customers. She earned \$9.00 per hour, as well as a potential commission, in this position. She testified that it was difficult to obtain the commission, however.

Ms. Kolls has also established her own daycare since the date of injury. She is currently a state-certified in-home daycare provider. She currently watches four children and can enroll up to six children in her daycare at a time. She did not provide an estimate of her current income in this position.

Although she has obtained subsequent employment, Ms. Kolls has permanent work restrictions that limit her ability to obtain some types of employment. I found the

restrictions outlined by Dr. Taylor at Claimant's Exhibit 14, pages 13-14, to be the most accurate and reasonable work restrictions for claimant. Specifically, Dr. Taylor recommended continued use of orthotics, avoidance of lifting or carrying greater than 50 pounds, limiting lifting activities to occurring at or above knee level. Dr. Taylor recommended that claimant be allowed to sit, stand, or walk, as needed for comfort. He noted that claimant may need to elevate her right ankle at times, if she experienced swelling. He also recommended occasional kneeling, no squatting, use of ladders only rarely, and walking stairs only occasionally.

Dr. Taylor also assigned an 11 percent permanent impairment to claimant's right lower extremity as a result of the June 27, 2013 work injury. I accept that impairment rating as an accurate assessment of claimant's permanent functional loss. Dr. Fitzgibbons opined there is no permanent functional loss of the right foot even though claimant required a fusion within the foot. I reject his opinion and find that claimant has sustained a permanent functional loss as a result of the June 27, 2013 work injury and that Dr. Taylor's assessment of that functional loss is most accurate in this record.

Ms. Kolls testified that she could not return to work at Lowe's or Femco because those jobs involved too much physical labor. Considering Dr. Taylor's recommended restrictions, I find claimant's testimony in this regard to be reasonable and accurate.

Considering Ms. Kolls' age, educational background, employment history, ability to find alternate work after her injury, the situs of her injury, the need for two foot surgeries following the injury, her resulting mental injuries, her permanent impairment, permanent restrictions, motivation level, and all other factors of industrial disability outlined by the Iowa Supreme Court, I find that Ms. Kolls has proven by a preponderance of the evidence that she sustained a 30 percent loss of future earning capacity as a result of the June 27, 2013 work injury at Lowe's.

Having found the November 12, 2015 surgery to be causally related to the June 27, 2013 work injury, I must also consider Ms. Kolls' request for healing period benefits after that surgery. It is apparent in this record that claimant had limitations on her weight bearing capability after the November 12, 2015 surgery. It is apparent that she was not at maximum medical improvement by this date or before January 14, 2016. It is also apparent that claimant was not capable of returning to substantially similar employment between November 12, 2015 and January 14, 2016.

Claimant's brief asserts that she was off work after the November 12, 2015 surgery. However, there is no evidence in this record to definitively establish whether claimant was working anywhere between November 12, 2015 and January 14, 2016. Defendant specifically disputed this fact. (Hearing Report) I find that claimant failed to prove she was actually off work between November 12, 2015 and January 14, 2016.

Ms. Kolls contends that defendant inaccurately calculated her applicable weekly worker's compensation rate. Specifically, Ms. Kolls contends that she is entitled to two

exemptions for purposes of calculating her rate. Defendant contends that claimant is entitled to only one exemption.

Ms. Kolls possesses the best evidence in this situation to demonstrate her entitlement to an additional exemption. Ms. Kolls claims entitlement to claim her daughter. She testified that her daughter was born in 1998, which would make her a minor at the time of the 2013 injury.

Yet, in her answers to interrogatories, Ms. Kolls provided an answer given under penalty of perjury that she was entitled to only one exemption. Ms. Kolls conceded that she is divorced. She testified at hearing that her former husband has never been entitled to claim the daughter for tax purposes. However, Ms. Kolls produced no evidence in the form of tax returns or a divorce decree to establish the accuracy of this contention. Given the competing statement in her answer to interrogatory, Ms. Kolls needed to produce some documentary evidence to establish the accuracy of her changed position and her trial testimony. Without some documentary evidence, I find that Ms. Kolls failed to carry her burden of proof to establish entitlement to claim her daughter as a dependent and exemption by a preponderance of the evidence. Therefore, I find that claimant is entitled to claim only one exemption for purposes of calculating her weekly rate.

Ms. Kolls also seeks an award of past medical expenses. Having found that claimant proved the June 27, 2013 work was a direct cause of her midfoot problems and caused a material aggravation of the remainder of claimant's right foot, right ankle, and depression conditions, I similarly find that claimant has proven the disputed medical expenses contained at Claimant's Exhibits 31 through 35 are causally related to the June 27, 2013 work injury at Lowe's. I find those charges to be reasonable and the medical treatment to be reasonable and necessary. (Hearing Report)

Claimant seeks reimbursement of Dr. Taylor's independent medical evaluation fees. Defendant obtained an impairment rating from Dr. Den Hartog on September 2, 2015. Claimant requested an evaluation at defendant's expense on May 19, 2016. Defendant consented to reimburse a reasonable fee for an independent medical evaluation pursuant to Iowa Code section 85.39. (Claimant's Ex. 25)

Ms. Kolls obtained an independent medical evaluation performed by Dr. Taylor on October 18, 2016. (Claimant's Ex. 14) Dr. Taylor spent an hour and forty-five minutes evaluating claimant as well as three and a half hours drafting a report. Dr. Taylor reviewed over 1,200 pages of medical records, many of which were reviewed by the undersigned and which took extensive time to review. Dr. Taylor generated a 15-page report. Dr. Taylor charged \$4,395.00 for his services.

Dr. Taylor's charges are significant and could be found to be excessive or unreasonable in some circumstances. However, the record in this case was relatively voluminous. There were prior injuries to be considered and claimant's medical history was relatively complex considering the issues involved. Considering the volume of

information to be reviewed, the length of his evaluation, and the length of his report, I find that Dr. Taylor's charges of \$4,395.00 are reasonable under the circumstances of this case.

CONCLUSIONS OF LAW

Defendant admits that claimant sustained a right foot injury on June 27, 2013. (Hearing Report) However, the parties dispute whether claimant sustained a right leg injury or a mental injury resulting from the right foot injury. Claimant contends that her injury should be compensated with industrial disability because she sustained a permanent mental injury. Defendant contends that claimant's injury is limited to a right foot injury.

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).

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).

An injury to a scheduled member may, because of after effects or compensatory change, result in permanent impairment of the body as a whole. Such impairment may in turn be the basis for a rating of industrial disability. It is the anatomical situs of the

permanent injury or impairment which determines whether the schedules in section 85.34(2)(a) - (t) are applied. Lauhoff Grain v. McIntosh, 395 N.W.2d 834 (Iowa 1986); Blacksmith v. All-American, Inc., 290 N.W.2d 348 (Iowa 1980); Dailey v. Pooley Lumber Co., 233 Iowa 758, 10 N.W.2d 569 (1943). Soukup v. Shores Co., 222 Iowa 272, 268 N.W. 598 (1936).

In this case, I found that claimant established she experienced a material aggravation of underlying conditions and established she sustained compensable injuries to her right foot, right ankle, and a permanent mental injury as a result of the traumatic injury sustained on June 27, 2013. Therefore, I conclude that claimant has established entitlement to permanent disability benefits and that her injury should be compensated with industrial disability. Iowa Code section 85.34(2)(u).

Section 85.34(1) provides that healing period benefits are payable to an injured worker who has suffered permanent partial disability until (1) the worker has returned to work; (2) the worker is medically capable of returning to substantially similar employment; or (3) the worker has achieved maximum medical recovery. The healing period can be considered the period during which there is a reasonable expectation of improvement of the disabling condition. See Armstrong Tire & Rubber Co. v. Kubli, 312 N.W.2d 60 (Iowa App. 1981). Healing period benefits can be interrupted or intermittent. Teel v. McCord, 394 N.W.2d 405 (Iowa 1986).

In this instance, claimant seeks award of healing period benefits from November 12, 2015 through January 14, 2016. It is clear that claimant was not capable of performing substantially similar employment during this period of time and that she was not at maximum medical improvement. However, defendant disputed whether claimant was off work during this period of time. Claimant failed to prove that she was actually off work during this period of time. Therefore, I cannot find entitlement to healing period benefits after those last voluntarily paid by defendant through October 31, 2015.

Having found that claimant established a permanent mental injury, an unscheduled injury, I conclude that claimant is entitled to an award of permanent partial disability benefits. Iowa Code section 85.34(2)(u).

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.

Permanent disability benefits commence at the termination of healing period. In this case, no healing period benefits were proven to be owed beyond the last voluntary payment made by defendant through October 31, 2015. (Defendant's Ex. A; Hearing Report) Therefore, I conclude that permanent disability benefits commence on November 1, 2015. Iowa Code section 85.34(1); Evenson v. Winnebago Industries, Inc., 881 N.W.2d 360 (Iowa 2016).

Having found that Ms. Kolls proved she sustained a 30 percent loss of future earning capacity as a result of the June 27, 2013 work injury, I conclude that she is entitled to an award of industrial disability benefits equal to 30 percent. This entitles Ms. Kolls to an award of 150 weeks of permanent partial disability benefits. Iowa Code section 85.34(2)(u).

The next issue for determination is the applicable weekly worker's compensation rate. The parties stipulated to the claimant's gross earnings before the date of injury as well as her marital status. The only dispute between the parties on this issue is claimant's entitlement to claim one or two exemptions. (Hearing Report)

The weekly benefit amount payable to an employee shall be based upon 80 percent of the employee's weekly spendable earnings, but shall not exceed an amount, rounded to the nearest dollar, equal to 66-2/3 percent of the statewide average weekly wage paid employees as determined by the Department of Workforce Development. Iowa Code section 85.37.

Typically, because the weekly rate is based upon spendable weekly earnings, ~~the claimant is bound by the number of exemptions to which she is entitled to claim on~~ tax returns. Deraad v. Fred's Plumbing & Heating, File No. 1134532 (Appeal Dec. Jan. 2002). In this instance, the factual determination is also muddled by the fact that claimant was divorced from her daughter's biological father. The factual and legal question regarding rate is whether claimant is entitled to claim her daughter as an exemption for purposes of calculating the weekly rate.

In this case, I found that claimant failed to prove entitlement to claim her daughter as an exemption. Claimant stipulated in her answers to interrogatories that she was entitled to only one exemption. She provided differing testimony at the time of trial, but offered no definitive documentary evidence, such as a tax return or divorce decree, to definitively establish whether her answer to interrogatory or her trial testimony was accurate.

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).

In this instance, I conclude that claimant is the party that would suffer loss if the issue of exemptions is not established. Therefore, claimant bore the burden to establish her entitlement to claim her daughter as an exemption by a preponderance of the evidence. Claimant offered conflicting evidence in this case and failed to produce the definitive documentary evidence that would establish her entitlement to exemptions. I conclude that claimant failed to establish entitlement to claim her daughter as an exemption on the date of injury. I conclude that claimant is entitled to claim only one exemption for purposes of calculating her weekly rate.

The weekly benefit amount is determined under section 85.37 by referring to the Iowa Workers' Compensation Manual in effect on the applicable injury date. Iowa Code section 85.37; 85.61(6); 876 IAC 8.8. Utilizing the parties' stipulations that claimant's gross earnings were \$419.16 per week, that claimant was single on the date of injury, having concluded that claimant is entitled to only one exemption, and using the Iowa Workers' Compensation Manual (rate book) with effective dates of July 1, 2012 through June 30, 2013, I determine that the applicable rate for weekly benefits is \$275.20.

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).

Claimant seeks an award of medical expenses and medical mileage contained at Claimant's Exhibits 31 through 35. Having found that treatment to be reasonable and necessary, and having found the charges to be reasonable, I conclude that claimant is entitled to an award of past medical expenses. Iowa Code section 85.27.

Claimant also seeks alternate medical care. Claimant does not request a specific award of alternate medical care into the future. Instead, she argues that she is entitled to "future medical care for her right ankle, foot, depression, gait and back." (Claimant's Post-Hearing Brief, p. 23) Claimant made claims for injury to her right ankle, foot and depression. She is certainly entitled to future care for those conditions. Iowa Code section 85.27.

Claimant's requests for treatment related to her gait and back are less clear. She requires orthotics for her foot. It is possible that this could cause issues related to her gait and/or back into the future. However, claimant did not assert injuries related to gait

or back in this proceeding and certainly did not prove such injuries. It would be speculative, at best, to award future treatment for altered gait or back issues at this time. No alternate care or specific treatment of claimant's gait or back are being ordered by this decision.

Ms. Kolls seeks reimbursement of an independent medical evaluation performed by Dr. Taylor pursuant to Iowa Code section 85.39. Dr. Taylor charged \$4,395.00 for his services. Defendant challenges the reasonableness of those charges.

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).

In this instance, claimant clearly established the prerequisites of Iowa Code section 85.39 to qualify for an evaluation at defendant's expense. The sole disputed issue in this situation is the reasonableness of Dr. Taylor's fees. For some reason, defendant did not pay what it considered to be a reasonable fee and, instead, disputed the entirety of the fee. Defendant is encouraged into the future to pay that amount which is conceded as being reasonable once defendant has consented to and agreed to pay the fee pursuant to Iowa Code section 85.39.

~~At any rate, the dispute in this situation is the reasonableness of Dr. Taylor's fee.~~ I considered the amount of information to be reviewed by Dr. Taylor, the length of his evaluation and report, and found that his charges were reasonable under the circumstances of this case. Having reached this finding, I conclude that claimant has established entitlement to be reimbursed for the entirety of Dr. Taylor's examination fees pursuant to Iowa Code section 85.39.

Finally, claimant seeks assessment of her costs. Assessment of costs is a discretionary function of the agency. Iowa Code section 86.40.

Claimant has prevailed on the majority of the issues. I conclude it is reasonable to assess claimant's costs against defendants in this file. Claimant seeks assessment of his filing fee (\$100.00) and service fee (\$6.46). Both are reasonable and are assessed pursuant to 876 IAC 4.33(3) and (7).

Claimant seeks assessment of her independent medical evaluation fee as a cost. Having determined that claimant is entitled to reimbursement of that expense pursuant to Iowa Code section 85.39, I do not award Dr. Taylor's fee as a cost.

Ms. Kolls seeks the cost of obtaining medical records from Foot & Ankle Clinic (\$165.00) as well as from Mercy Medical Center (\$106.46) as costs. I conclude that it is reasonable to assess these costs pursuant to 876 IAC 4.36(6). In total, I conclude that it is reasonable to assess costs against defendant totaling \$377.92.

ORDER

THEREFORE, IT IS ORDERED:

Defendant shall pay claimant one hundred fifty (150) weeks of permanent partial disability benefits commencing on November 1, 2015.

All weekly benefits shall be paid at the rate of two hundred seventy-five and 20/100 dollars (\$275.20) per week.

Defendant is entitled to a credit for all weekly benefits paid to date.

Defendant shall pay applicable interest pursuant to Iowa Code section 85.30 for all accrued weekly benefits.

Defendant shall pay any outstanding medical charges directly to the medical providers, reimburse claimant for any charges already paid directly by claimant, reimburse claimant for all medical mileage, or otherwise satisfy and hold claimant harmless for all past medical expenses and medical mileage, as detailed in Claimant's Exhibits 31 through 35.

Defendant shall provide claimant future medical treatment for her right foot, right ankle, and for her depression, as reasonable, necessary, and causally related to the June 27, 2013 work injury as determined by this decision.

Defendant shall reimburse claimant's independent medical evaluation fee charges totaling four thousand three hundred ninety-five and 00/100 dollars (\$4,395.00) pursuant to Iowa Code section 85.39.

Defendant shall reimburse claimant's costs totaling three hundred seventy-seven and 92/100 dollars (\$377.92).

Signed and filed this 7th day of December, 2017.



WILLIAM H. GRELL
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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WHG/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.