

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

KELLY LEWISTON,

Claimant,

vs.

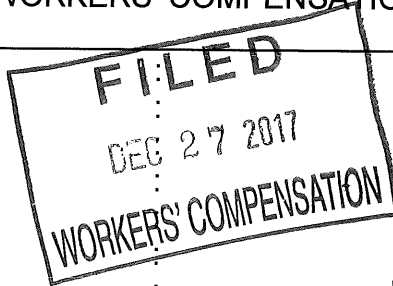
SUNNYBROOK SENIOR LIVING, LLC  
a/k/a SUNNYBROOK AL AND  
SUNNYBROOK FAIRFIELD,

Employer,

and

WEST BEND MUTUAL INSURANCE  
CO.,

Insurance Carrier,  
Defendants.



File No. 5056580

ARBITRATION

DECISION

Head Note No.: 1402.30

Claimant Kelly Lewiston filed a petition in arbitration on May 2, 2016, alleging she sustained an injury to her low back while working for the defendant, Sunnybrook Senior Living, LLC ("Sunnybrook") on May 7, 2014. Sunnybrook and its insurer, the defendant, West Bend Mutual Insurance Co. ("West Bend") filed an answer on June 15, 2016, denying Lewiston had sustained a work injury.

An arbitration hearing was held on July 27, 2017, at the Division of Workers' Compensation, in Des Moines, Iowa. Attorney Marc Humphrey represented Lewiston. Lewiston appeared and testified. Lewiston's daughter, K.C. Moore, also testified on her behalf. Attorney Mark Woollums represented Sunnybrook and West Bend. Joint Exhibits ("JE") 1 through 11, Exhibits 1 through 7, and Exhibits A through G were admitted into the record. The record was held open for the receipt of an additional exhibit, medical bills, to be produced by Lewiston by August 30, 2017, and post-hearing briefs to be filed by September 29, 2017. Sunnybrook and West Bend timely filed their brief. On September 29, 2017, Lewiston filed her brief, and Exhibits 8 and 9, which include medical bills. Lewiston did not request additional time to file Exhibits 8 and 9 on or before September 29, 2017. Sunnybrook and West Bend filed a motion to strike the late evidence on October 3, 2017. Lewiston submitted a response on October 12, 2017, and Sunnybrook and West Bend filed a reply on October 13, 2017. The matter was fully submitted upon receipt of the reply.

Lewiston did not produce Exhibits 8 and 9 at the time of the hearing. At the conclusion of testimony, the record was held open through August 30, 2017, for the receipt of Lewiston's medical bills. Lewiston did not file an exhibit including her medical bills on August 30, 2017. She filed Exhibits 8 and 9 with her post-hearing brief, on September 29, 2017. Lewiston did not contact the undersigned or opposing counsel before filing Exhibits 8 and 9 or provide an explanation why the exhibits were not produced by August 30, 2017. Lewiston did not comply with the August 30, 2017 deadline. She did not contact opposing counsel or the undersigned to request additional time to submit the additional evidence. The motion to strike is granted. Exhibits 8 and 9 are not admitted into the record.

Before the hearing the parties prepared a hearing report listing stipulations and issues to be decided. Sunnybrook and West Bend waived all affirmative defenses.

### **STIPULATIONS**

1. An employer-employee relationship existed between Sunnybrook and Lewiston at the time of the alleged injury.
2. Although entitlement to temporary benefits cannot be stipulated to, Lewiston was off work from July 6, 2014 through August 31, 2014.
3. If the injury is found to be a cause of permanent disability, the commencement date for permanent partial disability benefits, if any awarded is September 1, 2014.
4. At the time of the alleged injury, Lewiston's gross earnings were \$440.00 per week, she was single and entitled to one exemption, and the parties believe the weekly rate is \$281.10.
5. Prior to the hearing Lewiston was paid no weeks of compensation.

### **ISSUES**

1. Whether Lewiston sustained an injury on May 7, 2014, which arose out of and in the course of her employment with Sunnybrook.
2. Is the alleged injury a cause of temporary disability during a period of recovery?
3. Is Lewiston entitled to temporary benefits from July 6, 2014 through August 31, 2014?
4. Is the alleged injury a cause of permanent disability?
5. If the alleged injury is a cause of permanent disability, is the alleged injury an industrial disability?

6. If the alleged injury is a cause of permanent disability, what is the extent of disability?

7. Is Lewiston entitled to payment of medical benefits?

### FINDINGS OF FACT

Lewiston graduated from high school in Fairfield in 1979. (Exhibit F, page 3; Transcript, p. 9) Lewiston has attended classes through Indian Hills Community College, Southeast Community College, and University of Phoenix, but she has not completed any degrees. (Ex. F, p. 3; Tr., p. 9) Lewiston is familiar with Microsoft Word, Excel, PowerPoint and Publisher, QuickBooks, and Adobe Reader. (Exs. D, p. 3; F, p. 3) At the time of the hearing Lewiston was fifty-six. (Tr., p. 22)

Lewiston worked in programs management for the USDA-Natural Resources Conservation Service from 1987 through 2005, and as the CEO-Director of Regional Utility Service Systems from 2005 through 2011. (Exs. 6, p. 1; D, p. 1) As the CEO of the utility company, Lewiston oversaw the contract and construction work, ran public meetings, and worked with a board of directors. (Tr., p. 75) Between 2011 and 2013, Lewiston worked as an accountant for Van Buren County Hospitals and Clinics, as a manager for Revelations Bookstore and Coffeehouse, as a loan document specialist, and as a mortgage originator for different employers. (Exs. 6, p. 2; D, p. 2)

On February 10, 2014, Sunnybrook hired Lewiston as a full-time administrative coordinator. (Exs. 1, pp. 1, 5; 6, p. 2) Lewiston assisted with payroll. (Tr., p. 20) Brandi Logli was the manager of Sunnybrook. (JE 11, p. 15)

At the time of her hiring, Lewiston had a history of back pain dating back to 2001. (Tr., p. 22) Lewiston testified at hearing she first experienced back pain in 2001 when she was moving a couch at home and "ended up on the floor." (Tr., p. 23) Lewiston reported she received physical therapy for one month for muscle spasms. (Tr., p. 23)

In 2012, while working for Revelations Bookstore and Coffeehouse, Lewiston fell on the stairs at work and landed on her back. (Tr., p. 14) Lewiston reported her employer arranged an appointment for her to see a chiropractor for treatment. (Tr., p. 14) Lewiston testified she saw the chiropractor a few times and she continued to work. (Tr., p. 15)

On October 29, 2012, Lewiston attended an appointment with Ayslin Beckett, M.D., a family practice physician, and Justin Nielsen, PA-C, with Van Buren County Hospital, complaining of a sciatic nerve injury that occurred three months ago with pain. (JE 3, p. 1) Dr. Beckett documented, "[s]he continued to work with increased pain to intolerable pain going from her left buttock to toes and then 6 weeks ago pain stopped and numbness went down her left leg and now complains of dropped foot and toes feel like electricity is in them." (JE 3, p. 1) Lewiston complained of similar symptoms in her right foot "but not as severe." (JE 3, p. 1) Dr. Beckett diagnosed Lewiston with

rosacea, hypertension, depressive disorder, anxiety, narcolepsy, obesity, rheumatoid arthritis, left foot drop, and sciatica and prescribed prednisone for her sciatica and hydroxychloroquine for her rheumatoid arthritis. (JE 3, pp. 1-3) Dr. Beckett recommended, but Lewiston declined, lumbar spine magnetic resonance imaging because she did not have medical insurance. (JE 3, p. 3) At hearing Lewiston denied she had a drop foot and testified, "I was still able to walk. I didn't have a brace or anything like that. I didn't know – I mean, they may have thought I had weakness in the foot, but I was never told I had a drop foot." (Tr., p. 77)

On April 17, 2013, Lewiston returned to Van Buren County Hospital and was examined by Matthew Manning, D.O. (JE 3, p. 4) Dr. Manning documented Lewiston complained of intermittent left foot drop, left foot numbness, and low back pain dating back to June 2012. (JE 3, p. 4) Dr. Manning diagnosed Lewiston with lower back pain, left foot drop, and left leg paresthesias, and ordered lumbar spine magnetic resonance imaging. (JE 3, p. 6) The reviewing radiologist listed an impression of:

1. Dehydration early disc degeneration all lumbar disc levels with a very mild bulging annulus L2 to L5.
2. Small to moderate left lateral and foraminal disc protrusion at L3 to L4 with left foraminal encroachment.
3. Mild central stenosis L3 to L5.
4. Probable small Tarlov cyst S2.

(JE 3, p. 7)

On April 29, 2013, Lewiston attended an appointment with Chad Abernathey, M.D., a neurosurgeon. (JE 4, p. 1) Dr. Abernathey documented Lewiston had a ten month history of low back pain radiating into the left lower extremity with numbness and tingling along the lateral aspect of the left thigh, calf, and foot with weakness on dorsiflexion of the ankle and toes. (JE 4, p. 4) Dr. Abernathey noted Lewiston reported her symptoms began after a fall in July 2012, but she did not seek treatment because she did not have health insurance. (JE 4, p. 1) Lewiston testified the fall referenced in Dr. Abernathey's records was the fall at Revelations. (Tr., p. 24) Dr. Abernathey listed an impression of low back pain and left sciatica with foot drop, and he recommended conservative treatment versus a surgical exploration at L3-4 and L4-5. (JE 4, p. 1) Lewiston denied Dr. Abernathey told her she had foot drop, and relayed she was walking to and from work every day at Revelations. (Tr., p. 27) Lewiston again described her condition as "weakness." (Tr., pp. 26-27)

Lewiston alleges she sustained a work injury on May 7, 2014, while working for Sunnybrook. I took official notice of the calendar for 2014. May 7, 2014, was a Wednesday. Lewiston reported Sunnybrook had a new time clock or new system, and the systems were not "coinciding with each other very well," so she kept going from her

desk to the break room. (Tr., pp. 10-11) Lewiston relayed Logli, the manager, told her to give Logli her name badge, so she did not have to keep going from her desk to the break room. (Tr., p. 11) Lewiston testified,

[a]nd so I reached to hand her that, and my desk was behind a railing, kind of like something like this. And I was trying to reach and hand it to her in my desk chair, which had rollers on it too. And I was reaching forward, and she was reaching across, and we couldn't quite make it. And I reached a little bit further, and my chair tipped forward.

And I had on a dress, and I was scared to death that I was going to go clear to the floor and, of course, show things I didn't want to show, so I was trying to balance and hand off the key. And at the very moment that I was doing that, my back just – I just felt this sharp pain in my back. And I knew I had done something to it, but I didn't know how bad.

So she took the time card and went back, and it took awhile, but we finally got the thing to work. And as the day went on, I became more and more in pain, especially if I got up and tried to walk anywhere. I couldn't apply any pressure onto the left side of my leg and hip area without it giving me tremendous amount of pain.

When I left that day, Brandi knew that, you know, I was hurt, hurting, and knew I had troubles walking to my car; and, in fact, she even assisted me to my car that evening.

(Tr., pp. 11-12) Lewiston did not leave work early on Wednesday, May 7, 2014, and completed her shift. During her deposition in June 2017, Logli did not recall Lewiston tipping in her chair on May 7, 2014. (JE 11, p. 19)

There is no evidence in the record Lewiston missed work during the two week pay period ending Saturday, May 10, 2014. (Ex. 1, pp. 2-3) Lewiston's payroll records document she worked 80.25 hours for the period ending May 10, 2014. (Ex. 1, pp. 2-3)

On Sunday, May 11, 2014, Lewiston sought emergency medical treatment at the Jefferson County Health Center, complaining of pain radiating into her left buttock that commenced on May 7, 2014. (JE 5, p. 1) Hospital staff documented, "[t]his is not a return visit for the same problem. The injury occurred at home. Notes: left side sciatic pain since [W]ednesday." (JE 5, p. 7) Pascuala Reyes, D.O., examined Lewiston, prescribed diazepam and a Medrol Dosepak, noted "patient declined xrays of low back," and discharged Lewiston. (JE 5, pp. 1-9)

Lewiston did not report to work on Monday, May 12, 2014. That day Logli documented, "Kelly Lewiston called my cell phone stating she wouldn't be making it into work today due to her back hurting and was going to the dr. I asked her if she hurt her

back at work she stated 'it's a [sic] old injury' and no it didn't happen at SunnyBrook." (JE 11, p. 61)

Lewiston attended an appointment with Amanda Gerber, M.D., with Van Buren County Hospital on May 13, 2014, complaining of left leg and low back pain "suddenly worsening over the past week and making it impossible to go to work" due to the pain. (JE 3, p. 11) Lewiston complained of numbness on the front of the lower leg down the great toe. (JE 3, p. 11) Dr. Gerber documented Lewiston had a history of lumbar spine bulging discs and stenosis and she had seen a back surgeon who believed surgery was not indicated. (JE 3, p. 11) Dr. Gerber noted "[t]his pain seems to be worse than previously and can barely sit down d/t her pain." (JE 3, p. 11)

Dr. Gerber diagnosed Lewiston with radicular leg pain, lower back pain, bulging lumbar discs and lumbar stenosis with left leg involvement, told Lewiston to continue taking her steroid medication, prescribed Robaxin, and recommended repeat magnetic resonance imaging. (JE 3, p. 13) Lewiston underwent the lumbar spine magnetic resonance imaging and the reviewing radiologist listed an impression of:

1. Central, left paracentral disc protrusion at L4-L5 causing mild spinal canal stenosis, left neural foraminal narrowing with pressure effect on the exiting left nerve roots with associated facet arthropathy.
2. Mild disc bulge L3-L4 causing minimal pressure effect on the anterior thecal sac, left neural foraminal narrowing causing pressure effect on the existing nerve roots on the left.
3. Perineural/Tarlov cyst at S2 and a smaller one at S1.

(JE 3, pp. 14-15, 17-18)

On May 14, 2014, Logli documented:

Kelly came in at 8:30 A.M. I told Kelly to leave work due to the fact she had a dr. note. 5/12-5/16 (excuse from work). Kelly stated, "It didn't happen here, and I have to work!"

Kelly then stated she would try to get a dr. note to come back sooner.

I told her until then she could not legally work.

(JE 11, p. 62)

Lewiston was off work from Monday, May 12, 2014 through Friday, May 16, 2014. (Tr., p. 35) Lewiston testified when she returned to work on Monday, May 19, 2014, she was using a crutch. (Tr., p. 37) Lewiston reported Sunnybrook terminated her employment within two days of her return to work. (Tr., pp. 37-38)

Lewiston attended an appointment with Loren Mouw, M.D., a neurosurgeon practicing with Dr. Abernathey on May 20, 2014. (JE 4, p. 2) Dr. Mouw documented Lewiston reported approximately two weeks ago she was reaching and tipped out of the front of her chair, and she had experienced increased pain radiating down her left lower extremity, extending to the foot, which was worse with prolonged sitting. (JE 4, p. 2) Dr. Mouw noted her imaging revealed a disc protrusion at L4-L5 on the left, and he discussed conservative treatment and surgical intervention with Lewiston. (JE 4, p. 2) Dr. Mouw documented Lewiston requested conservative measures even though the weakness in her left foot "may become permanent without surgical intervention." (JE 4, p. 2)

Thursday, May 22, 2014, was the last day Lewiston worked for Sunnybrook. (Exs. A, p. 1; 1, p. 2; Tr., p. 91) Lewiston's payroll records for the period ending May 24, 2014 document she worked 31.25 hours, and she received paid time off for 26.02 hours, for a total of 57.27 hours. (Ex. 1, pp. 2-3) There is no evidence Lewiston was restricted from working after May 16, 2014, until her layoff. Sunnybrook terminated Lewiston's employment effective May 29, 2014. (Ex. 1, p. 13) New owners acquired Sunnybrook in 2014.

On May 28, 2014, Lewiston attended a physical therapy evaluation for back pain and left sciatica. (JE 5, p. 11) The physical therapist documented,

Patient's chief complaint is back pain on the left gluteal down to the left lower extremity and numbness down her left foot. Patient thinks that she has a dropfoot and has difficulty in walking and losing her balance. Patient claims this started in June 2012. Initially she fell down a flight of stairs and she tried to walk it off but 3 weeks after her initial injury she claims that she had excruciating pain down her left lower extremity. She had left lower extremity and foot numbness and noted a dropfoot. At that time she did not have any health insurance so no treatments were sought at that time. This May 6, 2014, she tipped forward in her chair at work and she never fell to the ground but she tried to balance and she had excruciating pain on her left side. Patient claims she went to the ER the weekend before and was prescribed tramadol. She was then referred to the referring doctor, Dr. Mouw, and she had an MRI done which revealed a ruptured disk at L3-L4 level. She had an ESI on May 23, 2014, which helped with her back pain. Patient however claims that she is still having difficulty on her left lower extremity after standing in one spot and sitting for too long periods of time. She has difficulty if she is bent over for too long and has great difficulty in walking that she has to have a conscious effort for her to lift her left leg so as not to fall. Patient claims that she had fallen in the past 2 years and had suffered fractured right elbow, dislocated shoulder, and slight concussion from her falls. Patient claims that she was working at SunnyBrook as an administrative coordinator and she recently got laid off and is currently unemployed. Patient claims that she would like to try physical therapy to strengthen her muscles to prevent

having to have surgery on her back. Patient claims that she would opt for her surgery but she would like to try the physical therapy first to strengthen her muscles and help with her footdrop.

(JE 5, p. 11)

Cambridge Investments hired Lewiston on June 23, 2014, as a fee billing specialist. (Exs. D, p. 2; F, p. 3) Cambridge Investments paid Lewiston \$13.25 per hour. (Ex. D, p. 2)

On July 2, 2014, Lewiston presented to the Jefferson County Health Center emergency room via ambulance, complaining of left upper lumbar pain radiating into her thigh, calf, and foot. (JE 5, pp. 14-16) Lewiston reported a loss of bladder function, and the staff contacted Dr. Mouw's office. (JE 5, p. 25) Dr. Mouw had initially requested Lewiston be discharged, but hospital staff declined to discharge Lewiston, and she was transported to Mercy Hospital in Cedar Rapids by ambulance for treatment. (JE 5, p. 26)

Dr. Mouw received a telephone call on July 2, 2014, noting Lewiston had been admitted to a local hospital because of bowel and bladder incontinence. (JE 4, p. 3) Dr. Mouw recommended immediate transfer of Lewiston for evaluation, and ordered magnetic resonance imaging. (JE 4, p. 3) Lewiston was admitted to Mercy Medical Center that day. (JE 7, p. 1) Dr. Mouw reviewed Lewiston's imaging and noted the imaging did not show any significant worsening from prior imaging and documented, "the disc protrusion at L4-5 appears to have reduced somewhat," noted he could not see evidence for the incontinence and stated he would continue with the plan for discectomy on July 9, 2014. (JE 4, p. 3)

Lewiston experienced complications from her pain medication after she was admitted to Mercy Medical Center and she was placed in the intensive care unit. (Tr., p. 48) Lewiston relayed that when she woke up in the intensive care unit she had complete foot drop. (Tr., p. 49)

David Segal, M.D., a neurosurgeon examined Lewiston and reviewed her imaging on July 5, 2014. (Ex. 3, p. 1) Dr. Segal noted that imaging showed "significant disc herniation with nerve impingement at L4-L5," and "lesser findings at L3-L4 and L2-L3. (Ex. 3, p. 1) Dr. Segal recommended a left microlumbar discectomy at left L4-L5. (JE 7, p. 1; Ex. 3, p. 1) The next day Dr. Segal performed a left decompressive laminectomy at L4-L5, a transpedicular decompression, and removed the extruded fragment with microscopic magnification dissection. (Ex. 3, p. 1) Lewiston reported pain relief from the surgery, she was up walking, and she was discharged on July 8, 2014, with diagnoses of facet arthropathy, bulging disk, and foraminal stenosis, L4-L5. (JE 7, p. 7)

Lewiston received physical therapy following her surgery. (JE 3) She continued to have problems with foot drop following her surgery. (JE 3, pp. 19, 21) Lewiston



received treatment from her primary care provider, and she received a prescription for a brace. (JE 3, pp. 19, 21)

Lewiston prepared an accident report for Sunnybrook on July 16, 2014. (Ex. B, p. 1) Lewiston relayed she was injured on May 7, 2014, and wrote she was "working on time clock problem – sitting in my chair – tried to hand off my time clock badge to Manager from the other side of the railing and tipped in my chair when passing it to her. I tried to balance my chair while it was tipping – hoping not to fall all the way to the floor. I felt the pain immediately." (Ex. B, pp. 1-2) When answering the question of when she reported her work injury to her supervisor, Lewiston responded, "[t]he next day when I began to have some major issues." (Ex. B, p. 3)

Ruby Boese worked for Sunnybrook from October 2009 through May 12, 2017. (JE 11, p. 2) During her employment with Sunnybrook Boese worked with Lewiston. (JE 11, p. 2) Boese completed a statement dated July 11, 2014, which provides:

I had asked Kelly what she did to her back cause [sic] she was sitting at her desk with a [sic] ice pack behind her back. She told me that she hurt her back at home, not here at SunnyBrook and she had been to the doctor. This conversation took place May the week of the 19th.

(JE 11, p. 60) During her deposition on June 9, 2017, Boese confirmed she recalled Lewiston told her that she hurt her back at home. (JE 11, pp. 3, 8)

Andrew Howell worked as a maintenance manager for Sunnybrook. (JE 11, p. 29) Howell left Sunnybrook in the late fall of 2014. (JE 11, pp. 29, 32) On July 14, 2014, Howell prepared the following statement stating he had the following conversation with Lewiston the week of May 19, 2014:

Kelly was limping to the kitchen to get coffee and a snack. I asked her what had happened and she said "I hurt my back over the weekend" its an old injury. She had over worked her back. Doing what she did not say. She said she would be okay and I told her to take it easy.

(JE 11, p. 63) Howell reported he was in and out of the kitchen regularly, and the kitchen was about twenty-five to thirty feet from Lewiston's desk. (JE 11, p. 30) Howell relayed that before the week of May 19, 2014, he had not observed Lewiston limping or had any conversations with her about a back injury or condition. (JE 11, p. 31)

Lidia Bryant worked as the director of human resources for Sunnybrook until the end of 2014. (JE 11, p. 41) Bryant prepared a statement, which provides:

[f]ormer employee called me, Lidia Bryant, (Director of HR) on July 9, 2014 to find out if we had submitted an injury report to Workers' Comp for her back injury. I told Kelly Sunnybrook was not aware that she had been injured at work. I asked her if she had reported her injury to her manager. Kelly stated that her manager had been witnessed to the injury on 5/7/14.

I asked Kelly why she had not brought this up to me back in June 12, 2014 when she came in to my office to find out about her health insurance benefits. She stated she assumed I knew about her work injury.

I told her we would need her to come in and fill out an accident/injury report. She came in on 7/16/14 to fill out the report (see attachment).

The manager, Brandi Logli, states that Kelly never reported an injury. Brandi also has statements from other employees stating Kelly had said she injured her back outside of work. (see attachments)

Kelly was off work from 5/12-5/16/2014. She used paid time off (PTO) to cover some of her time off during this week. She returned with a doctor's excuse and released her back to work with no restrictions on 5/19/2014. Kelly did not report this as a work injury to her manager when she returned from her week off. She worked without any complaints or report of work injury from 5/19 - 5/22/2014.

On 5/22/14 Kelly was terminated due to a reorganizational change.

She came in to the Human Resources office on 6/12/2014 to ask about her health insurance term date and wanted feedback on her performance. She did not report a work injury at that time either.

(JE 11, p. 64)

Sheila Kiesey worked for Sunnybrook as a registered nurse. (JE 11, p. 52) Kiesey left Sunnybrook during the summer of 2014, following the reorganization. (JE 11, pp. 52, 54) Kiesey prepared a statement on July 15, 2014, which provides:

Kelly L. worked for SunnyBrook Assisted Living in Fairfield as an assistant to the manager – Her desk was outside my office door – Around May 15th – approximately – I noticed how carefully she was moving, walking & sitting. When asked what was wrong She stated she had re-injured an old injury – over the weekend – at home –. So now she was going to have a chiropractor treat her.

She also told several of our residents this same information.

(JE 11, p. 65) Kiesey testified in June 2017 she recalled speaking with Lewiston about her back injury and she believed she said she injured her back while working outside, but it was hard for her to recall because it had been three years since the incident. (JE 11, p. 53) Lewiston testified it is not possible she could have told Kiesey she injured her back doing yard work at home because she rents her property, and all of the mowing and snow removal are provided. (Tr., p. 58)

Lewiston's daughter, Moore, lives in Randall, Iowa. (Tr., p. 115) Moore reported she is close to her mother and speaks with her daily by telephone. (Tr., p. 116) Moore keeps a journal and testified Lewiston told her she injured herself when she was passing something to her boss, her chair tipped, and she "kind of caught herself," and experienced immediate low back pain. (Tr., p. 119)

Lewiston applied for Social Security Disability Insurance benefits in 2014. (Ex. 7; Tr., p. 8) The Social Security Administration approved her application in December 2014, and found she became disabled on May 7, 2014. (Ex. 7, p. 1) Lewiston's employment with Cambridge Investments ended in August 2014. (Ex. F, p. 3)

Optimae Life Services hired Lewiston as a full-time service coordinator for Henry County on November 13, 2014. (Ex. E, pp. 2, 4, 12) On September 22, 2015, Lewiston submitted a resignation letter to Optimae, stating she had high hopes for herself, but she did not believe she could perform the job duties. (Ex. E, p. 1)

In May 2016, Dr. Segal responded to an inquiry from Lewiston's counsel regarding her work injury. (Ex. 3) Dr. Segal responded,

[i]n regards to the questions, first, I would like to add that I did not get a very detailed history about her work injury, but with the information you told me that she had two injuries – one in 2012 where she fell down a flight of stairs – it seems like her low back was sore, but she really did not suffer significant sequelae. The next was May 7, 2014, which was in closer approximation to the surgery that I did (two months before the surgery), and there was an incident that occurred while she was working at her employment at Sunnybrook Assisted Living. She was sitting on her work chair, trying to resolve a timeclock issue, where it was necessary for her to hand her timeclock badge to her supervisor. When she reached over the railing, the chair fell over, and she was thrown to the floor, landing on her low back. The pain for which I did surgery started at the time. She first saw another neurosurgeon, who essentially abandoned her when she came to the hospital with worsening pain and worsening foot drop.

(Ex. 3, p. 2) Dr. Segal opined the "fall from the chair while working at Sunnybrook Assisted Living on May 7, 2014, was indeed at least in part a cause of the condition which prompted her transfer to Mercy Hospital in Cedar Rapids," and that he believed, based on the information Lewiston's counsel provided it "was the predominant factor" that resulted in the need for surgery. (Ex. 3, p. 2)

Lewiston continued to experience left foot drop and underwent a left deep tendon transfer and gastrocnemius release on June 20, 2016. (JE 5, p. 102)

On September 30, 2016, Dr. Segal provided an impairment rating for Lewiston. (Ex. 4) Dr. Segal opined Lewiston reached maximum medical improvement on February 6, 2015, and under Table 15.3, page 384 of the Guides to the Evaluation of

Permanent Impairment (AMA Press, 5th Ed. 2001) ("AMA Guides"), Lewiston falls under DRE Lumbar Category III, and because of her foot drop, he assigned her a thirteen percent whole person impairment. (Ex. 4, p. 1) Dr. Segal recommended permanent restrictions of wearing a foot orthosis at all times, no lifting greater than twenty-five pounds, to limit bending and twisting to no more than ten times per hour, to limit sitting up to one hour, to never climb ladders or walk on heights, and to limit driving to thirty minutes at a time. (Ex. 4, p. 1)

David Boarini, M.D., a neurosurgeon, performed an independent medical examination of Lewiston on December 9, 2016. (Ex C) Dr. Boarini examined Lewiston and reviewed her medical records. (Ex. C, p. 1) Dr. Boarini opined:

[t]he chair incident that occurred on May 7, 2014, is, to my understanding, in dispute. This was certainly a trivial incident that would not have been a substantial cause for the patient's surgery. She had pre-existent symptoms. She had MRIs dating back two years that showed her disk herniation and it was symptomatic at times. The incident that occurred was trivial and did not require any immediate medical attention or even cause the patient to leave work. It is even in dispute whether it happened. Certainly, whatever happened that day was not a significant injury and if it had caused an acute disk rupture, it certainly would have been more severe and more noticeable at the time. As such, I do not think this chair incident in question, whether it occurred or not, was a substantial cause for the patient's problem for her foot drop or for her surgery.

At the present time, the patient certainly has a significant foot drop. This will leave her with a permanent functional disability of that leg regardless of the cause. I don't think there is any specific further treatment that can be done for her. I would estimate she has a 15% impairment of the body as a whole due to the permanent weakness in her leg. This will require restrictions on her mobility.

(Ex. C, p. 2)

In January 2017, Anderson Tooling hired Lewiston to answer the telephone. (Tr., p. 10) At the time of the hearing Lewiston was working part-time, fourteen to fifteen hours per week, and earning \$10.00 per hour. (Tr., pp. 7, 9, 73-74) Lewiston testified she attends physical therapy three times per week and she wears a brace every day because her foot is still too weak to hold up a shoe, which causes her to trip and fall. (Tr., pp. 51, 53)

Lewiston testified she does not work full-time anymore "[m]ainly it's because I can't sit for, you know, great lengths of time because it affects my – the swelling of my foot and leg." (Tr., p. 74) At the start of the hearing I informed Lewiston that she could stand up or move around, and take breaks during the hearing. (Tr., p. 6) I did not observe Lewiston stand, move around, or grimace during the hearing. Lewiston was

able to proceed with over two hours of direct and cross-examination without taking a break or moving around.

Lewiston did not plead a mental health sequela injury in her petition. At hearing Lewiston alleged she sustained a mental health sequela injury as a result of her work injury. (Tr., p. 73) In 2012, Lewiston was receiving treatment for major depression and anxiety, and testified, "I've been on depression medicine for a long time." (Tr., pp.79-80)

### CONCLUSIONS OF LAW

To receive workers' compensation benefits, an injured employee must prove, by a preponderance of the evidence, the employee's injuries arose out of and in the course of the employee's employment with the employer. 2800 Corp. v. Fernandez, 528 N.W.2d 124, 128 (Iowa 1995). An injury arises out of employment when a causal relationship exists between the employment and the injury. Quaker Oats v. Cih, 552 N.W.2d 143, 151 (Iowa 1996). The injury must be a rational consequence of a hazard connected with the employment, and not merely incidental to the employment. Koehler Elec. v. Willis, 608 N.W.2d 1, 3 (Iowa 2000). The Iowa Supreme Court has held, an injury occurs "in the course of employment" when:

*[i]t is within the period of employment at a place where the employee reasonably may be in performing his duties, and while he is fulfilling those duties or engaged in doing something incidental thereto. An injury in the course of employment embraces all injuries received while employed in furthering the employer's business and injuries received on the employer's premises, provided that the employee's presence must ordinarily be required at the place of the injury, or, if not so required, employee's departure from the usual place of employment must not amount to an abandonment of employment or be an act wholly foreign to his usual work. An employee does not cease to be in the course of his employment merely because he is not actually engaged in doing some specifically prescribed task, if, in the course of his employment, he does some act which he deems necessary for the benefit or interest of the employer.*

Farmers Elevator Co. v. Manning, 286 N.W.2d 174, 177 (Iowa 1979) (emphasis in original).

The claimant bears the burden of proving the claimant's work-related injury is a proximate cause of the claimant's disability and need for medical care. Ayers v. D & N Fence Co., Inc., 731 N.W.2d 11, 17 (Iowa 2007); George A. Hormel & Co. v. Jordan, 569 N.W.2d 148, 153 (Iowa 1997). "In order for a cause to be proximate, it must be a 'substantial factor.'" Ayers, 731 N.W.2d at 17. A probability of causation must exist, a mere possibility of causation is insufficient. Frye v. Smith-Doyle Contractors, 569 N.W.2d 154, 156 (Iowa Ct. App. 1997).

The question of medical causation is “essentially within the domain of expert testimony.” Cedar Rapids Cmty. Sch. Dist. v. Pease, 807 N.W.2d 839, 844-45 (Iowa 2011). The commissioner, as the trier of fact, must “weigh the evidence and measure the credibility of witnesses.” Id. The trier of fact may accept or reject expert testimony, even if uncontroverted, in whole or in part. Frye, 569 N.W.2d at 156. When considering the weight of an expert opinion, the fact-finder may consider whether the examination occurred shortly after the claimant was injured, the compensation arrangement, the nature and extent of the examination, the expert’s education, experience, training, and practice, and “all other factors which bear upon the weight and value” of the opinion. Rockwell Graphic Sys., Inc. v. Prince, 366 N.W.2d 187, 192 (Iowa 1985).

It is well-established in workers’ compensation that “if a claimant has a preexisting condition or disability, aggravated, accelerated, worsened, or ‘lighted up’ by an injury which arose out of and in the course of employment resulting in a disability found to exist,” the claimant is entitled to compensation. Iowa Dep’t of Transp. v. Van Cannon, 459 N.W.2d 900, 904 (Iowa 1990). The Iowa Supreme Court has held,

[a] disease which under any rational work is likely to progress so as to finally disable an employee does not become a “personal injury” under our Workmen’s Compensation Act merely because it reaches a point of disablement while work for an employer is being pursued. It is only when there is a direct causal connection between exertion of the employment and the injury that a compensation award can be made. The question is whether the diseased condition was the cause, or whether the employment was a proximate contributing cause.

Musselman v. Cent. Tel. Co., 261 Iowa 352, 359-60, 154 N.W.2d 128, 132 (1967).  
Lewiston has not met her burden of proof in this case.

#### **I. Witness Credibility**

Lewiston avers she sustained an injury on May 7, 2014, while working for Sunnybrook when her chair tipped while she was handing Logli her badge. (Tr., pp. 11-12) Lewiston avers the tipping incident resulted in her need for back surgery, additional treatment, and related sequela mental health injuries. Sunnybrook and West Bend challenged Lewiston’s credibility at hearing, and denied she sustained a work injury.

When assessing witness credibility, the trier of fact “may consider whether the testimony is reasonable and consistent with other evidence, whether a witness has made inconsistent statements, the witness’s appearance, conduct, memory and knowledge of the facts, and the witness’s interest in the [matter].” State v. Frake, 450 N.W.2d 817, 819 (Iowa 1990). Lewiston’s testimony is not reasonable and consistent with the other evidence I believe. Lewiston has an interest in receiving workers’ compensation benefits in this case.

During the hearing Lewiston minimized the extent of her preexisting problems. Lewiston denied having a drop foot or foot drop before July 2014. (Tr., p. 49) Lewiston testified "drop foot was never mentioned. The tingling, yes, probably did have that. . . I was never told that I had a drop foot" when she attended her appointment with Dr. Beckett in October 2012. (Tr., p. 77) Dr. Beckett documented Lewiston was reporting "intolerable pain going from her left buttock to toes and then 6 weeks ago pain stopped and numbness went down her left leg and now complains of dropped foot and toes feel like electricity is in them." (JE 3, p. 1)

During an appointment on April 17, 2013, Dr. Manning also documented

[t]his 52 y.o. female presents to clinic with intermittent left foot drop, left leg numbness and low back pain ongoing since last June which often worsens with walking. At times with her foot drop she has to make a conscience [sic] effort to think about walking otherwise she falls. Pt denies any injury but a couple weeks ago she had her symptoms worsen again and progressively improving. She doesn't currently have foot drop but does have the numbness in her left leg and foot.

(JE 3, p. 4) Dr. Manning diagnosed Lewiston with lower back pain, left foot drop, and left leg paresthesias. (JE 3, p. 6)

Lewiston attended an appointment with Dr. Abernathey, a neurosurgeon, on April 29, 2013. (JE 4, p. 1) Dr. Abernathey also documented Lewiston presented with foot drop, left back pain, and sciatica. (JE 4, p. 1) Lewiston denied Dr. Abernathey told her she had foot drop, and relayed she was walking to and from work every day at Revelations. (Tr., p. 27) Lewiston again denied she was told she had foot drop, and described her condition as "weakness." (Tr., pp. 26-27)

Lewiston attended physical therapy on May 28, 2014. (JE 5, p. 11). The physical therapist documented,

Patient's chief complaint is back pain on the left gluteal down to the left lower extremity and numbness down her left foot. Patient thinks that she has a dropfoot and has difficulty walking and losing her balance. Patient claims this started in June 2012. Initially she fell down a flight of stairs and she tried to walk it off but 3 weeks after her initial injury she claims that she had excruciating pain down her left lower extremity. She had left lower extremity and foot numbness and noted a dropfoot. . . Patient claims that she would opt for her surgery but she would like to try the physical therapy first to strengthen her muscles and help with her footdrop.

(JE 5, p. 11) I do not find Lewiston's testimony that she was unaware of the drop foot problem before July 2014 credible.

The circumstances of Lewiston's alleged work injury are also troubling. Lewiston worked full-time for Sunnybrook. Lewiston's supervisor, Logli, Bryant, the human resources manager, and her coworkers, Boese, Howell, and Kiesey, submitted statements concerning conversations they had with Lewiston during her employment. (JE 11, pp. 60-65) At the time of their depositions in June 2017, Logli, Bryant, Boese, Howell, and Kiesey no longer worked for Sunnybrook. (JE 11)

Lewiston testified Logli helped her to her car because she was having difficulty walking on Wednesday, May 7, 2014. (Tr., p. 12) During her deposition Logli did not recall the chair tipping incident. (JE 11, p. 19) Moreover, Lewiston's testimony is inconsistent with the injury report she prepared on July 16, 2014. (Ex. B, p. 3) When questioned about the date and time she reported her work injury to her supervisor, Lewiston wrote, "[t]he next day when I began to have some major issues." (Ex. B, p. 3)

There is no evidence in the record Lewiston missed work during the two week pay period ending on Saturday, May 10, 2014. (Ex. 1, pp. 2-3) Lewiston's payroll records document she worked 80.25 hours for the period ending May 10, 2014. (Ex. 1, pp. 2-3)

Lewiston first sought treatment for her low back on Sunday, May 11, 2014. Hospital staff documented Lewiston was complaining of pain radiating into her left buttock that commenced on May 7, 2014. (JE 5, p. 1) Hospital staff also documented, "[t]his is not a return visit for the same problem. The injury occurred at home. Notes: left side sciatic pain since [W]ednesday." (JE 5, p. 7) Dr. Reyes examined Lewiston, prescribed diazepam and a Medrol Dosepak, and noted "patient declined xrays of low back." (JE 5, pp. 1-9)

Lewiston did not report to work on Monday, May 12, 2014. That day Logli documented, "Kelly Lewiston called my cell phone stating she wouldn't be making it into work today due to her back hurting and was going to the dr. I asked her if she hurt her back at work she stated 'it's a [sic] old injury' and no it didn't happen at SunnyBrook." (JE 11, p. 61) Lewiston testified in June 2017, she asked Lewiston if she hurt her back at work because if she did, Sunnybrook would fill out workers' compensation papers and have her see a workers' compensation physician. (JE 11, p. 16)

On May 14, 2014, Logli documented:

Kelly came in at 8:30 A.M. I told Kelly to leave work due to the fact she had a dr. note. 5/12-5/16 (excuse from work). Kelly stated, "It didn't happen here, and I have to work!"

Kelly then stated she would try to get a dr. note to come back sooner.

I told her until then she could not legally work.



(JE 11, p. 62) Logli was employed by Sunnybrook at the time she documented Lewiston's call on May 12, 2014, and interaction on May 14, 2014. Logli left Sunnybrook in 2015. (JE 11, p. 15)

On July 11, 2014, Boese, who worked as an administrative assistant and dementia coordinator for Sunnybrook, prepared a statement, which provides:

I had asked Kelly what she did to her back cause [sic] she was sitting at her desk with a [sic] ice pack behind her back. She told me that she hurt her back at home, not here at SunnyBrook and she had been to the doctor. This conversation took place May the week of the 19th.

(JE 11, pp. 2, 60) During her deposition on June 9, 2017, Boese confirmed she recalled Lewiston told her that she hurt her back at home. (JE 11, pp. 3, 8) Boese left Sunnybrook on May 12, 2017. (JE 11, p. 2)

Howell, a maintenance manager for Sunnybrook prepared a statement on July 14, 2014, which provides that during the week of May 19, 2014:

Kelly was limping to the kitchen to get coffee and a snack. I asked her what had happened and she said 'I hurt my back over the weekend' its [sic] an old injury. She had over worked her back. Doing what she did not say. She said she would be okay. I told her to take it easy.

(JE 11, p. 63) Howell reported he was in and out of the kitchen regularly, and the kitchen was about twenty-five to thirty feet from Lewiston's desk. (JE 11, p. 30) Howell relayed that before the week of May 19, 2014, he had not observed Lewiston limping or had any conversations about a back injury or condition. (JE 11, p. 31) At the time of his deposition in June 2017, Howell was not working for Sunnybrook, and reported he left in the late fall of 2014. (JE 11, pp. 29, 32)

Kiesey worked as a registered nurse for Sunnybrook and prepared a statement on July 15, 2014, which provides:

Kelly L. worked for SunnyBrook Assisted Living in Fairfield as an assistant to the manager – Her desk was outside my office door – Around May 15th – approximately – I noticed how carefully she was moving, walking & sitting. When asked what was wrong She stated she had re-injured an old injury – over the weekend – at home –. So now she was going to have a chiropractor treat her.

She also told several of our residents this same information.

(JE 11, p. 65) Kiesey testified that she recalled speaking with Lewiston about her back injury and she believed she said she injured her back while working outside, but it was hard for her to recall because it had been three years since the incident. (JE 11, p. 53) Kiesey testified she left Sunnybrook during the summer of 2014, following a

reorganization, because the facility did not want to have more than one registered nurse on staff. (JE 11, pp. 52, 54) Lewiston testified it is not even possible that she could have told Kiesey she injured her back doing yard work at home because she rents her property, and all of the mowing and snow removal are provided. (Tr., p. 58)

Four former employees of Sunnybrook prepared statements and testified Lewiston told them she injured her back at home and not at work. While Logli, Boese, Howell, and Kiesey were employees at the time they gave their statements, they were not at the time they were deposed. There was no evidence presented at hearing that any of the employees held any animosity toward Lewiston or had some other motivation against her or favorable to Sunnybrook. I do not find Lewiston's testimony regarding the cause of her low back pain and related symptoms credible.

During the hearing Lewiston testified she does not work full-time anymore "[m]ainly it's because I can't sit for, you know, great lengths of time because it affects my – the swelling of my foot and leg." (Tr., p. 74) At the start of the hearing I informed Lewiston that she could stand up or move around, and take breaks during the hearing. (Tr., p. 6) I did not observe Lewiston stand, move around, or grimace during the hearing. She was able to proceed with over two hours of direct and cross-examination without moving or taking a break.

Based on my observations at hearing, and all of the evidence, I do not find Lewiston to be a credible witness. Lewiston has not established she sustained an injury arising out of and in the course of her employment on May 7, 2014.

## **II. Causation**

Alternatively, Sunnybrook and West Bend contend Lewiston has not established the alleged chair tipping incident caused her need for surgery and related medical treatment. Even assuming Lewiston's chair tipped on May 7, 2014, while she was working for Sunnybrook, I find Lewiston has not established the tipping incident caused her need for surgery and related treatment.

It is undisputed Lewiston had a history of low back pain before she commenced her employment with Sunnybrook dating back to a fall in the summer of 2012 while she was working for Revelations Bookstore and Coffeehouse. (Tr., p. 12) Lewiston treated with Dr. Beckett, a family practitioner, Dr. Manning, and with Dr. Abernathey, a neurosurgeon, prior to her employment with Sunnybrook, and she had been diagnosed with sciatica and foot drop. (JE 3; JE 4)

Two physicians have provided expert causation opinions in this case, Dr. Segal, a treating neurosurgeon selected by Lewiston, and Dr. Boarini, a neurosurgeon who conducted an independent medical examination for Sunnybrook and West Bend. I find Dr. Boarini's opinion more persuasive than Dr. Segal's opinion.

In May 2016, Dr. Segal opined:

[i]n regards to the questions, first, I would like to add that I did not get a very detailed history about her work injury, but with the information you told me that she had two injuries – one in 2012 where she fell down a flight of stairs – it seems like her low back was sore, but she really did not suffer significant sequelae. The next was May 7, 2014, which was in closer approximation to the surgery that I did (two months before the surgery), and there was an incident that occurred while she was working at her employment at Sunnybrook Assisted Living. She was sitting on her work chair, trying to resolve a timeclock issue, where it was necessary for her to hand her timeclock badge to her supervisor. When she reached over the railing, the chair fell over, and she was thrown to the floor, landing on her low back. The pain for which I did surgery started at the time. She first saw another neurosurgeon, who essentially abandoned her when she came to the hospital with worsening pain and worsening foot drop.

(Ex. 3, p. 2) Dr. Segal opined the “fall from the chair while working at Sunnybrook Assisted Living on May 7, 2014, was indeed at least in part a cause of the condition which prompted her transfer to Mercy Hospital in Cedar Rapids,” and that he believed, based on the information Lewiston’s counsel provided “it was the predominant factor” that resulted in the need for surgery. (Ex. 3, p. 2)

While working for Sunnybrook on May 7, 2014, Lewiston was not “thrown to the floor, landing on her low back.” Lewiston testified her chair tipped, she did not fall to the floor. Moreover, Dr. Segal was not provided with Lewiston’s medical records or the magnetic resonance imaging completed before May 7, 2014, which documented her preexisting problems. “When an expert’s opinion is based upon an incomplete history, the opinion is not necessarily binding on the [trier of fact].” Dunlavey v. Economy Fire & Cas. Co., 526 N.W.2d 845, 853 (Iowa 1995) (citing Bodish v. Fisher, Inc., 257 Iowa 521, 521-22, 133 N.W.2d 867, 870 (1965)) The trier of fact determines the weight of the opinion, “that may be affected by the completeness of the premise given the expert and other surrounding circumstances.” Id.

In December 2016, Dr. Boarini examined Lewiston and reviewed her medical records. (Ex. C) Dr. Boarini opined:

[t]he chair incident that occurred on May 7, 2014, is, to my understanding, in dispute. This was certainly a trivial incident that would not have been a substantial cause for the patient’s surgery. She had pre-existent symptoms. She had MRIs dating back two years that showed her disk herniation and it was symptomatic at times. The incident that occurred was trivial and did not require any immediate medical attention or even cause the patient to leave work. It is even in dispute whether it happened. Certainly, whatever happened that day was not a significant injury and if it

had caused an acute disk rupture, it certainly would have been more severe and more noticeable at the time. As such, I do not think this chair incident in question, whether it occurred or not, was a substantial cause for the patient's problem for her foot drop or for her surgery.

At the present time, the patient certainly has a significant foot drop. This will leave her with a permanent functional disability of that leg regardless of the cause. I don't think there is any specific further treatment that can be done for her. I would estimate she has a 15% impairment of the body as a whole due to the permanent weakness in her leg. This will require restrictions on her mobility.

(Ex. C, p. 2) No rebuttal opinion was obtained from Dr. Segal or any other medical provider.

Dr. Segal's opinion is based on an inaccurate and incomplete history. Dr. Boarini reviewed all of Lewiston's medical records and examined her. He had access to her prior imaging results, Dr. Segal did not. Lewiston has not established her need for back surgery and related treatment is causally related to the alleged work injury. Given this finding, the remaining issues are moot.

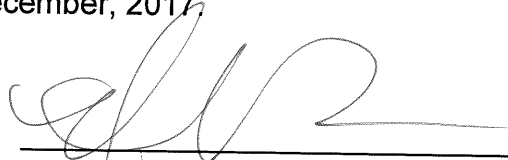
### ORDER

IT IS THEREFORE ORDERED,

Claimant shall take nothing in this case.

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

Signed and filed this 27<sup>th</sup> day of December, 2017.



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HLP/sam

**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.