BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JUDY SCHWERS, Claimant, vs. NORDSTROM, INC., Employer, Self-Insured, Defendant.	File No. 5064794 ARBITRATION DECISION Head Note Nos.: 1180.50, 1402.40, 1402.60, 1804, 2907

STATEMENT OF THE CASE

Judy Schwers, claimant, filed a petition in arbitration seeking workers' compensation benefits from Nordstrom, Inc., self-insured employer, as defendant. Hearing was held on October 7, 2020. This case was scheduled to be an in-person hearing. However, due to the outbreak of a pandemic in Iowa, the Iowa Workers' Compensation Commissioner ordered all hearings to occur via video means using CourtCall. Accordingly, this case proceeded to a live video hearing via CourtCall with all parties and the court reporter appearing remotely. The hearing proceeded without significant difficulties.

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.

Judy Schwers was the only witness to testify live at trial. The evidentiary record also includes joint exhibits JE1-JE7, claimant's exhibits 1-11, and 13, and defendant's exhibits A-E. Claimant objected to defendant's exhibit D, which is described as a highlight reel of surveillance video. Claimant offered exhibit 12, which is five hours of surveillance video. The objection was overruled, but claimant was given one week to provide their own video. However, the five-hour video was not admitted into evidence at the time of the hearing. The evidentiary record was left open at the conclusion of the hearing to provide claimant an opportunity to provide a video. The video was submitted and is marked as D(v). Rather than submit a highlight reel of her own, claimant opted to point out certain segments of the full surveillance video. Therefore, the full videos are admitted into evidence as well. Due to a privacy issue, defendants' exhibit D(v) had to be resubmitted after the hearing. The parties submitted post-hearing briefs. All evidence and arguments are now considered.

ISSUES

The parties submitted the following issues for resolution:

1. Whether claimant sustained any permanent disability as a result of the stipulated August 10, 2017, work injury. If so, the extent of industrial disability claimant sustained.

2. Whether claimant is entitled to medical care pursuant to Iowa Code section 85.21.

3. Assessment of costs.

FINDINGS OF FACT

The undersigned, having considered all of the evidence and testimony in the record, finds:

Claimant, Judy Schwers, was 56 years old at the time of the hearing. She began working for Nordstrom, Inc., in 1992. She was hired to work in the distribution center and performed essentially the same type work from 1992 until the time of the August 10, 2017, work injury. The majority of her work entailed loading and unloading trucks in the receiving department. She worked her way up at Nordstrom to an assistant manager and manager position. Nordstrom has working managers, which means the managers are required to perform the same tasks as the workers they oversee. These tasks include unloading and loading freight, palletizing merchandise, and moving merchandise. (Testimony: Claimant's Exhibits 2 and 5)

It is worth noting that Judy did have some problems with her back prior to the stipulated August 10, 2017, work injury. In September 2015 Judy sought treatment for low back pain for the past month. In February 2017 Judy reported lower back pain for the past two weeks. She had seen a chiropractor. When she stands, her legs feel like they are going to give out. She has pain down her right leg. She was assessed with acute right-sided low back pain with sciatica. In March 2017 she reported continued low back and sciatic pain. Her pain is worse with sitting for periods of time. Her pain radiates to her right leg. The assessment included acute right-sided low back pain with sciatica and radicular pain down the right leg. Judy was seen again on April 18, 2017. Judy reported low back pain, right side worse than left. She had numbness and tingling down her legs and into her toes. She reported that she had been seeing a chiropractor that had been adjusting her sacroiliac joint. She rated her pain as 8 out of 10. X-rays of her lumbosacral spine demonstrated minimal disc degeneration at L4-5 with minimal facet arthropathy at that level. The assessment was sacroiliac joint pain. Judy was offered an injection of the sacroiliac joints. She was also given a home exercise program. Judy underwent the bilateral SI joint injections on May 3, 2017. (JE1, pp. 1-7)

Judy testified that her pain returned to a 3 out of 10, which was baseline. Judy did not miss any significant time from work due to her back. (Testimony)

At the beginning of August, Nordstrom received a truck with cases of shoes. Judy was working in the receiving department. While Judy was unloading the boxes, she began to have significant low back pain. She reported her pain to Nordstrom. She told her manager that she was having a lot of pain and aches and she felt the job was too physical for her. Nordstrom moved her to a different position and provided her with aspirin and bio-freeze. Although the position they moved her to was lighter, her back pain did not improve, so Nordstrom sent her for medical treatment. (JE1, p. 8; testimony)

On September 1, 2017, at the direction of Nordstrom, Judy went to Tri-State Occupational Health where she saw Emily S. Armstrong, PA-C. Judy reported that she had a new injury of her back while working for Nordstrom on August 9, 2017. She was unloading multiple heavy shoe boxes off of a semi onto a roller flex. She was required to stand for long periods of time. Judy believes she injured her back over the course of August 9, 10, and 11, 2017. During those 3 days she worked in a new department at least 8 hours per day. Judy reported there was an order of 300-400 cases of shoes that came in on a semi-trailer. She said they unloaded those 70-80 pound boxes for 3 days in a row. The pain gradually increased each day she performed this work, and by the third day she knew something was wrong and that she had overdone it. Once she informed her supervisor that she was not tolerating the new position, she was moved to a different position. She currently works on the processing floor. Her duties include standing, grabbing boxes off of gravity lines, opening boxes, unpacking boxes, and scanning items. At the appointment, Judy reported that over the prior 2-3 days her pain was excruciating. She has back pain, down to her hips and into both of her legs. She tried to treat it on her own for three weeks, but her pain continued to get worse. She reported that her arms and legs were hurting. Prior to being put in the positon on August 9, she worked as the shoe department supervisor, which was less physically demanding than the position she started on August 9, and is more physically demanding than her current position on the processing floor. Judy reported that she does have a history of chronic back pain for approximately 10 years. She had constant pain across her low back, 3-10, right worse than left. She would have flare-ups of back pain 3-4 times per year. Some of her flare-ups caused sciatica pain. At the time of the appointment, Judy denied sciatica pain, just achy pain that went to her calves. PA-C Armstrong's assessment included: Acute exacerbation of chronic low back pain, acute thoracic back pain, back muscle spasm, and bilateral posterior neck pain. PA-C Armstrong felt the primary issue was an acute exacerbation of chronic low back pain. She believed the thoracic region and neck region was more of a soreness and tightness due to an increase in physical demand of her work in a deconditioned state, plus her current position with injury to the lumbar region. PA-C Armstrong also felt that the significant increase in her workload from August 9th through August 11th caused the acute exacerbation of the chronic low back pain. PA-C Armstrong wanted Judy to heal

from her August injury and undergo some conditioning to better tolerate her current position. Judy was given medication and temporary restrictions. (JE1, pp. 8-9)

Nordstrom did provide Judy with light duty work; however, her back pain did not improve. On September 7, 2017, Judy was called to the human resource office at Nordstrom. Nordstrom told her that due to the extent of her injuries and restrictions, they did not want her to continue working because she might further hurt herself, so they sent her home. This was the last date Judy ever performed work for Nordstrom. (Testimony)

Judy treated with Erin J. Kennedy, M.D. She was kept on restrictions, medications, and physical therapy until December 14, 2017. Dr. Kennedy noted that Judy's symptoms failed to resolve with physical therapy, chiropractic care, and steroid injection. Judy was not functioning at a level that she could work. Judy requested an orthopaedic consult, which Dr. Kennedy felt was reasonable. Dr. Kennedy continued the restrictions to 4-hour shifts with half seated and half standing, occasional bend and twist of spine, 10-pound maximum. (JE1, pp. 15-16)

On January 10, 2018, Michael P. Chapman, M.D., saw Judy. Dr. Chapman noted that Judy did not have a significant history of back, buttock, or leg problems until last August when she performed 3 days of heavy unloading of boxes that weighed up to 75 pounds. Since that time, she has had pain. Dr. Chapman examined Judy and assessed her with pain of the right sacroiliac joint. He felt that her primary pain generator was the SI joint. He believed there was no significant pathology in her lumbar spine. They discussed SI joint fusion and potential complications. Judy felt her quality of life was suffering enough to pursue the fusion. Judy was restricted from work until further notice. (JE1, pp. 17-18)

Dr. Kennedy saw Judy on March 2, 2018. She noted Judy had been off work since September 7, 2017. Judy reported that her pain was 8/10. Judy felt that her joint was always out of position. She reported difficulty sleeping. Cyclobenzaprine did not provide her any relief. The assessment was pain of right sacroiliac joint. Dr. Kennedy prescribed tramadol twice a day. (JE1, pp. 19-20)

Nordstrom officially terminated Judy via a letter dated March 18, 2020. At that time, Judy was informed that Nordstrom was not able to accommodate her permanent restrictions, and her employment was terminated. (Testimony)

Dr. Chapman performed a right sacroiliac joint fusion using iFuse implants done under fluoroscopic guidance on May 8, 2018. The pre- and postoperative diagnoses were right sacroiliac joint pain from sacroiliac joint arthritis. (JE3, pp. 1-2)

On May 21, 2018, Judy returned to Dr. Chapman. She was 13 days post-fusion. She reported an improvement in her pain. She continued to have right buttock pain. She was to follow-up in two weeks. By July 2018, Judy reported that a lot of her preoperative symptoms were improved. However, the pain in her low back and down

her leg into her foot was worsening. Dr. Chapman recommended a repeat MRI. (JE1, pp. 21-23)

Judy continued to treat with Dr. Chapman. By the end of August 2018, despite medial branch blocks, she had continued pain and her symptoms were getting worse. (JE1, pp. 24-27)

Judy returned to Dr. Chapman on August 9, 2018. Dr. Chapman noted that the recent MRI showed some disc desiccation at L3-4. It also showed facet arthropathy at L4-5 and L5-S1, which was worse on the right at L4-5. Dr. Chapman felt her leg symptoms were due to nerve irritation and recommended gabapentin. For her back, he recommended facet blocks and ablation. (JE1, pp. 24-25)

On August 29, 2018, Judy reported that the medial branch blocks did nothing. Her symptoms were getting worse and she was interested in proceeding with a spinal cord stimulator trial. (JE1, p. 26)

In October of 2018, at the request of the defendants, Judy saw Kenneth McMains, M.D. for a second opinion. Dr. McMains saw Judy and also reviewed approximately 200 pages of medical records. Judy reports that her primary pain is located in her low back with radiation down both legs with some increased weakness of the right leg. When she puts weight on the right leg, she experiences pain in the area of her previous SI fusion. She utilizes a cane to decrease some of the weight on ambulation. She reports that her right leg felt weaker than her left. Dr. McMains did not feel that her back complaints and diagnosis were related to the August 10, 2017, work injury. He felt on August 9-11, while performing activities she was not used to, Judy developed increased discomfort in her low back that appears to be myofascial. Dr. McMains noted that while Judy was off work, she reported a continued downhill course with worsening of pain manifesting itself with instability of the right SI joint that had been present for some time prior to August 10, 2017. Dr. McMains felt that Judy underwent a fusion of the SI joints due to a chronic condition, not due to any specific event or work-related injury. Because Judy had a chronic condition, Dr. McMains felt that her primary care physician should be the one to address restrictions. However, Dr. McMains noted that whether she could be returned to light duty or full duty was questionable due to the fact that Judy had marked limitation in movement and used a cane to ambulate. Dr. McMains felt it was highly unlikely that she could return to her previous work activity. Dr. McMains felt that Judy's soft tissue problem would have resolved in approximately 3-4 weeks and, therefore, placed her at MMI on September 10, 2017. Dr. McMains felt that Judy did not have any permanent impairment as the result of the work injury. He recommended that Judy see her primary care provider for an extensive workup for any rheumatological conditions. (Def. Ex. A)

Timothy J. Miller, M.D. authored a missive to defendants on November 1, 2018. Dr. Miller did not feel that Judy would be a good candidate for a spinal cord stimulator. He noted that her pain was primarily mechanical in nature and was not likely of a spinal

source. He felt that she had no indication of a radiculopathic or chronic neuropathic pain that would likely respond to spinal cord stimulators. Dr. Miller noted spinal cord stimulators usually only work for chronic regional pain syndrome and for neuropathic and radiculopathic pain relating to spinal origin. He felt that Judy would have less than 10 percent chance of responding to a spinal cord stimulator. Based on Judy's MRI, Dr. Miller felt she had relatively modest disease. He stated that she did not have any convincing radicular problem and that she had primarily mechanical back pain. Dr. Miller continued to set forth the reasons he did not recommend a stimulator. He recommended conservative treatment including medication and exercise. Dr. Miller believed that Judy's primary SI joint pain was likely related to her work–related injury from stress related to unloading shoes from a semi-trailer on the dates listed. (Def. Ex. B)

On November 20, 2018, Dr. Chapman signed a letter setting forth his opinions. His diagnoses included post op SI fusion and low back pain. Dr. Chapman noted that technically the surgery went well, but did not achieve the hoped for results. Dr. Chapman opined that the diagnoses were caused and/or materially or substantially aggravated by the August 2017 work injury at Nordstrom. He felt the S1 joint fusion was reasonable and necessary after her work injury. Dr. Chapman felt that Judy was not at maximum medical improvement, but anticipated that she would be at MMI one-year post op, or April 2019. Dr. Chapman stated that he had reviewed the November 1, 2018, report from Dr. Miller. In his report Dr. Miller referenced the wrong stimulator. Dr. Chapman referred Judy to Dr. Maiers at Mercy Dubuque Anesthesiologist for a Nevro spinal cord stimulator. Dr. Chapman opined this was reasonable and necessary given the August 9, 2017, work injury. Dr. Chapman felt Judy will have a permanent condition resulting from the work injury. He believed an FCE would be appropriate to determine what, if any, permanent restrictions she may need due to the work injury. Dr. Chapman stated it was appropriate for Judy to continue to return to see him. (JE1, pp. 28-31)

After an alternate care hearing, Nordstrom approved the trial spinal cord stimulator. (Cl. Ex. 4) On March 20, 2019, Dr. Chapman saw Judy for a spinal cord stimulator trial. She reported pain extending from her lower back down bilateral lower extremities into the ankle area of both legs. By March 25, Judy reported that she had excellent pain relief. Her leg pain decreased to 0/10 and she had significant functional improvement as well as improvement in her sleep. She did still have a small amount of centralized back pain which she rated as 3-4/10. (JE3, pp. 3-5)

On April 11, 2019, Judy reported good relief of her leg pain with the stimulator trial. The stimulator did not cover the back pain much, but she had enough improvement that she was interested in a permanent implant. (JE1, p. 32)

On May 24, 2019, Dr. Chapman permanently implanted a Nevro spinal cord stimulator through a T12-L1 laminotomy. (JE3, pp. 6-7)

Judy returned to Dr. Chapman on August 8, 2019. She was three months out from the spinal cord stimulator implant. A Nevro representative was working through different programs, which seemed to be stirring up her pain. She has difficulty doing much of anything. Judy cannot stay in any one spot more than a few minutes. She cannot lift or carry more than about 5 pounds. Judy's job requires being around radiofrequency devices which would affect her stimulator, so she is unable to go back to her job. She reported that she was collecting disability. Dr. Chapman encouraged her to be active as her comfort levels allow. Dr. Chapman was hopeful that Judy would be at MMI in six months. (JE1, p. 33)

On September 10, 2019 Dr. Chapman wrote a note for Judy to have a permanent handicapped parking permit. (JE1, p. 34)

On September 16, 2019, Dr. Chapman's office indicated that Judy had failed back syndrome. The note also stated that she was permanently unable to work, on disability, and would not be coming back. Judy testified that Dr. Chapman did not give her any specific restrictions; he just advised her to try to stay active. (JE1, p. 35)

Judy attended 14 sessions of physical therapy in October and November of 2019. The therapy notes indicate that Judy walked with an altered gait, but she should try to walk without the gait to minimize stress. Judy was also urged to minimize the use of her cane. The therapist felt that Judy was credible in her complaints. (JE5)

Judy testified that she received a phone call from Nordstrom informing her that they were going to file disability papers for her based on her back condition. On November 7, 2019, Judy was awarded Social Security Disability benefits. (Cl. Ex. 6)

Judy did return to see Dr. Chapman on November 15, 2019. She reported that the stimulator helped her leg pain, but she continued to have disabling back and buttock pain. Dr. Chapman noted that this prevented her from being able to reliably work because she cannot sit or stand or walk for any length of time. His assessment was low back pain, spinal enthesopathy, thoracic region. Dr. Chapman injected the trigger point. He encouraged her to stay as active as she could. Dr. Chapman felt Judy was at MMI from her work injury. He advised Judy that if she liked the injection she received today and wanted another one, she should contact his office. He refilled her tramadol and felt she would likely need this on a long-term basis. Dr. Chapman did not need to see her again as he felt she could be managed by her primary care physician. Dr. Chapman felt she had permanent disability. He did not anticipate her being able to reliably or predictably get back to even sedentary work due to her need to so frequently change positions. (JE1, p. 36)

On January 15, 2020, at the request of the defendants, Judy underwent a functional capacity evaluation (FCE) at E3 Work Therapy Services. Her overall classification of effort was found to be invalid due to Judy performing inconsistently. The therapist also noted extreme overt pain behaviors, gait deviation which was inconsistent throughout the evaluation, and 4 of 5 Waddell testing was positive. The

therapist also observed breakaway/cogwheeling during manual muscle testing. The FCE placed Judy in the light to sedentary category for material handling, but also noted that Judy was unable to achieve a deep squat posture, abnormal gait, and sitting with constant change of position. (JE6)

On January 24, 2020, at the request of her own attorney, Judy underwent a second FCE, this time at WorkWell – Short Physical Therapy, PLLC. Judy was found to have given consistent effort throughout the testing. The report states that Judy does not meet the capabilities of the sedentary category of physical demand. The report noted a 10 pound lifting limit waist to floor and 5 pound lifting limit waist to crown. Regarding non-material handling, Judy was found to have significant limitation in elevated work, forward bending, crouching, reaching and stairs. She was also noted to have some limitation in sitting, standing, and walking and the need to change positions. (JE7)

Judy testified that she was very sore after the two FCEs. She contacted Dr. Chapman regarding her pain. Dr. Chapman ordered additional medication for Judy. (Testimony)

The defendants have offered surveillance footage of Judy. It appears that they had Judy under surveillance for 10 days over two years. The dates of the 2018 surveillance are April 29, April 30, May 1, October 17, October 18, October 30 and October 31. The dates of the 2019 surveillance are December 12, 13, and 14. Defendants have submitted five hours of video from those 10 days. Additionally, defendants have submitted what has been described as a highlight reel which is just under 30 minutes long. Judy testified that she tries to remain as active as possible, even though, at times, she pays for it later. I have viewed the surveillance footage, but I will rely on the doctors' opinions. (Def. Ex. D; testimony)

At the request of the defendants, Judy saw Dr. Kennedy on January 27, 2020, to discuss the results of the FCE and permanent restrictions from her work injury. (JE1, pp. 37-41) Dr. Kennedy reviewed the medical records and surveillance video provided to her by Nordstrom. Judy reported that her symptomatology was 3-8 out of 10. She noted Judy's pain is mainly low back, which is burning and right-sided only. Her leg symptoms nearly fully subsided with the spinal cord stimulator. Dr. Kennedy examined Judy. Her assessment was failed back syndrome. Dr. Kennedy was asked to provide her opinion of permanent restrictions resulting from the work injury. Dr. Kennedy stated:

> Unfortunately, I do not have valid testing demonstrating Ms. Schwers' physical capacity. Rather, I have two FCEs that demonstrate physical capacity that is far less than what is observed in the community. I cannot speculate as to the etiology of the discrepancy between physical capacity during formal testing vs. activities performed in the community. I will offer my opinion as to Ms. Schwers' physical capacity based on the cumulation of information available to me at this time, and my training and experience in as a Board Certified physician by the American Board of Occ and

> Environmental Medicine. I recommend the following permanent workplace restrictions that have resulted from Ms. Schwers' lumbar spine injury and treatments performed to date:
>
> May work up to 50% of every hour of the shift in ambulatory position. The remainder of the hour must be seated work. May lift and carry up to 20 pounds occasionally while ambulatory with lifting to occur only between knee [*sic*] and shoulder height. May lift 5 pounds over shoulder height occasionally. No squatting or kneeling for employment.

(JE1, p. 39)

On February 11, 2020, the defendants sent a missive with questions to Dr. Chapman along with surveillance video of Judy. (JE1, p. 42) Dr. Chapman replied to their missive. He stated:

> The restriction regarding radiofrequency devices refers to the possibility that going through radiofrequency ablation procedures can have an effect on the stimulator. I am not aware of any hazards of having a stimulator being around radio waves.
>
> When I have seen the patient, she demonstrated very severe pain with any degree of flexion and extension and appeared very stiff as she walked. She was unable to reach her knees. The video showed her walking much more fluidly and bending rather easily and actually picking up a child and twisting and turning to put the child in a car seat. Therefore, I fully agree with Dr. Kennedy's assessment that the patient would be capable of sedentary work and I fully agree with her activity restrictions.

(JE1, p. 43)

On February 28, 2020, claimant's attorney wrote a missive to Dr. Chapman asking the doctor to agree or disagree with several statements. Dr. Chapman agreed that Judy's diagnosis was caused and/or materially aggravated by the August 2017 work injury. He felt Judy reached MMI on November 15, 2019, and that she did have permanent disability as the result of the work injury. With regard to the surveillance video, Dr. Chapman was asked to agree or disagree with the following statement: "I have had an opportunity to review the surveillance videos referenced in Dr. Kennedy's 1/27/20 report. The surveillance of December 12 and 13th, 2019 has no bearing on and does not change my opinions. The video surveillance does not represent Ms. Schwers [*sic]* capabilities from a work standpoint." (JE1, p. 45) Dr. Chapman disagreed with that statement. Dr. Chapman wrote, "She looked like she was doing more than what I expected she could do. However, her history is also consistent c trying things and paying for it later. May have been a good day." Id. Dr. Chapman felt

Judy did have a permanent disability and he did not anticipate her being able to reliably or predictably get back into even sedentary work due to her need to so frequently change positions. He still felt this was true, even after reviewing the surveillance video. Dr. Chapman adopted the restrictions set forth in the valid FCE at WorkWell. He also agreed that Judy cannot be around devices that cause electromagnetic interference such as power lines, arc welders, large magnetized speakers and radio frequency devices. Dr. Chapman stated that due to the work injury, Judy would require a referral to Dr. Sullivan. He recommended Judy be referred to her primary care physician to manage ongoing future medical related to her work injury. He also stated that she would need long-term use of tramadol, occasional office visits for maintenance of her spinal cord stimulator, and periodic injections as needed. (JE1, pp. 44-47)

On March 27, 2020, Dr. Kennedy provided her opinion regarding permanent impairment. Based on Chapter 15 of the AMA Guides 5th edition, Dr. Kennedy assigned a total of 6 percent whole person impairment. (JE1, p. 48)

Judy returned to Dr. Chapman in August 2020 with worsening pain. She reported significant low back and leg symptoms in the last few months and significant symptoms into her heels bilaterally. She tries to stay active, but says this is getting more difficult. Dr. Chapman performed another trigger point injection. He advised her to continue to stay active. He also recommended podiatry for what he felt might be plantar fasciitis. (JE1, pp. 49-50)

On August 20, 2020, Judy saw Jason R. Keppler, DPM. He diagnosed her with bilateral plantar fasciitis. Dr. Keppler recommended stretching and massage. He also felt that consideration be given to physical therapy and/or an injection if she did not improve in 4 weeks. (JE1, pp. 51-56)

At the request of her attorney, Judy saw Sunil Bansal, M.D. for an IME on June 25, 2020. As a result of that exam and records review, Dr. Bansal issued a report on September 2, 2020. Judy reported that she continued to have back pain which radiates down her right leg. The pain is better now than prior to the placement of the spinal cord stimulator. She is able to sit for 20 to 30 minutes, but she is always in pain. She has to stand up and move around. She also has pain when she shifts positions and when she stands for longer than 10 to 15 minutes which causes a burning sensation in her lower back. Judy reported that she uses a walker with a seat, and when she has the burning pain, she sits down on the walker to take a break. She also reported that she has pain above the laminectomy site and she cannot bend over too far. She uses a cane at all times, but if she walks the length of a mall she has to use her rolling walker. Dr. Bansal agreed with Dr. Chapman that Judy reached MMI as of November 15, 2019. Dr. Chapman opined that Judy aggravated her right sacroiliac joint from a cumulative process to her back occurring over the course of her job duties while working at Nordstrom, especially during the August 2017 time period with the

large shipment of boxes containing shoes. Dr. Bansal stated that the sacroiliac joint is twice as susceptible to overloading than are the lumbar motion segments. Working awkward postures, or twisting while lifting, may jeopardize the interlocking sacral mechanics by impeding balanced transiliac bony fixation and ligamentous tension across the sacrum. For Judy's back, Dr. Bansal assigned 15 percent permanent impairment of the body as a whole. Dr. Bansal agreed with the restrictions set forth in the WorkWell FCE. (Cl. Ex. 1)

On September 3, 2020, Dr. Kennedy authored a missive to defendants. Since Dr. Kennedy last saw Judy, Judy developed new onset foot pain midsummer 2020 in late July or early August. Dr. Kennedy opined that Judy's plantar fasciitis does not meet the threshold for causation relative to her 08/10/2017 injury. She noted that Judy was not currently working at Nordstrom, so an occupational exposure was not existent. Additionally, Judy admitted that she had been minimally ambulatory, so excessive time on her feet was likely not a factor. Dr. Kennedy also noted that Judy was restricted to only being on her feet 50 percent of each hour; this would not amount to sufficient stress on her feet. Dr. Kennedy noted that Judy had numerous personal risk factors, including age, gender, and weight as factors for plantar fasciitis. Dr. Kennedy also stated that development of this condition was better explained by seasonality and footwear. Judy developed this condition in the summer while wearing flip-flops almost exclusively. Ultimately, Dr. Kennedy could not indicate, within a reasonable degree of medical certainty, that Judy's current plantar fasciitis complaints were causally related to her work injury of August 2017. (Ex. E)

Judy continued to report disabling back and buttock pain. She required intermittent use of a cane and had been off work. In addition to reviewing records, Dr. Kennedy also reviewed surveillance video that was obtained on December 12 and 13, 2019. Dr. Kennedy stated the video showed, "Ms. Schwers used cane intermittently while venturing into the community." (JE1, p. 37) Dr. Kennedy noted that Ms. Schwers had an FCE by E3 on January 15, 2020, that was invalid due to inconsistent performance during evaluation. Dr. Kennedy was also aware of the second FCE that was performed on January 25, 2020, at WorkWell. This FCE reported a valid effort by Ms. Schwers. The report reflected an unemployable condition, not even meeting the capabilities of sedentary physical demand.

Judy testified that the fusion surgery made her back feel more stable, but it did not relieve her back and leg pain. She continues to see Dr. Chapman for injections on a periodic basis. She continues to utilize her spinal cord stimulator. She also takes tramadol and ibuprofen. She sees Dr. Sullivan for medication management. She continues to use a cane and walker, although she tries to limit the use of assistive devices as advised by the physical therapist. She also has a permanent handicapped parking permit. She also testified that her husband left his job to be able to provide her

with more assistance around the house. She has good days and bad days. Generally, her pain increases throughout the day. (Testimony; JE1, p. 49)

The first issue to be addressed is whether Judy's need for the fusion surgery was related to the work injury. Defendants selected Dr. Chapman to provide treatment for Judy. Dr. Chapman diagnosed Judy with post-op S1 fusion, chronic low back pain with radiculopathy, failed back syndrome, post-op spinal cord stimulator implant. He causally connected these conditions to her work injury. Dr. Bansal's opinion is consistent with the opinion of Dr. Chapman. I find the opinions of Dr. Chapman and Dr. Bansal are more persuasive than that of Dr. McMains. I find that the fusion surgery and the spinal stimulator are causally connected to the August 10, 2017, work injury. (JE1, pp. 29, 44; Cl. Ex. 1)

The next issue is whether Judy sustained any permanent disability as the result of the work injury. I find that Judy has sustained permanent disability as the result of the work injury. Dr. Kennedy and Dr. Bansal have both assigned permanent functional impairment as the result of the work injury. Dr. Kennedy, another physician selected by defendants, assigned 6 percent of the whole person impairment. Dr. Bansal assigned 15 percent whole person impairment. (JE1, p. 48; Cl. Ex. 1, p. 20) Additionally, several doctors have placed permanent restrictions on Judy's activities. Dr. Chapman and Dr. Bansal both agree with the restrictions set forth in the WorkWell FCE. These restrictions do not meet the capabilities of the sedentary category. (JE1, p. 46, Cl. Ex. 1, p. 20, JE7, p. 2) Dr. Kennedy stated Judy may work up to 50 percent of every hour in an ambulatory position; the remainder of the hour must be seated work. Judy may also lift and carry up to 20 pounds occasionally while ambulatory with lifting to occur only between knee and shoulder height. Dr. Kennedy also restricted Judy to lifting 5 pounds over shoulder height occasionally. Judy was not to squat or kneel for employment. (JE1, p. 39) I find the opinions of Dr. Chapman, Dr. Kennedy, and Dr. Bansal demonstrate that Judy has sustained permanent disability as the result of the work injury.

Based on the permanent restrictions adopted by Dr. Kennedy, Dr. Chapman, and Dr. Bansal, Judy is not able to return to her job at Nordstrom. Nordstrom did not offer Judy any type of work at their facility. Rather, they helped Judy apply for SSD. (Testimony)

I find that as the result of the work injury, Judy has permanent restrictions as set forth in the WorkWell FCE. These restrictions were adopted by Dr. Chapman and Dr. Bansal. Even after Dr. Chapman reviewed the surveillance footage, he did not anticipate Judy being able to reliably or predictably get back into even sedentary work due to her need to so frequently change positions. Dr. Chapman adopted the restrictions set forth in the valid FCE at WorkWell. He also agreed that Judy cannot be around devices that cause electromagnetic interference such as power lines, arc welders, large magnetized speakers and radio frequency devices.

Both parties have submitted reports from vocational counselors. Judy submitted the report of Phil Davis, M.S., CBIS. He interviewed Judy on June 10, 2020. Additionally, he also reviewed the records provided to him. Mr. Davis opined that, based on the restrictions set forth in the WorkWell FCE, Judy would not be capable of returning to any of her past occupations. Given her physical restrictions and inability to return to any of her previous occupations, Mr. Davis opined that Judy is now 100 percent precluded in her ability to obtain employment based upon her past vocational training or experience. Mr. Davis questioned Judy's ability to be retrained because her restrictions place her in less than sedentary physical capacity. (Cl. Ex. 3)

Defendants have offered the opinion of Lana Sellner, MS, CRC. Ms. Sellner had a telephone interview with Judy in June 2020. She also reviewed records provided to her regarding Judy. Judy testified that during the phone call Ms. Sellner agreed with Dr. Chapman's assertion that it would probably be very difficult for Judy to find work given her injuries. In her documentation, Ms. Sellner stated that Judy had many skills, including computer skills. She asked Judy if she would be willing to accept vocational services from Ms. Sellner. According to Ms. Sellner, Judy would be willing to accept vocational services, but Judy was not sure if there were any jobs she would be able to perform due to her pain and limitations. At the beginning of July, Ms. Sellner issued a report. Shortly thereafter, claimant's counsel expressed his dissatisfaction and stated that Ms. Sellner had made several inaccurate and misleading statements in her report. Due to these inaccuracies, Judy did not want to have any additional contact with Ms. Sellner and all correspondence should go through Judy's attorney's office. The letter also confirmed that Judy was open to finding a job now and in the future. At the end of July, Ms. Sellner issued a vocational progress report. She identified 6 jobs for Judy to review and apply accordingly. She also provided a draft resume for Judy. At the end of August, claimant's counsel requested additional job leads for Judy. Ms. Sellner provided additional job leads. On September 3, 2020, Ms. Sellner authored a vocational closure report. She stated that she had utilized the January 27, 2020, work restrictions of Dr. Kennedy to provide Judy with 11 job leads. Judy was offered an interview and the employer indicated that she would be considered for a reservation agent position once the pandemic is over and the employer is back to full staff. (Def. Ex. C)

Judy graduated from high school in 1982. She served in the United States Air Force from 1984 to 1988. While in the Air Force, Judy was an Operations Specialist/Air Refueling. She helped put the flying schedules together for F-16s. She has basic computer skills. Her work history also includes working the front counter at a fast food restaurant. From 1989-1990 Judy worked in customer service at Eagle Window and Door. She also has experience working as a clerk in a retail clothing store. Additionally, Judy has experience taking reservations for boat rides. All of this work experience was prior to her being hired by Nordstrom in 1992. (Testimony)

Judy testified that she applied for all jobs provided by Ms. Sellner. She was informed that she could not do the jobs due to her restrictions. Judy was motivated enough to also look for work on her own. She contacted Carrie Cannon at Express Employment. At that time, Express was currently recruiting for Rite Hite, Dubuque Stamp, Servpro, Service Master, UD, Aladdin, Berry Plastics, Hormel, Premier Tooling, Uelner Tool and Die, Camso, Mi TM, and Theisen's Supply and Hodge. However, those companies did not have available work within Judy's restrictions. (Testimony; Cl. Ex. 8, pp. 18-20)

I find that Judy is not capable of any full, regular employment. Since she was terminated by Nordstrom on March 18, 2020, she has not been able to secure employment. The last day that Judy actually worked for Nordstrom was September 7, 2017. She followed-up on the job leads that were provided to her by Ms. Sellner, but she did not receive a single job offer. Additionally, she sought employment on her own, but was told that there were not any positions available within her restrictions. She has now been physically out of the employment arena since September 8, 2017. I find that Judy has made a reasonable, but unsuccessful effort to find steady employment. Considering Judy's age, educational background, employment history, ability to retrain, motivation to return to the workforce, permanent impairment, and permanent restrictions, and the other industrial disability factors set forth by the Iowa Supreme Court, I find that she is wholly disabled from performing work that she would otherwise be qualified and capable of performing. This finding is based on Judy's inability to obtain regular employment. I find that as a result of the August 10, 2017, work injury, Judy is not physically capable of performing any of her prior jobs at Nordstrom. This is supported by the fact that Nordstrom did not offer Judy any employment; rather, they initiated her application for SSD. Thus, as a result of the work injury, she can no longer perform the jobs she performed for most of her adult working life. I find Judy is permanently and totally disabled as the result of the August 10, 2017, work injury.

The next issue to be addressed is whether claimant is entitled to medical care for her feet. Specifically, claimant is seeking alternate care for her heels bilaterally. Defendants deny that Judy's foot pain is causally connected to her work injury.

On August 14, 2020, Judy saw Dr. Chapman for trigger point injections in her low back. She reported to Dr. Chapman that she was having problems with her heels. He noted that Judy had been trying to remain active. Dr. Chapman referred her to podiatry for her heels. (JE1, p. 49) Judy saw a podiatrist, Dr. Keppler, on August 20, 2020. Dr. Keppler assessed her with bilateral plantar fasciitis. Dr. Keppler makes mention that Judy had an injury to her back and that her pain might be related to compensating for her back. However, Dr. Keppler does not give a true causation opinion, with supporting rationale, regarding whether Judy's foot problems were related to the work injury. This is also true of Dr. Chapman; he does not provide a causation opinion regarding her feet. (JE1, pp. 51-56) It is also worth noting that claimant saw Dr. Bansal for an IME during the summer of 2020, and Dr. Bansal did not diagnose her with any heel conditions.

At the request of the defendants, Dr. Kennedy did offer a causation opinion regarding Judy's heels. Dr. Kennedy does not causally relate Judy's problems with her feet to the work injury. Dr. Kennedy sets forth the rationale to support her opinions. Dr. Kennedy explained that Judy had numerous other risk factors, including age, gender, weight, and choice of footwear that were factors in the development of her plantar fasciitis. Dr. Kennedy could not state within a reasonable degree of medical certainty that Judy's plantar fasciitis complaints are causally related to her work injury of August 2017. (Def. Ex. E, pp. 49-50) With regard to the issue of causation on Judy's feet problems, I find the opinions of Dr. Kennedy to be persuasive. I find that Judy's plantar fasciitis complaints are not causally related to her work injury of August 2017. Therefore, I find claimant is not entitled to treatment for her plantar fasciitis at the expense of the defendants.

CONCLUSIONS OF LAW

The party who would suffer loss if an issue were not established ordinarily has the burden of proving that issue by a preponderance of the evidence. Iowa R. App. P. 6.904(3)(e).

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).

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 Ry. 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).

Assessments of industrial disability involve a viewing of loss of earning capacity in terms of the injured workers' present ability to earn in the competitive labor market without regard to any accommodation furnished by one's present employer. Quaker Oats Co. v. Ciha 552 N.W.2d 143, 158 (Iowa 1996); Thilges v. Snap-On Tools Corp., 528 N.W. 2d 614, 617 (Iowa 1995).

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 Ry. 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).

In the present case, I considered all of the relevant industrial disability factors and found that Judy is wholly disabled. She is physically unable to perform work that her experience, training, education, and intelligence would otherwise have allowed her to perform. Judy's injury has rendered her unable to compete in the competitive labor market. Having found Dr. Chapman's opinion Judy is not capable of any full time, regular employment is credible, I further find there are no realistic jobs available to Judy.

Based on the above findings of fact, I conclude that Judy has made a reasonable, but unsuccessful effort to find steady employment. Considering Judy's age, educational background, employment history, ability to retrain, motivation to return to the workforce, permanent impairment, and permanent restrictions, and the other industrial disability factors set forth by the Iowa Supreme Court, I find that she is wholly disabled from performing work that she would otherwise be qualified and capable of performing. I find that as a result of the August 10, 2017, work injury, Judy is not physically capable of performing any of her prior jobs at Nordstrom. This is supported

by the fact that Nordstrom did not offer Judy any employment. I conclude that claimant has proven she is permanently and totally disabled under the traditional analysis.

Next, claimant is seeking treatment for her bilateral heel pain. 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).

Based on the above findings of fact, I conclude that claimant has failed to demonstrate by a preponderance of the evidence that her bilateral heel pain is related to the August 10, 2017, work injury. Because claimant failed to carry her burden to prove that her heel pain is related to the work injury, I conclude that defendants are not liable for medical treatment for her heels.

Finally, claimant is seeking costs. Costs are to be assessed at the discretion of the Commissioner or at the discretion of the deputy hearing the case. I conclude that claimant was generally successful in her claim. Thus, I exercise my discretion and assess appropriate costs against the defendants.

Judy is seeking costs as set forth in claimant's exhibit 11. Claimant is seeking an assessment in the amount of one hundred and no/100 dollars ($100.00) for the filing fee. I conclude this is an appropriate cost under 876 IAC 4.33(7). (Cl. Ex. 11, p. 1)

Claimant is also seeking reimbursement in the amount of $900.00 for the WorkWell - Short Physical Therapy FCE. (Cl. Ex. 11, p. 2) The Commissioner has held that in assessing whether an FCE report is taxable under rule 876 IAC 4.33, the relevant inquiry is whether the FCE was required by a medical provider as necessary for the completion of a medical report. See Sainz v. Tyson Fresh Meats. Inc., File No. 5053964 (App. Sept. 28, 2018). In this case, the FCE performed at WorkWell-Short Physical Therapy was requested by claimant's counsel, and not by any of claimant's treating or evaluating providers. Because the FCE was not necessary for a medical provider or medical evaluator to complete their report, no portion of claimant's FCE charge is taxable as a cost under rule 876 IAC 4.33. See Sainz, File No. 5053964 (App. Sept. 28, 2018).

Finally, claimant is seeking reimbursement for the services of Philip Davis, M.S., in the amount of $1,860.00. The invoice breaks down the total expense as: $210 for the vocational interview; $675.00 for the casefile review; $975 for additional casefile review, and no charge for the vocational report. (Cl. Ex. 11, p. 3) This agency has determined that a vocational report is an appropriate cost under 876 IAC 4.33(6). However, the commissioner has ruled that under DART v. Young, 867 N.W.2d 839 (Iowa 2015), only the report of an IME physician—and not the examination itself—can be taxed as a cost

pursuant to rule 876 IAC 4.33(6). The commissioner has applied this to reports by vocational experts. See Kirkendall v. Cargill Meat Solutions Corp., File No. 5055494 (App. December 17, 2018); Voshell v. Compass Group, USA, Inc., File No. 5056857 (App. September 27, 2019); Simmer v Menards, File No. 5041139 (App. April 29, 2020). Because there was no charge for the report, I conclude it is not appropriate to assess any of the $1,860.00 as a cost.

Therefore, defendants are assessed costs totaling one hundred and no/100 dollars ($100.00).

ORDER

THEREFORE, IT IS ORDERED:

All weekly benefits shall be paid at the stipulated rate of seven hundred thirty-one and 48/100 dollars ($731.48).

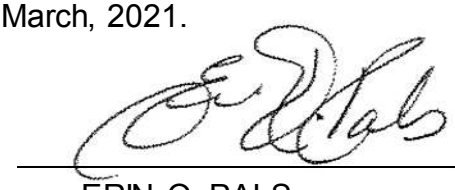
Defendants shall pay unto claimant permanent total disability benefits from the date of injury and continuing during the period of permanent total disability.

Defendants shall be entitled to credit for all weekly benefits paid to date. Defendants shall pay accrued weekly benefits in a lump sum together with interest 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.

Defendants shall reimburse claimant costs as set forth above.

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 ___23rd___ day of March, 2021.



ERIN Q. PALS
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Eric Loney (via WCES)

James Matthew Peters (via WCES)

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 filed via Workers' Compensation Electronic System (WCES) unless the filing party has been granted permission by the Division of Workers' Compensation to file documents in paper form. If such permission has been granted, the notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 150 Des Moines Street, Des Moines, Iowa 50309-1836. The notice of appeal must be received by the Division of Workers' Compensation 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 legal holiday.