BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

LAURIE TAYLOR, Claimant, vs. IOWA STATE UNIVERSITY EXTENSION AND OUTREACH WOODBURY COUNTY AGRICULTURAL EXTENSION DISTRICT OFFICE, Employer, and ACCIDENT FUND INSURANCE COMPANY OF AMERICA, Insurance Carrier, Defendants.	FILED NOV 19 2018 WORKERS COMPENSATION	File Nos. 5058624, 5058625 ARBITRATION DECISION Head Note Nos.: 1402.50, 1803, 2500, 2800

STATEMENT OF THE CASE

Laurie Taylor, claimant, filed two petitions in arbitration seeking workers' compensation benefits from defendants, Iowa State University Extension and Outreach Woodbury County Agricultural Extension District Office, employer, and Accident Fund Insurance Company of America, insurance carrier. The hearing occurred before the undersigned on October 1, 2018, in Des Moines, Iowa.

The parties filed two hearing reports at the commencement of the arbitration hearing. Midway through claimant's testimony, the parties narrowed their claims and defenses regarding the May 14, 2015 date of injury (file number 5058624). (See Hearing Transcript, pages 66-69) As a result, the hearing report for file number 5058624 was modified during the hearing (Hrg. Tr. pp. 70-74) and later approved by the undersigned on October 3, 2018.

In the hearing reports, 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.

Regarding exhibits, the parties were instructed to resubmit an agreed-upon, pared down version of JE 13 by October 19, 2018. (Hrg. Tr., p. 99) Neither party did so. Instead, on October 29, 2018, claimant's counsel filed a designation and offer of pages 49, 57, 77, 78, 80, and 83-84 of JE 13. Defendants failed to submit a similar offer or response to claimant's offer. As such, only pages 49, 57, 77, 78, 80, and 83-84 of JE 13 are admitted to the evidentiary record.

The evidentiary record consists of: Joint Exhibits JE 1-12; JE 13 pages 49, 57, 77, 78, 80, and 83-84; Claimant's Exhibits 1 through 16; and Defendants' Exhibits A through H with the exception of Exhibit F page 46, which was withdrawn by defendants' counsel at the start of the hearing.

Claimant testified on her own behalf. No other witness testified. The case was considered fully submitted upon receipt of the parties' briefs on October 26, 2018.

ISSUES

The parties submitted the following disputed issues for resolution:

File No. 5058624

1. Whether claimant gave timely notice pursuant to Iowa Code section 85.23.

2. If claimant provided timely notice, claimant's entitlement to reimbursement for medical treatment and corresponding mileage pursuant to Iowa Code section 85.27.

3. Costs.

File No. 5058625

1. Whether claimant sustained any permanent disability to her right lower extremity, and if so, the extent of that permanent disability.

2. Claimant's entitlement to reimbursement for medical mileage pursuant to Iowa Code section 85.27. Reimbursement for medical appointments and services is not at issue. (Hrg. Tr. p. 7; Hearing Report)

3. Costs.

The parties listed the underpayment of temporary benefits as a disputed issue on the hearing report, but defendants indicated in their post-hearing brief that this underpayment has been remedied. (Defendants' Post-Hearing Brief, p. 21) Thus, the underpayment issue will not be addressed in this decision.

FINDINGS OF FACT

File No. 5058624

As mentioned above, during the course of claimant's testimony at hearing, the parties narrowed their respective claims and defenses. (See Hrg. Tr., pp. 66-72) In doing so, the parties agreed that claimant's entitlement to temporary and permanent disability benefits is not ripe for determination. As such, claimant's medical treatment to date, expert opinions regarding impairment and restrictions, and other factors pertinent to the issue of industrial disability are not presently relevant. Thus, my findings of fact will be limited to defendants' notice defense.

Claimant sustained a stipulated injury on May 14, 2015, when one of the tires dislodged from her vehicle while she was traveling at 20 to 25 miles per hour, causing her vehicle to come to an abrupt halt. (Hrg. Tr. p. 31) At the time of the incident, claimant was working for defendant-employer as a master gardener coordinator and regional foods coordinator, and she was on her way back to defendant-employer's office after teaching an off-site gardening course. (Joint Exhibit 9 [Claimant Deposition Tr. p. 27]; Hrg. Tr. p. 29) There is no dispute that claimant's vehicle incident arose out of and in the course of her employment (Hrg. Report); instead, the only question is whether claimant provided defendant-employer with timely notice pursuant to Iowa Code section 85.23.

On the morning of May 14, 2015, claimant arrived at defendant-employer's office to answer e-mails and pick up the paperwork and handouts she needed to teach her off-site gardening class. (Hrg. Tr. pp. 29-30) She left the office around 11:30 a.m. to travel to the class. (Hrg. Tr. p. 30) Claimant testified she told the office assistant, Kristi Van Zanten, where she was going, though Van Zanten could not recall whether she saw claimant that morning. (Hrg. Tr. p. 33; JE 10 [Van Zanten Depo. Tr. p. 9]) After claimant finished teaching the class at roughly 2:00 p.m., she got back in her car to return to the office. (Hrg. Tr. p. 33) She was pulling out of the parking lot and onto the highway when the tire came off her vehicle. (Hrg. Tr. p. 33)

Claimant made several phone calls after the incident. She called the police, her insurance company, a friend, and eventually the office in an attempt to speak to her supervisor, Sherry McGill. (Hrg. Tr. pp. 35-36) However, McGill was out of the office, so claimant spoke only to Van Zanten. (Hrg. Tr. p. 35) Claimant told Van Zanten that she had "been involved in an accident and that – to please pass the information along to Sherry McGill." (Hrg. Tr. pp. 36-37) Claimant, however, did not report it as "work-related." (JE 9 [Cl. Depo. p. 55]; see JE 10 [Van Zanten Depo. Tr. pp. 21-22]) Claimant also testified that she told Van Zanten in that initial phone call that she had been injured in the vehicle incident, though Van Zanten could not recall when she learned this information. (Hrg. Tr. p. 37) (JE 10 [Van Zanten Depo. Tr. pp. 15-16]) Claimant went home after the vehicle incident and did not return to the office. (Hrg. Tr. p. 37)

The next morning, on May 15, 2015, claimant again called the office looking for McGill. (Hrg. Tr. p. 38) McGill was again unavailable, so claimant told Van Zanten she was "hurt from the injury and that [she] was going to the doctor." (Hrg. Tr. p. 38) Claimant again asked Van Zanten to pass this information along to Ms. McGill. (Hrg. Tr. p. 38)

Van Zanten, however, never reported claimant's accident or the fact that claimant was injured to any supervisors. (JE 10 [Van Zanten Depo. Tr. pp. 15-16]) When asked why she never relayed this information, Van Zanten testified, "That's not my responsibility." (JE 10 [Van Zanten Depo. Tr. p. 16])

In fact, Van Zanten's responsibilities as the office assistant were very limited. Generally speaking, Van Zanten's job was to "answer the phones and greet people when they come to the office"; she had no supervisory responsibilities or decision-making authority. (JE 10 [Van Zanten Depo. Tr. pp. 6-7]) Further, defendant-employer's personnel handbook instructs employees to report work injuries to their direct supervisors—not administrative staff. (See e.g., JE 11 [McGill Depo Tr. pp. 84-85]; JE 12 [Hewitt Depo. Tr. p. 8]) I therefore find Van Zanten was not charged with the responsibility of recognizing or reporting potential workers' compensation claims.

After claimant spoke to Van Zanten on March 15, 2015, she went to a chiropractor at Tri-State Physicians and Physical Therapy. (Hrg. Tr. p. 38) In the patient intake form, when asked who was responsible for claimant's bill, claimant marked "Insurance"—not "Employer." (JE 2, p. 1) In the same form, when asked how payment would be made, claimant marked "Health Insurance" and "Automobile Ins. Policy"—not "Worker's [*sic*] Comp." (JE 2, p. 1)

Claimant received an e-mail from McGill while claimant was at Tri-State. (Hrg. Tr. p. 38) The e-mail, which was sent at 10:40 a.m., states: "Just wondered about today – your schedule said you are to be in this am. Did you have a change?" (Claimant's Ex. 4, p. 1)

At 11:43 a.m., claimant responded, "I was involved in a vehicle problem yesterday and had to go to the doctor." (Cl. Ex. 4, p. 1)

At 11:55 a.m., McGill replied, "Sorry to hear that. Hope you are ok[.]" (Cl. Ex. 4, p. 1)

Notably, when McGill e-mailed claimant on May 15, 2015, McGill was not aware that claimant taught the gardening course the day before. (JE 11 [McGill Depo. Tr. pp. 10, 71-72]) Claimant's e-mail to McGill said nothing to alert McGill that the vehicle problem occurred while claimant was on her way back to the office from a work-related teaching engagement or even to indicate it occurred during work hours. I therefore find the e-mail contained insufficient details to alert defendant-employer that claimant received an injury in the course of her job at a specified time and place. Further, I find

there was nothing in claimant's e-mail to McGill to alert her that the condition for which claimant was going to the doctor may be work-related.

The May 15, 2015 e-mail is the only written documentation provided by claimant to defendant-employer regarding the May 14, 2015 vehicle incident.

Claimant testified she called McGill as soon as she was done with the appointment at Tri-State. (Hrg. Tr. pp. 40-41) She testified on one occasion that she described the incident in this phone call to McGill as "work-related" and on another that she did not know the incident was work-related.

For example, on direct examination at hearing, claimant recalled the conversation as follows:

> A: . . . I called [McGill] and told her about the car accident and that I had been hurt, that I had hurt my neck, upper back, and my left shoulder.
>
> Q: And what did she say?
>
> A: She said that it would not be - - could not be reported as a work comp claim because it was a car accident.
>
> Q: Okay. And what did you think of that?
>
> A: I believed her. I had no reason to question her.
>
> Q: Why did you believe that it was not a work comp claim?
>
> A: Because I was not physically at the office. And any previous experience that I had with work comp claims was on job sites or with an office setting, where it was at that spot, at that location.
>
> Q: So you trusted her and believed her that this was an exception to workers' compensation?
>
> A: Yes, I did.

(Hrg. Tr. p. 41)

Later, when asked why she did not indicate her injury was a workers' compensation injury on the chiropractor's intake form, she replied, "Because I didn't know it was a work comp claim." (Hrg. Tr. p. 97)

However, in her deposition roughly a month before hearing, claimant testified she told McGill she had a "work-related injury" during their May 15, 2015 phone conversation:

Q: Did you ever tell [McGill] yourself that you had a work-related injury?

A: Yes, I did.

Q: When did you do that?

A: On the 15th of May of '15.

. . . .

Q. And how did [McGill] respond?

A: She told me that it couldn't be filed as [a] work comp claim because it was a car accident.

(JE 9 [Cl. Depo. Tr. pp. 55-56])

With respect to claimant's assertion that McGill told her not to claim the incident as workers' compensation, McGill testified as follows:

Q: Okay. But I'm asking you, did you tell her, this is not a workers' compensation claim, it's a car accident?

A: No, I did not.

Q: You never said that?

A: I did not say that.

Q: Did anybody say that to her? Anybody at the office?

A: No, not that I know of.

Q: Okay. You're positive or you just don't - - don't recall?

A: I am positive I did not say that.

(JE 11 [McGill Depo. Tr. pp. 14-15])

McGill testified claimant never came to her to report a work injury or indicate she wanted to report the vehicle incident and resulting injuries as a workers' compensation claim. (JE 11 [McGill Depo. Tr. pp. 74-75]) Instead, McGill testified she knew only that a tire had come off claimant's car and that claimant was very angry and upset with the business that serviced the car the day prior to her injury. (JE 11 [McGill Depo. Tr. pp. 74-75])

According to McGill, the first time she had knowledge that claimant was claiming the incident and resulting injuries as a workers' compensation injury was upon receipt of a letter from claimant's attorney in March of 2017. (JE 11 [McGill Depo. Tr. pp. 75-76])

The March 2017 letter from claimant's attorney to defendants was issued after a conversation claimant had with her attorney in early 2017. According to claimant, she was discussing her subsequent May 10, 2016 injury when she casually mentioned the 2015 vehicle incident and her resulting shoulder complaints. (JE 9 [Cl. Depo. Tr. p. 74]) Her attorney then informed her the incident should have been handled as a workers' compensation claim. (JE 9 [Cl. Depo. Tr. p. 74]) I find the March 2017 letter from claimant's attorney was the earliest point at which notice of claimant's alleged work-related injury was given.

In response to the letter from claimant's attorney, defendants completed a First Report of Injury or Illness (FROI) on May 17, 2017. (Cl. Ex. 5, p. 3) The FROI was completed by a representative from defendant-employer's insurance carrier. (Cl. Ex. 5, p. 3) The FROI indicates defendant-employer had knowledge of the injury on May 14, 2015. (Cl. Ex. 5, p. 3) However, the FROI contains several scrivener's errors. For example, it also indicates claimant's last day worked was May 14, 2015, which is not accurate. Further, the nature of the injury, parts of body affected by the injury, and description of the events that caused the injury clearly refer to claimant's May 10, 2016 injury and not the May 14, 2015 injury. (Cl. Ex. 5, p. 3) Given these errors, I find the FROI to be of little probative value.

Claimant missed no work after May 15, 2015 except to attend doctor appointments, and she never told defendant-employer why she was taking time off to go to the doctor. (JE 9 [Cl. Depo. Tr. pp. 59-60]) I therefore find there was nothing about claimant's behavior after May 15, 2015 that would have alerted defendant-employer to the possibility of a workers' compensation claim.

Ultimately, then, the pivotal evidence is the content of the conversation or conversations between claimant and McGill. As mentioned, claimant in her deposition testified she specifically reported "a work-related injury" during her phone call to McGill. (JE 9 [Cl. Depo. Tr. pp. 55-56]) I do not find this testimony to be credible because immediately before the call, claimant indicated on her chiropractor's intake form that the injury was not a workers' compensation injury. (JE 2, p. 1)

Importantly, at no time during claimant's testimony either in her deposition or at hearing did she state whether she told McGill she was coming from a work-related off-site class when the vehicle incident occurred or even that it occurred during work hours. For example, while claimant testified in her deposition that she made it clear to McGill that she was injured "in that accident" or "in the accident" (JE 9 [Cl. Depo. Tr. pp. 86-87]), there is no testimony regarding what she told McGill about the incident itself, such as where or when it occurred or why she was travelling. Claimant's hearing testimony was similar: "I called her and told her about the car accident and that I had

been hurt . . . ." (Hrg. Tr. p. 41) Again, claimant offered no specific details with respect to how she described the incident to McGill.

McGill, on the other hand, testified as follows:

> Q: . . . . So we've established that [claimant] was at a speaking engagement on May 14th, 2015; is that correct?
>
> A: Yes.
>
> Q: Did you know about that speaking engagement prior to her attendance?
>
> A: No, I did not.
>
> . . . .
>
> Q: And later that day - - or I'm sorry - - the following day when Ms. Taylor didn't come in to work, did she indicate to you that she had been at the speaking engagement the day before?
>
> A: No.

(JE 11 [McGill Depo. Tr. pp. 71-72]; see JE 11 [McGill Depo. Tr. p. 10])

McGill also testified at numerous points in her deposition that she recalls hearing from claimant only that her tire had fallen off her car and nothing more. For example:

> Q: So as her supervisor, [claimant] never came to you to report a work injury arising out of this vehicle problem?
>
> A: No, she did not.
>
> Q: What do you know about this vehicle problem?
>
> A: I just - - I know that eventually I did talk with her about the fact that this tire had come off the car, and that she was very angry and upset with the tire service place, that she planned to address that with them.

(JE 11 [McGill Depo. Tr. p. 74]; see JE 11 [McGill Depo. Tr. pp. 11-12, 14])

While claimant's testimony reveals no details regarding what exactly she told McGill about the vehicle incident, such as where or when it occurred, McGill specifically testified that claimant never told her she was returning from an off-site teaching engagement. Further, McGill's testimony that she only recalls claimant telling her a tire came off her car is consistent with claimant's e-mail to McGill, in which she described a "vehicle problem" with no reference whatsoever to work. McGill's testimony is also

consistent with how claimant described the accident to Van Zanten – an "accident" with no additional details. Comparing the lack of specificity or details in claimant's testimony against the testimony of McGill, I find McGill's testimony to be more credible. I therefore find that while McGill was aware a tire came off claimant's vehicle, she was not aware of where or when the incident occurred or any additional information to alert her that claimant may have been injured in a work-related vehicle incident.

Claimant testified McGill told her she could not report the incident as a workers' compensation claim, and McGill testified she was positive she never made such statements. I found McGill was not made aware that the vehicle incident occurred on claimant's way back to the office from a work-related activity or during work hours. Without any information to link the vehicle incident to work, McGill would have had no reason to tell claimant not to claim the incident as workers' compensation. I therefore find McGill's testimony to be more credible than claimant's, and as such, I find McGill did not tell claimant she could not report the incident as a workers' compensation claim.

This credibility determination was a very close call. Nevertheless, I could not ignore the fact that claimant never testified as to how she described the vehicle incident to McGill, especially when considered in tandem with claimant's e-mail to McGill in which she described only a "vehicle problem yesterday" and her vague description of the incident to Van Zanten. Given that this was a difficult decision for me to make, I appreciate the zealous advocacy of counsel in this case. However, I find no basis for claimant's counsel's assertion that defendant-employer intentionally misled or deceived claimant into believing this was not a workers' compensation case.

File No. 5058625

Claimant sustained a stipulated work-related injury on May 10, 2016, when she was digging a hole to plant a tree and her foot rolled off the shovel. (Hrg. Tr. p. 48) Claimant reported the injury to her supervisor, Molly DeWitt, the following day after her ankle began to bruise and swell. (JE 9 [Cl. Depo. Tr. p. 69])

Defendants then referred claimant to the Unity Point Occupational Medicine clinic, where she was evaluated for the first time on June 3, 2016. (JE 6, p. 1) At that initial visit, claimant was diagnosed with an ankle sprain and prescribed anti-inflammatories and muscle relaxers along with a course of physical therapy. (JE 6, p. 2) When claimant continued to be symptomatic after roughly two months of conservative treatment, she was referred to a podiatrist, Valerie Tallerico, D.P.M.

At claimant's first appointment with Dr. Tallerico on August 17, 2016, Dr. Tallerico recommended an MRI. (JE 7, p. 4) The MRI revealed a partial-thickness tear of the anterior talofibular ligament in claimant's right ankle. (JE 7, p. 7) After an injection failed to alleviate any of claimant's pain, claimant proceeded to surgery on November 11, 2016 to repair the tear. (JE 7, p. 14; JE 8)

By late December of 2016, claimant was back into regular shoes and reporting minimal to no pain. (JE 7, p. 25) She was instructed to start physical therapy and was released to return to regular work. (JE 7, p. 25)

At claimant's follow-up appointment on February 2, 2017, Dr. Tallerico noted claimant's "5th metatarsal tuberosity bothers her sometimes from rubbing, still unrelated to surgery." (JE 7, p. 28) With respect to her ankle, however, claimant reported she was doing "great" with only minimal aching pain at the end of the day. (JE 7, p. 28) Dr. Tallerico told claimant to continue working without restrictions and to finish out her physical therapy before a final appointment in two to three months. (JE 7, p. 28)

When claimant was seen again on April 6, 2017, she reported no issues with her ankle other than some tightness in the morning and cramping in the legs at night. (JE 7, p. 33) Dr. Tallerico prescribed compression stockings to help with any swelling and cramping, and she released claimant from her care. (JE 7, p. 33)

Claimant did not return to Dr. Tallerico until July 25, 2017, when she presented with new foot pain along the outside of her foot at the 5th metatarsal base. (JE 7, p. 37) Dr. Tallerico indicated claimant's 5th metatarsal base was "anatomic and likely gets sore from overload to area as well." (JE 7, p. 39) She noted claimant's ankle was still stable, but she recommended custom orthotic inserts "to neutralize foot, offload lateral column and protect ankle surgery." (JE 7, p. 39)

For reasons unknown, claimant did not obtain the inserts until early 2018. (Hrg. Tr. pp. 54-55) When claimant saw Dr. Tallerico on February 20, 2018, she reported the inserts were helping "a little," but she continued to report pain along the same region of her right foot. (JE 7, pp. 56-57) Although Dr. Tallerico described claimant's ankle as "very stable, great ROM and pain free," she still recommended another MRI due to claimant's persistent complaints. (JE 7, p. 57)

The MRI revealed no significant abnormalities in claimant's right foot or ankle. (JE 7, p. 59) At claimant's final appointment with Dr. Tallerico on March 20, 2018, she indicated claimant "may always have some discomfort to her foot" because she has a "foot structure that overloads area." (JE 7, p. 59) Dr. Tallerico recommended claimant continue using the inserts, but she had no other treatment recommendations. (JE 7, p. 59) Claimant was then released from Dr. Tallerico's care. (JE 7, p. 59)

On May 2, 2018, Dr. Tallerico responded to questions generated by defendants' counsel. One of those questions was as follows: "In your opinion, does Claimant have any permanent impairment to her body as a whole as a result of the work injuries of May 10, 2016?" (Def. Ex. B, p. 28) (emphasis added) Dr. Tallerico responded "No" without any additional analysis. Dr. Tallerico also opined claimant did not require any permanent work restrictions or any additional medical treatment for the injuries sustained on May 10, 2016.

Defendants also obtained the opinion of Robert Broghammer, M.D. (Def. Ex. A; Def. Ex. C) Dr. Broghammer performed a records review and did not personally evaluate claimant. (Def. Ex. A; Def. Ex. C) He opined that while claimant continued to have symptoms after April 6, 2017, these symptoms were "due to an anatomic variant" of claimant's foot that causes her to place excessive weight over the lateral column. (Def. Ex. A, p. 20) Dr. Broghammer attributed this variant to claimant's gait and anatomy and not the March 10, 2016 work injury. (Def. Ex. A, p. 21) Notwithstanding this opinion, Dr. Broghammer indicated claimant "would qualify for permanent partial impairment rating" of her right ankle. (Def. Ex. A, p. 21) He was unable to assign a specific rating, however, because he did not have any of claimant's range of motion measurements in his possession. (Def. Ex. A, p. 21) Dr. Broghammer, like Dr. Tallerico, opined that claimant did not require any permanent work restrictions.

Claimant subsequently submitted to an independent medical examination (IME) with Sunil Bansal, M.D., on July 10, 2018. (Cl. Ex. 1, p. 1) Dr. Bansal, in an August 31, 2018 report, opined claimant sustained a five percent lower extremity impairment due to range of motion deficits in her right ankle as a result of the May 10, 2016 injury. (Cl. Ex. 1, p. 21) He recommended restrictions of no prolonged standing/walking greater than 30 minutes at a time and avoiding multiple steps, stairs, ladders, and uneven terrain. (Cl. Ex. 1, p. 22) Dr. Bansal had no recommendations for future treatment aside from maintenance. (Cl. Ex. 1, p. 22)

Dr. Broghammer reviewed Dr. Bansal's report and issued an updated opinion on September 18, 2018. Dr. Broghammer, when asked whether he agreed with Dr. Bansal's opinion regarding permanency and restrictions, stated as follows: "Dr. Bansal appears to have appropriately completed [the rating] based on the range of motion methodology per the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition." (Def. Ex. C, pp. 32-33)

With this history and these opinions in mind, the first issue to be decided is whether claimant sustained any permanent disability as a result of the May 10, 2016 work injury. Defendants rely primarily on the opinions of Dr. Tallerico. As noted above, however, Dr. Tallerico was only asked whether claimant sustained a permanent impairment to her body as a whole. (Def. Ex. B, p. 28) Dr. Tallerico was never specifically asked about claimant's lower extremity. Given the parties' stipulation that claimant's May 10, 2016 injury was limited to a scheduled member, I find that Dr. Tallerico's opinion regarding claimant's whole body impairment is of little utility.

Further, defendants' own expert, Dr. Broghammer, opined claimant's condition qualified for a permanent impairment rating. (Def. Ex. A, p. 21) Dr. Broghammer declined to assign a specific rating only because he did not have the necessary range of motion measurements to do so. (Def. Ex. A, p. 21) In a subsequent report, Dr. Broghammer essentially agreed with the impairment rating assigned by Dr. Bansal, which was based on Dr. Bansal's range of motion measurements at the time of claimant's IME. (Def. Ex. C, pp. 32-33) For these reasons, I find Dr. Bansal's opinions, which were affirmed by Dr. Broghammer, to be most convincing.

Defendants argue claimant's continued level of activity following her May 10, 2016 injury is evidence that claimant did not sustain any permanent impairment to her ankle. I acknowledge that claimant in the instant case continued to be an active gardener at the time of the hearing (see, e.g., Def. Ex. H) and that a claimant's post-injury activities can undercut the credibility of a permanent disability claim. In this case, however, defendants point to no other evidence, such as alternative range of motion measurements, to discredit Dr. Bansal's opinions. Thus, claimant's post-injury activity level, by itself, is not enough to overcome the opinions of Dr. Bansal and Dr. Broghammer.

I therefore adopt the impairment rating assigned by Dr. Bansal and find claimant sustained a five percent permanent impairment to her right lower extremity as a result of her May 10, 2016 work injury.

The next issue to be addressed is claimant's entitlement to reimbursement for medical mileage. Attached to claimant's Amended Request for Reimbursement of Costs are several non-paginated, handwritten logs of mileage incurred by claimant in 2016, 2017, and 2018 while traveling to medical appointments for her ankle.

On three separate white sheets of paper, labeled "2016 Ankle," "2017 Ankle Medical," and "2018 Mileage Ankle," claimant asserts she traveled 250 miles in 2016 (127 of which were paid), 222 miles in 2017, and 109 miles in 2018. These three sheets identify by date every appointment for which claimant is seeking mileage. (Claimant's Amended Request for Reimbursement of Costs)

Then, on a separate unlabeled yellow sheet of notebook paper, claimant asserts she traveled 280 miles in 2016, 222 miles in 2017, and 553 miles in 2018 for appointments relating to her ankle. This yellow sheet of paper does not identify any appointments; it simply lists the mileage without explanation. Given the lack of explanation for these conflicting and higher numbers, I defer to the mileage asserted on the three white sheets of paper.

Defendants provided no contradictory evidence, nor did they address claimant's claim for medical mileage in their brief. I therefore find claimant incurred 250 miles in 2016 (127 of which were paid), 222 miles in 2017, and 109 miles in 2018, for a total of 454 miles of unpaid transportation expenses.

CONCLUSIONS OF LAW

File No. 5058624

Iowa Code section 85.23 requires an employee to give notice of the occurrence of an injury to the employer within 90 days from the date of the occurrence, unless the employer or employer's representative has actual knowledge of the occurrence of the injury. Iowa Code § 85.23.

The purpose of the 90-day notice or actual knowledge requirement is to give the employer an opportunity to timely investigate the facts surrounding the injury. "[T]he notice requirement of section 85.23 protects the employer by insuring he is alerted 'to the *possibility of a claim* so that an investigation can be made while the information is fresh.'" Dillinger v. City of Sioux City, 368 N.W.2d 176, 180 (Iowa 1985) (quoting Robinson v. Department of Transportation, 296 N.W.2d 809, 811 (Iowa 1980)).

As mentioned, "section 85.23 does not require notice be given if the employer has actual 'knowledge of the occurrence of an injury.'" Dillinger, 368 N.W.2d at 181. However, the actual knowledge alternative "is not satisfied unless the employer has information putting him on notice that the injury may be work-related." Robinson, 296 N.W.2d at, 811. In other words, it is not enough that the employer, through its representatives, is aware of claimant's injury. Id. (quoting 3A. Larson, Workmen's Compensation § 78.31(a) at 15-39 to 15-44 (1976)). Instead, there employer must have knowledge "connecting the injury or illness with the employment, and indicating to a reasonably conscientious manager that the case might involve a potential compensation claim." Id. (quoting 3A. Larson, Workmen's Compensation § 78.31(a) at 15-39 to 15-44 (1976)).

In sum, the actual knowledge alternative to notice is met when the employer, as a reasonably conscientious manager, is alerted to the possibility of a potential compensation claim through information that makes the employer aware that the injury occurred and that it may be work-related.

Failure to give notice is an affirmative defense which the employer must prove by a preponderance of the evidence. DeLong v. Highway Comm'n, 299 Iowa 700, 295 N.W. 91 (1940).

I conclude defendants, by a preponderance of the evidence, proved defendant-employer did not have notice of the May 14, 2015 work injury within 90 days of the incident as required by Iowa Code section 85.23. Instead, I found it was not until March of 2017, when defendant-employer received a letter from claimant's attorney, that defendant-employer had notice of claimant's May 14, 2015 work injury. This notice was well beyond the 90-day deadline in Iowa Code section 85.23. I found the May 15, 2015 e-mail from claimant was not sufficient pursuant to Iowa Code sections 85.24 and 85.25 because it failed to mention her employment or the time and place of the accident. See Iowa Code §§ 85.24, 85.25.

Having concluded claimant did not provide notice within 90 days of her injury, it must now be decided whether defendant-employer or its representative had actual knowledge of claimant's injuries.

In the instant case, the parties spent considerable time trying to discern whether Van Zanten knew or should have known that the injuries sustained by claimant in the vehicle incident might be work-related. Van Zanten's knowledge (or lack thereof) is

immaterial, however, because I conclude Van Zanten was not defendant-employer's "representative" for purposes of Iowa Code section 85.23.

"Representative" is not defined in the statute. However, the Iowa Supreme Court has suggested that an employee is not a representative for notice purposes unless he or she has some supervisory responsibilities or authority over other employees. In Franks v. Carpenter, 192 Iowa 1398, 186 N.W. 647, 649 (1922), the court found an individual to be a representative because it was his duty to report the work injury in question and he was in charge of employees working and directed the manner in which the work should be done. Managers, foremen, and supervisors have been routinely treated as representatives for purposes of notice in cases since Franks. See, e.g., Knipe v. Skelgas Co., 294 N.W. 880, 884 (1940) ("Notice to or knowledge of the . . . manager is knowledge on the part of the employer.")

In this case, however, Van Zanten was a receptionist. She had no supervisory responsibilities and no decision-making power. I also found Van Zanten was not expected as a part of her job to recognize or report potential workers' compensation claims. Unlike a manger or supervisor, Van Zanten had no authority over other employees. For these reasons, I conclude Van Zanten was not a "representative" of defendant-employer for purposes of Iowa Code section 85.23. Thus, even if Van Zanten had actual knowledge of claimant's May 14, 2015 work injury, I conclude such knowledge did not impute to defendant-employer for purposes of Iowa Code section 85.23.

Unlike Van Zanten, there is no question that McGill, as one of claimant's supervisors, would be considered a "representative." It must be determined, therefore, whether McGill had actual knowledge of the injury within 90 days of its occurrence.

As discussed above, McGill's first knowledge that something happened to claimant on May 14, 2015 came the next day, on May 15, 2015, via an e-mail from claimant. The e-mail said only that claimant was involved in a "vehicle problem yesterday" for which claimant "had to go to the doctor." (Cl. Ex. 4, p. 1) At the time of this e-mail, McGill was not aware that claimant taught an off-site class the day before. Because claimant's e-mail said nothing about when the "vehicle problem" occurred or that it occurred during work hours, I found there was nothing in the e-mail to alert McGill that claimant was going to the doctor for what could be a work-related condition. Without any additional information to connect the "vehicle problem" to work, this e-mail is insufficient. Robinson, 296 N.W.2d at 811.

Both parties acknowledge claimant and McGill spoke after this e-mail. McGill could not recall whether she learned after speaking with claimant that claimant was injured in the vehicle incident. (See, e.g., JE 11 [McGill Depo. Tr., pp. 12, 14]) Even assuming McGill knew claimant was injured, however, Iowa Code section 85.23 requires knowledge that injury is work-related, and I found McGill was not aware of where or when the vehicle incident occurred or any additional information to alert her that claimant may have been injured in a work-related vehicle incident. See Robinson,

296 N.W.2d at 811. Knowledge that claimant's tire came off her vehicle and that claimant was injured in the incident without any information tying the incident to claimant's employment is not sufficient. See id. (adopting principle that awareness of an injury without any information connecting the injury to employment is not enough to establish actual knowledge); see also Johnson v. Int'l Paper Co., 530 N.W.2d 475, 477 (Iowa 1995) ("A statement to an employer than an employee is ill, without more, does not satisfy the actual knowledge requirement of Iowa Code section 85.23.").

I therefore conclude the knowledge obtained by McGill during her conversations with claimant was not sufficient to indicate to a reasonably conscientious manager that the incident might involve a potential workers' compensation claim. See Robinson, 296 N.W.2d at 811 (holding knowledge must indicate "to a reasonably conscientious manager that the case might involve a potential compensation claim").

I also conclude nothing about claimant's behavior at work after May 15, 2015 would have provided McGill or any other representatives with actual knowledge of claimant's injures. Claimant missed no work after May 15, 2015 except to attend doctor appointments, and she never told defendant-employer why she was taking time off to go to the doctor. (JE 9 [Cl. Depo. Tr. pp. 59-60]) As a result, I found nothing occurred after May 15, 2015 to alert defendant-employer that claimant may have been injured in a work-related incident. Thus, I conclude claimant's behavior after May 15, 2015 did not satisfy the actual knowledge alternative under Iowa Code section 85.23. See Robinson, 296 N.W.2d at 811.

For these reasons, I conclude defendants, by a preponderance of the evidence, proved defendant-employer did not have actual knowledge of the May 14, 2015 work injury within 90 days of the incident as required by Iowa Code section 85.23.

Thus, I conclude defendants, by a preponderance of the evidence, proved claimant did not timely satisfy either notice alternative under Iowa Code section 85.23.

In her deposition, claimant testified she did not believe she could file the March 14, 2015 vehicle incident as a workers' compensation claim. When asked what made her decide to file a claim almost two years later, she indicated she learned for the first time from her attorney in early 2017 that the incident should have been handled as a workers' compensation claim. This raises the possibility that claimant did not discover the probable compensability of her injury until early 2017. If that were the case, it appears the letter from claimant's attorney in March of 2017, which put defendants on notice of the possible work-relatedness of the March 14, 2015 incident, may have fallen within the 90-day notice period in Iowa Code section 85.23. However, claimant did not raise the discovery rule as an issue at hearing or in her brief, so I will not address it herein.

Because defendants proved by a preponderance of the evidence that defendant-employer had neither actual knowledge nor notice of the May 14, 2015 work

injury within 90 days of the incident, I conclude claimant's claim is barred by Iowa Code section 85.23.

Having concluded claimant's claim is barred, all other issues are moot.

File No. 5058625

The first issue to be decided is whether claimant sustained any permanent disability as a result of her May 10, 2016 work 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).

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

When the result of an injury is loss to a scheduled member, the compensation payable is limited to that set forth in the appropriate subdivision of Code section 85.34(2). Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961).

I found Dr. Bansal's opinions, which were endorsed by Dr. Broghammer, to be most convincing. Having adopted Dr. Bansal's five percent lower extremity rating, I conclude claimant is entitled to 11 weeks of permanent partial disability benefits. See Iowa Code § 85.32(o). Per the parties' stipulations on the hearing report, these 11 weeks of benefits are to commence on April 6, 2017 at the rate of $378.11.

The next issue to be decided is claimant's entitlement to reimbursement for mileage to medical appointments.

Pursuant to Iowa Code section 85.27, 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. Iowa Code § 85.27.

I found claimant incurred 250 miles in 2016 (127 of which were paid), 222 miles in 2017, and 109 miles in 2018 while traveling to appointments relating to treatment of her ankle. I therefore conclude claimant is entitled to reimbursement for 454 miles of unpaid transportation expenses pursuant to Iowa Code section 85.27.

Both Files – Costs

The final issue to be addressed is costs. Claimant seeks the following costs: $100.00 (filing fee); $2,988.00 (IME); $1,154.90 (court reporter – depositions); $300.00 (opinion letter – CNOS); and several additional fees for medical records.

Assessment of costs is a discretionary function of this agency. Iowa Code § 86.40. Costs are to be assessed at the discretion of the deputy commissioner or workers' compensation commissioner hearing the case. 876 IAC 4.33.

I exercise my discretion and conclude an assessment of costs against defendants is appropriate in this case.

The $100.00 filing fee is taxed to defendants. 876 IAC 4.33(7).

Claimant next seeks reimbursement of $2,988.00 for Dr. Bansal's IME, but Dr. Bansal's IME addressed both claimant's May 14, 2015 injury and claimant's May 10, 2016 injury in his examination and report. Roughly half of Dr. Bansal's report was devoted to the May 14, 2015 injury, and the remaining half was devoted to the May 10, 2016 injury.

First, with respect to the portion of the IME relating to the May 14, 2015 date of injury, no employer-retained physician made an evaluation of permanent disability prior

to Dr. Bansal's examination. Thus, pursuant to Des Moines Area Regional Transport v. Young, 867 N.W.2d 839, 847 (Iowa 2015), the only recoverable cost under rule 876 IAC 4.33 is the cost of the report itself. However, because I determined claimant did not provide timely notice pursuant to Iowa Code section 85.23, I decline to tax defendants the costs of the half of the IME report relating to the May 14, 2015 date of injury.

Regarding the half of the IME relating to the May 10, 2016 date of injury, claimant was evaluated by Dr. Bansal on August 31, 2018. Several months earlier, on May 2, 2018, Dr. Tallerico opined claimant did not sustain any permanent impairment. Because Dr. Tallerico, the employer-retained physician, made an evaluation of permanent disability prior to Dr. Bansal's examination, claimant is entitled to reimbursement pursuant to Iowa Code section 85.39. I therefore conclude defendants are responsible for reimbursement in the amount of $1,494.00, which represents half of the fee for Dr. Bansal's physical examination ($564.00) and half of the fee for Dr. Bansal's report ($2,424.00). Iowa Code § 85.39.

Claimant also seeks $1,154.90 for fees related to the depositions of claimant, Van Zanten, McGill, and Molly Hewitt. The depositions of Van Zanten, McGill, and Hewitt were taken primarily for purposes of the notice issue and for discovery relating to claimant's termination. Because defendants prevailed on the notice issue and claimant's termination was not relevant to this decision, I decline to tax defendants the cost of the transcripts or the reporting fee. Defendants are only taxed $218.30 for the copy of claimant's deposition transcript. 876 IAC 4.33(2).

Because defendants prevailed on the notice issue for the May 14, 2015 vehicle incident that allegedly injured claimant's shoulder, I also decline to tax defendants the $300.00 for Dr. Sherman's opinion letter.

The remaining costs by claimant all reflect fees relating to the procurement of copies of claimant's medical records. Such costs are not delineated as taxable costs under rule 876 IAC 4.33. I, therefore, decline to tax any of these associated costs to defendants.

In total, defendants are taxed $318.30 pursuant to 876 IAC 4.33 and are responsible for reimbursement in the amount of $1,494.00 pursuant to Iowa Code section 85.39.

ORDER

THEREFORE, IT IS ORDERED:

File No. 5058624:

Claimant shall take nothing.

File No. 5058625:

Defendants shall pay claimant eleven (11) weeks of permanent partial disability benefits beginning on the stipulated commencement date of April 6, 2017 until all benefits are paid in full.

All weekly benefits shall be paid at the stipulated rate of three hundred seventy-eight and 11/100 dollars ($378.11) per week.

Defendants shall pay accrued weekly benefits in a lump sum together with interest at the rate of ten percent for all weekly benefits payable and not paid when due which accrued before July 1, 2017, and all interest on past due weekly compensation benefits accruing on or after July 1, 2017, shall be payable at an annual rate equal to the one-year treasury constant maturity published by the federal reserve in the most recent H15 report settled as of the date of injury, plus two percent. See Gamble v. AG Leader Technology, File No. 5054686 (App. Apr. 24, 2018).

Defendants shall reimburse claimant for four hundred fifty-four (454) miles of transportation expenses relating to claimant's medical treatment.

Defendants shall reimburse claimant in the amount of one thousand four hundred ninety-four and 00/100 dollars ($1,494.00) for claimant's IME.

Defendants shall reimburse claimant costs in the amount of three hundred eighteen and 30/100 dollars ($318.30).

Defendants shall file subsequent reports of injury (SROI) as required by this agency pursuant to rules 876 IAC 3.1(2) and 876 IAC 11.7.

Signed and filed this 19th day of November, 2018.

STEPHANIE J. COPLEY
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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SJC/srs

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.