

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

 ANA CRUZ,

Claimant,

vs.

GERLEMAN MANAGEMENT, INC.,

Employer,

and

ATLANTIC STATES INSURANCE CO.,

Insurance Carrier,
Defendants.

File No. 1662244.03

ARBITRATION DECISION

Headnotes: 1803; 2502; 2907

STATEMENT OF THE CASE

Claimant, Ana Cruz, filed a petition in arbitration seeking workers' compensation benefits against defendants Gerleman Management, Inc., employer, and Atlantic States Insurance Company, insurer. In accordance with agency scheduling procedures and pursuant to the Order of the Commissioner in the matter of the Coronavirus/COVID-19 Impact on Hearings, the hearing was held on March 1, 2023 via Zoom.

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

The evidentiary record consists of Joint Exhibits 1 through 12, Claimant's Exhibits 1 through 4, and Defendants' Exhibits A through D. Claimant testified on her own behalf with the assistance of an interpreter. No other witnesses were called to testify. The evidentiary record closed at the conclusion of the evidentiary hearing. All parties filed their post-hearing briefs on April 28, 2023, at which time the case was deemed fully submitted to the undersigned.

ISSUES

The parties submitted the following disputed issues for resolution:

1. The extent of claimant's entitlement to permanent disability benefits;

2. The commencement date for permanent partial disability benefits, if any;
3. Whether claimant is entitled to an independent medical examination (IME) under Iowa Code section 85.39; and
4. Whether costs should be assessed against either party and, if so, in what amount.

FINDINGS OF FACT

Ana Cruz was a 43-year-old individual at the time of the evidentiary hearing. (Hearing Transcript, page 12) Ms. Cruz was born in El Salvador. (Hr. Tr., pp. 12, 46) She attended college in El Salvador and graduated with a degree in Legal Sciences. (See Hr. Tr., pp. 13, 46) After graduating from college, Ms. Cruz continued to live in El Salvador for two to three years and worked at her father's tax business. (Hr. Tr., pp. 46-47) Ms. Cruz moved to Des Moines, Iowa in 2007. (See Hr. Tr., pp. 47-48)

Ms. Cruz's primary language is Spanish. Since moving to Des Moines, Iowa in 2007, Ms. Cruz has taken two semesters of English language courses at Des Moines Area Community College (DMACC). (Hr. Tr., pp. 13, 50-51) She obtained a certificate for completing the courses; however, she is not able to speak English fluently, and she cannot read or write in English. (Hr. Tr., p. 13)

Since moving to Iowa, claimant's employment history has largely consisted of work in the service industry. Between 2007 and 2010, claimant worked as a custodian at Jordan Creek Mall. (Hr. Tr., pp. 14, 48) Her job duties consisted of cleaning tables, cleaning restrooms, and picking up trash throughout the mall. (Hr. Tr., p. 49; Claimant's Ex. 1, p. 2) Claimant next worked in food prep at Cheesecake Factory from 2010 to 2018. (Hr. Tr., pp. 15, 55) She left this job to work for the defendant employer. (Hr. Tr., p. 15)

Claimant began working as a "preparer" for the defendant employer in March 2018. (Id.) She testified her job duties were physical and consisted of preparing food for the cooks. (Hr. Tr., pp. 16, 19) Claimant seasoned various cuts of meat, pulled meats from the smoker, and prepared side dishes. (Hr. Tr., pp. 16-17) Her job required her to work at or above shoulder level on a regular basis. (Hr. Tr., p. 19) She worked 37 hours over five days each week. (Hr. Tr., p. 16)

On March 5, 2019, claimant was pulling an overhead container of ribs from the cooler when she experienced a cramp from her neck down to her right hand. (Hr. Tr., p. 20-21) When claimant realized she was unable to move her arm, she sat down on a bucket to collect herself. (Hr. Tr., p. 21) After reporting her injury, claimant returned to work and, little by little, her symptoms decreased and she was able to finish her shift. (Id.)

Claimant first sought medical treatment for her stipulated injury on March 14, 2019. (Joint Exhibit 1, p. 1) She was assessed with back and shoulder strains. She received a

shoulder injection and prescription medications. (JE1, p. 2) She was then referred to sports medicine for an evaluation of her right shoulder. (JE1, pp. 1-2)

Before the evaluation with sports medicine occurred, claimant presented to Kristin Schroeder, D.O. in the emergency department at Iowa Lutheran Hospital. (JE2, p. 3) Claimant reported constant and sharp right shoulder pain with radiation throughout her right upper extremity, right chest wall, right upper back, and right neck. (Id.) Dr. Schroeder injected claimant with diazepam and morphine to control her pain. (JE2, p.6) She then ordered a repeat shoulder x-ray and recommended claimant talk to her primary care provider about an MRI in the event the repeat x-ray came back normal. (JE2, p. 6)

Shawn Spooner, M.D., conducted an initial evaluation of claimant on March 25, 2019. (JE3, p. 10) Dr. Spooner assessed claimant with cervicalgia, chest wall pain, right shoulder joint pain, and right upper extremity pain. (JE3, p. 13) Dr. Spooner opted to treat claimant's condition conservatively with rest, activity modifications, and physical therapy. (Id.)

When her symptoms did not improve with conservative treatment, Marc Molis, M.D. expressed concern for a possible rotator cuff tear and ordered an MRI of the right shoulder. (JE3, p. 20) The MRI, dated May 14, 2019, revealed tendinosis of the supraspinatus tendon. (JE3, p. 23) After reviewing the imaging, Dr. Molis recommended an additional course of physical therapy. (See JE3, p. 23)

By June 17, 2019, claimant was doing much better and demonstrating normal strength without deficits or pain; however, she was still hesitant to return to full-duty work. (JE3, p. 26) Given claimant's improvement, Dr. Molis allowed her to return to work without restrictions. (JE3, p. 27)

On August 6, 2019, claimant reported that she was able to do "pretty much everything" at her job except for lifting heavy pans. (JE3, p. 28) She also reported that her shoulder was "really tense and tight" at night. (Id.) Claimant was still hesitant to fully use her right arm and shoulder; however, Dr. Molis encouraged her to continue pushing her limits. (JE3, p. 29)

On September 30, 2019, claimant reported she was back to doing her full-duty job with no pain. (JE3, p. 30) As a result, Dr. Molis placed claimant at maximum medical improvement (MMI) and cleared her for all duties. (JE3, p. 31)

Three months later, claimant returned to Dr. Molis' office and reported that her right shoulder and neck pain had returned with more burning, numbness, and tingling. She further reported difficulty with overhead motion. (JE3, p. 32) When an updated right shoulder MRI returned negative for any rotator cuff or labral pathology, Dr. Molis recommended an MRI of the cervical spine. (JE6, p. 59)

The cervical MRI, dated February 3, 2020, revealed a bulging intervertebral disc at C5-C6. (JE7, p. 64; See JE3, p. 33) After reviewing the MRI results, Dr. Molis referred

claimant to pain specialist, John Rayburn, M.D., for further evaluation. (See JE3, pp. 34-35)

Dr. Rayburn performed his initial evaluation of claimant on February 17, 2020. (JE8, p. 78) The medical record provides, "Upon exam she does have multiple things that could be causing her pain. I am most concerned about the large protrusion at C5-6 causing severe neural foraminal narrowing." (JE8, p. 80) Dr. Rayburn administered a cervical epidural steroid injection and recommended a referral to a spine surgeon. (JE8, pp. 80-81)

Claimant presented to Trevor Schmitz, M.D. on March 11, 2020. (JE8, p. 85) Dr. Schmitz reviewed claimant's imaging and noted the large C5-C6 right paracentral disc herniation was causing moderate central stenosis. (JE8, p. 87) Dr. Schmitz diagnosed claimant with cervical disc disorder at C5-6 with myelopathy and foraminal stenosis of the cervical region. (Id.) Dr. Schmitz explained that claimant could proceed with cautious observation or undergo surgical intervention. (Id.) After considering her options, claimant opted to proceed with the recommended fusion procedure. (See JE8, p. 90)

Following Dr. Schmitz's recommendation for surgery, defendants scheduled claimant for an independent medical evaluation with Lynn Nelson, M.D. (JE7, p. 66) The evaluation occurred on May 12, 2020. (Id.) Dr. Nelson opined claimant's ongoing cervical spine complaints and findings were related to her right-sided C5-6 herniated disc, and her work injury of March 5, 2019 was a material cause of the herniated disc and need for surgical treatment. (JE7, p. 68) He further opined the C5-6 ACDF proposed by Dr. Schmitz was a very reasonable treatment recommendation. (Id.)

On July 10, 2020, Dr. Schmitz performed an anterior cervical discectomy and spinal cord and foraminal decompression bilaterally at C5-C6 with placement of a titanium cage. (JE6, pp. 60-61) Surgery was beneficial and reduced the radicular symptoms in claimant's right arm. (See JE8, p. 99)

Claimant participated in physical therapy from September 1, 2020, to October 29, 2020. (See JE4, pp. 40-46) At her final physical therapy appointment, claimant demonstrated tolerances to frequently lifting 50 pounds to the waist, frequently lifting 30 pounds from waist to shoulder, occasionally lifting 20 pounds overhead, frequently carrying 50 pounds, and occasionally pulling 50 pounds. (JE4, p. 45).

Dr. Schmitz placed claimant at MMI and released her to return to work without restrictions on December 2, 2020. (JE8, pp. 102-103) In a letter dated December 9, 2020, Dr. Schmitz placed claimant in DRE Cervical Category IV and assigned 25 percent whole person impairment. Dr. Schmitz utilized the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition when rendering his impairment rating. (JE8, p. 104)

In response, claimant sought an independent medical evaluation with Jeffrey Pederson, D.O. The evaluation occurred on February 5, 2021. (Ex. 2, p. 3) During the examination, claimant described dull, achy, right-sided neck pain and right periscapular

pain which radiated into the right upper arm. (Ex. 2, p. 5) Dr. Pederson diagnosed claimant with C5-6 herniated disc resulting in a C5-6 anterior cervical discectomy and fusion, right shoulder pain, neck pain, and myofascial right periscapular pain. (Ex. 2, p. 11) Dr. Pederson opined that claimant would not reach MMI for her cervical spine condition until she was at least one year out from her surgery, or July 10, 2021. (Id.) Nevertheless, he still assessed claimant's permanent impairment. Like Dr. Schmitz, Dr. Pederson placed claimant in DRE Cervical Category IV; however, he assigned a slightly higher rating of 28 percent whole person impairment. (Id.) He explained that the higher rating was due to claimant's "burden of treatment, difficulty with daily tasks, and continued symptoms[.]" (Id.)

Additionally, Dr. Pederson opined that the right shoulder/periscapular myofascial muscle pain is independent from the cervical condition and limits claimant's range of motion. (Id.) As such, Dr. Pederson assigned an additional two percent whole person impairment for range of motion deficits in right shoulder flexion, extension, and abduction. (Ex. 2, pp. 11-12) Utilizing the combined values chart on page 604 of the Guides, Dr. Pederson assigned a 29 percent whole person impairment for the March 5, 2019, work injury. (Ex. 2, p. 12)

Claimant spoke with the defendant employer about returning to work; however, the defendant employer did not have any work available at that time. (Hr. Tr., pp. 26-27, 61-62) The defendant employer told claimant they would contact her once they had work available. (Hr. Tr., p. 62) Shortly thereafter, claimant applied for and accepted a position with Tasty Tacos. (Hr. Tr., p. 27) Claimant's duties at Tasty Tacos included making tacos, frying mushrooms, cleaning up her workstation, sweeping/mopping the floor and moving floor mats. (Hr. Tr., pp. 64-65, 72-73) Claimant did not find the job to be physically difficult. (Hr. Tr., p. 65)

Claimant returned to Dr. Schmitz on March 17, 2021, with complaints of right-sided neck, upper back, and shoulder pain. (JE8, p. 105) She denied experiencing any radiating symptoms, numbness, or tingling down the right arm. (Id.) Following his examination, Dr. Schmitz referred claimant to physical medicine and rehabilitation. (JE8, p. 106)

Kurt Smith, D.O., evaluated claimant on March 26, 2021. (JE8, p. 108) Claimant reported persistent pain in the right upper thoracic region with muscle spasms. (Id.) After reviewing claimant's imaging and performing a physical examination, Dr. Smith recommended claimant take Naproxen as needed. Otherwise, he had nothing to offer her from a physical medicine and rehabilitation standpoint. (JE8, p. 110)

Frustrated by her ongoing pain, claimant requested additional treatment from the defendants. Defendants agreed to provide additional care and scheduled claimant for an evaluation with Christian Ledet, M.D. Dr. Ledet first evaluated claimant on May 26, 2021. (JE9, p. 117) Claimant reported persistent pain in the cervical spine, right trapezius, right shoulder, and right upper arm. (JE9, p. 120) Dr. Ledet reviewed the diagnostic imaging and recommended a referral to an orthopedic shoulder specialist to rule out quadrilateral space syndrome. (Id.)

Pursuant to Dr. Ledet's recommendation, defendants scheduled claimant to present to Jason Sullivan, M.D. on June 15, 2021. (JE7, p. 69) Dr. Sullivan recommended an updated MRI of the right shoulder to rule out any residual injury. (JE7, p. 70) The MRI dated July 1, 2021, revealed mild supraspinatus tendinopathy and mild subacromial subdeltoid bursitis. (JE7, p. 73) Dr. Sullivan reviewed the MRI with claimant and relayed that he did not believe the shoulder was causing her ongoing symptoms. (JE7, pp. 74-75) In a letter dated July 13, 2021, Dr. Sullivan opined that claimant does not have quadrilateral space syndrome. (JE7, p. 77)

At Dr. Ledet's request, Claimant underwent a right upper extremity nerve conduction study and EMG on November 2, 2021. (JE10, p. 142; see JE9, p. 120) The results were consistent with mild right carpal tunnel syndrome and a remote right C6 radiculopathy with some evidence of reinnervation. (JE10, p. 142)

Claimant followed up with Dr. Schmitz on January 19, 2022, noting right interscapular pain with some residual neck pain and stiffness. Dr. Schmitz reviewed the nerve conduction study and advised that, on examination, claimant did not have any numbness or tingling in her hand that would be consistent with carpal tunnel syndrome. Dr. Schmitz opined claimant could work without restrictions and advised her to return to his office as needed. (JE8, pp. 115-116)

Dr. Ledet reviewed the nerve conduction study on January 27, 2022, and opined:

"There is evidence of C6 nerve injury and peripheral entrapment at the right carpal tunnel. This may represent a double crush syndrome. Additionally, there is clinical evidence of cervical facet syndrome which may account for the scapular symptoms."

(JE9, p. 123) Given these findings, Dr. Ledet recommended an MRI of the cervical spine. (Id.) The MRI dated February 10, 2022, showed residual uncovertebral and facet disease causing mild right neural foraminal narrowing. (JE11, p. 147; see JE9, p. 127) After reviewing the imaging, Dr. Ledet recommended a trial of gabapentin. (JE9, p. 127)

Defendants produced the February 10, 2022 MRI to Dr. Schmitz and requested his opinions regarding the same. (Defendants' Exhibit B, p. 5-6) Dr. Schmitz noted some residual mild stenosis, but no neural impingement. He opined claimant's MRI findings were not unexpected and recommended no additional surgery. (Id.)

Claimant presented to Royce Woodroffe, M.D. of University of Iowa Health Care for a neurosurgical evaluation on June 2, 2022. (JE12, p. 152) She reported continuous localized pain in the back of the neck and pinpoint areas of pain in the right posterior shoulder and right posterior scapular region. (Id.) She further reported paresthesia in the right shoulder region that was alleviated with gabapentin. (Id.) Dr. Woodroffe examined claimant and reviewed the cervical imaging and EMG. (JE12, p. 154) Dr. Woodroffe opined there was good bony fusion in the cervical spine without concern for significant

adjacent segment disease and, therefore, he did not recommend any further surgical interventions. (JE12, p. 155) Dr. Woodroffe recommended claimant follow-up with Dr. Ledet to continue with conservative therapy. (Id.)

Dr. Ledet declared maximum medical improvement from a pain management standpoint on June 6, 2022. (JE9, p. 134) He then instructed claimant to follow-up in his clinic at 90-day intervals for ongoing medication management. (JE9, p. 135)

Between June 6, 2022, and December 13, 2022, Betsy Bolton, PA-C increased the dosage of claimant's gabapentin prescription on two occasions. (JE9, pp. 138, 141)

The primary issue to be addressed in this decision is the extent of claimant's entitlement to permanent partial disability benefits. Defendants admit the compensability of the cervical spine surgery performed by Dr. Schmitz and accept his opinion that the injury to the cervical spine resulted in a 25 percent whole person impairment; however, defendants contend claimant sustained no additional permanent disability as a result of her alleged right shoulder and right upper extremity injuries.

Defendants acknowledge that the bulk of claimant's initial medical treatment focused on the right shoulder; however, they correctly point out that the focus of claimant's medical treatment subsequently shifted to the cervical spine following two essentially normal right shoulder MRIs and one abnormal cervical spine MRI. (JE5, p. 57; JE6, p. 59; JE7, p. 64)

After claimant underwent a cervical fusion, she continued to experience symptoms in her neck, upper back, and shoulder area. Consequently, medical professionals decided to re-examine claimant's right shoulder as a potential cause of her pain.

Dr. Sullivan, a shoulder specialist, ordered an updated right shoulder MRI, which revealed mild supraspinatus tendinopathy and mild subacromial subdeltoid bursitis. (See JE7, p. 73) After reviewing the imaging, Dr. Sullivan explained to claimant that he did not believe her ongoing symptoms were coming from the right shoulder. (JE7, p. 74) Dr. Sullivan explained that, on MRI, the shoulder structure appeared normal and there are not always tangible solutions to pain around the neck into the shoulder girdle. (Id.)

In comparison, Dr. Pederson opined that the myofascial shoulder component is independent from the corrected cervical spine disc bulge. He then opined that the right shoulder/periscapular myofascial muscle pain limits claimant's range of motion and assigned two percent whole person impairment as a result of the same. (Ex. 2, pp. 11-12)

I do not find the additional two percent whole person impairment rating from Dr. Pederson to be convincing. Dr. Pederson's report fails to explain how the myofascial shoulder pain is independent from the corrected cervical spine disc bulge. At one point in his report, Dr. Pederson even acknowledges the lack of objective medical evidence demonstrating shoulder pathology. The IME report provides:

"The right shoulder injury was initially believed to be from shoulder pathology, however, after further investigating, it was shown to be cervical spine related, resulting in an anterior cervical discectomy and fusion. Clinically, the right shoulder did not indicate any pathology within the right shoulder joint. Passive range of motion and special testing of the right shoulder did not reveal obvious intrinsic shoulder pathology."

(Ex. 2, p. 11)

In this case, claimant underwent three right shoulder MRIs. The first right shoulder MRI, completed approximately two months after the date of injury, revealed "mild supraspinatus tendinosis" and "muscular edema within the teres minor muscle belly." (JE5, p. 57) The second MRI, dated January 20, 2020, returned essentially normal. (JE6, p. 59) The third right shoulder MRI revealed mild supraspinatus tendinopathy and mild subacromial subdeltoid bursitis. (JE7, p. 73) Dr. Sullivan reviewed the MRI and explained to claimant that he did not believe her symptoms were coming from the shoulder. (JE7, p. 74) He did not anticipate any impairment to the right shoulder and provided no work restrictions. (JE7, pp. 74-77) I find Dr. Sullivan's opinion to be convincing.

Having rejected the two percent whole person impairment rating provided by Dr. Pederson, I find claimant has not proven by a preponderance of the evidence that she sustained a permanent right shoulder injury as a result of the March 5, 2019, work injury.

With respect to claimant's neck injury, I find the medical opinions and impairment rating of Dr. Schmitz to be credible and convincing. Dr. Schmitz and Dr. Pederson provided similar impairment ratings; however, Dr. Schmitz is claimant's treating surgeon and had the opportunity to evaluate claimant on numerous occasions, including intra-operatively. I accept Dr. Schmitz's opinion that claimant reached MMI on December 2, 2020. I also accept Dr. Schmitz's 25 percent whole person impairment rating as most accurate. Therefore, I find that claimant has proven a 25 percent whole person impairment as a result of her injury.

The defendant employer was able to return claimant to work in May, 2021; however, it could only offer her three days of work per week. (See Ex. 1, p. 1; Hr. Tr., p. 63) At hearing, Ms. Cruz testified that she performs the prep work and her co-workers help with all lifting aspects of the job. (Hr. Tr., p. 30) She further testified that she now works slower and her right arm is more easily fatigued. (Hr. Tr., p. 31)

In addition to working 18-21 hours per week for the defendant employer, claimant continued working part-time for Tasty Tacos. (Hr. Tr., pp. 28-29, 65-67) Claimant eventually quit her job at Tasty Tacos in July 2022 and returned to work for Cheesecake Factory in approximately August 2022, working 16 to 18 hours per week and earning \$19.50 per hour. She was still working in this position as of the date of hearing. (Hr. Tr., pp. 31, 69) Defendants assert claimant returned to work without any physical restrictions

and is now earning more money – working two jobs – than she earned at the time of the March 5, 2019, work injury.

Claimant's current complaints include pain in the right trapezius area, headaches, cramping in the right arm, and a feeling of heaviness in the right arm. (Hr. Tr., pp. 38-40) Claimant testified that she uses her left hand more than her right because the "right one doesn't work the same as before." (Hr. Tr., p. 33) She does not believe she could return to her normal job duties at Jethro's because of her current difficulties with lifting and moving heavy items. (Hr. Tr., p. 41) Based on her credible testimony, it is clear to the undersigned that claimant's ongoing symptoms limit her functional abilities.

Claimant is 43 years old. She is well-educated and intelligent. Unfortunately, it does not appear as though her legal science degree has translated to job opportunities in the United States. Claimant is a hard worker; however, her language barrier limits the employment opportunities available to her. Considering claimant's age, educational and employment histories, her continued employment for Jethro's, the situs and severity of her injury, her permanent impairment, her motivation to continue working, as well as all other factors of industrial disability outlined by the Iowa Supreme Court, I find claimant proved a 40 percent loss of future earning capacity as a result of the March 5, 2019, work injury.

Costs will be addressed in the Conclusions of Law section.

REASONING AND CONCLUSIONS OF LAW

The main issue to be addressed in this decision is the extent of claimant's entitlement to permanent partial disability benefits for an unscheduled injury to the cervical spine.

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).

Under the Iowa Workers' Compensation Act, permanent partial disability is compensated either for a loss or loss of use of a scheduled member under Iowa Code section 85.34(2)(a)-(u) or for loss of earning capacity under section 85.34(2)(v). The extent of scheduled member disability benefits to which an injured worker is entitled is determined by using the functional method. Functional disability is "limited to the loss of the physiological capacity of the body or body part." Mortimer v. Fruehauf Corp., 502 N.W.2d 12, 14 (Iowa 1993); Sherman v. Pella Corp., 576 N.W.2d 312 (Iowa 1998).

In all cases of permanent partial disability described in paragraphs "a" through "u", or paragraph "v" when determining functional disability and not loss of earning capacity, the extent of loss or percentage of permanent impairment shall be determined solely by utilizing the Guides to the Evaluation of Permanent Impairment, Fifth Edition, published by the American Medical Association, as adopted by the workers' compensation commissioner by rule pursuant to chapter 17A. Lay testimony or agency expertise shall not be utilized in determining loss or percentage of permanent impairment pursuant to paragraphs "a" through "u", or paragraph "v" when determining functional disability and not loss of earning capacity. Iowa Code section 85.34(2)(x).

Cruz's injury constitutes an unscheduled injury under Iowa Code section 85.34(2)(v) as cervical injuries are not listed in the statutory schedule.

Pursuant to Iowa Code section 85.34(2)(v), an unscheduled injury is compensated on a functional impairment basis if the injured worker returns to work and receives the same or greater salary than what the worker earned on the date of injury. However, if the employee no longer works for the employer, permanent disability is payable based upon an industrial disability analysis. Martinez v. Pavlich, Inc., File No. 5063900 (Appeal July 2020). In this instance, claimant returned to work and received the same or greater wages than what she earned on the date of injury. She was still working for Jethro's at the time of hearing. However, claimant is working less hours than she did at the time of her work injury.

In determining whether the above provision of Iowa Code section 85.34(2)(v) applies, there is a comparison between the pre-injury and post-injury wages and earnings. McCoy v. Menard, Inc., File No. 1651840.01 (App. April 9, 2021).

In McCoy, the deputy commissioner found that because the claimant's hourly wage did not change post-injury, his disability was limited to his functional impairment. The commissioner reversed the deputy commissioner's decision, finding such an interpretation of Iowa Code section 85.34(2)(v) inaccurate. The commissioner held that a claimant's hourly wage, considered in isolation, is not sufficient to limit a claimant's compensation to functional disability. The claimant's hourly wage must be considered in

tandem with the actual hours worked or offered by the employer when comparing pre-injury and post-injury wages and earnings. In this instance, the defendant employer was able to return claimant to work in May of 2021; however, it was only able to offer her three days of work per week as opposed to the five days of work per week she received prior to the date of injury.

It is undisputed that claimant returned to work for the same or greater hourly wage that she was receiving at the time of the stipulated work injury. However, she did not return to work for the same or greater earnings. Claimant has established that her earnings were less after she returned to work following her injury because she did not receive as many hours. (Hr. Tr., pp. 29, 65-66) Therefore, she is entitled to a determination of permanent disability based on lost earning capacity. McCoy v. Menard, Inc., File No. 1651840.01 (App. April 9, 2021).

Since claimant has an impairment to the body as a whole, an industrial disability has been sustained. When determining industrial disability, it is important to consider functional impairment, which refers to the reduction in earning capacity. However, other factors must also be taken into account. These include the age, education, qualifications, and experience of the injured employee, as well as their motivation, loss of earnings, severity and location of the injury, work restrictions, and their ability to engage in suitable employment. Additionally, the employer's offer of work, or lack thereof, should be considered. 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. Iowa Code section 85.34.

Having considered the relevant industrial disability factors outlined by the Iowa Supreme Court, I found that claimant proved a 40 percent loss of future earning capacity as a result of the March 5, 2019, work injury. This is equivalent to a 40 percent industrial disability and entitles claimant to an award of 200 weeks of permanent partial disability benefits. Iowa Code section 85.34(2)(v).

The hearing report lists a commencement date of December 2, 2020, as disputed. Under Iowa Code section 85.34(2), compensation for permanent partial disability commences "when it is medically indicated that maximum medical improvement from the injury has been reached and that the extent of loss or percentage of permanent impairment can be determined" under the AMA Guides. Dr. Schmitz is the only physician to definitively place claimant's cervical spine condition at MMI. I find the commencement date for permanency is December 2, 2020, the date that Dr. Schmitz placed claimant at maximum medical improvement.

Claimant seeks reimbursement of the fees associated with Dr. Pederson's independent medical evaluation under Iowa Code section 85.39. 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.

Dr. Schmitz, an authorized treating physician, assessed claimant's permanent impairment on December 9, 2020. (JE8, p. 104) Dr. Pederson conducted an independent medical evaluation of claimant on February 5, 2021. (Ex. 2) It is clear a physician, chosen by defendants, assessed claimant's permanent impairment prior to claimant seeking out an alternative impairment rating from Dr. Pederson. I find claimant is entitled to reimbursement of Dr. Pederson's independent medical evaluation under Iowa Code section 85.39.

The final issue for determination is a specific taxation of costs pursuant to Iowa Code section 86.40 and rule 876 IAC 4.33. Costs are to be assessed at the discretion of the deputy commissioner or workers' compensation commissioner hearing the case. Rule 876 IAC 4.33. I conclude that claimant was successful in her claim and therefore exercise my discretion and assess costs against the defendants in this matter.

Claimant seeks assessment of her filing fee (\$100.30). This cost is appropriate and assessed pursuant to 876 IAC 4.33(7).

ORDER

THEREFORE, IT IS ORDERED:

Defendants shall pay claimant two hundred (200) weeks of permanent partial disability benefits commencing on December 2, 2020, at the stipulated weekly rate of three hundred ninety-four and 98/100 dollars (\$394.98).

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


Defendants shall be entitled to credit for any weekly benefits paid to date.

Defendants shall reimburse claimant's independent medical evaluation fee from Dr. Pederson in the amount of four-thousand and 00/100 dollars (\$4,000.00).

Costs are taxed to defendants pursuant to 876 IAC 4.33, as set forth in the decision.

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

Signed and filed this 15th day of August, 2023.



MICHAEL J. LUNN
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served as follows:

Samuel Aden (via WCES)

Justin Burroughs (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, 10A) of the Iowa Administrative Code. The notice of appeal must be filed via Workers' Compensation Electronic System (WCES) unless the filing party has been granted permission by the Division of Workers' Compensation to file documents in paper form. If such permission has been granted, the notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 150 Des Moines Street, Des Moines, Iowa 50309-1836. The notice of appeal must be received by the Division of Workers' Compensation 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 legal holiday.