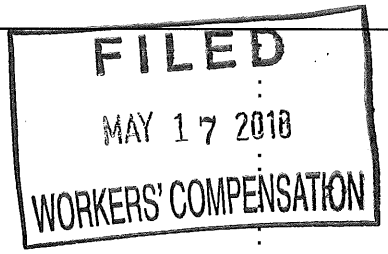
BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER



JILL BENNETT,	:	File No. 5055697
Claimant,	:	ARBITRATION
vs.	:	DECISION
PROGRESSIVE PROCESSING, INC.,	:	
Employer, Self-Insured, Defendant.	:	Head Notes: 1801, 1803.1, 4000

STATEMENT OF THE CASE

Jill Bennett, claimant, filed a petition in arbitration seeking workers' compensation benefits from Progressive Processing, Inc., the self-insured employer. The matter proceeded to hearing on December 15, 2017.

The evidentiary record includes: Joint Exhibits JE1 through JE14, Claimant's Exhibits 1 through 6 and Defendant's Exhibits A through C. Claimant provided testimony at hearing.

The parties filed a hearing report at the commencement of the arbitration hearing. On the hearing report, the parties entered into various stipulations. All of those stipulations were accepted and are hereby incorporated into this arbitration decision and no factual or legal issues relative to the parties' stipulations will be raised or discussed in this decision. The parties are now bound by their stipulations.

The parties submitted post-hearing briefs on or about February 12, 2018 and the matter was considered fully submitted on that date.

ISSUES

The parties submitted the following disputed issues for resolution:

1. Whether the injury is limited to a scheduled member or includes the body as a whole.

2. Whether the work injury is a cause of temporary disability during the period of May 15, 2015 through August 30, 2015 and from November 16, 2015 forward as a running award.

3. Medical expenses, including mileage, attached to the hearing report.

4. Alternate medical care.

5. Penalty.

6. Costs.

FINDINGS OF FACT

After a review of the evidence presented, I find as follows:

Claimant was 38 years old at the time of the hearing. She graduated from high school in 1998. She did not attend college and has no additional education.

1) Work History

Claimant has worked in grocery stores, gas station/convenience stores as a cashier, and as a deli clerk. (Exhibit 5) She has worked in general merchandise retail stores stocking merchandise, unloading trucks and she has had some supervisory responsibilities. She also balanced store registers and made bank deposits. (Ex. 5; Testimony) Claimant testified that the majority of these jobs required her to stand for all, or nearly all, of her work day. She testified that she would not be able to do these jobs now because of the prolonged standing, walking, bending, lifting and using stairs. Her job as a cash associate at Younkers Department Store allowed her to sit down, but she stated that she was uncertain if she could sit all day in her current condition.

Claimant began working for the defendant employer, Hormel/Progressive Foods in 2014 in the job of, Spam Singles Inspector. She worked about 50 hours per week and earned $13.35 per hour plus $0.75 per hour shift differential at the time of the injury on March 4, 2015. (Testimony) The work injury in this matter occurred on March 4, 2015. Claimant was returned to light duty work after the injury and then released to regular duty with no restrictions on April 27, 2015. (Ex. JE2, p. 21) Claimant testified that she quit working for the defendant around May 15, 2015, because the requirement of prolonged standing in one position was too hard for her after the work injury. (Ex. 5, p. 3; Testimony) However, she did not miss any time from work during the period between her return to work and the time that she quit. (Testimony)

Since quitting her job with the defendant employer, claimant obtained a job at Country Inn and Suites as a breakfast server. This involved set-up and clean-up of a breakfast bar. She left that job because she was not getting enough hours. She went on vacation to Florida and looked for work while she was there. She had two interviews in Florida at Macy's and Home Depot, but was not offered employment. She returned to Iowa and was hired by Aramark at Loras College as a full-time cook. The job required her to be on her feet all day, and she stated that as the hours increased the job became too hard for her. After working for Aramark, claimant has looked for work in retail

stores, child care and at a casino as a slot attendant. She has not been offered employment at any of these locations.

Claimant's work history shows that she has a history of moving from job to job before and after the work injury. She does not appear to have been employed by any single employer for more than about two consecutive years. (Ex. 5)

2) The Injury

On March 4, 2015, claimant was moving a trolley of Spam with a co-worker when her left lower leg was pinned between an automatic door and a cement post. She had pain, swelling and bruising in her left lower leg from the incident. (Ex. 6) She reported the injury to her supervisor and was helped to the nurses' station where she stayed until the end of her shift. She was not sent for any further medical care at that time.

3) Prior Medical Condition

Before the March 4, 2015 incident, claimant testified that she had no problems with her left leg or foot and specifically she had not had any prior injuries to her left calf.

However, she stated that she did have bilateral knee pain in 2013. Claimant explained that, she had been diagnosed with Crohn's disease and placed on medication, which led to a 40-pound weight gain. She stated that there was no trauma to her knees, and the weight gain was the source of her knee pain. She received pain medication, but did not have any injections or surgery on her knees. Also, after she was taken off the medication, she lost the weight and her knee pain resolved.

In 2012, claimant was the victim of an assault in her home. As a result she received medication for a time for depression and anxiety related to the assault.

John Brooke, Ph.D. noted in his independent psychological evaluation that in October, 2013, claimant was seen by Crista Weber, ARNP for anxiety and depression, was tearful most days and had poor sleep. Claimant was restarted on Celexa and prescribed Xanax. Her diagnoses were major depressive disorder and generalized anxiety disorder at that time. She reported improved anxiety, resolved tearfulness and apparently declined a refill of Xanax, but he noted that the records indicated claimant continued to take Celexa and Xanax in May, 2014, October 2014 and January 2015. (Ex. JE11, p. 4)

4) Post-Injury Medical Treatment

The day after the March 4, 2015, injury claimant reported to her employer that she had continuing pain. She was sent to see Kimberly Deppe, ARNP at Finley Occupational Health. (Ex. JE2, p. 1) She reported her left lower leg pain was 8/10 and she had been using Advil and ice without significant relief. (Id.) She was diagnosed with a "[c]rush injury to the left lower leg" and placed in an Ace bandage wrap from her ankle to her knee and told to continue to elevate and ice the leg. Claimant was

encouraged to work on range of motion of her ankle and knee and told to increase her Advil to 400 mg to 600 mg every four to six hours. (Ex. JE2, p. 2) She was returned to work with "sitting work preferred" but not mandated. She was to elevate the leg intermittently and change positions as needed, along with no ladders and no prolonged walking or standing. (Id.) Claimant testified that she returned to work doing data entry for just one day and was then returned to her regular job. The employer provided a chair at her job, but she had to stand up quite a bit to do her job, and there was no place to elevate her leg. (Testimony) On March 6, 2015, her work restriction was again stated only as "seated work preferred." (Ex. JE2, p. 4) On March 19, 2015, it is recorded by Ms. Deppe that claimant "has continued to work and is seated at work." (Ex. JE2, p. 9)

On March 12, 2015, claimant was seen by Jill Hunt, M.D., also of Finley Occupational Health, who diagnosed claimant with a left lower leg crush injury with moderate pain and swelling. (Ex. JE2, p. 6) She prescribed hydrocodone for 24 hours with no refills. (Ex. JE2, p. 7)

Claimant testified that she did not feel she was receiving good care from Finley Occupational Health, so she went on her own to Crista Weber, ARNP at Medical Associates Clinic on March 17, 2015. (Ex. JE3, p. 1) She was tearful and concerned about increased swelling. (Id.) X-rays were obtained, which were negative. (Ex. JE3, pp. 3-4)

Claimant continued to treat with Ms. Deppe at Finley Occupational Health. (Ex. JE2, pp. 9, 12) on March 19, 2015, claimant stated that she stopped taking hydrocodone because it was not helpful, and she had not been taking ibuprofen regularly either. (Ex. JE2, p. 9) She also reported worrying about potential future injury if the door that injured her failed to operate correctly at work. (Id.) On March 24, 2015, her condition seemed "to be resolving." (Id.) She was to continue with hydrocodone at night (although she previously reported that she stopped taking it), Aleve during the day, continue wearing the Ace bandage, using heat and soaking her leg in water. (Ex. JE2, p. 12) She was encouraged to get out and do some walking outdoors. (Ex. JE2, p. 15) Ms. Deppe ordered physical therapy on April 2, 2015. (Ex. JE2, p. 14)

On April 17, 2015, claimant's work restrictions were removed entirely. (Ex. JE2, p. 20)

On April 24, 2015, Dr. Hunt, noted claimant was tearful due to frustration that she does not feel that she has returned to baseline after almost two months of treatment. Nevertheless, Dr. Hunt opined that claimant "most certainly, will return to full function." (Ex. JE2, p. 22) Claimant was told to continue with only Advil or Aleve. (Ex. JE2, p. 23) On May 8, 2015, she was discharged, but was told to continue wearing the Ace bandage. (Ex. JE2, p. 24)

On June 25, 2015, claimant returned to Ms. Deppe with swelling, pain and persistent discoloration in her leg. She was given a prescription for a compression

sleeve and told to resume physical therapy. (Ex. JE2, pp. 26-27) She was noted to have induration and edema of the lower leg, but a "quick resolution" was anticipated. (Ex. JE2, p. 31) Ms. Deppe believed claimant would reach maximum medical improvement (MMI) in two to three weeks. (Id.) However, on July 9, 2015, her swelling persisted and she had not yet received the support sleeve. (Ex. JE2, p .32) She continued to treat with Ms. Deppe and Dr. Hunt at Finley Hospital from July 15, 2015 through September 8, 2015. (Ex. JE2, pp. 33-41) On September 8, 2015, claimant requested to see an orthopedic physician, which was then recommended by Dr. Hunt. (Ex. JE2, pp. 41, 43)

On September 15, 2015, claimant was seen by David Field, M.D., of Westside Orthopaedics. (Ex. JE6, p. 1) His impression was a "small crush injury to the anterior compartment" and "an indented area" in her affected leg. (Ex. JE6, p. 2) Claimant was found to have a clear "cosmetic injury but not a functional deficit." (Id.) Dr. Field stated that there was no neurological condition relative to this and "I think she has to push through it, use it, and go from there." (Id.) On October 1, 2015, Dr. Field authored a letter to the claims adjuster and stated that claimant had no functional loss, but nevertheless sustained a 2 percent permanent impairment to the whole person due to the "cosmetic defect that is not treatable." (Ex. JE6, p. 5) This was based on Table 8-2 of the American Medical Association Guides to the Evaluation of Permanent Impairment, Fifth Edition (AMA Guides).

On December 14, 2015, claimant was seen by Mark Taylor, M.D., of Medix at the request of claimant's attorney for the purpose of an independent medical examination (IME). (Ex. 2) Dr. Taylor reviewed claimant's work history, the job that she was doing at the time of the injury, the history of the work injury, and the subsequent medical treatment up to the time of Dr. Field's evaluation on September 15, 2015. (Ex. 2, pp. 1-6) He stated that claimant was only taking Aleve infrequently at that time. (Ex. 2, p. 6) Dr. Taylor conducted a physical examination and noted "an indentation and a slight discoloration" in the mid left lower leg. (Ex. 2, p. 7) Dr. Taylor assigned 3 percent permanent impairment to the left lower leg based on complaints of paresthesias/dysesthesias over the top of the left foot utilizing Table 17-37, page 552, of the AMA Guides. This was assigned despite claimant having an unremarkable sensory exam. (Ex. 2, pp. 7-8) Dr. Taylor also agreed with Dr. Field's application of Table 8-2, page 178 of the AMA Guides and assignment of 2 percent whole person impairment for the cosmetic deformity. (Ex. 2, p. 8) He then assigned a 40-pound lifting restriction preferably at or above the knee, based on claimant's reported pain from squatting. He further stated that claimant should alternate sitting, standing and walking as needed, use stairs and ladders occasionally, and stop when traveling occasionally to get out of the vehicle. (Id.) Dr. Taylor opined that claimant reached MMI on September 8, 2016, the date of her most recent prior appointment with Dr. Hunt. (Id.)

However, claimant returned to see Dr. Hunt again on April 4, 2016, and described pain levels of 7/10 after just a few minutes of walking. (Ex. JE2, p. 44) At that time, claimant was not wearing the compression stocking, was not taking any medication and was not using ice or heat to treat her leg. (Id.) An appointment with

Timothy Miller, M.D. at a pain clinic was recommended. (Ex. JE2, p. 45) Also, on April 13, 2016, claimant was discharged from care with Ms. Deppe, who noted no edema, normal skin tones and temperature and full range of motion of the knees and ankles. (Ex. JE2, p. 47)

On April 13, 2016, claimant was seen by Dr. Miller. (Ex. JE8, p. 3) Claimant described ongoing pain about 4 inches above her left ankle, although the swelling had resolved. (Id.) Dr. Miller could not identify any specific source of the ongoing pain and did not anticipate this "to be a long-term injury." (Ex. JE8, p. 4) Claimant returned on April 28, 2016 with continued complaints of swelling and pain. She was given Meloxicam and Cymbalta. (Ex. JE8, p. 6) On May 11, 2016, Dr. Miller found "no swelling" and "no visible signs of problems," and "[g]ood strength in her calf and . . . in dorsi and plantar flexion." (Ex. JE8, p. 8) He described claimant's complaints of pain as having an "unclear etiology," but stated that it appeared "to be primarily mechanical" in his view. (Id.) Claimant continued to treat with Dr. Miller, who ruled out CRPS and stated that the pain was not impacting her walking or mobility, and her range of motion was full. (Ex. JE8, pp. 10-11, 13) He placed her at MMI on March 15, 2017. (Ex. JE8, p. 14)

Claimant was seen at the emergency room of Finley Hospital on August 16, 2016, complaining of increased left leg/foot pain and slight swelling in her calf. An x-ray revealed no DVT and she was released. (Ex. 9)

Dr. Miller at the pain clinic had suggested acupuncture, and claimant was seen at Elements Acupuncture several times in August and September, 2016. (Ex. 10) In September, 2016, claimant was reporting that her condition was not getting any better or worse. (Ex. JE10, p. 10) In an undated letter, written to claimant's counsel, apparently in response to a January 19, 2017 letter, the acupuncturist, Joel Thielen, recommended a referral back to a pain clinic. (Ex. JE10, p. 12)

About one year later, on September 28, 2017, Dr. Hunt authored a letter stating that claimant was observed to stand and sit without difficulty. She climbed on and off the exam table without assistance. She had a normal gait. She complained of new left thigh and buttock pain that began about two years after the work injury, which Dr. Hunt did not believe was related to the original work injury. (Ex. JE2, pp. 49, 50)

Concerning the situs of the physical injury, the 2 percent impairment assigned by Dr. Field and agreed to by Dr. Taylor was for the indention in claimant's left lower leg from the injury. (Ex. JE6, p. 2) The rating was assigned to the body as a whole based on Table 8-2 of the AMA Guides, which addresses skin disorders. I find that there is no credible evidence that the physical injury extended beyond the left lower extremity and into the body as a whole. Therefore, the 2 percent impairment to the whole person should be converted to a lower extremity impairment, which is 4 to 6 percent pursuant to Table 17-3, page 527 of the AMA Guides. This conversion to the lower extremity impairment is supported by the fact that the indentation in the skin, is unlike other skin disorders, such as psoriasis, dermatitis, latex allergy or eczema, which can affect

multiple areas of the body, come and go in severity and move from one location on the body to another. Rather, the indentation on claimant's left lower leg is in a fixed position and does not impact physical function of any other part of claimant's body beyond the left lower leg. Further, Dr. Field stated that even with this indentation, claimant has no functional loss in her leg and the impairment rating is for the cosmetic injury only. I find the physical injury is limited to claimant's left lower leg.

Claimant described sensitivity in the foot. Dr. Field found no neurologic component. Dr. Taylor assigned impairment for the paresthesia/dysesthesia described by claimant over the top of the left foot, despite an "unremarkable" sensory examination, which seems contradictory to the undersigned. (Ex. 2, p. 6) I therefore accept the permanent impairment assigned by Dr. Field of 2 percent to the whole person due to the cosmetic change of the indentation in claimant's lower left leg and reject any further permanent impairment. I convert the 2 percent to the whole person to 5 percent of the lower extremity, which is 11 weeks of benefits. I select 5 percent as the mid-point between 4 and 6 percent as found at Table 17-3, page 527 of the AMA Guides, finding no compelling reason to assess the rating at the highest or lowest part of the available range.

On November 17, 2016, claimant was seen by Dr. Brooke of Psi Psychological Services for the purpose of an independent psychological examination at the request of defendant. (Ex. JE11) Dr. Brooke interviewed claimant and she completed the MMPI-2. He reviewed medical records, claimant's deposition and her answers to interrogatories. He concluded that claimant "has a long standing dysthymic disorder which was briefly exacerbated by her work injury in 2015," but that claimant "is at her premorbid level of functioning and there are no work restrictions from a psychological point of view due to her 2015 work injury." (Ex. JE11, p. 3) Claimant "cooperated fully" during the exam. (Ex. JE11, p. 5) Dr. Brooke recommended ongoing psychotherapy and occasional psychiatric input. (Ex. JE11, p. 7) He later clarified that this recommended treatment is "not causally related to her March 2015 work injury." (Ex. JE11, p. 10)

On January 10, 2017 and January 24, 2017, claimant visited Summit Outpatient. (Ex. JE12) She described hurting her leg on the job, no longer being able to do the work and quitting. (Ex. JE12, p. 3) She testified that she sought out this appointment because she was crying all the time and wanted help. She testified that she stopped going to this clinic because there was no one that she could talk with, and all they did was prescribe medication. Although there are specific diagnoses stated in the records in reference to the DSM-5, it is not clear what criteria were relied upon to arrive at those diagnoses. Also, it is unclear who made the diagnoses and who prepared the records or met with claimant. The interviewer's name, education, training and experience are unknown. Also, claimant testified that she did not disclose to the providers at Summit, that she had been a victim of what she previously described as an attempted rape and murder in 2012. Summit noted that her psychiatric history was "unremarkable." (Ex. JE12, p. 3) The undersigned gives these records little weight.

On March 30, 2017, claimant was seen at Hillcrest Family Services for a psychological assessment. She expressed "current suicidal ideation." (Ex. JE13, p. 1) She stated that she was not working at that time due to pain. (Ex. JE13, p. 3) She reported a "history of depression, but states it is 'getting worse." (Ex. JE13, p. 6) She reported pain in her leg from her work injury in 2015. (Ex. JE13, pp. 6-7) She reported that the incident she described as her neighbor attempting to rape and kill her while wielding a knife "has not affected her too much, nor did it have an impact on her depression/anxiety." (Ex. JE13, p. 7) She also previously reported to Dr. Brooke on November 17, 2016, that concerning this incident, she never felt she was in danger despite scuffling with the attacker and escaping out of a bedroom window. (Ex. JE11, p. 6) It is difficult for the undersigned to reconcile the notion that this incident did not affect her too much with the repeated mention of this incident throughout the records, the magnitude of the event being a self-described attempted rape and murder and the prescription medication that claimant received after the incident.

Claimant described a "falling out" with her father about one year before she saw Dr. Brooke in November, 2016. (Ex. JE11, p. 6) She testified that the breakdown of her relationship with her father was not a cause of stress for her. This seems counterintuitive to the undersigned. She also reported to Hillcrest Family Services on March 30, 2017, that her relationship with her father has been "crappy for a year and a half." (Ex. JE13, p. 6)

Claimant testified that living with her brother has included kicking him out of the residence and then having him come back. She said that this "did not cause me stress." (Testimony) This is difficult for the undersigned to understand that this confrontation and the changes in her living situation would cause <u>no</u> stress.

Claimant had ongoing therapy at Hillcrest Family Services. On April 12, 2017, claimant reported that she was not working and the pain kept her up at night. She reported that she cannot stand, sit or lay down very long due to the pain in her leg, and that her "mood was great before her leg got hurt." (Ex. JE 13, p. 8) However, on May 5, 2017, her mood was described as better than it had been in previous sessions. (Ex. JE13, p. 11) Her mood in other sessions was regularly described as "depressed." (Ex. JE13) Claimant described multiple stressors in addition to her pain, including trying to help her mother, who she described as a hoarder, move to a new home and the anger she felt toward her brother, whom she lives with. (Ex. JE13, p. 15) Some progress was noted by claimant's increased involvement in meaningful activities. (Ex. JE13, p. 18)

On September 15, 2017, Jennifer Gladon, LMSW, Mental Health Therapist of Hillcrest Family Services authored a letter to claimant's counsel stating that claimant's diagnoses included: 1) posttraumatic stress disorder (PTSD), chronic; 2) major depressive disorder, recurrent episode, moderate; and, 3) generalized anxiety disorder. She stated that claimant reported intermittent depression and anxiety prior to her work-related injury that is more persistent and severe post-injury. Claimant also reported to Ms. Gladon that the PTSD symptoms were not present prior to the injury and "based on

what Ms. Bennett has shared . . . the development of Post-traumatic stress disorder caused by the work-related injury has greatly exacerbated pre-existing mental health issues." (Ex. JE13, p. 27) Ms. Gladon stated that at that time, she was "not clear on the mental health prognosis for this work-related mental health injury." (Id.) Ms. Gladon stated that if claimant was able to work, it would "help with feelings of worthlessness, as well as decrease anxiety related to finances." (Id.) Ms. Gladon did not affirmatively state that claimant's condition was permanent and did not assign any work restrictions.

After this letter was written, claimant continued to receive therapy at Hillcrest Family Services with Ms. Gladon. The last progress note from November 30, 2017, indicates a significant apparent change of claimant's diagnoses to: 1) Major depressive disorder, recurrent, moderate; 2) Generalized anxiety disorder; and, 3) Cannabis use disorder. (Ex. JE13, p. 45) Notably absent from the diagnoses is posttraumatic stress disorder. Because Ms. Gladon had previously stated that the work injury caused PTSD, and the PTSD aggravated the preexisting mental health conditions, and because that PTSD diagnosis was no longer in place in the last record, the September 15, 2017 letter from Ms. Gladon is given less weight.

I find that claimant has a history of depression and anxiety that pre-dates the work injury herein. I find, based on the opinions of Dr. Brooke and Ms. Gladon, that the March 4, 2015, work injury exacerbated claimant's preexisting mental condition. I further find that based on the most recent diagnoses from Hillcrest Family Services, which excluded PTSD and the opinion of Dr. Brooke, that the exacerbation was temporary and did not lead to a permanent worsening of her condition or any permanent impairment.

5) Current Condition

Claimant testified that she has continued pain in her left lower leg, mostly on the sides. She finds that standing increases the pain. (Testimony) She described sensitivity to touch all over the lower and upper area in her leg and stated that her pain levels range from 3 to 8/10. She stated that she has pain in the top of her left foot ranging from 0 to 5/10 and she had daily tingling in her toes. Concerning the indentation on claimant's left lower leg that was described as a disfigurement and was the basis of the impairment rating assigned by Dr. Field, which Dr. Taylor agreed with, at the hearing, claimant stated that she could still feel it, but it was no longer visible. (Testimony)

At the time of the hearing, claimant stated that she walks her dogs four times per day and goes to the gym two to three times per week where she often rides a stationary bike. (Testimony)

6) Additional Findings

On May 22, 2015, claimant was noted to have been a no-call, no-show since May 14, 2015 for three consecutive days at the defendant employer and was deemed to have abandoned her job. (Ex. A, p. 4)

On May 15, 2016, claimant wrote a letter to the defendant employer stating in part:

> I'm asking for a different position within the plant. I can no longer deal with the pressure and aggravation of Spam Singles Fill. I don't want to leave Progressive Processing but if you can't accommodate my request by Friday May 24, 2015 that will be my last day.

(Ex. A, p. 5) It is significant to the undersigned that claimant does not mention in her letter anything about her work injury, nor any pain in her leg, or any particular physical difficulty that she is having doing her job.

At the time of the hearing, claimant had applied for Social Security Disability, which was denied and has been appealed. (Testimony)

Claimant agreed that but for voluntarily quitting her job with the defendant employer on May 15, 2015, she could have continued her employment.

Concerning the unauthorized medical care that claimant received, I find that the same was helpful in treating her conditions and that the same was reasonable and beneficial under the totality of the circumstances because the treatment provided a more favorable medical outcome than would likely have been achieved in its absence.

I find that claimant was paid PPD benefits on November 16, 2015 for the period of October 1, 2015 through November 11, 2015 and weekly thereafter through January 13, 2016. (Attachment to Hearing Report)

The parties have stipulated that if any permanent partial disability benefits are awarded, the commencement date for such benefits is March 5, 2015. (Hearing Report, p. 1) The parties have also stipulated that claimant was paid 15 weeks of permanent partial disability benefits at the rate of $526.93, prior to the hearing and that the correct rate of weekly benefits is $451.84. (Hearing Report, pp.1-2)

CONCLUSIONS OF LAW

1. Whether the injury is limited to a scheduled member or involves the body as a whole, and the extent of permanent impairment, if any.

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).

When an expert opinion is based upon an incomplete history, the opinion is not necessarily binding upon the commissioner. 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 & Casualty Co., 526 N.W.2d 845 (Iowa 1995).

I have found above based on the opinions of both Dr. Brooke and Ms. Gladon that as a result of the March 4, 2015 work injury, claimant sustained a temporary exacerbation of her prior mental condition, which did not result in any permanent impairment.

I now consider the physical injury.

An injury to a scheduled member may, because of after effects or compensatory change, result in permanent impairment of the body as a whole. Such impairment may in turn be the basis for a rating of industrial disability. It is the anatomical situs of the permanent injury or impairment which determines whether the schedules in section 85.34(2)(a) - (t) are applied. Lauhoff Grain v. McIntosh, 395 N.W.2d 834 (Iowa 1986); Blacksmith v. All-American, Inc., 290 N.W.2d 348 (Iowa 1980); Dailey v. Pooley Lumber Co., 233 Iowa 758, 10 N.W.2d 569 (1943). Soukup v. Shores Co., 222 Iowa 272, 268 N.W. 598 (1936).

I have found above that the situs of the physical injury in this case is limited to the left lower leg and does not involve the whole person for the reasons there stated. I have accepted the opinion of Dr. Field and determined that claimant sustained a 5 percent permanent impairment to her left leg, which is 11 weeks of permanent partial disability benefits.

However, the parties stipulated that claimant was previously paid 15 weeks of permanent partial disability benefits prior to the hearing.

2. Whether the work injury is a cause of temporary disability during the period of May 15, 2015 through August 30, 2015 and a running award from November 16, 2015 forward.

There may be more than one healing period for a single injury. Waldinger Corp. v. Mettler, 817 N.W.2d 1, 8 (Iowa 2012).

Healing period benefits are payable to an employee who has sustained a permanent partial disability "beginning on the first day of disability after the injury, and until the employee has returned to work or it is medically indicated that significant improvement from the injury is not anticipated or until the employee is medically capable of returning to employment substantially similar to the employment in which the employee was engaged at the time of injury, whichever occurs first." Iowa Code section 85.34(1).

Healing period compensation describes temporary workers' compensation weekly benefits that precede an allowance of permanent partial disability benefits. Ellingson v. Fleetguard, Inc., 599 N.W.2d 440 (Iowa 1999). Section 85.34(1) provides that healing period benefits are payable to an injured worker who has suffered permanent partial disability until the first to occur of three events. These are: (1) the worker has returned to work; (2) the worker medically is capable of returning to substantially similar employment; or (3) the worker has achieved maximum medical recovery. Maximum medical recovery is achieved when healing is complete and the extent of permanent disability can be determined. Armstrong Tire & Rubber Co. v. Kubli, Iowa App., 312 N.W.2d 60 (Iowa 1981). Neither maintenance medical care nor an employee's continuing to have pain or other symptoms necessarily prolongs the healing period.

When an injured worker has been unable to work during a period of recuperation from an injury that did not produce permanent disability, the worker is entitled to temporary total disability benefits during the time the worker is disabled by the injury. Those benefits are payable until the employee has returned to work, or is medically capable of returning to work substantially similar to the work performed at the time of injury. Section 85.33(1).

Claimant was injured on March 4, 2015. She was returned to work with restrictions on the following day. She was released to return to work without restrictions on April 17, 2015. Claimant continued to work without missing any time until she voluntarily quit her job on May 15, 2015. At that time she was under no work restrictions.

Claimant demonstrated her ability to return to work after the injury and she, in fact, returned to work causing a cessation of healing period benefits. She was not later taken off work by any provider. Significantly, claimant's resignation letter, which is handwritten and described her feelings about the job and her aggravation with her job, does not mention the injury or any physical difficulties that she had with her job. Further, there is no mention of claimant's aggravation being related in any way to her work injury.

Claimant has failed to carry her burden of proof that she is entitled to any additional healing period benefits.

3. Medical Expenses.

The next issue for determination is whether claimant is entitled to payment of medical expenses contained in Exhibit 23.

The employer shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance, and hospital services and supplies for all conditions compensable under the workers' compensation law. The employer shall also allow reasonable and necessary transportation expenses incurred for those services. The employer has the right to choose the provider of care, except where the employer has denied liability for the injury. Section 85.27. Holbert v. Townsend Engineering Co., Thirty-second Biennial Report of the Industrial Commissioner 78 (Review-Reopening October 16, 1975).

Prudent persons customarily rely upon their physician's recommendation for medical care without expressly asking the physician if that care is reasonable. Proof of reasonableness and necessity of the treatment can be based on the injured person's testimony. Sister M. Benedict v. St. Mary's Corp., 255 Iowa 847, 124 N.W.2d 548 (1963).

It is said that "actions speak louder than words." When a licensed physician prescribes and actually provides a course of treatment, doing so manifests the physician's opinion that the treatment being provided is reasonable. A physician practices medicine under standards of professional competence and ethics. Knowingly providing unreasonable care would likely violate those standards. Actually providing care is a nonverbal manifestation that the physician considers the care actually provided to be reasonable. A verbal expression of that professional opinion is not legally mandated in a workers' compensation proceeding to support a finding that the care provided was reasonable. The success, or lack thereof, of the care provided is evidence that can be considered when deciding the issue of reasonableness of the care. A treating physician's conduct in actually providing care is a manifestation of the physician's opinion that the care provided is reasonable and creates an inference that can support a finding of reasonableness. Jones v. United Gypsum, File No. 1254118 (App. May 2002); Kleinman v. BMS Contract Services, Ltd., File No. 1019099 (App. September 1995); McClellon v. Iowa Southern Utilities, File No. 894090 (App. January 1992). This inference also applies to the reasonableness of the fees actually charged for that treatment.

Claimant is entitled to an order of reimbursement only if he has paid treatment costs; otherwise, to an order directing the responsible defendants to make payments directly to the provider. See, Krohn v. State, 420 N.W.2d 463 (Iowa 1988). Defendants should also pay any lawful late payment fees imposed by providers. Laughlin v. IBP, Inc., File No. 1020226 (App., February 27, 1995)

The Court in Bell Bros. stated:

> We do not believe the statute can be narrowly construed to foreclose all claims by an employee for unauthorized alternative medical care solely because the care was unauthorized. Instead, the duty of the employer to furnish reasonable medical care supports all claims for care by an employee that are reasonable under the totality of the circumstances, even when the employee obtains unauthorized care, upon proof by a preponderance of the evidence that such care was reasonable and beneficial. In this context, unauthorized medical care is beneficial if it provides a more favorable medical outcome than would likely have been achieved by the care authorized by the employer.

Bell Bros. Heating and Air Conditioning v. Gwinn, 779 N.W.2d 193, 206 (Iowa 2010)

I have found above that the medical care claimant received was helpful in treating her conditions and that the same was reasonable and beneficial under the totality of the circumstances because the treatment provided a more favorable medical outcome than would likely have been achieved in its absence. I therefore conclude that defendants should be obligated to pay the medical expenses and related mileage identified in the attachment to the hearing report.

4. Alternate Medical Care.

The employer shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance and hospital services and supplies for all conditions compensable under the workers' compensation law. The employer shall also allow reasonable and necessary transportation expenses incurred for those services. The employer has the right to choose the provider of care, except where the employer has denied liability for the injury. Section 85.27. Holbert v. Townsend Engineering Co., Thirty-second Biennial Report of the Industrial Commissioner 78 (Review-Reopening October 16, 1975).

By challenging the employer's choice of treatment – and seeking alternate care – claimant assumes the burden of proving the authorized care is unreasonable. See Iowa R. App. P 14(f)(5); Bell Bros. Heating v. Gwinn, 779 N.W.2d 193, 209 (Iowa 2010); Long v. Roberts Dairy Co., 528 N.W.2d 122 (Iowa 1995). Determining what care is reasonable under the statute is a question of fact. Long v. Roberts Dairy Co., 528 N.W.2d 122 (Iowa 1995). The employer's obligation turns on the question of reasonable necessity, not desirability. Id.; Harned v. Farmland Foods, Inc., 331 N.W.2d 98 (Iowa 1983).

An application for alternate medical care is not automatically sustained because claimant is dissatisfied with the care he has been receiving. Mere dissatisfaction with the medical care is not ample grounds for granting an application for alternate medical care. Rather, the claimant must show that the care was not offered promptly, was not

reasonably suited to treat the injury, or that the care was unduly inconvenient for the claimant. Long v. Roberts Dairy Co., 528 N.W.2d 122 (Iowa 1995).

In this case, claimant seeks an order for alternate care for an MRI and EMG of the left leg based on the IME of Dr. Taylor. Claimant also seeks an MRI of the low back based on the opinion of Dr. Miller and authorization of Dr. Meyer at the Mercy Pain Clinic, per the referral of the acupuncturist, Joel Thielen.

Concerning the MRI and EMG, I note that Dr. Taylor stated that "it is unlikely that an MRI would alter her plan of care although it could be considered," and that an "EMG could also be considered." (Ex. 2, p. 8) I do not read these to be specific recommendations for medical care, but possible options without an expectation of reaping useful data. I conclude that claimant has failed to carry her burden of proof that the care the defendant has provided, which has been extensive, is unreasonable such that the MRI and EMG are warranted.

Concerning the MRI of the low back, I note that Dr. Miller's mention of the MRI is in the following context:

> The injury appears to have resolved. She may have a secondary pathology and this should be checked out through her family physician. If necessary in evaluation they may wish to order an MRI to see if she might have a sciatic referral given the pain in the thigh as well.

(Ex. JE8, p. 13) This is understood by the undersigned to be a statement that the work injury is resolved and that any potential need for the MRI is not related to the work injury. I therefore conclude that claimant has failed to carry her burden of proof that the care the defendant has provided is unreasonable such that the MRI of her back is warranted.

Concerning the referral by the acupuncturist, Joel Thielen, I note that he was an authorized provider who made a specific referral to Dr. Meyer at the Mercy Pain Clinic. (Ex. JE10, p. 12) Defendant has not authorized this referral.

An employer's right to select the provider of medical treatment to an injured worker does not include the right to determine how an injured worker should be diagnosed, evaluated, treated, or other matters of professional medical judgment. Assmann v. Blue Star Foods, File No. 866389 (Declaratory Ruling, May 19, 1988).

The referral by the authorized provider, Joel Thielen to Dr. Meyer at the Mercy Pain Clinic, made Dr. Meyer an authorized provider. Defendant is obligated to provide this authorization.

5. Penalty.

Claimant seeks penalty for non-payment of healing period benefits. However, I have concluded above that claimant, who returned to work the day after her injury and

missed no time from work due to her injury, is not entitled to any healing period. Therefore, this claim is moot.

Claimant also seeks penalty for late payment of permanent partial disability benefits. Claimant asserts that defendants paid permanent partial disability benefits in a lump sum on November 16, 2015, for the period of October 1, 2015 through November 11, 2015. Thereafter, weekly benefits were paid through January 13, 2016. Claimant asserts that penalty benefits should relate back to March 5, 2015, the day that claimant returned to work following the injury, which claimant agreed was the correct commencement date for PPD benefits at the hearing. I agree that March 5, 2016 is the correct commencement date for PPD benefits.

If weekly compensation benefits are not fully paid when due, section 86.13 requires that additional benefits be awarded unless the employer shows reasonable cause or excuse for the delay or denial. Robbennolt v. Snap-on Tools Corp., 555 N.W.2d 229 (Iowa 1996).

Delay attributable to the time required to perform a reasonable investigation is not unreasonable. Kiesecker v. Webster City Meats, Inc., 528 N.W.2d 109 (Iowa 1995).

It also is not unreasonable to deny a claim when a good faith issue of law or fact makes the employer's liability fairly debatable. An issue of law is fairly debatable if viable arguments exist in favor of each party. Covia v. Robinson, 507 N.W.2d 411 (Iowa 1993). An issue of fact is fairly debatable if substantial evidence exists which would support a finding favorable to the employer. Gilbert v. USF Holland, Inc., 637 N.W.2d 194 (Iowa 2001).

An employer's bare assertion that a claim is fairly debatable is insufficient to avoid imposition of a penalty. The employer must assert facts upon which the commissioner could reasonably find that the claim was "fairly debatable." Meyers v. Holiday Express Corp., 557 N.W.2d 502 (Iowa 1996).

If the employer fails to show reasonable cause or excuse for the delay or denial, the commissioner shall impose a penalty in an amount up to 50 percent of the amount unreasonably delayed or denied. Christensen v. Snap-on Tools Corp., 554 N.W.2d 254 (Iowa 1996). The factors to be considered in determining the amount of the penalty include the length of the delay, the number of delays, the information available to the employer and the employer's past record of penalties. Robbennolt, 555 N.W.2d at 238.

I conclude that the PPD benefits were paid late. The first payment was made about one and one half months after Dr. Field issued his impairment rating on October 1, 2015. (Ex. JE6, p. 5) The benefits were paid from the date of the rating forward, even though they had all accrued at that time based on the proper conversion date of March 5, 2015. I further conclude that defendants have failed to articulate a reasonable cause or excuse for the late payments.

I have concluded above that claimant is entitled to PPD benefits of 5 percent of the leg, which is 11 weeks. All of those 11 weeks were paid late. I note that there was no evidence presented of defendant's penalty history. Therefore, based on the amount delayed and the length of the delay, I find that defendant should be obligated to pay a penalty of approximately 30 percent of the 11 weeks that was delayed.

The parties have stipulated that the correct weekly rate is $451.84. (Hearing Report) This amount multiplied by 11 weeks is $4,970.24, 30 percent of which is approximately $1,490.00.

6. Costs.

The final issue is costs. I note that at the outset of the hearing, the issue of the IME reimbursement under Iowa Code section 85.39 was resolved between the parties. Therefore, the same is not addressed in this decision either under Iowa Code section 85.39 or as a potential cost. That leaves only $172.50 in costs that claimant seeks representing the filing fee and the cost of the transcript for claimant's deposition. I exercise my discretion and assess costs against the defendant in this matter in the sum of $172.50, as described above.

ORDER

THEREFORE, IT IS ORDERED:

Defendant shall pay claimant permanent partial disability benefits of eleven (11) weeks, beginning on the stipulated commencement date of March 5, 2015, until all benefits are paid in full. However, defendant shall be entitled to credit for all weekly benefits paid to date. The parties have stipulated that defendant is entitled to a credit of fifteen (15) weeks.

All weekly benefits shall be paid at the stipulated rate of four hundred fifty-one and 84/100 dollars ($451.84) per week.

All accrued benefits shall be paid in a lump sum, if any.

Defendant shall pay accrued weekly benefits in a lump sum together with interest at the rate of ten (10) percent for all weekly benefits payable and not paid when due which accrued before July 1, 2017, and all interest on past due weekly compensation benefits accruing on or after July 1, 2017, shall be payable at an annual rate equal to the one (1) year treasury constant maturity published by the federal reserve in the most recent H15 report settled as of the date of injury, plus two (2) percent. See Gamble v. AG Leader Technology File No. 5054686 (App. Apr. 24, 2018).

Defendant shall reimburse claimant for his out-of-pocket medical expenses set forth in the attachment to the hearing report, including mileage and shall pay, reimburse, and/or otherwise satisfy all remaining medical expenses contained therein.

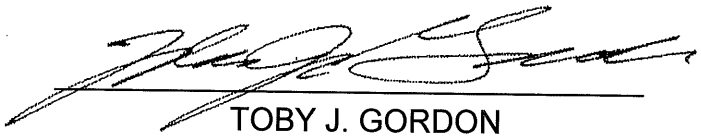
Defendant shall promptly authorize and pay for medical care for claimant consisting of the referral by the authorized provider, Joel Thielen to Dr. Meyer at the Mercy Pain Clinic.

Defendant shall pay penalty benefits to claimant in the amount of one thousand four hundred ninety and 00/100 dollars ($1,490.00), which is approximately thirty (30) percent of the amount delayed.

Defendant shall pay costs in the amount of one hundred seventy-two and 50/100 dollars ($172.50) as set forth above.

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

Signed and filed this 17th day of May, 2018.



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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.