BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

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| LACEY ALDERSON,<br><br>Claimant,<br><br>vs.<br><br>CR PHARMACY SERVICES, INC.,<br><br>Employer,<br><br>and<br><br>PHARMACIST MUTUAL,<br><br>Insurance Carrier,<br>Defendants. | | File No. 5059494<br><br>A R B I T R A T I O N<br><br>D E C I S I O N<br><br>Head Notes: 1803, 1803.1, 2501, 2701, 3003 |



## STATEMENT OF THE CASE

Claimant, Lacey Alderson, filed a petition in arbitration seeking workers' compensation benefits from CR Pharmacy Services, Inc. (CR), employer and Pharmacist Mutual, insurance carrier, both as defendants. This matter was heard in Davenport, Iowa on July 10, 2018 with a final submission date of July 31, 2018.

The record in this case consists of Joint Exhibits 1-8, Claimant's Exhibits 1-9, Defendants' Exhibits A through D, and the testimony of claimant.

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.

## ISSUES

1. The extent of claimant's entitlement to permanent partial disability benefits.

2. Rate.

3. Whether claimant is entitled to alternate medical care.

4. Whether there is a causal connection between the injury and the claimed medical expenses.

## FINDINGS OF FACT

Claimant was 37 years old at the time of hearing. Claimant graduated from high school. Claimant studied graphic design for a semester and a half at a community college. Claimant did not graduate from the community college.

Claimant has worked at fast food restaurants. She did clerical work at Tyson, a furniture store and a steel company. Claimant has also worked as an operator and dispatcher.

Claimant began with Kelly's in 2009. Claimant testified Kelly's was bought by Care Pro in 2014. She said Care Pro was bought by CR Pharmacy. Claimant testified all three companies sold and rented durable medical equipment. Claimant worked as a customer care representative.

Claimant testified that, on December 30, 2015, she slipped and fell as she was walking in the back of the company building.

Exhibit 8 are photographs of the area where claimant fell. The "x" on Exhibit 8 shows approximately, in the photos, where claimant fell.

On December 31, 2015 claimant was seen at Ora Orthopedics. Claimant had pain in the left foot. Claimant was assessed as having a fracture of the second metatarsal on the left foot. A CT scan was recommended. (Joint Exhibit 2, pages 1-2)

On January 10, 2016 claimant had a CT scan. It showed multiple fractures at the base of the second metatarsal and a chip fracture of the cuboid. Claimant was seen by Myles Luszczyk, D.O. Surgery was discussed as a treatment option. (Jt. Ex. 2)

Claimant was seen at the University of Iowa Hospitals and Clinics (UIHC) on January 20, 2016. Claimant was assessed as having a fracture at the base of the second metatarsal and a chip fracture of the cuboid. (Jt. Ex. 3, pp. 1-8)

On January 29, 2016 claimant underwent surgery which involved a fusion of the mid-foot. Surgery was performed by Phinit Phisitkul, M.D. (Jt. Ex. 3, pp. 11-16)

Claimant returned in follow up with Dr. Phisitkul in March through July of 2016. The record from this period notes claimant had gradual improvement in function and symptoms in her foot. (Jt. Ex. 3, pp. 19-38)

Claimant returned to Dr. Phisitkul on August 18, 2016. Claimant had no improvement in symptoms since July of 2016. Claimant had soreness in the foot, worse in the morning and at the end of the day. Claimant's pain medication was increased. (Jt. Ex. 3, pp. 39-43)

On September 29, 2016 claimant was discharged from care by Dr. Phisitkul. Claimant was given a night splint and home exercise program. Claimant was recommended to use a TENS unit for pain. (Jt. Ex. 3, pp. 44-47)

In a December 1, 2016 letter, Dr. Phisitkul found claimant had a 10 percent permanent impairment to the foot, converting to a 7 percent permanent impairment to the lower extremity based on the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition. (Jt. Ex. 6, p. 2)

In a January 4, 2017 report Richard Kreiter, M.D., gave his opinions of claimant's condition following an independent medical evaluation (IME). Dr. Kreiter's opinion appears to suggest he believes claimant's impairment to the foot resulted in a gait derangement. Using Table 17-5 of the Guides he found claimant had a 15 percent permanent impairment to the body as a whole. He recommended claimant have modifications to her shoes to reduce stress in the mid-foot area. He also recommended claimant be prescribed mild analgesics and lose weight. (Claimant's Ex. 1)

Dr. Kreiter's notes indicate claimant walked with a chronic limp. Claimant used a cane for walking distances but not at the work place. Dr. Kreiter assessed claimant as having a left foot arthrodesis in the first, second, third and fourth tarsometatarsals. He also assessed her as having obesity and mild post-traumatic depression. (Cl. Ex. 1)

On February 2, 2017 claimant was evaluated by James Lindley, M.D. for onset of back pain while sitting at work. Claimant had no known injury. Claimant was treated with medication. (Jt. Ex. 7, pp. 3-6)

Claimant testified she began using a cane sometime in December of 2016 or January of 2017. She said she began having hip pain six to nine months after her surgery. Claimant testified when she walked long distances she used a cane. She said due to pain in her feet, she overcompensates and leans to the right. She says she tried a TENS unit for pain, but it did not help.

Claimant said because of her foot problems she had difficulty walking up and down stairs and doing household chores. She says she wears a size 10 shoe on her injured foot, and an 8 ½ to 9 size shoe on her good foot.

At the time of hearing claimant was working for Genesis Health System in customer service. Claimant said she earned approximately $16.00 an hour at Genesis. She said she worked between 40-60 hours per week.

Claimant testified she would like to have special foot care for her foot. She believed aquatherapy would be beneficial to her. Claimant said she pays out of pocket for pain medication.

Claimant testified, on direct exam, she did not believe she directly requested orthotics or physical therapy from defendants. On re-direct, claimant testified she did

request this care in answers to interrogatories dated January 2018. (Transcript. pp. 55-56)

Claimant testified she routinely worked 40 hours per week with CR and also routinely worked overtime. The parties stipulated claimant was paid $12.28 per hour. (Ex. A, p. 1; Cl. Ex. 9)

The record indicates claimant worked the following hours the 13 weeks prior to her injury.

| Week | Date of Week | Hours Worked |
|---|---|---|
| 1 | 10/2/15 | 45.45 |
| 2 | 10/9/15 | 45.11 |
| 3 | 10/16/15 | 46.86 |
| 4 | 10/23/15 | 47.8 |
| 5 | 10/30/15 | 44.24 |
| 6 | 11/6/15 | 45.91 |
| 7 | 11/13/15 | 46.63 |
| 8 | 11/20/15 | 43.98 |
| 9 | 11/27/15 | 48.35 |
| 10 | 12/4/15 | 44.2 |
| 11 | 12/11/15 | 41.48 |
| 12 | 12/18/15 | 43.11 |
| 13 | 12/24/15 | 48.06 |
| | Total | 591.18 |

(Ex. 11 and A)

## CONCLUSIONS OF LAW

The first issue to be determined is the extent of claimant's entitlement to permanent partial disability benefits.

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 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).

"If" 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.

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).

The Iowa Supreme Court has held that "where an accident occurs to an employee in the usual course of his employment, the employer is liable for all consequences that naturally and proximately flow from the accident." Oldham v. Schofield & Welch, 266 N.W. 480, 482 (1936). The Court explained as follows:

If an employee suffers a compensable injury and thereafter suffers further disability which is the proximate result of the original injury, such further disability is compensable. Where an employee suffers a compensable injury and thereafter returns to work and, as a result thereof, his first injury is aggravated and accelerated so that he is greater disabled than before, the entire disability may be compensated for." Id. at 481.

Increased disability from a prior injury, even if brought about by further work, does not constitute a new injury. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); Ellingson v. Fleetguard, Inc., 599 N.W.2d 440 (Iowa 1999); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995); McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985).

An employer may be liable for a sequela of an original work injury if the employee sustained a compensable injury and later sustained further disability that is a proximate result of the original injury. Mallory v. Mercy Medical Center, File No. 5029834 (Appeal February 15, 2012).

A sequela can also take the form of a secondary effect on the claimant's body stemming from the original injury. For example, where a leg injury causing shortening of the leg in turn alters the claimant's gait, causing mechanical back pain, the back

condition can be found to be a sequela of the leg injury. Fridlington v. 3M, File No. 788758 (Arb. November 15, 1991).

The parties agree claimant sustained an injury to her left foot when she fell on December 30, 2015. Claimant contends she sustained an altered gait as a sequela to the December 30, 2015 foot injury. Defendants contend claimant is only due permanent partial disability benefits based upon her foot injury.

Claimant testified she had been having hip pain six to nine months after her surgery. Claimant treated with Dr. Phisitkul at the UIHC from approximately January 2016 through September 2016. There is no mention in any of the medical records from this period of time of claimant having hip or low back pain. There is no mention in the records from this period of time of claimant having altered gait. (Jt. Ex. 3)

There is no mention in Dr. Phisitkul's report of December 2016 of any permanent impairment to claimant's hip or lower back problems. There is also no mention of an altered gait. (Jt. Ex. 6)

On February 2, 2017 claimant was evaluated by Dr. Lindley. Records from this visit indicate claimant had an onset of lower back pain while *sitting* at work. There is no indication in any of Dr. Lindley's records that claimant's back pain was due to an altered gait. There is no mention of an altered gait being caused by claimant's left foot injury. (Jt. Ex. 7, pp. 3-6)

Dr. Kreiter saw claimant on one occasion for an IME. Dr. Kreiter seems to opine claimant had an altered gait as a result of her left foot injury. (Cl. Ex. 1, p. 1)

There are several problems with Dr. Kreiter's opinion. Dr. Kreiter does not address why there is no mention in any of the UIHC records of an altered gait or a back condition. Dr. Kreiter's opinion does not give an explanation why claimant's altered gait is due to her left foot, when the February of 2017 records indicate claimant had back pain while sitting. Dr. Kreiter does appear to opine claimant had an altered gait due to her left foot problems. (Ex. 1, p. 1) However, in the medical exam portion of his report, Dr. Kreiter does not assess claimant as having an altered gait. (Cl. Ex. 1, p. 4) Given all of these discrepancies in Dr. Kreiter's report, it is found his opinions regarding causation are found not convincing.

There is no mention in any of the treatment records from UIHC of an altered gait. There is no mention in any treatment records from UIHC of back or hip pain. The first mention of back pain is in a February of 2017 record from Dr. Lindley. There is no indication in Dr. Lindley's records claimant's back pain is due to an altered gait. Dr. Kreiter's opinion regarding causation is found not convincing. Given this record, claimant has failed to carry her burden of proof her back or hip problems arose out of and in the course of employment. Claimant has also failed to carry her burden of proof her altered gait is a sequela of her December of 2015 injury to her foot.

Given this finding of fact and conclusion of law, defendants are only required to pay permanent partial disability benefits based upon Dr. Phisitkul's rating to claimant's left foot. Based on this rating, claimant is due 15 weeks of permanent partial disability benefits (10% x 150 weeks).

The next issue to be determined is rate.

Section 85.36 states the basis of compensation is the weekly earnings of the employee at the time of the injury. The section defines weekly earnings as the gross salary, wages, or earnings to which an employee would have been entitled had the employee worked the customary hours for the full pay period in which the employee was injured as the employer regularly required for the work or employment. The various subsections of section 85.36 set forth methods of computing weekly earnings depending upon the type of earnings and employment.

If the employee is paid on a daily or hourly basis or by output, weekly earnings are computed by dividing by 13 the earnings over the 13-week period immediately preceding the injury. Any week that does not fairly reflect the employee's customary earnings is excluded, however. Section 85.36(6).

The record indicates claimant works 40 hours per week plus overtime. The records show 13 weeks before her injury, claimant worked a total of 591.18 hours. Defendants appear to dispute the total hours worked, but offer no description or detail to contradict Claimant's Exhibit 9. Given this record, it is found claimant worked 591.18 hours the 13 weeks prior to hearing. Claimant's rate was $12.28 per hour. Defendants' average weekly wage was $558.44 (591.18 x 12.28 ÷ 13). Claimant was single with one exemption. Claimant's rate is $349.59 per week.

The next issue to be determined is whether claimant is due alternate medical care.

Iowa Code section 85.27(4) provides, in relevant part:

> For purposes of this section, the employer is obliged to furnish reasonable services and supplies to treat an injured employee, and has the right to choose the care. . . . The treatment must be offered promptly and be reasonably suited to treat the injury without undue inconvenience to the employee. If the employee has reason to be dissatisfied with the care offered, the employee should communicate the basis of such dissatisfaction to the employer, in writing if requested, following which the employer and the employee may agree to alternate care reasonably suited to treat the injury. If the employer and employee cannot agree on such alternate care, the commissioner may, upon application and reasonable proofs of the necessity therefor, allow and order other care.

An application for alternate medical care is not automatically sustained because claimant is dissatisfied with the care he has been receiving. Mere dissatisfaction with the medical care is not ample grounds for granting an application for alternate medical care. Rather, the claimant must show that the care was not offered promptly, was not reasonably suited to treat the injury, or that the care was unduly inconvenient for the claimant. Long v. Roberts Dairy Co., 528 N.W.2d 122 (Iowa 1995).

Claimant requests defendants pay for an orthotic device, aquatherapy for weight loss, and psychological evaluation. Claimant also requests defendants be required to pay for tramadol and citalopram. (Claimant's Post-Hearing Brief, p. 11)

Claimant made a request for these items in her answers to interrogatories on or about January 2018. (Tr. pp. 55-56)

Dr. Kreiter, in his IME report, recommends claimant be provided with an orthotic device. He indicates claimant should be prescribed anti-inflammatory or mild analgesics. He recommends claimant to lose weight and suggests water aerobics. He noted claimant's "post-injury depression can be addressed through her family doctor." Dr. Kreiter does assess claimant as having mild posttraumatic depression. (Cl. Ex. 1, p. 1-2) No experts contradict Dr. Kreiter's opinion that claimant has mild posttraumatic depression.

Claimant has made a request for alternate medical care through her answers to interrogatories on or about January 2018. The record indicates claimant has problems walking with foot pain. Dr. Kreiter has recommended an orthotic device for claimant's left foot. Given this record, claimant has carried her burden of proof she is entitled to an orthotic device. Defendants shall provide the orthotic device.

Dr. Kreiter recommended claimant be prescribed anti-inflammatories or mild analgesics. There is no proof in the record tramadol or citalopram fall into these categories of medications. Defendants shall authorize claimant to be provided anti-inflammatories or mild analgesics.

Dr. Kreiter recommended claimant lose weight. The record indicates claimant weighed approximately 300 pounds at the time of injury. It is clear her obesity was a pre-injury problem. There is no evidence claimant's obesity was caused by her December of 2015 injury. Given this record, claimant has failed to carry her burden of proof defendants are liable in paying for a water aerobics program.

Dr. Kreiter opined claimant has posttraumatic depression as a result of her injury. (Ex. 1, pp. 2, 4) No expert has contradicted that opinion. Given this record, claimant is entitled to a psychological evaluation.

In summary, defendants shall provide claimant with an orthotic device for her injured foot, anti-inflammatories or mild analgesics and a psychological evaluation.

The final issue to be determined is whether there was a causal connection between the injury and the claimed medical expenses.

The employer shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance, and hospital services and supplies for all conditions compensable under the workers' compensation law. The employer shall also allow reasonable and necessary transportation expenses incurred for those services. The employer has the right to choose the provider of care, except where the employer has denied liability for the injury. Section 85.27. Holbert v. Townsend Engineering Co., Thirty-second Biennial Report of the Industrial Commissioner 78 (Review-Reopening October 1975).

Claimant seeks an order that defendants be required to pay for her radiology bills and emergency care, as detailed in Exhibit 5, pages 1-2. These expenses appear to be related to claimant's December of 2015 injury. Defendants are liable for payment of the radiology bills, emergency room care, and any other care related to the treatment of claimant's foot injury.

Claimant also makes a request that defendants be required to pay for her prescriptions of tramadol. As noted above, Dr. Kreiter has only recommended claimant be prescribed anti-inflammatories or mild analgesics for her foot condition. Claimant's tramadol prescription appears to be for her back condition, which has been found not to be work related. Defendants are not liable for bills related to claimant's tramadol prescriptions.

## ORDER

Therefore it is ordered:

That defendants shall pay claimant fifteen (15) weeks of permanent partial disability benefits at the rate of three hundred forty-nine and 59/100 dollars ($349.59) a week.

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

That defendants shall pay interest on unpaid weekly benefits as ordered above and as set forth in Iowa Code section 85.30.

That defendants shall receive a credit for benefits previously paid.

That defendants shall provide claimant with alternate medical care including an orthotic device, analgesic medications for pain and a psychological evaluation.

That defendants shall pay claimant's medical bills as detailed above.

That defendants shall pay costs.

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

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

JAMES F. CHRISTENSON
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.