BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

THERESA ELY,	FILED	
Claimant,	MAR 06 2017	
vs.	WORKERS COMPENSATION	File No. 5054644
ACH FOOD COMPANIES, INC.,		ARBITRATION DECISION
Employer,		
and		
SENTRY INSURANCE,		
Insurance Carrier, Defendants.		Head Note Nos.: 1803, 2500

STATEMENT OF THE CASE

This is a proceeding in arbitration. The contested case was initiated when claimant, Theresa Ely, filed her original notice and petition with the Iowa Division of Workers' Compensation. The petition was filed on October 12, 2015. Claimant alleged she sustained a work-related injury on September 24, 2014. (Original notice and petition.)

For purposes of workers' compensation, ACH Food Companies, Inc., defendant, is insured by Sentry Insurance, defendant. Defendants filed their answer on January 19, 2016. They denied the occurrence of the work injury.

The hearing administrator scheduled the case for hearing on November 17, 2016. The hearing took place in Des Moines, Iowa at the Iowa Workforce Development Building. The undersigned appointed Ms. Emily Maiers as the certified shorthand reporter. She is the official custodian of the records and notes.

Claimant testified on her own behalf. Defendants elected not to call any witnesses at the hearing. The parties offered exhibits. Claimant offered exhibits marked 1 through 7. Defendants offered exhibits marked A through K. All proffered exhibits were admitted as evidence in the case.

The original transcript was filed on November 29, 2016. Post-hearing briefs were filed on December 7, 2016. The case was deemed fully submitted on that date.

STIPULATIONS

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

1. There was the existence of an employer-employee relationship at the time of the alleged injury;
2. Temporary benefits are no longer an issue;
3. The parties agree if permanency is found, the permanency is an industrial disability;
4. The parties agree, if a permanent work injury is determined, claimant reached maximum medical improvement on June 17, 2015;
5. The parties agree, the weekly benefit rate is $545.35;
6. Defendants have waived any affirmative defenses they may have had available;
7. Prior to the date of the hearing, defendants paid claimant zero weeks of permanent partial disability benefits; and
8. The parties agree certain costs that are detailed were paid by claimant.

ISSUES

The issues presented are:

1. Did claimant sustain an injury on September 24, 2014 which arose out of and in the course of her employment?
2. Is the alleged work injury a cause of permanent disability?
3. Is claimant entitled to permanent partial disability benefits?
4. If so, to what extent is claimant's permanent partial disability?
5. Is claimant entitled to medical costs in the form of prescription costs and medical mileage?
6. For which costs are defendants liable?

FINDINGS OF FACT

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

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

Claimant is 49 years old and single. She is very pleasant and was an articulate witness during her hearing. She has lived in Boone, Iowa for the past 26 years. She was raised in Carroll, Iowa and graduated from Kemper High School. She attended Ellsworth Community College and received a certificate in Human Resources. Later, she enrolled at Des Moines Area Community College. She obtained an associate of science degree in medical laboratory technology. Claimant received her medical laboratory certificate in October of 2005. (Exhibit J, page 4)

Claimant has held a variety of positions since she was in high school. She worked as a waitress and bartender for her father in his restaurant. She had other waitressing jobs too. Then claimant worked as a cashier in a grocery store. The job involved some heavy lifting. Later, claimant worked full-time at McDonald's restaurant as a counter worker. From McDonald's restaurant claimant went to Archway cookie factory. Claimant packaged cookies. There was no heavy lifting involved in the job. Claimant earned $11.15 per hour. Claimant left the cookie factory and became manager of the Health and Beauty Care Department at the local Hy-Vee Store. Claimant worked there for three years. Next, claimant worked at Gates Manufacturing. Claimant worked only one year because the plant closed. Claimant followed her employment at Gates with employment at Wal-Mart as a stocker.

Claimant left the employ of Wal-Mart to take a position with ACH Food Companies, Inc., d/b/a Tone's Spices. Initially, claimant was hired as an order picker in the warehouse. She was assigned to place cases of spices on pallets. The job required twisting, bending, pulling and throwing cases onto conveyor belts too.

At the time of the arbitration hearing, claimant worked in the "West Room." Her duties included operating a machine where product is placed into bottles and then packaged. The job is lighter in nature than the order picker position. Claimant's shift is from 7:00 a.m. to 3:30 p.m.

Claimant testified she has had a long history of back pain. In 2001, claimant underwent surgery for a back condition by a Dr. Green. (Transcript, page 21) Claimant testified subsequent to the surgery, she was able to continue to lift. She had no symptoms and no restrictions. (Tr., p. 21) There are medical records to support intermittent back problems between 2001 and the alleged date of injury on September 24, 2014.

On June 15, 2006, claimant presented to Boone County Family Medicine with complaints of low back pain. (Exhibit A, p. 1) Claimant reported she was better than she had been on May 12, 2006. (Ex. A, p. 1) Claimant was taking ibuprofen for her symptoms. (Ex. A, p. 1)

When claimant returned to the family medical clinic on October 5, 2006, her back pain had improved considerably. (Ex. A, p. 1) On November 7, 2007, claimant returned to the same clinic with complaints of severe back pain and low hip area pain. Claimant reported the pain was constant. The medical provider prescribed a muscle relaxant. (Ex. A, p. 1)

Several years later, claimant was involved in a sledding accident. (Ex. A, p. 2) She sustained bruised ribs and back spasms. (Ex. A, p. 2) Frank S. Downs, M.D., prescribed Flexeril. (Ex. A, p. 2)

On September 1, 2010, claimant presented to Boone County Family Medicine. She complained of pain on the inside of her thigh. (Ex. A, p. 3) Claimant reported it felt as if she had pulled muscles on her inner thighs. (Ex. A, p. 3) Claimant reported increased symptoms when she was walking but not when she was sitting. Claimant also described increased pain when she had to lift. (Ex. A, p. 3) Kris Shaver, PA-C, diagnosed claimant with "[m]yalgias." (Ex. A, p. 3) The physician's assistant prescribed 800 mg of Skelaxin to take every eight hours. (Ex. A, p. 3)

Joshua Anderson, D.O., examined claimant on March 12, 2013 for low back pain. (Ex. A, p. 4) Claimant reported she had been shoveling snow and experienced some significant right-sided back pain. (Ex. A, p. 4) Dr. Anderson diagnosed claimant with: "[a]cute low back pain with spasms." (Ex. A, p. 4) Dr. Anderson prescribed the following:

> Naproxen 500 mg,
>
> Vicodin 5/325 every 12 hours as needed,
>
> Skelaxin 800 mg 3 times a day as needed,
>
> Diazepam 5 mg 2 times per day as needed.

(Ex. A, p. 4)

On April 2, 2013, claimant sought chiropractic care at Montag Chiropractic Offices in Boone, Iowa. (Ex. B, p. 1) The chiropractor treated claimant for low back pain and right thigh pain. (Ex. B, p. 1) Claimant sought other chiropractic treatments on April 6, 2013; April 15, 2013; April 30, 2013; May 18, 2013; August 20, 2013; March 31, 2014; and April 7, 2014. (Ex. B)

On September 24, 2013, claimant again presented to Boone County Family Medicine. Claimant's medical history was recorded by Nicole Golber, PA-C. The physician's assistant wrote:

> Patient comes into clinic secondary to upper leg pain. Patient complains of pain progressively worsening over the past week. Patient works at Tones' [*sic*] spice warehouse and admits she does a lot of lifting (anywhere from 1-40 lbs) and stands all day long. Patient states she has pain especially in the Right upper leg, feels like it may start in the back and concentrates in the groin and upper thigh. Patient states last week her Left thigh was bothering her but since talking with a physical therapist at work and doing stretching exercises he recommended, the left thigh pain is much improved. She states on teh [*sic*] right, the pain is starting to radiate down to her knee at times as well. She states today she had to do a lot of movement up and down a step and her right side is really bothering her. She denies any numbness/tingling sensation. She also has a history of discectomy L4-L5 in 2001.

(Ex. A, p. 7)

The physician's assistant suspected there was strain to the quadriceps. (Ex. A, p. 8) Muscle relaxers, anti-inflammatory medications, and stretching were prescribed. (Ex. A, p. 8) Two x-rays of the right hip were taken. The results were normal. (Ex. A, p. 9)

On April 2, 2014, claimant presented to Jason R. Sheffler, D.O., with complaints of back pain. Claimant suspected the pain was work-related although she had not discussed her condition with a member of management. Claimant denied a specific injury or fall. (Ex. A, p. 10) Claimant rated her pain on an analog scale at 7 out of 10 with 10 being the most excruciating pain imaginable. (Ex. A, p. 10) Claimant reported she had to throw packages of spices onto a conveyor belt at work the previous Friday. Thereafter, claimant experienced a shooting pain from her low back down into the left buttock. (Ex. A, p. 12) Dr. Sheffler diagnosed claimant with "[a]cute low back pain." (Ex. A, p. 13) The physician prescribed hydrocodone for pain management. (Ex. A, p. 13)

Claimant returned to the clinic on the succeeding day. She indicated her pain medication was not working. (Ex. A, p. 14) Dr. Anderson changed claimant's prescriptions and provided a note for claimant to be off work. (Ex. A, p. 18)

On April 7, 2014, claimant once again returned to the same medical clinic. Claimant thought she was feeling better after having taken prednisone. She reported no shooting pain down her legs. Naproxen was prescribed. Claimant was engaged in physical therapy. (Ex. A, pp. 21-22) One week later, claimant reported no pain. (Ex. A, p. 26)

Claimant sought treatment for right leg pain at Mercy North Family Practice and Urgent Care on August 28, 2014. (Ex. C, p. 1) Claimant reported she had experienced right thigh pain for two years. Denis Reavis, D.O., diagnosed claimant with "[c]hronic leg pain." Hydrocodone was prescribed for pain management. (Ex. C, p. 2) Claimant returned to the Mercy Clinic on September 8, 2014 with "right leg/upper thigh pain

without injury." (Ex. C, p. 3) Claimant reported she was not having any back pain. (Ex. C, p. 3) She indicated, she threw out her back "about once a year." (Ex. C, p. 3) Jean Paul, D.O., prescribed 100 mg of gabapentin. (Ex. C, p. 4)

On September 24, 2014, claimant was sent to Methodist Occupational Health and Wellness per the authorization of defendants. (Ex. 3, p. 1) Nicholas O. Bingham, D.O., examined claimant for a new workers' compensation injury. (Ex. 3, p. 1) Claimant reported the following medical history:

> She states that her back has "always hurt." She reports "throwing my back out" about once a year. She gets to where she cannot walk or hardly bend. It lasts a few days. She treats it with medication. The patient states that she had a back surgery (we have learned that this was a right L4-5 hemilaminectomy) in 2001. She states she had good relief until 2 years ago. She could not relate an event to this. This is in contrast with her complaints of "throwing out" her back once a year. She states that her back became painful and she began to have symptoms into her right thigh starting around January. She states that at the end of last year, her department took on extra responsibilities and the workload became harder and she thinks this and repetitive trauma are causing her problems. She traces the area of her right thigh pain as extending from about the femoral canal, down the anterior thigh, and encompassing her kneecap. This became quite problematic and bothered her daily, but her doctor has given her gabapentin to take which has made the problem milder and only intermittent. She complains of back pain at about the L4-5 level and spasm over the entire musculature of the back. She had treated with her own doctor for some time who eventually got an MRI and recommended pain management at that point. However, the doctor, Dr. Jean Paul, decided to back out, feeling that this was related to her work.

(Ex. 3, p. 1)

Dr. Bingham opined he did not have all of claimant's relevant medical records. (Ex. 3, p. 2) Nevertheless, the occupational medical specialist opined:

> P: The patient for now will return back to full duty as before with medications as before. Our medical records are incomplete, and I wish to reverse final determination until that time. The patient suffers from degenerative disk disease and it is possible that her repetitive work has contributed to it, at least to a small degree. The patient denies any acute incident while employed at Tone's. I think that her doctor's plan for a consult with pain management is in order. As far as her thigh symptoms, they seem to cross 3 dermatomes as the anterior thigh is innervated by the L2, L3, and L4 nerve roots. Therefore, I am unclear as to whether this particular problem will be helped at the pain clinic. She does have disease at each of these levels individually, but they have manifested in a rather unusual pattern.

> At this point, I would say that the work-relatedness is "possible." I wish to obtain full medical records before making a final determination.

(Ex. 3, p. 2)

In response to questions posed to Dr. Bingham from Ann Rosenbaum, Medical Case Manager at Encore Unlimited, LLC., the authorized treating physician opined:

> 1. Can you say with a reasonable degree of medical certainty that Ms. Ely's low back pain and leg pain are related to her employment/job duties while employed with ACH Foods?
>
> I can say with reasonable medical certainty that work activities are at least contributing to her low back pain.
>
> 2. Are you able to state within a reasonable degree of medical certainty that Ms. Ely's condition is a result of her work activities, or a result of a personal condition unrelated to her job duties?
>
> I cannot state with certainty that work activities are the sole cause of her condition I think it is likely that work has contributed to the degenerative condition of her spine.
>
> 3. Is it probable that Ms. Ely's employment and job duties resulted in a material aggravation, exacerbation or lighting up of the underlying condition?
>
> Yes.
>
> 4. If Ms. Ely suffered a temporary aggravation to a pre-existing condition, please provide the MMI date? [*sic*]
>
> Unknown.

(Ex. 3, p. 3)

On November 5, 2014, Dr. Bingham sent a detailed report to the case manager, Ms. Rosenbaum. In the report, Dr. Bingham discussed the cause of claimant's back and leg condition. The physician wrote in relevant portion:

> The question remains, however, as to what is causing it and I think her diagnosis is multilevel degenerative joint disease of the lumbar spine. I think that this degenerative change is progressive. I think it has most certainly been aggravated by her continuing use of tobacco. Given the nature of the patient's job, which is moderately heavy and highly repetitive with much bending and twisting, I think it would be hard to say that this has not contributed to the degeneration in her spine. I do, however, feel that the work's contribution to this degeneration is not as damaging as her

> continued tobacco use. As stated above, I think the recommendation of her doctor to be evaluated by the pain clinic for epidural steroid injections is appropriate, although it remains to be seen if it would cure her right anterior hip and thigh problems. Had I been the one ordering the MRI, given the patient's report of posterior superior iliac spine symmetry, I likely would have included the sacroiliac joints in that study. I do think that there is the possibility of chronic sacroiliac joint inflammation contributing to her problem although cannot state that with certainty. I do think that treatment with epidural steroid injection is a legitimate treatment for the patient's current symptomatology which overlies the degenerative condition of her spine in an attempt to bring her back to baseline. I do not, however, think that she will be, ultimately, a one-time visitor to the pain clinic. I think that she has the potential to be a regular user of these services for many years to come.
>
> In closing, I say the patient suffers from degenerative joint disease of the lumbar spine which has been aggravated by her continuous tobacco usage, and although to a lesser degree, her repetitive job duties. I do feel the pain clinic/epidural steroid injections would be an appropriate treatment course. I would be, however, hesitant to recommend any further intervention should these measures fail.

(Ex. 3, pp. 4-5)

On November 20, 2014, claimant visited with Thomas D. Hansen, M.D. The consultation concerned pain management. Claimant voiced concerns with right thigh pain. Dr. Hansen opined the distribution of the thigh pain did not necessarily correspond with claimant's disk herniation at L4-5. (Ex. 4, p. 1) Claimant was referred for physical therapy.

On November 25, 2014, claimant commenced physical therapy at Accelerated Rehabilitation Centers in Ankeny. Claimant provided the following medical history:

> Pt is a 47 y.o. female with c/o R anterior thigh pain which began 2 years ago when she was walking through a turn-style gate at work to get into the plant and got a catch in her anterior thigh. She had right leg x-ray which was negative. Symptoms have progressively been getting worse this past year with work activity and she had a lumbar MRI one month ago which revealed 2 herniated discs. She has not had an injection. She has been taking Gabbapentin [*sic*] and Tramadol and sees pain management at Iowa Clinic.

(Ex. D, p. 1)

Effective December 19, 2014, claimant was released from physical therapy. (Ex. D, pp. 3-4) Claimant informed the physical therapist, there was only "[m]inimal low back or leg pain." (Ex. D, p. 3) Claimant was assessed as having standing lumbar full

range of motion, normal strength, normal hip flexion, abduction with no increase in symptoms. Claimant successfully achieved all of her short and long term goals established by the physical therapists. (Ex. D, pp. 3-4)

Robert L. Broghammer, M.D., MPH, conducted an independent medical examination of claimant on June 8, 2015. (Exhibit E) Dr. Broghammer reviewed medical records and conducted a physical examination of claimant. The evaluating physician found:

> Physical examination revealed a well-developed, well-nourished female who appeared her stated age. Verbal reported height was 4 feet 11 inches. Verbal reported weight was 135 pounds. The worker's lungs were clear to auscultation bilaterally with no wheezes, rales, rubs, or rhonchi. Heart was regular in rate and rhythm with no murmurs, rubs, or gallops. Lower extremities, revealed symmetric and intact patellar reflexes 2+ and symmetric bilaterally. Achilles reflex was 1+ on the left, trace to 1+ on the right. Sensation was intact to both lower extremities. No focal deficits in the L4-L5 and S1 distributions. EHL strength was 5/5 bilaterally. The rest of the lower extremity strength was 5/5 bilaterally, including quadriceps, hamstrings, and gastrocnemius soleus complex as well as tibialis anterior. Color, temperature, and circulation in both lower extremities was [*sic*] within normal limits. Palpation of the worker's lumbar spine did not reveal any tenderness over the bilateral sacroiliac joints. There was no tenderness over the piriformis notches bilaterally and no tenderness of the gluteus medius. She was able to walk on her toes and walk on her heels. She was able to perform a full squat with good recovery. Her gait, station, and posture were preserved.

(Ex. E, p. 9)

Dr. Broghammer diagnosed claimant with the following conditions:

1. Subjective/proven L4-L5 disk herniation status post definitive surgery with Dr. Greene.

2. Spondylosis of the lumbar spine.

3. Chronic idiopathic ongoing right anterior thigh pain.

(Ex. E, p. 9)

With respect to the issue of causation, Dr. Broghammer opined there was no causal connection between claimant's condition and her alleged work injury on September 24, 2014. The evaluating physician wrote in his report:

> Regarding relationship to the alleged injury of January 12, 2012, [*sic*] it is my medical opinion to a reasonable degree of medical certainty that

> there is no evidence of an injury having occurred on January 12, 2012. [*sic*] In fact, there is no evidence of any injury at all occurring from any industrial standpoint. It is quite clear in the medical record that there is no specific work related event and no work related injury. Ms. Ely has had chronic intermittent back pain since at least 2006.
>
> In this regard, I would agree with Dr. Bingham that the worker has had a chronic history of low back pain. I would also agree with Dr. Bingham that it is possible that Ms. Ely's work has caused and continues to cause intermittent ongoing low back pain. I disagree with Dr. Bingham that Ms. Ely's work is a substantial contributing factor to her ongoing subjective complaints. Dr. Bingham does make what I believe is one error in his report in that he believes or relates Ms. Ely's work to the degenerative condition of her spine. In fact, literature reports suggest that activity is beneficial to the lumbar spine. Work activity in and of itself is not associated with disc degeneration (despite popular belief). Studies have shown that workers who are in sedentary type of jobs which involve a lot of sitting are actually at higher risk of disc degeneration. Workers who may exceed the supraphysiologic load of the lumbar spine with extremely heavy manual labor may be at increased risk of spinal disc degeneration, but at current there is no evidence that physical activity or even rigorous physical activity puts one at any type of risk for degeneration of the lumbar spine. Rather, Ms. Ely's spondyloarthropathy represents a personal genetic medical condition unrelated to industrial injury or activities. As such, I believe that Ms. Ely's lumbar condition should be treated outside the auspices of the Worker's [*sic*] Compensation system.

(Ex. E, pp. 9-10)

On November 11, 2015, claimant presented to Todd R. Harbach, M.D., an orthopedic surgeon at Iowa Ortho. (Ex. F, p. 1) Claimant provided the following medical history:

> Theresa is a 48-year-old workers' compensation transfer of care who comes in with low back pain. She has had musculature low back pain since she was 18 years old. History of L4-L5 disckectomy in 2001, which she had relief of pain. She states she had left leg pain at that time; however, the surgery was on the right side. She has had this pain for the last few years, and it got worse January 2014. Today, she is having 100% low back pain with occasional right leg pain. Describes the right leg pain as a catching and stabbing sensation. Bowel and bladder ok. Has been taking gabapentin since 2014 which helps her pain. No injections. Lifting and twisting reproduces her pain. No other medications or positions seem to help her pain. Has done physical therapy with no long-term relief. No routine aerobic activity.

(Ex. F, p. 1)

Dr. Harbach suspected claimant had scar tissue related to her 2001 spinal surgery. (Ex. F, p. 2) Claimant had a follow up appointment on September 25, 2015. Dr. Harbach diagnosed claimant with "advanced spondylosis clinically at L4-L5 where she has had a previous diskectomy." (Ex. F, p. 4) Dr. Harbach placed claimant at maximum medical improvement and the orthopedist released claimant to full duty work. (Ex. F, p. 4)

Claimant exercised her right to an independent medical examination pursuant to Iowa Code section 85.39. On August 9, 2016, Robin L. Sassman, M.D., MPH, reviewed medical records and examined claimant. Dr. Sassman issued her report on October 7, 2016. With respect to the physical examination, Dr. Sassman found:

> She exhibited a very slight limp. She was able to heel and toe walk but did note pain. She was able to squat and recover.

BACK **Range of Motion**	**Flexion**	**Extension**	**Right-Side Bending**	**Left-Side Bending**
Value	30 degrees	10 degrees	20 degrees	10 degrees

> She was nontender to palpation over the lumbar spinous processes. Costovertebral angle testing was negative. Leg circumferences: Right calf 36 cm, left calf 36 cm. Reflexes were 2+/4 at the right patella, left patella and left ankle. She had 1+/4 reflexes at the right ankle. Muscle strength testing was 5/5 bilaterally. Toe flexor and extensor strength was 5/5 bilaterally. Seated leg raising was negative bilaterally.
>
> Sensory examination showed normal sensation in the bilateral lower extremities. Straight leg raising was negative.

Knee Range of motion:

KNEE **Right/Left**	**Flexion**	**Extension**
Value	150/150 degrees	0/0 degrees

Hip range of motion:

HIP **Right/Left**	**Flexion**	**Extension**	**Abduction**	**Adduction**	**Internal Rotation**	**External Rotation**
Value	100/100 degrees	0/0 degrees	40/40 degrees	20/20 degrees	40/40 degrees	50/50 degrees

Ankle/foot range of motion:

ANKLE/FOOT	**Dorsiflexion**	**Plantar Flexion**	**Inversion**	**Eversion**
Right/Left	20/20 degrees	40/40 degrees	20/20 degrees	30/30 degrees

(Ex. 2, pp. 6-8)

Dr. Sassman opined claimant's work was a substantial contributing factor to claimant's low back pain and radicular symptoms. (Ex. 2, p. 8) Dr. Sassman recommended injections for pain management. (Ex. 2, p. 8) Dr. Sassman placed claimant at maximum medical improvement on June 17, 2015. (Ex. 2, p. 9) The evaluating physician rated claimant as having a 17 percent permanent impairment. However, 11 percent was allocated to loss of range of motion and 7 percent was allocated to the prior one level spinal fusion. The spinal fusion was not related to the work injury in question. (Ex. 2, p. 9)

Defendants requested another independent medical examination. William R. Boulden, M.D., reviewed medical records and conducted an examination of claimant on September 8, 2016. (Ex. H) Claimant reported the following history to Dr. Boulden:

> **INJURY:** The patient states that she thought her injury occurred when she went through a turnstile and she had a twinge in her right thigh. She thought this occurred in January 2014. The alleged date of injury, however, according to the first report of injury, a worker's [*sic*] compensation type, was January 1, 2012. The employer had knowledge of the injury as of September 2014. There was no mention at that time, according to the injury report, of the turnstile issue. That was stated later to an IME doctor, Dr. Broghammer.

(Ex. H, p. 1)

Dr. Boulden conducted a physical examination of claimant. The doctor noted specifically:

> On examination, she has negative straight leg raising right and left. She has normal reflexes in the knees. She has trace reflexes at the ankles bilaterally. She has no weakness in the great-toe extensors, dorsiflexors of the ankles, plantar flexors of the ankles, evertors of the ankles, quadriceps, or hip flexors bilaterally. She has no palpable pain over the front of her thigh. There are no sensory deficits noted in the lower extremities. Her circulation is adequate.
>
> **RADIOGRAPHIC STUDIES:** I have reviewed the patient's MRIs and they are basically the same. There is really no indication for doing a Gadolinium-enhanced MRI that was ordered by Dr. Harbach since they really make no difference after 10 years from back procedures. I would agree with Dr. Harbach and Dr. Broghammer that there is no indication for surgery on this patient. She does have very serious degenerative disc disease at L4-5. Once again, I would totally agree with Dr. Broghammer that this is of genic origin, as well as smoking induced issues that have definite direct effect on degenerative disc disease.

(Ex. H, pp. 4-5)

Dr. Boulden opined claimant did not have a work-related injury. The evaluating physician wrote at the end of his report:

> In my medical opinion, this patient has had no work-related injury, other than maybe temporary aggravation of pre-existing degenerative disc disease. As I stated before, the degenerative disc disease pre-dated her work and the work has not been an issue as far as accelerating this.
>
> I would place no restrictions on this patient based on any related work injuries and there would be no rating based on any work-related injuries she is claiming. Once again, there are definite discrepancies in my opinion of what the true history is with what the patient relates and what the records relate.

(Ex. H, p. 5)

During her hearing, claimant testified she has difficulties standing at work, lifting objects that are heavy, pushing, pulling, and carrying significant weights. (Tr., p. 29) Claimant indicated when she squats, she has trouble getting back into an upright position. (Tr., pp. 29-30) Claimant testified the pain in her leg is sharp and there is numbness but the symptoms are intermittent. (Tr., p. 30)

Claimant testified she no longer shovels snow or takes out her garbage. (Tr., p. 31) Claimant is making $.50 less per hour than she was earning at the time of the alleged work injury. (Tr., p. 32) She works 40 hours per week. (Tr., p. 32)

RATIONALE AND CONCLUSIONS OF LAW

While a claimant is not entitled to compensation for the results of a preexisting injury or disease, its mere existence at the time of a subsequent injury is not a defense. Rose v. John Deere Ottumwa Works, 247 Iowa 900, 76 N.W.2d 756 (1956). If the claimant had a preexisting condition or disability that is materially aggravated, accelerated, worsened or lighted up so that it results in disability, claimant is entitled to recover. Nicks v. Davenport Produce Co., 254 Iowa 130, 115 N.W.2d 812 (1962); Yeager v. Firestone Tire & Rubber Co., 253 Iowa 369, 112 N.W.2d 299 (1961).

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

The weight to be given an expert opinion may be affected by the accuracy of the facts the expert relied upon as well as other surrounding circumstances. St. Luke's Hospital v. Gray, 604 N.W.2d 646 (Iowa 2000).

Expert testimony may be buttressed by supportive lay testimony. Bradshaw v. Iowa Methodist Hospital, 251 Iowa 375, 380; 101 N.W.2d 167, 170 (1960).

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

The undersigned finds claimant to be a credible witness. She readily admitted she has had intermittent back problems since her spinal surgery in 2001. Claimant described the repetitive nature of her job at Tone's and how the repetitive work impacted her back and right thigh pain. Claimant was seen by Dr. Bingham on September 24, 2014. Claimant described her medical history to him. Claimant treated with Dr. Bingham on several occasions. He prescribed several treatment modalities for her.

After Dr. Bingham reviewed medical records and examined claimant on several occasions, he opined claimant's work was a cause of aggravation for claimant's pre-existing back condition. It was not the sole cause of aggravation but it was a substantial cause. (Ex. 3, pp. 4-5) Claimant's claim is compensable even if work was not the sole cause of her aggravation.

Dr. Sassman, claimant's independent medical examiner, supported the opinions of Dr. Bingham. Dr. Sassman rated claimant as having a 17 percent permanent impairment, although at least 7 percent of the impairment was attributed to claimant's surgery in 2001. Therefore, the rating itself is inflated with respect to the September 24, 2014 work injury.

The undersigned gave more weight to the opinions of Dr. Bingham, the treating physician, and Dr. Sassman, claimant's evaluator. The opinions of Dr. Broghammer and Dr. Boulden were considered, but were not persuasive. Dr. Boulden totally discounted any impact claimant's work may have had on her spinal condition. Dr. Broghammer opined heavy manual work had a positive effect on claimant's spinal condition. (Ex. E, p. 10)

It is the determination of the undersigned claimant sustained a permanent injury to her pre-existing spinal condition. Her permanent condition is an injury to the body as a whole.

Since claimant has an impairment to the body as a whole, an industrial disability has been sustained. Industrial disability was defined in Diederich v. Tri-City R. Co., 219 Iowa 587, 258 N.W. 899 (1935) as follows: "It is therefore plain that the legislature intended the term 'disability' to mean 'industrial disability' or loss of earning capacity and not a mere 'functional disability' to be computed in the terms of percentages of the total physical and mental ability of a normal man."

Functional impairment is an element to be considered in determining industrial disability which is the reduction of earning capacity, but consideration must also be given to the injured employee's age, education, qualifications, experience, motivation, loss of earnings, severity and situs of the injury, work restrictions, inability to engage in employment for which the employee is fitted and the employer's offer of work or failure to so offer. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963); Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961).

Compensation for permanent partial disability shall begin at the termination of the healing period. Compensation shall be paid in relation to 500 weeks as the disability bears to the body as a whole. Section 85.34.

Claimant is 49 years old. She has worked in manual labor type jobs or else she has worked in food service. Heavy lifting does not appear realistic. Claimant loves her job at Tone's Spices. However, she has voluntarily taken a job that has lighter duties than she had on the date of her work injury. She earns $.50 less per hour now than she did in September of 2014.

Claimant holds an Associate of Science degree from Des Moines Area Community College, but she has never worked in her field of study. It is doubtful she would be able to find a position as a medical lab technician at this late date. Other vocational training seems unlikely.

Therefore, after considering all of the factors involving industrial disability, it is the determination of the undersigned; claimant has a permanent partial disability in the amount of ten (10) percent. Defendant shall pay unto claimant fifty (50) weeks of permanent partial disability benefits to claimant at the stipulated weekly benefit rate of $545.35 per week and commencing on June 17, 2015.

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

The next issue for resolution is the matter of prescription charges and medical mileage. 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).

The prescription drug charges are detailed in Exhibit 7 at page 57. The charges total $29.81. Defendants shall reimburse claimant for those costs.

The medical mileage is detailed in exhibit 7 at page 56. The total cost is $173.88. Defendants shall reimburse claimant for the mileage.

The final issue is costs to litigate.

Iowa Code section 86.40 states:
Costs. All costs incurred in the hearing before the commissioner shall be taxed in the discretion of the commissioner.

Iowa Administrative Code Rule 876—4.33(86) states:

Costs. Costs taxed by the workers' compensation commissioner or a deputy commissioner shall be (1) attendance of a certified shorthand reporter or presence of mechanical means at hearings and evidential depositions, (2) transcription costs when appropriate, (3) costs of service of the original notice and subpoenas, (4) witness fees and expenses as provided by Iowa Code sections 622.69 and 622.72, (5) the costs of doctors' and practitioners' deposition testimony, provided that said costs do not exceed the amounts provided by Iowa Code sections 622.69 and 622.72, (6) the reasonable costs of obtaining no more than two doctors' or practitioners' reports, (7) filing fees when appropriate, (8) costs of persons reviewing health service disputes. Costs of service of notice and subpoenas shall be paid initially to the serving person or agency by the party utilizing the service. Expenses and fees of witnesses or of obtaining doctors' or practitioners' reports initially shall be paid to the witnesses, doctors or practitioners by the party on whose behalf the witness is called or by whom the report is requested. Witness fees shall be paid in accordance with Iowa Code section 622.74. Proof of payment of any cost shall be filed with the workers' compensation commissioner before it is taxed. The party initially paying the expense shall be reimbursed by the party taxed with the cost. If the expense is unpaid, it shall be paid by the party taxed with the cost. Costs are to be assessed at the discretion of the deputy commissioner or workers' compensation commissioner hearing the case unless otherwise required by the rules of civil procedure governing discovery. This rule is intended to implement Iowa Code section 86.40.

Iowa Administrative Code rule 876—4.17 includes as a practitioner, "persons engaged in physical or vocational rehabilitation or evaluation for rehabilitation." A report or evaluation from a vocational rehabilitation expert constitutes a practitioner report under our administrative rules. Bohr v. Donaldson Company, File No. 5028959 (Arb. November 23, 2010); Muller v. Crouse Transportation, File No. 5026809 (Arb. December 8, 2010). The entire reasonable costs of doctors' and practitioners' reports may be taxed as costs pursuant to 876 IAC 4.33. Caven v. John Deere Dubuque Works, File Nos. 5023051, 5023052 (App. July 21, 2009).

The following costs are assessed to defendants:

Filing fee $100.00

Service fee $12.96

ORDER

THEREFORE, IT IS ORDERED:

Defendants shall pay unto claimant fifty (50) weeks of permanent partial disability benefits at the stipulated weekly benefit rate of five hundred forty-five and 35/100 dollars ($545.35) and payable from June 17, 2015.

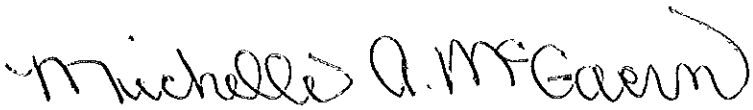
Defendants shall reimburse claimant for prescription charges and medical mileage as detailed in the body of the decision.

Accrued benefits shall be paid in a lump sum, together with interest, as provided by law.

Costs are assessed to defendants as detailed in the body of this decision.

Defendants shall file all reports as required by law.

Signed and filed this 16th day of March, 2017.



MICHELLE A. MCGOVERN
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

Copies to:

David Lawyer
Attorney at Law
4090 Westown Pkwy., Ste. E
West Des Moines, IA 50266-6760
dmlawyer@me.com

Michael S. Roling
Attorney at Law
6800 Lake Dr., Ste. 125
West Des Moines, IA 50266-2504
mike.roling@peddicord-law.com

MAM/srs

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.