BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

SHERILYN FASIG SNITKER,

Claimant,

vs.

BIRDNOW ENTERPRISES, INC., d/b/a BIRDNOW MOTORS,

Employer,

and

SEABRIGHT INSURANCE CO.,

Insurance Carrier,
Defendants.

File No. 5065702

ARBITRATION

DECISION

Head Note No.: 1803

STATEMENT OF THE CASE

Sherilyn Fasig Snitker, claimant, filed a petition in arbitration seeking workers' compensation benefits against Birdnow Enterprises, Inc., d/b/a Birdnow Motors, employer, and SeaBright Insurance Co., insurer, both as defendants.

This case was heard on April 26, 2018, in Waterloo, Iowa. The case was considered fully submitted on May 17, 2018, upon the simultaneous of filing of briefs.

The record consists of joint exhibits 1 through 6, claimant's exhibits 1 through 7, defendants' exhibits A through G along with the testimony of the claimant and Mark Birdnow.

ISSUES

1. The appropriate commencement date of permanent disability benefits;
2. The extent of claimant's industrial disability;
3. Whether claimant is entitled to an assessment of costs.

STIPULATIONS

The parties agree claimant sustained an injury on February 8, 2013, which arose out of and in the course of her employment. They further agree that the injury was the cause of some temporary disability during a period of recovery and that it was the cause of a permanent disability that is industrial in nature.

At the time of the injury the claimant's gross earnings were $1,094.00 per week. She was single and entitled to one exemption. Based on the foregoing numbers the weekly benefit rate is $649.29.

Prior to the hearing the claimant was paid 151 weeks of permanent partial disability benefits at the rate of $649.29. The parties agree that the defendant is entitled to reimbursement or credit of that amount against any award of permanent partial disability benefits.

FINDINGS OF FACT

Claimant was a fifty-five (55) year old person at the time of the hearing. At all relevant times hereto, claimant was single with no dependents. Her educational history includes a high school diploma and an EMT certification obtained at some point later in life.

After high school, claimant ran an in-home daycare. With the EMT certification, she volunteered at the Aurora Fire Department from 1987-2006. She also worked as a DNR guide and greeter for a few years and a docent for the Frank Lloyd Wright home.

Around 1995, a friend suggested that she sell cars. She accepted a position at Iowa Motor Company which was eventually bought out by the defendant employer. Claimant worked there until 2005.

In 2005, claimant relocated to Wisconsin. When she returned to Iowa, she took a position at Pritchard Auto as an F&I manager where she was responsible for credit applications and financing for customers purchasing vehicles. After claimant's husband, Mr. Fasig, unexpectedly passed, claimant reached out to defendant employer about returning as a sales consultant. She rejoined defendant employer officially in 2012 and worked there until she quit in March 2017.

After her injury, claimant was working only twenty-four hours a week. Sales were slow. She found it hard to make a living working only part-time and decided to voluntarily leave her employment.

Her job duties as a car salesman included showing the vehicle, coming to a sales agreement with customers, delivering the vehicles and moving them around the lot. She testified that being known as an honest sales person was important because she lived in a small community and needed referrals to make sales. While she worked for

defendant employer, she received no disciplinary action for dishonesty. Claimant was a finance manager for defendant employer and helped process credit applications.

Mr. Birdnow, the owner of defendant employer, testified at hearing that while he initially had no problem with claimant or her injury, over time he began to doubt the veracity of her complaints. He said he saw her walking without a limp and that she did not appear to be as incapacitated as she claimed.

On February 8, 2013, claimant slipped and fell twice on the lot. One of her co-workers helped her back inside the showroom floor. She felt pain in her low back and buttocks region.

Claimant initially sought treatment with a chiropractor but when her pain did not abate she was sent to Wheaton Franciscan Healthcare to be seen by David Kobliska, M.D., on April 16, 2013. (JE 1:1) She complained of pain in the back radiating into her right upper thigh with no numbness or tingling. (JE 1:1) Pain was reported to be a 5/10 on a 10 scale. (JE 1:1) Her x-rays were unremarkable and she was referred to physical therapy and ordered to return in a week. (JE 1:2, 4:38)

Claimant underwent six weeks of physical therapy for her low back but had no improvement. On May 7, 2013, she was reevaluated by Dr. Kobliska who ordered an MRI. (Exhibit 1:2) The MRI showed, "Grade I anterolisthesis of L3 on L4 and L4 on L5. Mild b/l facet hypertrophy and mild flattening of the ventral thecal sac at L3-4 as well as uncovering of the disk. Severe b/l facet hypertrophy at L4-5 with moderate canal stenosis and moderate b/l foraminal narrowing." (JE 2:11, JE 2:16)

She followed a course of conservative treatment including more therapy, medications and injections. Her first steroid injection was conducted on August 7, 2013 at the recommendation of Gayathry Inamdar, M.D. (JE 4:25) Because claimant continued to have pain in her low back, hip and lower extremity above the knee, lumbar facet injections were recommended. These were conducted on August 28, 2013. (JE 4:26) She proceeded to have bilateral lumbar median branch nerve blocks at L2, L3 and L4 levels and then radio frequency ablation on the right and left side at L2 through L5. (JE 4:27-29) Initially, she had pain relief. She had additional treatment in the form of physical therapy, chiropractic manipulation and acupuncture with electrical stimulation. (Ex 1:3) The second round of radiofrequency ablation was conducted on the left and right in April and May 2014. (JE 4:30-31) However, these treatments were not successful in reducing claimant's pain. She underwent a lumbar laminectomy and fusion on July 9, 2014, with Russell Buchanan, M.D. (JE 4:34)

Initially, her results were positive from the surgery but her pain crept back in. On April 22, 2015, she underwent a functional capacity evaluation at E3 Work Therapy Services. The functional class evaluation was deemed valid and based on the results she was placed in the light duty job category.

On May 26, 2015, she underwent a bilateral SI joint injection. (JE 4:42)

On June 10, 2015, claimant underwent a CT of her lumbar spine which showed that her hardware was in satisfactory position but there was neural foraminal narrowing as a result of a focal disc protrusion involving the left aspect of the posterior disc margin extending into the left L3-4. There was diffuse intervertebral disc bulging at L4 – 5 and mild diffuse intervertebral disc bulging at L5-S1 (JE 1:7-8) At one point, one of her physicians recommended the use of a TENS unit.

On or about October 3, 2015 claimant was in a serious motor vehicle collision when she lost control of her car driving 60 mph. The vehicle rolled and she ended up upside down in a field. Following the collision, she received a course of chiropractic treatment throughout the month of October primarily targeted at the neck and mid back. (JE 5)

Just prior to the motor vehicle accident, claimant began treatment with Maruti Kari, M.D., on September 30, 2015 for continued back pain. During the September 30, 2015 visit, claimant reported that prior to the surgery she had radiating pain going down to her right leg and ankle but that the pain after the surgery was located in the buttock and hip area. (Joint Exhibit 6:60) Her straight leg raise tests were negative, she had normal gait, normal sensation with tenderness to palpation in the right sacroiliac and lumbar paravertebral area. (JE 6:62)

Dr. Kari believed the claimant was suffering from post laminectomy syndrome with S1 and S2 involvement on the right side in addition to sacroiliitis. (JE 6:63) He recommended a series of epidural injections along with a caudal epidural lysis of adhesions and if those would not reduce her pain, then implementation of a spinal cord stimulator. (JE 6:63) He also recommended claimant reduce her work hours to 24 per week until her treatment was completed and continue the use of her TENS unit. Id. The first course of injections began in November 2015. (JE 6:69) Claimant reported approximately 5 to 10 percent improvement with the ability to lay on the right side and tolerate standing for about 20 minutes. (JE 6:73)

She was seen again by Dr. Kari on December 16, 2015. During his examination she exhibited normal gait, negative straight leg raising test, normal sensation and coordination. There was tenderness to palpation in the paravertebral and lumbar area at L5-S1 and tenderness to palpation in the right sacroiliac joint. (JE 6:76) During the psychiatric screening, she had a diagnosis of depression. (JE 6:78) Another series of injections was administered. (JE 6:77 to 78)

The procedure again gave claimant 5 to 10 percent relief of her pain. (JE 6:79) However, during the January 18, 2016 visit, claimant reported that her pain was worse and had traveled to the left side in addition to the right. (JE 6:81) The caudal epidural lysis of adhesions was performed during that visit. (JE 6:85) On September 9, 2016, after being deemed a nonsurgical candidate by Dr. Buchanan and Dr. Abernathey, and having failed caudal lysis of adhesions, epidural steroid injections, radiofrequency ablation, narcotic pain medication, Dr. Kari recommended a trial of spinal cord stimulation. (JE 6:92) The electrodes were placed on February 27, 2017. (JE 6:94) The

spinal cord stimulation was terminated on March 2, 2017 due to the absence of pain relief. Claimant's medications were increased as an attempt to alleviate her chronic back pain before considering an intrathecal pain pump. (JE 6:103)

On August 10, 2017, claimant returned to Dr. Kari. (JE 6:115) During this visit he was concerned with her narcotic pain medication use. She was showing signs of dependence and he urged her not to use all four doses during the day. He wanted to wean her down to two tablets a day in total.

As of January 4, 2018, claimant's medications included 1000 mg of Tylenol taken every four hours as needed, 10 mg Norvasc, 60 mg Cymbalta taken twice a day, and one tablet of hydrocodone taken every six hours as needed. (JE 5:118) During this visit, her gait was mildly antalgic with mild tenderness to palpation in the right lumbar paravertebral area and lumbosacral region. (JE 6:114) She had negative straight leg test and normal sensation. She underwent a trigger point injection on January 4, 2018. (JE 1:22)

At the request of the defendants, Timothy Miller, M.D., conducted an evaluation of claimant on February 18, 2015. (Ex. A:2) While he agreed that she had ongoing back problems, he did not believe there was clear indication that the sacroiliitis was directly related to her fall at work. Id. He went on to state that differentiation of sacroiliac pain from referred lumbar pain is extremely difficult in certain individuals and that the literature suggests that the cause and source of pain is poorly understood. Id. In Dr. Miller's estimation, the diagnosis of sacroiliitis did not meet the criteria of medical certainty. Id. Dr. Miller would slightly revise his position on this in a later opinion. (Ex. A:5)

He opined that claimant did suffer chronic back pain which was treated surgically. Id. He determined she was at maximum medical improvement, and continued use of Cymbalta and home exercise along with over-the-counter NSAID drugs were appropriate. Id. As a result of the injury and ongoing impairment, he assessed a 21 percent whole person impairment but did not feel the need to impose any permanent restrictions. Id.

He affirmed the no restriction stance in a letter on May 11, 2015 following a review of the functional capacity evaluation during which the claimant exhibited ability to handle approximately 25 pounds. (Ex. A:3)

On May 17, 2016, claimant underwent an independent medical examination with Robin Sassman, M.D., at the request of the claimant. (Ex 1:1) Claimant reported constant low back pain that increased with bending or twisting. She also noted shooting pain down both legs and some symptoms in the feet. (Ex 1:7) At the time, she was working the same job she had performed before her injury, limited to 24 hours per week with no lifting more than 20 pounds. Id. During the examination she exhibited a slow gait, the ability to heel and toe walk, pain with squatting, and tenderness to palpation over the right SI joint in the lumbar spinous processes. (Ex. 1:8) She had reduced range

of motion of the back, some reduced reflexes, positive straight leg testing bilaterally and decreased sensation in the right lower extremity over the L3, L4, L5 dermatomes. She had normal range of motion in the ankle, feet, and as well as good muscle strength and equal leg circumferences. (Ex. 1:8)

Dr. Sassman concluded that as a result of the claimant's historical assurance that she had suffered no previous low back symptoms or low back injury, the current pain, loss of range of motion, and course of treatment were the result of an aggravation of underlying degenerative disease. (Ex 1:9) Dr. Sassman did not find claimant at maximum medical improvement but instead recommended she seek out further opinions regarding whether another surgical repair would be useful. (Ex 1:9) Based on her reduced range of motion, Dr. Sassman assessed a 28 percent whole person impairment relying primarily on the range of motion method instead of the DRE method. (Ex. 1:11) Dr. Sassman also recommended the following restrictions:

> Ms. Fasig should limit lifting, pushing, pulling and carrying to 10 pounds rarely from the floor to waist, 10 pounds occasionally from waist to shoulder and 10 pounds rarely above shoulder height. She should limit sitting, standing and walking to occasional basis and will need to change positions frequently due to her symptoms. She should not use ladders. She should rarely use stairs.

(Ex 1:11)

On July 20, 2016, Chad Abernathey, M.D., wrote a letter in response to the defendants inquiry stating the following:

> 1. It was reasonable to continue to prescribe claimant with medication such as Lyrica, Duloxetine and baclofen to help manage her pain.
>
> 2. Claimant's current treatment was associated with the February 8, 2013 injury and not to the motor vehicle accident of October 2015.
>
> 3. Claimant was physically capable of continuing to work in her current capacity as a sales associate.

(Ex. B:9) Dr. Abernathey wrote a follow-up letter on January 16, 2017, reaffirming his opinions given in the July 22, 2016 report. (Ex 3:17) Dr. Abernathey further clarified that the use of a spinal cord stimulator was reasonable, that claimant is not at risk for physically damaging her fusion or hardware by continuing to work as a part-time sales associate, and that he would defer to the functional capacity evaluation or occupational doctor as to what restrictions were appropriate. (Ex 3:17)

On December 20, 2017, Dr. Miller evaluated claimant again at the request of the defendants. (Ex. A:4) During this examination, claimant reported pain across her low back into the right buttock and occasionally into the leg. Id. Initially, she had a good response to the surgery but that the pain returned. Since the surgery she had received injections and a dorsal column stimulator, both which she described as not helpful or of minimal benefit. (Ex. A:5)

Prior to, during, and following the examination, Dr. Miller observed claimant to generally have full range of motion. She had full strength in all testing. Straight leg raising was negative. She had no decrease in sensation to light touch and dermatomes from L3 through S1. She walked with a normal gait in a full upright position. While assessment of lumbar extension and flexion showed limited range of motion, this was different than what he had observed when he first walked into the room and found her fully flexed to 90° leaning over a patient tray table. These observations, combined with a review of the surveillance videotape, led him to conclude that she needed no further interventional treatment of any type, that she was at maximum medical improvement and had been since he saw her in February 2015 and that no further opiates should be prescribed. (Ex A:6)

He did conclude that the claimant's condition arose directly from the injury suffered on February 8, 2013, through an exacerbation of an underlying condition of degenerative disease. (Ex A:5) He further agreed that the injury of February 8 was a material factor in her need for further treatment. He increased her impairment rating from 21 percent to 22 percent based on the two-level fusion. (Ex A:6)

He stated that to a reasonable degree of medical certainty claimant could take a position with nonmaterial handling activities that included prolonged walking, sitting, driving, use of upper extremities, climbing stairs, reaching, bending at the waist to 90° repeatedly for eight hours a day and 40 hours per week. (Ex. A:6) He further felt that claimant could lift 30 pounds and recommended another functional capacity evaluation and review by claimant's surgeon. (Ex. A:7)

The second functional capacity evaluation was conducted on February 15, 2018. (D: 14) This evaluation was deemed invalid due to inconsistent performance and failure to give maximum voluntary effort. Id. Claimant was tested for the ability to perform lifting tasks. Unmarked steel weights were used in the corresponding weights were replicated using a lever arm. (Ex. D: 21) There was a 24 to 49 percent variance in what claimant could lift in both circumstances. Id. The therapist explained that the biomechanical positioning is identical during the dynamic lifts of the unmarked steel bars and the lever arm less and therefore there should be a high degree of reproducibility between the repeated measures. Id. The therapist also noted that there was a gate deviation between when the claimant walked forward versus when she was walking backwards, there were high pain reports during and/or following the evaluation which were inconsistent with minimal or no pain demonstrated behaviors. (Ex. D:14)

Dr. Miller further revised his restrictions after receiving a report of an invalid functional capacity evaluation conducted on February 15, 2018. (Ex. A:8) Based on a review of the medical records and what he believed to be claimants purposeful underrepresentation of her abilities and over report of symptoms, Dr. Miller set forth the following work restrictions:

> Lifting, maximum 40 pounds, repeated lifting during the day of 30 pounds.
>
> No nonmaterial handling restrictions, with the exception of deep squat greater than 90°, including no restriction on sitting, walking, standing, bending, climbing, reaching including overhead.

(Ex. A:8)

Ted Strickland, MS, performed an industrial disability assessment at the request of the defendants. (Ex. E) He determined that there were positions available to claimant based on Dr. Miller's restrictions including, but not limited to, collection representative, inside sales clerk, office clerk, telephone sales representative, and customer service associate. Claimant pointed out that she did not meet with Mr. Strickland nor did he speak with her on the telephone.

Based on the conclusions of Dr. Miller and the invalid functional test evaluation, Mr. Strickland found claimant to have sustained an 18 percent loss of access to employment and wage loss in the range of 27 percent to 58 percent, particularly given the region where claimant lived along with the work restrictions recommended by Dr. Miller. (Ex. E:34) Altogether, Mr. Strickland believed the claimant's loss of earning capacity or industrial disability is approximately 35 percent. (Ex. E:35)

At hearing, claimant reported a constant pain in her back and a lack of sleep. She testified that she is not as sharp as she used to be and attributes this to her prescriptions. She does not remember things well and struggles mentally. She described herself as not as happy as she would like to be. She testified that she does not believe she could do her previous job as a car salesman due to her mental and physical disabilities.

When asked on cross examination as to why she has not looked for other sales positions, she replied she did not feel mentally fit for a full-time job. Claimant placed emphasis on her mental condition when explaining why she was unemployable at this time.

She testified she has difficulty sitting for long periods of time but was observed by the undersigned to sit without compliant or shifting in the hearing for over an hour. She testified she could stand for an hour at a time.

She disagrees with the work restrictions set forth by Dr. Miller and believes that her physical condition is more in line with the opinions of Dr. Sassman.

As for the surveillance video, claimant testified that she took prescription medications and drank fairly heavily during the wedding. She also maintained that the child she was seen picking up weighed only around 20-25 pounds. I find that the surveillance video holds little value. It is a video of only a small section of one special day and does not provide insight as to claimant's day to day abilities.

Claimant was found to be disabled under the Social Security guidelines as of December 31, 2014. (Ex. 6:29) Initially, her claim was denied. Upon refiling, claimant brought forth a mental injury and the combined physical ailments along with claimant's depression were sufficient for the Social Security Administration to render a finding of full disability. (Ex. 6:38, 45)

Claimant has sustained expert witness fees in the amount of $50.00 from Dr. Abernathey, medical record cost of $760.24, the deposition fee of the claimant for $187.22, and a filing fee of $100.00. My review of the record indicates the claimant's deposition was not used by the claimant during the testimony nor was it proffered as an exhibit.

CONCLUSIONS OF LAW

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

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

The claimant has the burden of proving by a preponderance of the evidence that the injury is a proximate cause of the disability on which the claim is based. A cause is proximate if it is a substantial factor in bringing about the result; it need not be the only cause. A preponderance of the evidence exists when the causal connection is probable

rather than merely possible. George A. Hormel & Co. v. Jordan, 569 N.W.2d 148 (Iowa 1997); Frye v. Smith-Doyle Contractors, 569 N.W.2d 154 (Iowa App. 1997); Sanchez v. Blue Bird Midwest, 554 N.W.2d 283 (Iowa App. 1996).

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

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).

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.

Total disability does not mean a state of absolute helplessness. Permanent total disability occurs where the injury wholly disables the employee from performing work that the employee's experience, training, education, intelligence, and physical capacities would otherwise permit the employee to perform. See McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Diederich v. Tri-City R. Co., 219 Iowa 587, 258 N.W. 899 (1935).

A finding that claimant could perform some work despite claimant's physical and educational limitations does not foreclose a finding of permanent total disability, however. See Chamberlin v. Ralston Purina, File No. 661698 (App. October 1987); Eastman v. Westway Trading Corp., II Iowa Industrial Commissioner Report 134 (App. May 1982).

The primary dispute in this matter is the extent of the claimant's disability. Defendants assert that the claimant's current symptomology, as expressed to the independent medical examiners and at hearing, is exaggerated. In support of that premise, defendants point to surveillance video of the claimant during a wedding and her invalid functional capacity evaluation. None of the claimant's treating physicians have characterized claimant as malingering.

The experts agree claimant sustained ongoing chronic back pain as a result of her fall on February 8, 2013, which aggravated an underlying, and formally asymptomatic, degenerative disease in the lumbar and sciatic region. As a result of this injury, claimant has underwent physical therapy, medication management, fusion surgery, injections, and a spinal cord stimulator trial.

Currently, she is on a battery of medications including narcotics which she takes up to four pills a day.

Despite these multiple treatment modalities, claimant continues to suffer from burning pain in her back which prevents her from working in the same capacity as she had prior to the injury.

The symptoms recorded by Dr. Sassman during the 2015 independent medical examination and those recorded by Dr. Miller in the 2017 independent medical examination are quite different. Dr. Sassman found claimant to have decreased sensation in the lumbar region, positive straight leg raise tests bilaterally, and an antalgic gait. Dr. Miller did not find any of these. Dr. Miller's results, however, were more in line with the physical examination of Dr. Kari on January 4, 2018. Dr. Kari recorded claimant's symptoms to include an antalgic gait, tenderness in bilateral buttock and lumbosacral area, normal sensation, negative straight leg raise tests, negative facet loading maneuvers and positive sacroiliac tests. (JE 6:120)

Based in part on the invalid functional capacity evaluation as well as the observations of Dr. Miller who most recently saw the claimant in a medical capacity, it is determined that claimant has not sustained a permanent total disability.

Even under the work restrictions assessed by Dr. Sassman, claimant would still be able to undertake many of the tasks that she had prior to the work injury. Her previous job as a sales associate required very little lifting. She has been involved in processing financial paperwork, credit applications, and sales documents. Further, she has spent the last 20 years in a sales position. Since claimant's resignation from the defendant employer in March 2017, it does not appear that she has made any efforts to find new employment. Her initial Social Security disability application was denied because she was working part-time and earning a substantial income. It was not until she added a mental component to her injury that the Social Security Administration found the claimant to be disabled.

There is no evidence in this case the claimant has sustained a mental injury arising out of and in the course of her employment. Claimant testified that the medications that she takes renders her incapable of performing the more complicated financial duties that she undertook as a car salesperson; however, there are many jobs in the sales field which do not require extensive financial paperwork.

The vocational report prepared by Mr. Strickland suggested the claimant has sustained a nearly 60 percent loss of income and 35 percent decrease in earning capacity. Prior to her voluntary discharge from the defendant employer, claimant was working approximately 24 hours a week. The work restrictions recommended by Dr. Sassman place claimant in the light to sedentary work category. Claimant's past work experience in sales give her the skills to be able to work light to sedentary positions such as collection representative, inside sales clerk, office clerk, telephone sales representative, and customer service associate.

Taking all the foregoing into consideration, it is determined the claimant has sustained a 40 percent industrial loss.

The next question is when permanent partial disability benefits should commence. Based upon Dr. Miller's conclusions, the defendants argue the appropriate commencement date of permanent benefits is February 18, 2015. On the other hand, the claimant urges the undersigned to rely upon the medical records of Dr. Kari and set the commencement date as of August 10, 2017.

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, 312N.W.2d 60 (Iowa App. 1981). Healing period benefits can be interrupted or intermittent. Teel v. McCord, 394 N.W.2d 405 (Iowa 1986).

Claimant did not return to work in a substantially similar employment. Therefore, the question is when claimant achieved maximum medical improvement (MMI). During claimant's treatment with Dr. Kari, claimant underwent injections, oral medications, and a spinal cord stimulator. As claimant was treating with Dr. Kari, it was evident that both parties had a reasonable expectation of improvement. While claimant did not improve, the expectation of improvement existed as different medical modalities were attempted to treat claimant's chronic back pain. When all of these treatments failed, it was determined the claimant had reached maximum medical improvement. Therefore the appropriate commencement date of permanent partial disability benefits would be August 10, 2017, the date upon which Dr. Kari considered claimant at MMI.

The final issue to be addressed is the assessment of costs. Claimant seeks an assessment in the amount of $1097.46. (Ex. 5) This includes the cost of Dr. Abernathey's opinion, medical records, filing fees, and claimant's deposition fee.

Rule 876 Iowa Administrative Code rule 4.33 allows the Deputy Commissioner to assess costs including attendance of a certified shorthand reporter at hearing or evidential depositions, transcript costs, cost of service of original notice and subpoenas, witness fees and expenses, the cost of doctors and practitioners depositions testimony, the reasonable cost of obtaining no more than two doctors or practitioners reports, filing fees when appropriate, and costs of persons reviewing health services disputes. The requested costs fall into the covered categories and therefore all costs requested are assessed.

ORDER

THEREFORE, it is ordered:

That defendants are to pay unto claimant two hundred (200) weeks of permanent partial disability benefits at the rate of six hundred forty-nine and 29/100 dollars ($649.29) per week from August 10, 2017.

That defendants shall pay accrued weekly benefits in a lump sum.

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

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. April 24, 2018).

That defendants are to be given credit for benefits previously paid.

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

That defendant shall pay the costs of this matter pursuant to rule 876 IAC 4.33.

Signed and filed this 18th day of July, 2018.

JENNIFER S. GERRISH-LAMPE
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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