BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

MARIBEL VASQUEZ,

Claimant,

vs.

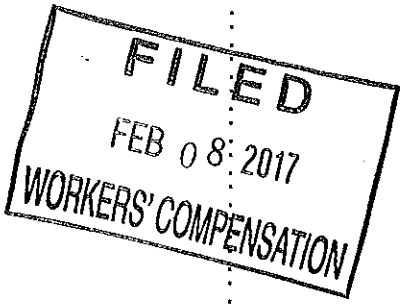
JBS SWIFT,

Employer,

and

AMERICAN ZURICH INSURANCE CO.,

Insurance Carrier,
Defendants.



File Nos. 5053641
5053642

ARBITRATION

DECISION

Head Note Nos.: 1402.30; 1402.40; 1803; 2502; 2907; 3003

STATEMENT OF THE CASE

Maribel Vasquez, claimant, filed two petitions for arbitration against JBS Swift, as the employer, and Sedgwick Claims Management Service, Inc. (Sedgwick), as the insurance carrier. An in-person hearing occurred on October 10, 2016. At the commencement of hearing, the undersigned inquired about the proper insurance carrier. Defense counsel acknowledged that Sedgwick was a third-party administrator on the file and agreed to file a formal amendment after the hearing clarifying the proper insurance carrier. On October 25, 2016, defendants filed a consent amendment, identifying American Zurich Insurance Company as the proper insurance carrier for the claim.

Claimant consented at the hearing to correction of the named insurance carrier. (Transcript, page 5) Therefore, the consent amendment is granted. American Zurich Insurance Company is substituted as the proper carrier on this claim.

The evidentiary record includes claimant's Exhibits 1 through 20 and defendants' Exhibits A though H. All exhibits were received without objection. Claimant testified on her own behalf. No other witnesses testified live at the arbitration hearing.

The parties filed two hearing reports at the commencement of hearing. On those hearing reports, the parties entered into numerous stipulations. Those stipulations were accepted and no factual or legal issues relative to the parties' stipulations will be made or discussed in either file. The parties are now bound by their stipulations.

The evidentiary record closed at the end of the October 10, 2016 hearing. However, counsel for the parties requested the opportunity to file post-hearing briefs.

The parties were given until November 14, 2016 to file their post-hearing briefs, at which time the case was considered fully submitted to the undersigned.

ISSUES

In File No. 5053641, the parties submitted the following disputed issues for resolution:

1. Whether claimant sustained an injury that arose out of and in the course of her employment with JBS Swift on November 29, 2013.

2. Whether the alleged injury caused permanent disability and, if so, the extent of claimant's entitlement to permanent disability benefits.

3. The proper commencement date for permanent disability benefits, if any are awarded.

4. Whether claimant is entitled to claim a nephew that resides in Mexico as an exemption for purposes of calculating claimant's weekly benefit rate.

5. Whether claimant is entitled to an independent medical evaluation reimbursement for an evaluation performed by Robin L. Sassman, M.D.

6. Whether costs should be assessed against either party.

In File No. 5053642, the parties submitted the following disputed issues for resolution:

1. Whether claimant sustained an injury that arose out of and in the course of her employment with JBS Swift on or about October 20, 2014, including a claim for a cumulative trauma injury.

2. Whether the alleged injury caused permanent disability and, if so, claimant's entitlement to permanent disability benefits.

3. Whether claimant is entitled to claim a nephew that resides in Mexico as an exemption for purposes of calculating claimant's weekly benefit rate.

4. Whether claimant is entitled to an independent medical evaluation reimbursement for an evaluation performed by Dr. Sassman.

5. Whether costs should be assessed against either party.

FINDINGS OF FACTS

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

Maribel Vasquez is a 41 year old woman, who was born and raised in Mexico. She has a ninth grade education, which she received while residing in Mexico. Ms. Vasquez has no further education or training since ninth grade. (Claimant's testimony)

Ms. Vasquez is not conversationally fluent in English, but understands basic English terms and is able to receive simple instructions to perform her job at JBS Swift in English. Claimant cannot read or write in English. She cannot type or use a computer. (Claimant's testimony)

Claimant's work history includes two jobs in the past 23 years. She worked as a housekeeping supervisor for Holiday Inn from 1994 to 2006. In 2007, Ms. Vasquez started working for JBS Swift. She was required to submit to and pass a pre-employment physical before beginning her employment with JBS Swift. Claimant did pass her pre-employment physical and had no permanent work restrictions when she commenced her employment at JBS Swift. (Claimant's testimony)

When she began her employment at JBS Swift, claimant was a line floater. In that position, claimant primarily was assigned to making boxes. She would lift and carry boxes weighing 30-60 pounds. (Claimant's testimony)

Claimant's next job with JBS Swift was packaging. Her job description included three separate stations. In essence, three employees worked as a team and rotated positions. At the first station, claimant would move a bag into a sealer and seal the bag shut. At the second station, claimant would move a 50-60 pound box, close it and push it down the line. This position did not require significant lifting but required pushing weights totaling approximately 50-60 pounds. In the third station, claimant would lift and carry the 50-60 pound box to a scale, weigh the box and then load the box into a container. (Claimant's testimony)

On November 29, 2013, claimant was performing the third station job when she lifted and was attempting to carry a 50-60 pound box to the scale. She lost her grip on the box, it began to fall, and she attempted to catch the box before it fell to the floor. In so doing, claimant felt a pull in her lower back, neck and shoulders. Ultimately, claimant was not able to catch the box and it fell to the floor. Ms. Vasquez attempted to lift the box from the floor but was not able to do so. (Claimant's testimony)

Ms. Vasquez reported her injury to her supervisor on November 29, 2013 and she was taken to the company's nurse's station. Claimant testified that the nurse agreed to write up the incident as causing a low back injury. (Claimant's testimony) The nurse's notes did not reference either a neck or shoulder injury as a result of the events of November 29, 2013. (Ex. 1, p. 1) The nurse's station provided claimant ice, heat and massages but her symptoms did not resolve. (Claimant's testimony)

In December 2013, the JBS Swift nurse referred claimant for evaluation by Daniel C. Miller, D.O. Claimant testified that she reported both low back and neck symptoms to Dr. Miller. However, claimant testified that Dr. Miller told her he was only authorized to treat the low back. (Claimant's testimony)

Dr. Miller employed conservative medical treatment, including physical therapy and medications for claimant's low back. (Ex. 2) By January 31, 2014, Dr. Miller declared claimant to be at maximum medical improvement. He released claimant to return to work on that date without restrictions. (Ex. 2, pp. 55-56) Claimant testified that Dr. Miller released her despite her ongoing pain. Ms. Vasquez testified that Dr. Miller told her he had no further treatment to offer.

Although claimant was released to return to work without restrictions, claimant struggled to perform her regular duties. Claimant's co-workers assisted claimant and allowed her to remain at the first station, sealing bags throughout her shift. Claimant's co-workers essentially took over the two harder job stations and allowed claimant to continue working. (Claimant's testimony)

The employer allowed claimant to change her job duties since the co-workers were already informally accommodating claimant. Claimant continues to work for JBS Swift in her pre-injury job. However, claimant has been removed from performing the second and third positions and now only performs the first station, sealing bags. (Claimant's testimony)

Claimant is able to continue performing her job at the first station at JBS, but testifies that she could not return to her housekeeping position, to her prior job with JBS Swift, or perform either the second or third stations in her current position. In 2013, at the time of her acute injury, claimant earned $12.30 per hour. Currently, claimant earns $15.55 per hour. (Tr., p. 100)

After Dr. Miller released claimant, she sought medical treatment through Jerry Wille, M.D. Dr. Wille provided claimant pain medications to reduce her symptoms and continued to treat claimant through September 2014. (Ex. 4)

Ms. Vasquez also sought some chiropractic care. (Ex. 6) She testified that the chiropractic care improved her movement and reduced her symptoms but her symptoms returned.

In October 2014, JBS Swift returned claimant for further evaluation with Dr. Miller for her low back symptoms. In his October 24, 2014 office note, Dr. Miller notes that claimant was discharged from treatment in January 2014, "but still having pain in her back." (Ex. 2, p. 57) Dr. Miller ordered x-rays for claimant's low back and diagnosed claimant in October 2014 with "chronic lumbar pain." (Ex. 2, p. 58)

Dr. Miller subsequently obtained an MRI of claimant's lumbar spine. (Ex. 2, pp. 59, 61; Ex. 7) On her return visit on November 7, 2014, Dr. Miller notes ongoing back pain and then also records pain in the shoulders. (Ex. 2, p. 61)

Dr. Miller noted ongoing low back pain and decided to focus on those concerns because they were the most troubling and symptomatic in November 2014. (Ex. 2, pp. 62-63) Dr. Miller referred claimant to a pain specialist for her low back. (Ex. 2, p. 63)

By December 2014, Dr. Miller noted bilateral shoulder symptoms were ongoing and also recorded neck complaints. (Ex. 2, p. 68) Ms. Vasquez returned to Dr. Miller in early December 2014 complaining of radicular arm pain in both arms and that her neck was really tight. (Ex. 2, p. 68) Nevertheless, Dr. Miller declared maximum medical improvement and release claimant without work restrictions as of January 6, 2015. (Ex. 2, pp. 72-73) He discharged claimant from his care as of that date and opined, "As totally normal examination and x-rays within normal limits I am confident there is no permanent injury or impairment." (Ex. 2, p. 73) Dr. Miller also opined that "the continued discomfort is not due to work injury." (Ex. 2, p. 73) Instead, Dr. Miller opined, "I believe this is normal muscle discomfort that comes with hard work and gets more pronounced with age." (Ex. 2, p. 73)

Claimant presented for evaluation by neurosurgeon, David H. Segal, M.D., on May 26, 2015. Dr. Segal reported symptoms in claimant's low back and neck. (Ex. 10, p. 181) Dr. Segal's history indicates the claimant did not have neck pain before November 29, 2013. (Ex. 10, pp. 182, 188)

Dr. Segal ultimately recommended injections in claimant's neck and subsequently indicated that a back fusion would be an option. (Ex. 10, pp. 184, 186) In a report dated May 21, 2016, Dr. Segal corrected his medical history to note that claimant did experience neck pain before November 2013. (Ex. 10, p. 193) Dr. Segal opined that claimant's neck and shoulders were worse with repetitive work performed through October 2014. (Ex. 10, p. 199)

Specifically, Dr. Segal opined that the November 29, 2013 incident was:

> [A]t a minimum substantially and permanently aggravated her underlying degenerative condition in her low back lumbar spine, which substantially contributed to her development or worsening of her lumbar radiculopathy, causing resultant permanent impairment and permanent restrictions consistent with permanent impairment and permanent restrictions assigned by Dr. Robin Sassman for her back.

(Ex. 10, p. 199) Dr. Segal assigned claimant a 12 percent permanent impairment as a result of her low back injury. He imposed permanent restrictions that limited claimant's lifting, pushing, pulling, and carrying to 10 pounds rarely from floor to waist as well as 20 pounds occasionally from waist to shoulder and 10 pounds rarely above shoulder height. (Ex. 10, p. 199)

With respect to claimant's neck claim, Dr. Segal opined within a "very high degree of medical certainty" that "her clinical presentation is consistent with the neck and back injuries I believe she appears to have sustained on the two dates in question." (Ex. 10, p. 199) Dr. Segal further opined, "Ms. Vasquez has sustained injury to her neck, at a minimum, a substantial impairment aggravation of underlying degenerative condition in connection with her November 29, 2013, workplace accident while carrying a box." (Ex. 10, p. 200) Alternatively, Dr. Segal also opines that claimant sustained injury as a result of cumulative effects of her work activities through October 2014. (Ex. 10, p. 200) Dr. Segal assigned 17 percent permanent impairment as a result of claimant's neck injury. (Ex. 10, p. 200)

Claimant obtained an independent medical evaluation performed by Robin L. Sassman, M.D., on March 1, 2016. Dr. Sassman opined that the November 29, 2013, incident caused claimant's low back, as well as her neck injuries. Dr. Sassman also concluded that claimant sustained ongoing repetitive injuries due to her work activities through October 2014. (Ex. 13, p. 275) Dr. Sassman awarded claimant 15 percent permanent impairment as result of her neck injury, as well as a 12 percent permanent impairment rating for her low back. Dr. Sassman combined those ratings, awarding 25 percent of the whole person. (Ex. 13, p. 276) Dr. Sassman also imposed permanent restrictions that include a 20-pound lift, push, pull, and carry restriction. (Ex. 13, p. 276)

Defendants obtain an independent medical evaluation performed by Cassim M. Igram, M.D., on June 13, 2016. Dr. Igram is an orthopedic back surgeon practicing at the University of Iowa Hospitals and Clinics. Dr. Igram concluded the claimant "had a temporary aggravation of her chronic back condition which has returned to baseline." (Ex. A, p. 60) Dr. Igram recorded no complaints of neck pain during his evaluation. (Ex. A, p. 61) Dr. Igram also noted claimant's pre-existing low back injuries and condition. He concluded the claimant sustained a temporary aggravation and returned to her baseline following the November 2013 injury. (Ex. A, p. 61) Dr. Igram recommended against any surgical intervention. Dr. Igram further opined that claimant has not sustained any impairment due to a work-related injury or condition. (Ex. A, p. 68)

Ms. Vasquez was also evaluated by a neurosurgeon at the University of Iowa Hospitals and Clinics. Matthew A. Howard, M.D., evaluated claimant on September 4, 2016. Dr. Howard recommended against any surgical intervention for claimant's neck or back. (Ex. A, p. 71) Dr. Howard did not offer any specific opinions regarding the cause of claimant's neck condition and symptoms.

Defendants accurately point out that claimant has a significant history of pre-existing injury and symptoms in her neck, shoulders, and low back. (Ex. A, pp. 1-5; Claimant's testimony) Realistically, however, claimant was working without permanent restrictions and performing sufficiently at JBS Swift to maintain employment from 2007 through November 2013. After her injury in November 2013, claimant had ongoing symptoms and was not able to return to two of the three positions typically considered

part of her job description. I find Ms. Vasquez to be a motivated worker that is willing and trying to maintain her employment in spite of her injuries and restrictions.

Claimant asserts, however, that she sustained permanent injuries to her neck and low back. Claimant relies upon the medical opinions of Dr. Sassman and Dr. Segal. Defendants challenge Dr. Segal's credibility, asserting that Dr. Segal has pending charges against him by the Iowa Board of Medicine. Defendants rely upon the medical opinions of Dr. Igram, Dr. Miller, and Dr. Howard and assert that claimant has sustained nothing more than a temporary aggravation of a pre-existing condition.

Ultimately, considering the various medical opinions, I find the opinions expressed by Dr. Sassman to be the most credible and consistent with other evidence I find convincing in this record. Dr. Miller's opinions and Dr. Igram's opinions are not credible as to a temporary aggravation. Claimant clearly passed her pre-employment physical with JBS Swift and worked without restriction from 2007 through November 29, 2013. She then had a significant, traumatic event and was never symptom free thereafter. The November 29, 2013 incident caused, or materially and permanently aggravated, claimant's underlying condition such that she now requires permanent restrictions and carries permanent impairment.

Specifically, I find that claimant experienced a significant and permanent increase of symptoms after her November 29, 2013 injury. I find that Ms. Vasquez was capable of performing her full job duties at JBS Swift prior to November 29, 2013. However, after that work injury, she was no longer capable of performing her job duties without restrictions.

Therefore, I find that Ms. Vasquez has proven she sustained a permanent injury, or at least a permanent and a material aggravation and worsening of her neck and low back conditions as a result of the November 29, 2013 work injury. I similarly find that claimant proved she has sustained permanent disability as a result of the November 29, 2013. I further find that claimant has proven a permanent injury and permanent disability resulting from her neck injury, as well as her low back injury on November 29, 2013.

Claimant also filed a petition and alleged a cumulative injury on October 20, 2014. I find that claimant did not sustain new injuries or material aggravations of her neck and low back injuries resulting in a cumulative injury on October 20, 2014. Rather, I find that her conditions, injuries, impairment, and disability result from her traumatic injury sustained on November 29, 2013. Although there is medical evidence that claimant sustained cumulative injuries through October 2014, her symptoms did not significantly change, the location of her symptoms did not significantly change, and her permanent impairment and restrictions appear to be similar to those that would be imposed solely for the traumatic injury in November 2013. Therefore, I find that claimant has proven she sustained a traumatic injury to her low back and neck on November 29, 2013, but has not proven a separate and discrete disability as a result of any cumulative work duties through October 2014.

As a result of the November 29, 2013 work injury, claimant is unable to perform two of the three positions she used to perform in her job. However, she remains capable of performing the sealing position. The employer has essentially reassigned claimant to performing only the sealing position. This is a legitimate and necessary job function within JBS Swift. However, claimant's inability to perform the other two positions, as well as her inability to perform her prior position with JBS Swift or her prior housekeeping position, suggest that Ms. Vasquez has sustained a moderate loss of earning capacity as a result of the neck and low back injuries sustained on November 29, 2013.

Having considered the situs of claimant's injuries, the permanent impairment sustained, her permanent restrictions, as well as claimant's age, employment history, educational background, limited English skills, motivation, her actual return to work and performance of necessary work duties on behalf of the employer, as well as all other relevant industrial disability factors outlined by the Iowa Supreme Court, I find that Ms. Vasquez has proven she sustained a 45 percent loss of future earning capacity as a result of the November 29, 2013 work injury at JBS Swift.

Claimant asserts entitlement to claim a nephew in Mexico as an exemption for purposes of calculating her weekly rate. Claimant testified credibly that she sends money to her brother in Mexico to provide for her nephew. However, her nephew does not live with claimant. The amount Ms. Vasquez sends to her brother does not appear likely to provide for more than half of her nephew's living expenses. (Tr., pp. 13, 56)

In fact, Ms. Vasquez conceded that her brother provides her nephew with all of his needed food, shelter, and clothing. (Tr., p. 56) Claimant testified that she gives her brother "a little bit of money so he can buy [the nephew] a toy." (Tr., p. 57) Claimant also conceded that other family members are also sending cash and gifts to her brother to provide to the same nephew. (Tr., pp. 57-58)

I find that Ms. Vasquez did not prove her nephew was actually dependent upon her financial support as of either November 29, 2013 or October 20, 2014. Rather, Ms. Vasquez generously sends money to her brother as a gift but that the money is not intended to and does not financially provide substantive support to claimant's nephew.

CONCLUSIONS OF LAW

The claimant has the burden of proving by a preponderance of the evidence that the alleged injury actually occurred and that it both arose out of and in the course of the employment. Quaker Oats Co. v. Ciha, 552 N.W.2d 143 (Iowa 1996); Miedema v. Dial Corp., 551 N.W.2d 309 (Iowa 1996). The words "arising out of" referred to the cause or source of the injury. The words "in the course of" refer to the time, place, and circumstances of the injury. 2800 Corp. v. Fernandez, 528 N.W.2d 124 (Iowa 1995). An injury arises out of the employment when a causal relationship exists between the injury and the employment. Miedema, 551 N.W.2d 309. The injury must be a rational consequence of a hazard connected with the employment and not merely incidental to

the employment. Koehler Electric v. Wills, 608 N.W.2d 1 (Iowa 2000); Miedema, 551 N.W.2d 309. An injury occurs "in the course of" employment when it happens within a period of employment at a place where the employee reasonably may be when performing employment duties and while the employee is fulfilling those duties or doing an activity incidental to them. Ciha, 552 N.W.2d 143.

The claimant has the burden of proving by a preponderance of the evidence that the injury is a proximate cause of the disability on which the claim is based. A cause is proximate if it is a substantial factor in bringing about the result; it need not be the only cause. A preponderance of the evidence exists when the causal connection is probable rather than merely possible. George A. Hormel & Co. v. Jordan, 569 N.W.2d 148 (Iowa 1997); Frye v. Smith-Doyle Contractors, 569 N.W.2d 154 (Iowa App. 1997); Sanchez v. Blue Bird Midwest, 554 N.W.2d 283 (Iowa App. 1996).

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

A personal injury contemplated by the workers' compensation law means an injury, the impairment of health or a disease resulting from an injury which comes about, not through the natural building up and tearing down of the human body, but because of trauma. The injury must be something that acts extraneously to the natural processes of nature and thereby impairs the health, interrupts or otherwise destroys or damages a part or all of the body. Although many injuries have a traumatic onset, there is no requirement for a special incident or an unusual occurrence. Injuries which result from cumulative trauma are compensable. Increased disability from a prior injury, even if brought about by further work, does not constitute a new injury, however. 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 occupational disease covered by chapter 85A is specifically excluded from the definition of personal injury. Iowa Code section 85.61(4) (b); Iowa Code section 85A.8; Iowa Code section 85A.14.

When the injury develops gradually over time, the cumulative injury rule applies. The date of injury for cumulative injury purposes is the date on which the disability manifests. Manifestation is best characterized as that date on which both the fact of injury and the causal relationship of the injury to the claimant's employment would be plainly apparent to a reasonable person. The date of manifestation inherently is a fact based determination. The fact-finder is entitled to substantial latitude in making this determination and may consider a variety of factors, none of which is necessarily dispositive in establishing a manifestation date. Among others, the factors may include missing work when the condition prevents performing the job, or receiving significant medical care for the condition. For time limitation purposes, the discovery rule then becomes pertinent so the statute of limitations does not begin to run until the employee, as a reasonable person, knows or should know, that the cumulative injury condition is serious enough to have a permanent, adverse impact on his or her employment. Herrera v. IBP, Inc., 633 N.W.2d 284 (Iowa 2001); Oscar Mayer Foods Corp. v. Tasler, 483 N.W.2d 824 (Iowa 1992); McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985).

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).

Having found that Ms. Vasquez proved she sustained an injury, or at least a material aggravation of a pre-existing condition in her neck and low back on November 29, 2013, I must address whether the injury caused permanent disability. Having considered the various medical opinions in this record, I ultimately found the opinions of Dr. Sassman to be most convincing. Relying upon Dr. Sassman's causation opinion, permanent impairment rating, and permanent work restrictions, I found that Ms. Vasquez proved she sustained permanent disability. Therefore, I conclude that claimant is entitled to an award of permanent disability benefits. Iowa Code section 85.34(2).

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.

Considering all of the relevant industrial disability factors outlined by the Iowa Supreme Court, I found that claimant has proven a 45 percent loss of future earning capacity. This is equivalent to a 45 percent industrial disability and entitles claimant to an award of 225 weeks of permanent partial disability benefits. Iowa Code section 85.34(2)(u).

The parties also dispute when permanent disability benefits should commence. Claimant asserts that permanent disability should commence on October 2, 2015, while defendants contend that permanent disability benefits should commence on January 31, 2014. Unfortunately, neither party set forth the specific basis for their contention in their post-hearing brief. Therefore, it is incumbent upon the undersigned to determine when the proper commencement date for permanent disability benefits is.

In this case, claimant continued to work after her work injury on November 29, 2013. In fact, she was not sent to a physician until December 2014 and she credibly testified that she continued to perform her normal job duties even after being evaluated by Dr. Miller in December 2014. (Tr., pp. 37-38) Permanent disability commences at the end of healing period. Iowa Code section 85.34(1). In this instance, claimant continued working and did not qualify for, or request, healing period benefits.

Claimant's return to work after her injury established the termination of a healing period. Evenson v. Winnebago Industries, Inc., 881 N.W.2d 360, 372-373 (Iowa 2016). Claimant's entitlement to permanent partial disability benefits commenced on November 30, 2013. Id.; Iowa Code section 85.34(1).

Claimant also asserts a second date of injury under a cumulative trauma theory. The cumulative injury rule only applies and there is only considered to be a "new injury" if the alleged new injury results in a separate and discrete disability. Excel Corp. v. Smithart, 654 N.W.2d 891, 898 (Iowa 2002). Having found that claimant's injury and resulting disability are causally related to her initial traumatic injury on November 29, 2013 and having found that claimant did not sustain a separate and discrete disability as a result of further work activities between November 30, 2013 and October 20, 2014, I conclude that claimant has not proven entitlement to a second injury claim, or cumulative injury claim, on October 20, 2014. Id.

Ms. Vasquez asserts a claim for a nephew as a dependent and exemption for purposes of calculating her weekly rate. Pursuant to Iowa Code section 85.44, "a dependent shall be one actually dependent or mentally or physically incapacitated from earning." In this case, claimant's nephew is a minor. However, he is not dependent upon claimant for his financial support.

Claimant conceded on cross-examination that her brother actually provides the nephew with all required food, clothing, and shelter. Claimant does provide some money to her brother so her brother can buy her nephew a toy or for other incidental purposes. However, having found that claimant did not prove her nephew was actually dependent upon her for support, I conclude that claimant is not entitled to claim the nephew as a dependent or exemption.

The parties stipulated to all other relevant factual issues pertaining to the weekly rate. Specifically, the parties stipulated that claimant's gross weekly earnings were $671.65 as of November 29, 2013. The parties also stipulated that claimant was single on the date of injury. Having determined that claimant is entitled to claim herself as well as two children but not her nephew that resides in Mexico, I conclude that claimant is entitled to claim three exemptions for purposes of calculating her rate. Pursuant to the Iowa Workers' Compensation Manual (rate book) applicable on November 29, 2013, claimant is entitled to a weekly rate of $434.82 on all weekly benefits awarded in this case.

Ms. Vasquez requests the award of reimbursement for her independent medical evaluation. Dr. Sassman performed her independent medical evaluation on March 1, 2016. Dr. Miller was the authorized treating physician. He opined on January 6, 2015 that claimant had no permanent impairment. (Ex. 2, p. 73) Therefore, defendants clearly obtained a permanent impairment rating from a physician of their choosing before claimant obtained her independent medical evaluation from Dr. Sassman. Claimant was clearly dissatisfied with the opinions of Dr. Miller. Therefore, claimant is entitled to reimbursement for the evaluation with Dr. Sassman pursuant to Iowa Code section 85.39. Dr. Sassman charged $3,900.00 for her evaluation. Defendants will be ordered to reimburse claimant in this amount pursuant to Iowa Code section 85.39.

Finally, claimant seeks assessment of her costs. Costs are assessed at the discretion of the agency. Iowa Code section 86.40. Exercising the agency's discretion and recognizing that claimant has prevailed on all disputed issues in File No. 5053641, I conclude that it is appropriate to assess costs in that file. All claims asserted in File No. 5053642 are being dismissed without an award of benefits. I conclude it is proper that each party bear their own costs for File No. 5053642.

With respect to File No. 5053641, claimant seeks assessment of her filing fee totaling $100.00. It is appropriate to assess the filing fee pursuant to 876 IAC 4.33(7). Claimant also seeks assessment of the costs of service on each of the defendants. Agency rule 876 IAC 4.33(3) permits assessment of service costs. Claimant seeks

assessment of service costs totaling $13.48 in File No. 5053641. Defendants will be assessed these costs. Iowa Code section 86.40.

ORDER

THEREFORE, IT IS ORDERED:

In File No. 5053641:

Defendants shall pay claimant two hundred twenty-five (225) weeks of permanent partial disability benefits commencing on November 30, 2013 at the rate of four hundred thirty-four and 82/100 dollars ($434.82) per week.

Defendants shall pay all accrued benefits in lump sum, along with interest on all accrued weekly benefits pursuant to Iowa Code section 85.30.

Defendants shall reimburse claimant for the cost of her independent medical evaluation with Dr. Sassman in the amount of three thousand nine hundred and 00/100 dollars ($3,900.00).

Defendants shall reimburse claimant's costs totaling one hundred thirteen and 48/100 dollars ($113.48).

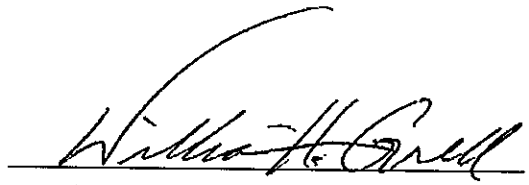
Defendants shall file subsequent reports of injury (SROI) as required by this agency pursuant to rules 876 IAC 3.1(2) and 876 IAC 11.7.

In File No. 5053642:

Claimant takes nothing.

The parties shall bear their own costs.

Signed and filed this 8th day of February, 2017.



WILLIAM H. GRELL
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

Copies to:

Patrick V. Waldron
Attorney at Law
505 5th Avenue, Ste. 729
Des Moines, IA 50309
pwaldron@pattersonfirm.com

James C. Byrne
Attorney at Law
1441 – 29TH Street, Suite 111
West Des Moines, Iowa 50266
jbyrne@nbolawfirm.com

WHG/kjw

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.