BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

VIRGINIA MANNING,

Claimant,

vs.

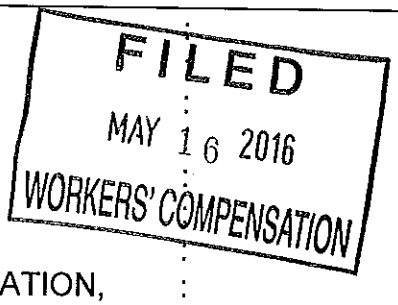
SEARS HOLDING CORPORATION,

Employer,

and

INDEMNITY INSURANCE COMPANY OF NORTH AMERICA,

Insurance Carrier,
Defendants.



File No. 5049520

ARBITRATION

DECISION

Head Note Nos.: 1803, 1703, 1704, 2700

STATEMENT OF THE CASE

This is a proceeding in arbitration. The contested case was initiated when claimant, Virginia Manning, filed her original notice and petition with the Iowa Division of Workers' Compensation. The petition was filed on November 24, 2014. Claimant alleged she sustained a work-related injury on August 14, 2014. (Original notice and petition.)

Sears Holding Corporation, and its workers' compensation insurance carrier, Indemnity Insurance Company of North America, filed their answer on January 16, 2015. They denied the occurrence of the work injury. A first report of injury was filed on October 23, 2014.

The hearing administrator scheduled the case for hearing on December 9, 2015 at 11:00 a.m. The hearing took place in Sioux City, Iowa at the Iowa Workforce Development Building. The undersigned appointed Ms. Kristin Teel as the certified shorthand reporter. She is the official custodian of the records and notes.

Claimant testified on her own behalf. Defendants elected not to call any witnesses.

The parties offered exhibits. Claimant offered exhibits marked 1 through 7. Defendants offered exhibits marked A through K. All proffered exhibits were admitted as evidence in the case.

Post-hearing briefs were filed on January 8, 2016. The case was deemed fully submitted on that date.

STIPULATIONS

The parties completed the designated hearing report. The various stipulations are:

1. There was the existence of an employer-employee relationship at the time of the alleged injury;

2. Claimant sustained an injury on August 14, 2014 which arose out of and in the course of his employment;

3. The injury resulted in a temporary disability;

4. Temporary benefits were underpaid by $55.73 per week and defendants agree to reimburse claimant for all underpayments;

5. If permanency benefits are awarded, the permanent disability is an industrial disability;

6. The commencement date for any permanent partial disability benefits is February 18, 2015;

7. The parties believe the weekly rate is $479.95 per week;

8. Medical benefits are no longer in dispute;

9. Defendants have withdrawn any affirmative defenses they may have had available;

10. Defendants will pay the cost of the Independent Medical Examination;

11. Prior to the hearing, claimant was paid 68.286 weeks of weekly benefits at the rate of $424.22 per week and;

12. The parties are able to stipulate to the costs to litigate the claim.

ISSUES

The issues presented are:

1. Whether claimant has sustained a permanent partial disability; and

2. If so, what is the extent of claimant's permanent partial disability?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This deputy, after listening to the testimony of claimant at hearing, after judging her credibility, and after reading the evidence, and the post-hearing briefs, makes the following findings of fact and conclusions of law:

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

Claimant is 59 years old and resides in Cleghorn, Iowa. The town has a population of only 250 residents. Cleghorn is located in Cherokee County about 10 miles north and west of Cherokee, Iowa. While Cherokee is the county seat, it only has slightly more than 5,000 residents.

Claimant is married. Her husband is severely disabled and receives Social Security disability benefits. Claimant smokes tobacco products despite the fact she has been counseled by numerous medical providers to cease smoking.

Claimant graduated from high school in 1974. In1982 claimant graduated from West Mar College with a Bachelor of Arts degree in sociology and psychology. For a number of years, claimant worked as a social worker. However, she allowed her license to lapse in the State of Iowa.

Claimant also spent many years working as a waitress. For 7 years she was an assistant manager and then a manager at a Casey's Convenience Store in Cherokee, Iowa. She earned $32,000.00 per year, plus quarterly bonuses. The store closed and claimant had to find new employment.

Members of management for the Sears Holding Corporation hired claimant as an assistant manager at the K-mart store in Cherokee. Claimant commenced her employment on April 14, 2014. The company paid claimant a salary of $38,000.00 per year, and claimant was required to work 48 hours per week. The job involved physical lifting, and warehouse work. Claimant described herself as "a hands on person".

On August 14, 2014, claimant slipped on a wet floor that a member of the housekeeping staff had just mopped. Claimant testified she fell and landed on to her buttocks. She experienced low back pain and right hip pain.

Jeremy Pelletier, an employee at the Cherokee K-mart, was present at the time of claimant's fall. Mr. Pelletier prepared a signed statement for company officials. The statement indicated:

> I was working on video game accessories resets and I heard Ginny scream. She came over to me I did not see anything all I heard was

> screaming. When she came to me she said she had fallen due to the floor being wet.

(Exhibit E)

Claimant testified she rested in the break room with an ice pack until Ms. Kelly Wilkie, the Human Resource Manager, arrived at the store. Claimant explained the incident to Ms. Wilkie and the two individuals proceeded to Cherokee Regional Medical Center. (Exhibit 2) Christopher J. Vandelune, D.O., was the attending physician in the emergency room. (Ex. 2, p. 9) Claimant complained of tailbone pain. She provided the following history:

> **Fall**
>
> The accident occurred 1 to 2 hours ago. The fall occurred while walking. She fell from a height of 1 to 2 ft (standing). She landed on a hard floor. There was no blood loss. Point of impact: buttock. The pain is present in the right hip (buttock). The pain is at a severity of 5/10. The pain is moderate. She was ambulatory at the scene. There was no entrapment after the fall. Pertinent negatives include no numbness, no headaches, and no loss of consciousness. The symptoms are aggravated by flexion, extension and sitting. She has tried ice and NSAIDS for the symptoms. The treatment provided no relief.

(Ex. 2, p. 9)

Dr. Vandelune diagnosed claimant with a "Coccyx contusion." (Ex. 2, p. 16) Claimant was advised to follow up with her family physician, Wesley A. Parker, M.D., within two weeks.

On August 18, 2014, claimant followed-up with Dr. Parker for a "hurt tailbone". (Ex. 2, p. 11) Claimant complained of aggravated pain in her back and right hip. (Ex. 2, p. 11) Dr. Parker diagnosed claimant with:

1. Right hip pain post fall on Thursday, August 14. The patient landing on the floor initially had pain more on the hip but now has progressed to pain in the back with radiating pain down her right hip. We are certainly concerned about potential disc disease or further problems in the back. No x-rays were obtained in the lumbar spine. We will obtain a lumbosacral back film today.

2. Right paralumbar back pain with right L5 radiculopathy with weakness of extensor toe strength. We elected to give her prednisone 20 mg b.i.d. got 5 days. We will give her Tramadol 50 mg 1-2 q 6 for more severe pain. Continue with Aleve 2 tablets 2-3 times per day to help manage anti inflammatory factor along with the prednisone. She was given Flexeril to take 10 mg at nighttime to see whether this would be

> beneficial for her. We will have a follow up on Thursday. If no improvement I think we would proceed and do an MRI scan. We will go ahead and get a lumbosacral x-ray looking for disc space abnormality. We will make sure she doesn't have any lumbosacral fracture from the fall.

(Ex. 2, p. 12)

MRI testing was ordered. Steven J. Saulsbury, M.D., interpreted the results as:

IMPRESSION:

1) Prominent disc degeneration L4-5 with endplate marrow degenerative changes. Bulging of the annulus which is mild. No significant central canal of foraminal stenosis.

2) Mild age-related facet degenerative changes L3-4 through L5-S1. No specific etiology for right sided radiculopathy.

(Ex. 4, p.1)

Dr. Parker ordered numerous physical therapy sessions. The therapist was asked to address claimant's low back pain, right hip pain, and right leg pain. (Ex. 2, p. 18) Claimant remained in a great deal of pain. (Ex. 2, p. 35) Dr. Parker recommended a referral to an orthopedic specialist.

Wade K. Jensen, M.D., is an orthopedic spine surgeon at CNOS in Dakota Dunes, South Dakota. On October 8, 2014, Dr. Jensen examined claimant for low back pain and right leg pain. (Ex. 1, p. 1) Claimant related her work injury to the physician. Dr. Jensen reviewed the MRI results. Dr. Jensen opined:

> MRI: MRI reviewed shows evidence of L4-5 degenerative changes with Modic changes at the 4-5 disk space and some mild lateral recess stenosis. The 5-1 level appears relatively well preserved. Other levels above this also appear relatively well preserved.
>
> **Assessment Transcription**
>
> L4-5 degenerative change with facet arthropathy and an L5 radiculopathy on the right side, symptomatic.
>
> **Plan Transcription**
>
> I talked to her about the options. At this point, I would recommend an L5 selective nerve root block on the right side. Hopefully, this will help mitigate her symptoms. I will plan to see her back in about 6 weeks to see how she is doing. She will continue with the physical therapy in the

interim. If there are any questions, concerns, or problems at any point before then, I am happy to see her.

(Ex. 1, p. 1)

On November 5, 2014, claimant visited Siouxland Pain Clinic. Wade S. Lukken, M.D., administered a right L5-S1 transforaminal epidural steroid injection. (Ex. 3, p. 2) Claimant was discharged on the same day. (Ex. 3, p. 4) Claimant testified the injection helped for approximately one week.

Claimant returned to Dr. Jensen on December 17, 2014. Claimant reported her "pain is worse with prolonged standing or prolonged sitting and prolonged walking." She complained of left sided pain too. (Ex. 1, p. 3) Dr. Jensen prescribed drug and physical therapy. (Ex. 1, p. 3) Dr. Jensen noted claimant was performing fairly well following right selective nerve block injection. (Ex. 1, p. 4) Dr. Jensen continued physical therapy and ordered a left sided epidural steroid injection. (Ex. 1, p. 5)

On January 20, 2015, claimant presented once again to the offices of Dr. Lukken, M.D. for a left L4-5 transforaminal epidural steroid injection. (Ex. 3, p. 5) Claimant tolerated the procedure well. She was discharged on the same day. (Ex. 3, p. 7) Claimant testified she received no relief from the left sided injection.

Dr. Jensen examined claimant on February 2, 2015. He assessed claimant's condition as:

Assessment Transcription

ASSESSMENT: L4-5 degenerative changes and facet arthropathy and L5 radiculopathy on the left, symptomatic. Per the patient's history, she claims that this is all new, symptoms starting after her slip and fall at work.

Plan Transcription

PLAN: Short of new information showing that this is an underlying degenerative problem with previous symptoms, we would proceed with an L4-5 decompression and fusion to help resolve her issues of back and leg pain. She understands the risks, benefits, and alternatives including bleeding, infection, nerve damage, incomplete relief of symptoms, cardiopulmonary complications, vascular injury, or even death. Despite the risks, benefits, and alternatives, the patient wishes to proceed. We will plan to do this at her convenience in the near future. If there are any questions, concerns or problems at any point before then, I am certainly happy to see her.

I have recommended that she stop smoking prior to the surgical intervention and she is going to talk with Dr. Parker about doing that and starting on Chantix.

(Ex. 1, p. 6)

Defendants did not agree to proceed with the recommended surgery. Instead, the insurance company scheduled an independent medical examination for claimant with Chris A. Cornett, M.D., an orthopedic surgeon, at the University of Nebraska Medical Center. The examination occurred on April 29, 2015. Claimant testified the entire examination totaled 10 minutes in length. She explained she sat on an examination table; the examining physician touched claimant's leg, and then claimant walked to the door and back to the table. The doctor completed some papers. That was the substance of the exam, according to claimant.

In his report of May 18, 2015, Dr. Cornett wrote:

> PHYSICAL EXAMINATION
>
> On exam today, she stands 5 feet 10 inches tall and weighs 143 pounds. She can walk independently but she does use a cane some today and has that with her. She is noted to be thin. Her skin is intact. She has sensitivity to even light touch of the skin of her low back as well as log rolling of her spine which would be consistent with some positive Waddell's signs. In the seated position, strength and sensation are normal and symmetric in bilateral lower extremities except she has decreased sensation throughout the right lower extremity in a non-dermatomal pattern. Her reflexes are otherwise 2+ and symmetric. She is noted to walk with a limp. Thoracolumbar range-of-motion is limited due to discomfort.

(Ex. 7, p. 34)

Dr. Cornnett diagnosed claimant with:

> In my opinion, her diagnosis would be status post fall at work with likely a contusion-type of injury and perhaps temporary exacerbation of underlying degenerative changes in the lumbar spine.

(Ex. 7, p. 34)

Dr. Cornnett opined claimant had reached maximum medical improvement on February 14, 2015. The evaluating physician did not believe a permanent impairment rating was appropriate. (Ex. 8, p. 34) Nor did Dr. Cornnett recommend work restrictions. He opined claimant could return to unrestricted work. (Ex. 8, p. 34)

The insurance adjuster, Ms. Miranda Barnes, requested a Peer Review Report from an orthopedic surgeon who is licensed in California. Jeffrey Schiffman, M.D., did not examine claimant. The surgeon did not telephone claimant. The reviewing physician did review some of claimant's medical records with respect to the case before

this deputy. Dr. Schiffman authored a report. The reviewing physician opined in relative portion:

> **REVIEW QUESTION (S):**
>
> **Is a lumbar 4-5 Decompression and fusion medically necessary?**
>
> CA MTUS states, there is no good evidence from controlled trials that spinal fusion alone is effective for treating any type of acute low back problem, in the absence of spinal fracture, dislocation, or spondylolisthesis if there is instability and motion in the segment operated on. In this case, the medical necessity for the requested transforaminal lumbar interbody fusion, instrumentation and bone grafting of L4-5 has not been established. Guideline criteria have not been met due to lack of psychosocial screen, and no evidence of spinal instability. Therefore, the request for transforaminal lumbar interbody fusion, instrumentation and bone grafting of L4-5 is not medically necessary or appropriate.

(Ex. J, p. 28)

Dr. Jensen received a copy of the peer review report. He challenged the opinion of Dr. Schiffman. In his clinical notes of February 16, 2015, Dr. Jensen opined:

> CHART NOTE: I recently reviewed a peer-to-peer review analysis stating that there are no randomized control studies that show that a fusion for acute low back pain is effective treatment unless spinal fracture, dislocation, spondylolisthesis or instability is noted. The reason this patient's situation is different is because she does have radiculopathy and does have significant low back pain with degenerative disk disease and facet arthropathy. She has Modic change at that level. A simple microdisk would not resolve her problems. Therefore, the only way to effectively deal with this situation is to perform a wide decompression, full neural foraminal decompression requiring more than 50% resection of each facet on each side creating instability and therefore requiring a fusion. This would be the only effective way of treating this patient's problems, unless we want ongoing residual issues from this problem. I believe this is an acute-on-chronic aggravation of her preexisting condition and has resulted in a clear L5 radiculopathy on the left, based on a work-related injury on 08/14/2014. In spite of the fact of her having underlying degenerative changes, I think her radiculopathy is new and acute.

(Ex. 1, p. 7)

Ms. Barnes, requested another Peer Review Report from Brian Braaksma, M.D., an orthopedic surgeon who is licensed in Illinois. Dr. Braaksma did not examine claimant or speak to her over the telephone. Rather Dr. Braaksma reviewed some

medical records pertaining to claimant's slip and fall at work. After reviewing the records, the reviewer opined:

REVIEW QUESTION (S):

1. **Is a Lumbar 4-5 Decompression and Fusion medically necessary?**

   Noncertified

   In this case, there is no good evidence from controlled trials that spinal fusion alone was effective for treating any type of acute low back problem, in the absence of spinal fracture, dislocation, or spondylolisthesis. Guideline criteria has not been met due to lack of psychosocial screen, no evidence of spinal instability, and lack of documentation of smoking cessation. Therefore, the request for Lumbar 4-5 Decompression and Fusion is non-certified as it is not medically necessary and appropriate.

(Ex. I, p. 24)

Dr. Jensen disagreed with the opinion of Dr. Braaksma too. Dr. Jensen dictated a note to claimant's clinical chart. (Ex. 1, p. 8) The dictation was essentially the same opinion as Dr. Jensen had expressed several days earlier and as detailed above. (Ex. 1, p. 8)

Dr. Jensen recommended additional physical therapy for claimant during the winter of 2015. The insurance adjuster, Ms. Amy Dobson requested a Peer Review Report from Glenn L. Smith, D.O., an orthopedic surgeon who is licensed in Oklahoma, Texas, California, and Tennessee. Dr. Smith did not examine claimant. The surgeon did not speak to claimant over the telephone. Dr. Smith issued a report on or about April 30, 2015 concerning whether additional physical therapy was appropriate treatment for claimant. Dr. Smith wrote in relevant portion:

REVIEW QUESTION (S):

1. **Is PT 2 x 6 for the Lumbar Spine medical necessary?**

   PT 2 x 6 for the lumbar spine is not medically necessary.

   The records do not document sufficient subjective complaints or objective findings to support the need to deviate from ODG recommendations on a continuing basis. Therefore, PT 2 x 6 for the lumbar spine is not medically necessary.

(Ex. H, p. 21) From the record submitted to the undersigned; it appears claimant was not allowed to undergo additional physical therapy sessions.

Claimant exercised her right to an independent medical examination pursuant to Iowa Code section 85.39. Sunil Bansal, M.D., M.P.H., examined claimant on July 28, 2015. Dr. Bansal diagnosed claimant with:

> BACK:
>
> Aggravation of L4-L5 spondylosis and facet arthropathy.
>
> RIGHT HIP/LEG:
>
> In my opinion, Ms. Manning's right hip pain is directly related to her lumbar spine pathology.

(Ex. 5, pp. 8-9)

Dr. Bansal opined claimant had not had adequate treatment for her lumbar spine condition. Dr. Bansal agreed with Dr. Jensen; a fusion surgery was warranted. (Ex. 5, pp. 9, 11) However, Dr. Bansal opined that if claimant did not undergo surgery, she would be placed at maximum medical improvement effective February 23, 2015.

With respect to a permanent impairment rating, Dr. Bansal wrote:

> Unfortunately, adequate treatment has not yet been performed. **Therefore, this rating is permanent in the absence of further treatment.**
>
> With reference to the **AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition (Guides)**, Table 15-3, based on her current symptomatology and physical examination, she meets the criteria for a DRE Category III impairment. She has clinical radiculopathy with a loss of relevant reflexes and strength. She has continued pain. **She is assigned a 13% impairment of the body as a whole.** It should be noted that she is a candidate for an arthrodesis. The impairment for that is a DRE Category IV, and would move her to the 20 to 22% range.

(Ex. 5, p. 11)

Dr. Bansal imposed restrictions on claimant's work activities. The evaluating physician recommended claimant lift no more than 10 pounds on an occasional basis, and no more than 5 pounds on a frequent basis. Claimant was advised she should sit, stand and walk as tolerated. Claimant was told to vary those activities every 30 minutes. (Ex. 5, p. 12)

Claimant made several attempts to return to work. The store manager told claimant to perform work as she could. Eventually, claimant was assigned to stand at the cash register and to check people's items at the store. Claimant testified the work involved constant twisting and turning. Members of management offered claimant a

part-time job as a cash register operator for minimum wage. Claimant was told she was losing her title as an assistant manager and her fringe benefits were no longer available to her. Claimant testified Dr. Jensen told her she should not work until the issue of her spinal condition had resolved.

At her arbitration hearing, claimant testified she has constant pain from her lower spine, with shooting pain down her right leg to her right foot and down the left leg to the left knee. Claimant indicated the worse pain is in the region of the lower spine. Claimant uses a cane on occasion. With respect to medications, claimant takes four Hydrocodone per day, Gabepentin, Trazadone and Prozac on a daily basis. Claimant said she has a difficult time focusing on her tasks because of all of her medications. She does drive and is able to travel to the Winna-Vegas Casino in Sloan, Iowa. (Ex. D) Claimant has not applied for any employment since she last worked at the Cherokee K-mart.

RATIONALE AND CONCLUSIONS OF LAW

When an expert's opinion is based upon an incomplete history it is not necessarily binding on the commissioner or the court. It is then to be weighed, together with other facts and circumstances, the ultimate conclusion being for the finder of the fact. Musselman v. Central Telephone Company, 154 N.W.2d 128, 133 (Iowa 1967); Bodish v. Fischer, Inc., 257 Iowa 521, 522, 133 N.W.2d 867 (1965).

The commissioner as trier of fact has the duty to determine the credibility of the witnesses and to weigh the evidence. Together with the other disclosed facts and circumstances, and then to accept or reject the opinion. Dunlavey v. Economy Fire and Casualty Co., 526 N.W.2d 845 (Iowa 1995).

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 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.

Claimant is an older worker who attempted to return to work following her work injury. The unfortunate matter is: defendants would not allow the authorized treating orthopedic surgeon, Dr. Jensen, to treat claimant in the manner he determined to be reasonable and necessary. Rather than approve the recommended surgery, and the physical therapy that was ordered, the insurance adjusters sought three Peer Review Reports from orthopedic surgeons who were not licensed in Iowa. Not one of the peer review surgeons examined claimant or even spoke to claimant to determine what her symptoms were. Those surgeons did not observe claimant performing any work duties or other activities of daily living. For the reasons stated, their reports are accorded no credibility whatsoever.

It is acknowledged Dr. Cornett disagreed with the opinions of Dr. Jensen. Dr. Cornett examined claimant on one occasion only. According to claimant's credible testimony, the examination lasted 10 minutes. Dr. Cornett did note claimant walked with a limp and claimant's thoracolumbar range of motion was limited due to her discomfort. (Ex. C, p. 7) Notwithstanding claimant's symptoms, Dr. Cornett did not recommend any additional medical treatment.

Dr. Bansal, also an independent medical examiner, did agree with the opinions held by the authorized treating surgeon. Dr. Bansal opined claimant needed additional medical care in the form of surgery. Because claimant is a candidate for an arthrodesis,

Dr. Bansal rated claimant at 20 to 22 percent. (Ex. 5, p. 11) Dr. Bansal also imposed permanent restrictions. The restrictions are onerous.

Currently, claimant is precluded from holding many of her former jobs. She cannot return to working as a store manager where she is required to perform "hands on work." Food service work also requires the lifting of heavy trays, pots and kettles. Claimant does have a Bachelor of Arts degree but she no longer holds her certificate as a licensed social worker.

The Cherokee K-mart would not return claimant to a position of management. The store manager only offered claimant part-time work at minimum wage with no benefits. The position of cashier was outside the work restrictions provided by Dr. Bansal. Dr. Jensen told claimant she could not even handle the cashiering job.

After considering all of the factors involving industrial disability, it is the determination of the undersigned; claimant has sustained a permanent partial disability in the amount of 75 percent. Defendants shall pay unto claimant three hundred seventy-five (375) weeks of permanent partial disability benefits at the stipulated weekly benefit rate of $479.95 per week and commencing from February 18, 2015.

The parties admitted defendants were entitled to a credit of 68.286 weeks of permanent partial disability benefits paid at the incorrect rate of $424.22 per week. Defendants have admitted they will reimburse claimant for all underpayments made to claimant for healing period benefits.

In arbitration proceedings, interest accrues on unpaid permanent disability benefits from the onset of permanent disability. Farmers Elevator Co., Kingsley v. Manning, 286 N.W.2d 174 (Iowa 1979); Benson v. Good Samaritan Ctr., File No. 765734 (Ruling on Rehearing, October 18, 1989).

The final issue is costs to litigate. The deputy workers' compensation commissioner has discretion to tax costs. Dickenson v. John Deere Products Engineering, 395 N.W. 2d 644, 647 (Iowa Ct. App. 1986). The subsequent costs are assessed to defendants:

Filing fee $100.00

Service of Petition

ORDER

THEREFORE, IT IS ORDERED:

Defendants shall pay unto claimant three hundred seventy-five (375) weeks of permanent partial disability benefits commencing from February 18, 2015 and payable at the rate of four hundred seventy-nine and 95/100 dollars ($479.95) per week.

Accrued benefits shall be paid in a lump sum, together with interest at the rate allowed by law.

Defendants shall pay unto claimant any underpayments.

Defendants shall take credit for all benefits previously paid.

Costs, as established in the body of the decision, are assessed to defendants.

Defendants shall file all reports as required by this division.

Signed and filed this 16th day of May, 2016.

Michelle A. McGovern

MICHELLE A. MCGOVERN
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.