BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

SHANNON GARDNER,	:	
Claimant,	:	File Nos. 5054642, 5062921
vs.	:	A R B I T R A T I O N
MENARD, INC.,	:	D E C I S I O N
Employer,	:	
PRAETORIAN/XL INSURANCE CO.,	:	
Insurance Carrier, Defendants.	:	Head Note Nos.: 1108, 1803, 2500

STATEMENT OF THE CASE

Claimant, Shannon Gardner, filed two petitions for arbitration seeking workers' compensation benefits from Menard, Inc., the employer and Praetorian/XL Insurance Company, the insurance carrier.

The matter came on for hearing on July 18, 2018, before Deputy Workers' Compensation Commissioner Joseph L. Walsh in Des Moines, Iowa. The hearing originally began on March 12, 2018, and was continued to August 13, 2019. The record in the case consists of Claimant's Exhibits 1 through 34 (3, 6, 8, 31 withdrawn); Defense Exhibits A through N; Joint Exhibits 1 through 19; as well the sworn testimony of claimant, Shannon Gardner and her husband, Bruce Gardner. On March 12, 2018, Chris Quinlan was appointed and served as the court reporter. (Transcript I) On August 13, 2018, M. Jane Weingart was appointed as the court reporter for the proceedings. (Transcript II) Due to a number of factors, including that the hearing took place over two separate dates and the exhibit designations were revised, the hearing record is complicated and messy. Nevertheless, I conclude the hearing record is satisfactory for final determination. The parties briefed this case and the matter was fully submitted on September 19, 2018.

ISSUES AND STIPULATIONS

The following issues and stipulations were submitted. All of the stipulations have been accepted by the agency and are deemed binding at this time.

The claimant alleges she suffered two injuries to her low back which arose out of and in the course of her employment for Menard, Inc. (hereafter "Menard's"). The issues between the two files overlap extensively. While the employer admitted the claimant was employed for the employer on her alleged dates of injury, they denied that she suffered any injury, or that either alleged injury was a cause of either temporary or permanent disability. Claimant is seeking temporary disability benefits from April 25, 2015 through February 1, 2016, and November 15, 2016, through November 30, 2016. Defendants deny she is entitled to any such benefits. Claimant also seeks permanency benefits for industrial disability for both injuries. Defendants again deny she is entitled to any such benefits. If such benefits are owed, it is stipulated the disability would be industrial, however, the parties do not agree on a commencement date.

Gross wages are disputed, however, the parties stipulate that claimant was married and entitled to four (4) exemptions at all relevant times. Affirmative defenses have been waived. Claimant seeks medical expenses under Iowa Code section 85.27 as set forth in Claimant's Exhibits 14 and 15. Defendants deny responsibility for these expenses and raise a number of defenses. Claimant also seeks payment for an independent medical evaluation (IME) under Iowa Code section 85.39. Defendants allege they are entitled to a credit against any award and have raised various issues under Iowa Code section 85.34(4) and (7). Claimant disputes this. Claimant seeks penalty benefits for late payments.

FINDINGS OF FACT

Shannon Gardner was a pleasant 39-year-old resident of Iowa City, Iowa, at the time of hearing. She is married and has two minor children. She received her GED in 2012 at Kirkwood Community College. She has also received a medical terminology certificate. Ms. Gardner has been working full-time since she was 16 years old. Her work history is varied with numerous jobs in retail sales, including a management position with a clothing store, until moving into the medical field in approximately 2012.

Ms. Gardner testified live and under oath at hearing. I find her hearing testimony to be highly credible. Her testimony appears to be consistent with her discovery answers as well as the medical records which make up the record in this case. Her answers at hearing were straightforward and earnest. There was nothing about her demeanor which suggested that she was, in any way, untruthful.

There is no question that Ms. Gardner has a history of back problems prior to her work injuries. Her low back issues are first documented in Mercy Hospital medical records in July 2007. She testified that she just woke up and had pain in her back and leg. The medical records documented three to four months of leg pain. (Joint Exhibit 1, pages 3-4) She was diagnosed with degenerative disc disease, mild spinal canal stenosis and a disc protrusion at L5-S1. (Jt. Ex. 1, pp. 3-4) She was treated at Steindler Orthopedic Clinic where she was eventually diagnosed with Left S1 radiculopathy and left ankle weakness secondary to the disk herniation. (Jt. Ex. 2, p. 3)

She received a series of three epidural steroid injections (ESI). (Jt. Ex. 2, pp. 3-4) She was released from medical care from this condition in January 2008. (Jt. Ex. 2, p. 5) She testified at hearing that she made a full recovery from this condition. (Transcript I, p. 48)

She returned to Steindler Clinic in 2011 with recurrent low back pain following an injury from a children's clothing store. X-rays showed some moderate spondylosis at L5-S1, and mild spondylosis at L4-5. (Jt. Ex. 2, pp. 6-7) Benjamin MacLennan, M.D., diagnosed L4-5, L5-S1 degenerative disc disease and recommended conservative care. (Jt. Ex. 2, p. 7) She had physical therapy in September 2011. (Jt. Ex. 4, pp. 1-2) After seeing the physical therapist, Ms. Gardner did not return for follow up treatment. She was diagnosed with myofascial flank pain. (Jt. Ex. 3)

In 2013, and again in 2014, Ms. Gardner suffered acute injuries to her low back which she associated with work-related activities in the healthcare field. In 2013, she experienced some low back pain when boosting a patient with a co-worker. (Tr. II, pp. 116-17) In September 2014, Ms. Gardner experienced another episode of low back pain while assisting a co-worker. She described this at hearing as a very minor incident. She received minimal treatment for these injuries.

While it is clear that Ms. Gardner had a number of episodes of low back pain prior to her work injuries, which are the subject of this litigation, the evidence strongly suggests that in each instance, she fully recuperated and her lower back was generally healed up. This is further supported by her pre-employment physical at Mercy Hospital in February 2015, wherein Ernest Perea, M.D., documented the prior low back injuries and confirmed that all "injuries have resolved." (Jt. Ex. 5A, p. 2) The record demonstrates she missed no work for any of these episodes. For each instance, she only received minimal, conservative care such as physical therapy or injections. She never had any sort of work restrictions or any assignment of permanent impairment. There is no evidence that she had any type of chronic or ongoing symptoms prior to her work accidents. On the contrary, at the time of her first work injury, she had no ongoing symptoms or difficulties in her lower back. Thus, while it is correct to state that she had a history of episodic low back pain, she did not have an ongoing low back condition at the time of her first work injury on April 25, 2015.[1]

Her first injury, which is the subject of this litigation, occurred on April 25, 2015. On that date, Ms. Gardner was performing her regular job as a cashier at Menard's. She bent and reached to scan a bag. She experienced immediate pain in her back. She testified that she finished her work shift in extreme discomfort. The pain worsened after her work shift ended, and she called her supervisor to report the injury the

[1] There are family medical records where claimant was treated for various illnesses where low back pain is mentioned in passing. (Jt. Ex. 5, pp. 1-8) These records appear to document symptoms associated with other conditions, such as influenza, rather than an actual low back diagnosis.

following day. She was directed to see her family physician. She saw Christopher Schuster, M.D., on April 27, 2015. The injury is well-documented in his records. (Jt. Ex. 6, p. 1) While she testified that the pain was much more severe than any of her prior episodes, no radicular complaints were documented, and her condition was diagnosed as a "benign muscle strain." (Jt. Ex. 6, p. 2) Dr. Schuster did take her off work for a week and then gave her restrictions for another week before returning her full-duty on May 12, 2015. (Jt. Ex. 6, p. 3) He ended up altering her restrictions some but keeping her on restrictions and periodically taking her off work through June 2015. He ordered medications and physical therapy. On reevaluation May 22, 2015, he prescribed some physical therapy and noted that she had intermittent pain in her extremities. (Jt. Ex. 6, p. 9) In June, he referred her to an orthopedist.

On June 22, 2015, Ms. Gardner was evaluated at Steindler Clinic by Dr. MacLennan. He diagnosed multilevel lumbar spondylosis, low back pain and left leg radiculitis. (Jt. Ex. 9, p. 3) He ordered an MRI which showed moderately severe central canal stenosis at L3-4, mild central canal narrowing at L4-5 and a left paracentral annular tear with no focal disc extrusion. (Jt. Ex. 9, pp. 5-6) On July 10, 2015, Dr. MacLennan authored a medical report which opined that her disc protrusions and stenosis was likely aggravated by her work injury. (Jt. Ex. 9, p. 7) Ms. Gardner received two ESIs in July and August 2015.

On August 12, 2015, Dr. MacLennan evaluated Ms. Gardner again. Claimant testified credibly that Dr. MacLennan provided information regarding possible surgical interventions but recommended further conservative care first. (Jt. Ex. 9, pp. 9-12)

In early November 2015, medical care was switched to Chad Abernathey, M.D., who evaluated Ms. Gardner and quickly determined she was not a surgical candidate. (Jt. Ex. 10) The transfer of medical care is not well explained in the record. He referred her on to Cassim Igram, M.D., for pain management. Dr. Igram diagnosed, "lower back pain and diffuse paresthesias and radicular symptoms . . ." He, however, opined Ms. Gardner was not a surgical candidate. (Jt. Ex. 11, p. 2) He lifted all claimant's medical restrictions and recommended evaluation by the spine rehabilitation team. (Jt. Ex. 11, p. 2)

Ms. Gardner returned to work for Menard's in early February 2016, and immediately suffered a flare-up of her pain. (Jt. Ex. 11, p. 6) Dr. Igram excused her from work and eventually re-imposed a 40-pound lifting restriction. (Jt. Ex. 11, p. 7) Joseph Chen, M.D., evaluated Ms. Gardner in March 2016. He diagnosed "chronic mechanical and myofascial low back pain" and recommended exercises and restrictions of no lifting more than 30 pounds and to avoid prolonged standing or sitting. (Jt. Ex. 11, pp. 10-11) A number of recommendations were sent directly to Ms. Gardner. (Jt. Ex. 11, pp. 12-13) In May 2016, she underwent treatment in the Spine Rehabilitation Program at the UI Spine Center. (Jt. Ex. 11, p. 16) Dr. Chen provided a number of further recommendations thereafter, stating "you may not feel back to your 'baseline' regarding back pain complaints, we have explained to you that there are no further

supervised medical treatments that will likely improve your pain." (Jt. Ex. 11, p. 17)

Ms. Gardner continued to experience pain. Her attorney arranged an evaluation with Robert Milas, M.D., in June 2016. Dr. Milas had a full and accurate medical history. (Claimant's Ex. 1) He examined her back and reviewed the medical history directly with her. "My impression at this time is that of a lumbar radiculopathy secondary to a herniated lumbar disc at the L3-L4 level." (Cl. Ex. 2, p. 2) He assigned a 13 percent whole body disability rating and a 10-pound lifting restriction, opining that the April 2015, work injury was the direct cause of her condition. (Cl. Ex. 2, p. 2)

Dr. Chen examined the claimant a week later and noted that he had reviewed her lumbar spine MRI from 2015. He acknowledged that "a small disc tear that is off to the left that may be causing her ongoing pain symptoms." (Jt. Ex. 11, p. 22) He assigned a 5 percent whole body disability rating and a 25-pound occasional lifting restriction (12 pound repetitive), amongst others. (Jt. Ex. 11, p. 24)

Thereafter, Ms. Gardner continued to receive some care for her back. She also continued to work at Menard's while applying for dozens of other jobs with other employers. (Cl. Ex. 33) Ms. Gardner began working for the University of Iowa Hospitals and Clinics as a monitor technician in September 2016.

On October 8, 2016, she testified she suffered a new injury. While attempting to move an item for a customer on a conveyor belt, she felt a sudden onset of pain in her back, radiating through her left leg down to her foot. (Tr. II, pp. 79-80) She reported the injury was referred to Mercy Medical Care on October 10, 2016, where the injury is properly documented. It is noted that the symptoms are essentially the same, just worse. (Jt. Ex. 8, p. 8) She saw Dr. Perea next who diagnosed an "acute exacerbation of chronic low back pain" and provided some medications and other conservative treatments. (Jt. Ex. 12, p. 4)

Claimant quit her job with Menard's on October 24, 2016. (Cl. Ex. 30)

On November 2, 2016, she returned to Dr. MacLennan, who ordered an MRI. (Jt. Ex. 9, p. 17) This was the first time that she had seen Dr. MacLennan since care was transferred away from him following his review of the MRI. Dr. MacLennan recommended surgery, and a lumbar laminectomy was performed November 15, 2016. (Jt. Ex. 14)

The surgery was successful, and over the next several months she underwent a relatively normal course of post-operative care. (Jt. Ex. 15) Dr. MacLennan opined that the "accidents sustained at work April 25, 2015 and October 8, 2016 substantially brought about the need for her lumbar surgery." (Jt. Ex. 15, p. 8) She has continued to have pain which waxes and wanes to some degree. She has been provided steroid injections and physical therapy to treat her condition up through February 2018. (Jt. Ex. 15, pp. 14-15) At the time of hearing, she was still on pain medications, including a

muscle relaxer.

In addition to the medical records from the treating physicians, there are several expert opinion reports in the file. The report of Dr. Milas has already been summarized above. Richard Kreiter, M.D., an orthopedist, examined Ms. Gardner in June 2017. He reviewed her records, examined her and provided the following diagnosis: "chronic low back pain with residual mild motor and sensory deficit left, with mild sciatica following left L4-5 and L5-S1 decompression hemilaminectomies, and lateral recess decompression." (Cl. Ex. 7, p. 1) He assigned a 10 to 13 percent whole body impairment rating and recommended a 25-pound occasional lifting restriction, rare bending and twisting and alternate standing, sitting and walking. (Cl. Ex. 7, pp. 1-2)

Defendants had claimant evaluated by James Milani, D.O., an occupational medicine specialist. He was asked by defense counsel whether she suffered an injury on April 25, 2015. He answered the following:

> Answer: She did not aggravated/accelerated/advanced [*sic*] a preexisting condition. (This question states the mechanism actually caused structural change to happen faster than it normally would have) She had a normal event that showed that she already had this preexisting condition. As stated above, the mechanism would not be one that would cause injury/damage to tissues. At most, the 'injury' would be a strain type problem.

(Def. Ex. A, p. 8) He provided a similar answer when asked about the October 8, 2016, work injury. "Forces of this nature should not cause injury/damage to tissues. The forces could show the preexisting condition but would not cause the preexisting condition." (Def. Ex. A, p. 8) The history recorded by Dr. Milani does not seem to acknowledge a central fact in the case. While Ms. Gardner undoubtedly had episodes of preexisting low back pain, she was symptom-free at the time she began working for Menard's up until the injuries occurred. It is unclear whether Dr. Milani did not know this to be the case, or whether he did not believe it was true.

Finally, a records review was performed by William Boulden, M.D., an orthopedist, in January 2018. (Def. Ex. B) Dr. Boulden opined that Ms. Gardner suffered a temporary exacerbation of her preexisting condition and suggested she did not really need the surgery at all. (Def. Ex. B, pp. 2-3) He apparently compared two MRIs "head to head" and saw no changes between the two. (Def. Ex. B, p. 3) It does not appear he compared these MRIs to the preexisting 2007 MRI. He assigned no impairment rating or restrictions to her work injuries.

Dr. Milas and Dr. Kreiter both subsequently wrote responsive expert opinion reports. (Cl. Ex. 4; Cl. Ex. 9) In those expert opinion letters, they defended their earlier expert opinions. Dr. Boulden also updated his opinions in August 2018, stating that he is still correct. (Def. Ex. K)

Having reviewed the entire record as a whole, I find that the claimant experienced injuries which arose out of and in the course of her employment on April 25, 2015, and October 8, 2016. The greater weight of evidence supports a finding that the April 25, 2015, work injury is a substantial cause of permanent disability in her low back. This is based upon the claimant's credible testimony, the medical opinion of the treating physician, Dr. MacLennan, the medical opinion of Dr. Chen and the claimant's experts, Dr. Milas and Dr. Kreiter. The second injury may have caused permanent disability as well, however, I find it is unclear whether this second injury is a cause of any permanent disability which is distinct and/or distinguishable from her first injury. In other words, based upon the evidence before the agency at this time, Ms. Gardner has one disability. Her disabling condition began with the first injury, as evidenced in the opinions of Dr. MacLennan, Dr. Chen and Dr. Milas.

I specifically reject the opinions of Dr. Milani and Dr. Boulden. These defense experts both ignore a central fact in this case. While Ms. Gardner had a history of episode of low back pain and symptoms, as well as an underlying degenerative condition, she was symptom-free at the time she began working at Menard's up until she had her April 25, 2015, work injury. She has had consistent, chronic symptoms since then. She worked without restrictions or accommodations. She had no impairment rating and was under no active treatment of any kind. After her first work injury though, she has had consistent symptoms of low back pain and left leg radiculopathy. I find the opinion of Dr. MacLennan, the treating orthopedic surgeon, to be the most credible medical causation opinion in the file. In July 2015, Dr. MacLennan diagnosed low back pain and [left] leg radiculitis. "Her MRI shows disc protrusions and stenosis. I believe with greater than 50% medical certainty her work injury aggravated and worsened this." (Jt. Ex. 9, p. 7) Dr. MacLennan was, at that time, an authorized treating physician. After the defendants switched claimant's care away from Dr. MacLennan, Dr. Chen acknowledged that a disc tear may be causing her symptoms for which he assigned permanent restrictions and an impairment rating. (Jt. Ex. 11, p. 22)

CONCLUSIONS OF LAW

The first question is whether claimant suffered an injury which arose out of and in the course of employment on April 25, 2015, and/or October 8, 2016.

The claimant has the burden of proving by a preponderance of the evidence that the alleged injury actually occurred and that it both arose out of and in the course of the employment. Quaker Oats Co. v. Ciha, 552 N.W.2d 143 (Iowa 1996); Miedema v. Dial Corp., 551 N.W.2d 309 (Iowa 1996). The words "arising out of" referred to the cause or source of the injury. The words "in the course of" refer to the time, place, and circumstances of the injury. 2800 Corp. v. Fernandez, 528 N.W.2d 124 (Iowa 1995). An injury arises out of the employment when a causal relationship exists between the injury and the employment. Miedema, 551 N.W.2d 309. The injury must be a rational consequence of a hazard connected with the employment and not merely incidental to the employment. Koehler Electric v. Wills, 608 N.W.2d 1 (Iowa 2000); Miedema, 551

N.W.2d 309. An injury occurs "in the course of" employment when it happens within a period of employment at a place where the employee reasonably may be when performing employment duties and while the employee is fulfilling those duties or doing an activity incidental to them. Ciha, 552 N.W.2d 143.

A personal injury contemplated by the workers' compensation law means an injury, the impairment of health or a disease resulting from an injury which comes about, not through the natural building up and tearing down of the human body, but because of trauma. The injury must be something that acts extraneously to the natural processes of nature and thereby impairs the health, interrupts or otherwise destroys or damages a part or all of the body. Although many injuries have a traumatic onset, there is no requirement for a special incident or an unusual occurrence. Injuries which result from cumulative trauma are compensable. Increased disability from a prior injury, even if brought about by further work, does not constitute a new injury, however. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); Ellingson v. Fleetguard, Inc., 599 N.W.2d 440 (Iowa 1999); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995); McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985). An occupational disease covered by chapter 85A is specifically excluded from the definition of personal injury. Iowa Code section 85.61(4) (b); Iowa Code section 85A.8; Iowa Code section 85A.14.

The finding of an "injury" is a de minimus finding. The claimant must merely prove that she suffered a trauma of some type which arose out of and in the course of her employment. The claimant testified that she did. I find her testimony to be highly credible based upon the consistency of her testimony with other evidence in the record, as well as her demeanor. On April 25, 2015, claimant was scanning products for a customer when she felt a sudden onset of sharp pain in her low back which worsened over the next few days. On October 8, 2016, while moving an item on a conveyor belt, she felt a sudden onset of acute pain which went down her left leg into her foot. She described these injuries consistently. They were well-documented in the medical notes. The injuries may appear minor. There is simply no reason in this record to disbelieve that these incidents occurred as she described.

The defendants presented an expert report from Dr. Milani wherein he seemed to argue there was no "injury." He focused on the preexisting state of her low back, noting that Ms. Gardner "had a normal event that showed that she already had this preexisting condition." (Def. Ex. A, p. 8) He went on, however, to describe that she probably suffered some type of low back strain with no permanent damage. I find that Dr. Milani's opinions are really about medical causation, not the fact of whether either injury occurred.

Stated another way, if I drop a box on my foot at work and it causes symptoms, I undoubtedly suffered an injury which arose out of and in the course of my employment. This injury of course may heal within a matter of moments, hours or days, with no permanent impact. It also may not heal up quickly. Those are causal connection

issues, not “injury” issues.

In claimant’s brief, counsel alleges the defendants actually admitted that the April 25, 2015, injury arose out of and in the course of employment through their Answers to Requests for Admissions. This is not an exhibit and was not raised at hearing. Since the Requests for Admissions were not introduced at hearing or otherwise raised when discussing the prehearing conference report, I do not consider this argument here. Either way, there is really no doubt that these injuries occurred as described by the claimant. The real fighting issue centers around causal connection, not whether the claimant sustained an injury.

For their part, defendants argue that claimant is not credible. In her deposition, she did not recall her earlier episodes of low back pain in the same manner they are described in the medical documentation. (Cl. Ex. 16, Gardner Depo., pp. 68-75) Defendants therefore, simply do not believe that she was asymptomatic prior to April 25, 2015. As set forth above, I assessed the claimant’s credibility at hearing. Her testimony was earnest and straightforward. While she may not have recalled the precise details of her prior episodes of low back pain, such as exactly how many ESIs she had in 2007, she never denied that she had previous episodes even at her deposition. (Cl. Ex. 16, Gardner Depo., p. 67) There truly is no reason in this record to disregard, discredit or disbelieve her testimony. On the contrary, the record reflects Ms. Gardner’s testimony is highly credible.

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

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

For the reasons set forth in the findings of fact, I find that claimant has met her burden of proof that her April 25, 2015, work injury is a cause of both temporary and permanent disability in her low back. In particular, I rely upon claimant's credible testimony regarding the onset of the injury and her subsequent symptoms and the medical opinions of Dr. MacLennan and Dr. Milas. (Jt. Ex. 9, p. 7; Cl. Ex. 2, p. 2) This position is further bolstered by the opinions of Dr. Kreiter and Dr. Chen.

It is worth noting that claimant testified credibly that Dr. MacLennan spoke to her in August 2015, about surgery for her disc protrusions and stenosis. This was, of course, prior to her second injury. Dr. Milas opined she needed to pursue surgical options prior to her second injury as well. While it is possible that the claimant's October 8, 2016, work injury may have also contributed to the disability in her low back as well, the evidence strongly suggests that her condition was already chronic and permanent. There is no specific evidence in the record that the October 8, 2016, work injury is a cause of a distinct or ascertainable portion of her condition. Therefore, I find the greater weight of evidence pinpoints the causal connection of her condition to her April 25, 2015, work injury.

The next question is claimant's entitlement to temporary disability benefits for her April 25, 2015, work injury.

Section 85.34(1) provides that healing period benefits are payable to an injured worker who has suffered permanent partial disability until (1) the worker has returned to work; (2) the worker is medically capable of returning to substantially similar employment; or (3) the worker has achieved maximum medical recovery. The healing period can be considered the period during which there is a reasonable expectation of improvement of the disabling condition. See Armstrong Tire & Rubber Co. v. Kubli, 312 N.W.2d 60 (Iowa App. 1981). Healing period benefits can be interrupted or intermittent. Teel v. McCord, 394 N.W.2d 405 (Iowa 1986).

In the final hearing report, claimant seeks healing period benefits for various periods of time, however, she acknowledges that she has been paid for these periods. The hearing report states claimant alleges she was underpaid on her rate and therefore penalty is owed. At hearing, however, claimant's counsel clarified that she was also seeking temporary benefits from the date of her surgery, November 15, 2016, through November 30, 2016. Ms. Gardner testified credibly that she was taken off work by Dr. Schuster immediately after her April 25, 2015, work injury and she did not return to work until February 2, 2016. (Tr. II, pp. 38-41) On the hearing report, however, claimant asserted the following. "Claimant agrees the proper number of TTD weeks were paid, but paid far too late and, thus, interest and penalty are due thereon." (Hearing Report) The indemnity payment logs in evidence are confusing unfortunately. (Cl. Exs. 21, 22) The logs show some type of payment from April 25, 2015, through July 15, 2015, in the amount of $995.25. (Cl. Ex. 21) Ms. Gardner further testified that she was off work

from November 15, 2016, through November 27, 2016, following her surgery. She was paid benefits during this period of time, but they were labeled as permanency payments. (Cl. Ex. 22)

Having reviewed the record as a whole, I am not at all sure what happened in the period of time between April 25, 2015, and July 15, 2015. It appears claimant was off work, however, she stipulated that benefits were paid. I do find claimant is entitled to healing period benefits from November 15, 2016, through November 27, 2016, while she was off work recuperating from surgery. She was paid benefits during this period of time, which should properly be classified as healing period payments rather than PPD.

The next issue is gross wages. Claimant alleges her gross wages were $615.00 per week, while defendants contend her gross wages were $593.00.

Section 85.36 states the basis of compensation is the weekly earnings of the employee at the time of the injury. The section defines weekly earnings as the gross salary, wages, or earnings to which an employee would have been entitled had the employee worked the customary hours for the full pay period in which the employee was injured as the employer regularly required for the work or employment. The various subsections of section 85.36 set forth methods of computing weekly earnings depending upon the type of earnings and employment.

If the employee is paid on a daily or hourly basis or by output, weekly earnings are computed by dividing by 13 the earnings over the 13-week period immediately preceding the injury. Any week that does not fairly reflect the employee’s customary earnings is excluded, however. Section 85.36(6).

While gross wages are listed as disputed on the hearing report, in her brief, claimant no longer contests any rate issue. I find claimant’s gross wages were $593.00 per week.

The next issue is extent of industrial disability and commencement date. Claimant argues she has sustained a substantial industrial disability. Defendants contend she has not.

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.

I find that the claimant has suffered a thirty-five (35) percent loss of earning capacity as a result of her April 25, 2015 work injury. Claimant was 39 years old at the time of hearing. She appeared bright, articulate and employable at hearing. She has a GED from Kirkwood. Her work history is varied with numerous jobs in retail sales, including a management position with a clothing store. In approximately 2012, she moved more into the field of medicine. At the time of hearing, she was working for UIHC as a monitor technician.

Her low back condition undoubtedly adversely affects her employability to some degree. She has a whole body impairment rating in the range of 10 to 13 percent. While Dr. MacLennan formally lifted her medical restrictions, several other physicians recommended reasonable preventative lifting and activity restrictions. At the time of hearing, UIHC was accommodating the restrictions imposed by Dr. Chen. (Tr. II, pp. 113-114) These restrict her from lifting more than 25 pounds occasionally, 12 pounds repetitively, pushing/pulling more than 40 pounds, as well as occasional twisting, bending, reaching, stooping, squatting, kneeling, pushing and pulling. (Jt. Ex. 11, p. 24) I find these are reasonable restrictions in light of her condition.

I find Ms. Gardner is highly motivated to secure employment, as evidenced by her well-documented efforts.

Having reviewed the entire record of evidence and considering all of the factors of industrial disability, I find claimant has suffered a 35 percent loss of earning capacity. I conclude this entitles her to one hundred seventy-five weeks of benefits.

The commencement date is also disputed.

The parties dispute the proper commencement date for permanent partial disability benefits. Permanent partial disability benefits commence upon the termination of the healing period. Iowa Code section 85.34(1). As the Iowa Supreme Court explained, the healing period terminates and permanent partial disability benefits commence at the earliest of claimant’s return to work, medical ability to return to substantially similar employment, or the point at which the claimant achieves maximum medical improvement. Evenson v. Winnebago Industries, Inc., 881 N.W.2d 360, 374 (Iowa 2016).

Claimant first returned to work following her April 25, 2015, work injury on February 2, 2016. (Tr. II, pp. 40-41) Benefits, therefore, shall commence on February 2, 2016, the date she first returned to work for the employer.

The next issue is the claimant's entitlement to expenses under Iowa Code section 85.27. She seeks expenses as set forth in Claimant's Exhibits 18 and 19. These bills primarily involve claimant's treatment with Dr. MacLennan.

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 1975).

Evidence in administrative proceedings is governed by section 17A.14. The agency's experience, technical competence, and specialized knowledge may be utilized in the evaluation of evidence. The rules of evidence followed in the courts are not controlling. Findings are to be based upon the kind of evidence on which reasonably prudent persons customarily rely in the conduct of serious affairs. Health care is a serious affair.

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 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).

I find that defendants are responsible for all of claimant's treatment with Dr. MacLennan. They shall reimburse claimant all out-of-pocket costs associated with his treatment, as well as any other carrier who paid such bills.

The next issue is penalty. Claimant seeks penalty under a number of theories.

Claimant also seeks an award of penalty benefits pursuant to Iowa Code section 86.13. Iowa Code section 86.13(4) provides:

> a. If a denial, a delay in payment, or a termination of benefits occurs without reasonable or probable cause or excuse known to the employer or insurance carrier at the time of the denial, delay in payment, or termination of benefits, the workers' compensation commissioner shall award benefits in addition to those benefits payable under this chapter, or chapter 85, 85A, or 85B, up to fifty percent of the amount of benefits that were denied, delayed, or terminated without reasonable or probable cause or excuse.
>
> b. The workers' compensation commissioner shall award benefits under this subsection if the commissioner finds both of the following facts:
>
> (1) The employee has demonstrated a denial, delay in payment, or termination in benefits.
>
> (2) The employer has failed to prove a reasonable or probable cause or excuse for the denial, delay in payment, or termination of benefits.
>
> c. In order to be considered a reasonable or probable cause or excuse under paragraph "b," an excuse shall satisfy all of the following criteria:
>
> (1) The excuse was preceded by a reasonable investigation and evaluation by the employer or insurance carrier into whether benefits were owed to the employee.

(2) The results of the reasonable investigation and evaluation were the actual basis upon which the employer or insurance carrier contemporaneously relied to deny, delay payment of, or terminate benefits.

(3) The employer or insurance carrier contemporaneously conveyed the basis for the denial, delay in payment, or termination of benefits to the employee at the time of the denial, delay, or termination of benefits.

I find that defendants had a reasonable basis to deny both of these claims once they obtained a medical opinion from Dr. Milani in August 2017. The claim was denied formally on August 9, 2017. Prior to that, defendants did not have a reasonable basis for denying the April 25, 2017, work injury claim. On June 20, 2016, defendants' authorized treating physician, Dr. Chen, assigned a 5 percent whole body impairment rating and medical restrictions. (Jt. Ex. 11, p. 23) These benefits should have commenced back to February 2, 2016, as set forth above. According to payment logs introduced by claimant, defendants paid benefits which were labeled as permanent partial disability benefits, many of which were designated as permanent partial disability benefits from May 2016 through December 2016. (Cl. Exs. 21, 22) Having thoroughly reviewed this messy and voluminous record, I find that claimant has failed to meet her initial burden of proof that payments were unreasonably late or denied.

The next issue is the credit to which defendants are entitled against the award of one hundred seventy-five weeks of permanent partial disability benefits. Defendants, however, did not submit any evidence of the payments they made to claimant. Defendants' Exhibit F, titled Gallagher Bassett Benefit Payment Logs deals with medical payments only. Claimant submitted Claimant's Exhibits 21 and 22, which are the claimant's summary of indemnity payments versus the defendants' summary. I find that the defendants are entitled to a credit for the weeks of PPD paid as set forth in Claimant's Exhibit 22, with the exception of the period of time from November 15, 2016, through November 27, 2016, which are properly classified as payment of claimant's healing period following surgery.

The defendants also argue they are entitled to a credit for an overpayment of the weekly rate on the weekly benefits they have already paid under McBride v. Casey's Marketing Company, File No. 5037616 (Remand Dec. Feb. 9, 2015). Defendants argue they paid previous benefits at the rate of $494.84, while the actual rate is $411.27. (Def. Brief, p. 21) Iowa Code section 85.34(4), states that when an injured worker is paid healing period benefits in excess of that required, "the excess shall be credited against the liability of the employer for permanent partial disability under section 85.34, subsection 2." Iowa Code section 85.34(2) (2015). I agree with the defendants they are

entitled to a credit for the rate overpayment on the healing period benefits paid in Claimant's Exhibit 21.

The final issue is claimant's entitlement to independent medical examination expenses in the amount of $800.00 from Dr. Kreiter as attached to the Hearing Report.

Section 85.39 permits an employee to be reimbursed for subsequent examination by a physician of the employee's choice where an employer-retained physician has previously evaluated "permanent disability" and the employee believes that the initial evaluation is too low. The section also permits reimbursement for reasonably necessary transportation expenses incurred and for any wage loss occasioned by the employee attending the subsequent examination.

Defendants are responsible only for reasonable fees associated with claimant's independent medical examination. Claimant has the burden of proving the reasonableness of the expenses incurred for the examination. See Schintgen v. Economy Fire & Casualty Co., File No. 855298 (App. April 26, 1991). Claimant need not ultimately prove the injury arose out of and in the course of employment to qualify for reimbursement under section 85.39. See Dodd v. Fleetguard, Inc., 759 N.W.2d 133, 140 (Iowa App. 2008).

I find claimant has met all of the statutory requirements and is entitled to reimbursement in the amount of $800.00.

ORDER

THEREFORE, IT IS ORDERED:

For File No. 5054642:

Claimant is entitled to healing period benefits from November 15, 2016, through November 27, 2016, following her surgery until she returned to work.

Defendants shall pay the claimant additional healing period benefits. Defendants shall pay the claimant one hundred seventy-five (175) weeks of permanent partial disability benefits at the rate of four hundred eleven and 27/100 dollars ($411.27) per week from February 2, 2016.

Defendants shall pay accrued weekly benefits in a lump sum.

Defendants shall pay accrued weekly benefits in a lump sum together with interest at the rate of ten 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-year treasury constant maturity published by the federal reserve in the most

recent H15 report settled as of the date of injury, plus two percent. See Gamble v. AG Leader Technology File No. 5054686 (App. Apr. 24, 2018).

Defendants shall be given credit for PPD payments previously made as set forth in Claimant's Exhibit 22, with the exception of those from November 15, 2016, through November 27, 2016. Defendants are further entitled to a credit for rate overpayment of healing period benefits as set forth in the body of this decision.

Defendants are responsible for medical expenses of Dr. MacLennan as set forth in Claimant's Exhibits 18 and 19, consistent with this decision.

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

Additional costs are taxed to defendants in the amount of one hundred and 00/100 dollars ($100.00).

For File No. 5054642:

Defendants shall reimburse claimant for the costs of Dr. Kreiter's IME in the amount of eight hundred and 00/100 dollars ($800.00).

Claimant shall take nothing further.

Signed and filed this 20th day of December, 2019.

JOSEPH L. WALSH
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Paul McAndrew (via WCES)
Charles Blades (via WCES)
Theron Christensen (via WCES)

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.