BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

BARBARA ROBINSON, Claimant, vs. PRINCIPAL LIFE INS. CO., Employer, Self-Insured, Defendants.	:	File No. 1298314 A R B I T R A T I O N D E C I S I O N Head Note Nos.: 1106; 1108; 1401; 1402.20; 1402.30; 1402.40; 1402.60; 1802; 1803; 2501; 2502; 2907; 4000.2

INTRODUCTION

This is a proceeding in arbitration filed by Barbara Robinson, claimant, against Principal Life Insurance Company, employer, and self-insured, defendant for benefits as the result of an alleged injury that allegedly occurred on January 20, 2000. A hearing was held in Des Moines, Iowa, at the office of the workers' compensation commissioner on May 6, 2002, at 8:30 a.m., which is the time and place previously set by the order of the worker's compensation commissioner. Claimant was represented by Martin Ozga. Defendant was represented by E. J. Giovannetti.

The record consists of Joint Exhibits 1 through 34 in the original bound packet of exhibits. At the hearing the parties added additional Joint Exhibits 3, 25, 32, and 33. Exhibit 35 was introduced during the hearing. The parties also submitted a loose packet of exhibits labeled Hicklin Deposition Exhibits 1, 2, and 3. Neither party had any objection to any of these exhibits and, therefore, they were all admitted into evidence.

The record also consists of the testimony of Barbara Robinson, claimant, and the testimony of Denyce Wingert, employers' manager.

Also present in the court room at the time of the hearing were: Anya Bierl, Mr. Ozga's legal assistant, Debbie Knutson, Mr. Giovannetti's legal assistant and Steve Jones, employer's corporate claims analyst.

Subsequent to the hearing both parties submitted excellent post hearing briefs.

PRELIMINARY MATTERS

One of the first paragraphs in the hearing assignment order is captioned First Report of Injury which states that defendant is ordered to file a first report of injury. Defendant will be required to prove at the time of hearing that a first report of injury has been filed and if unable to do so they shall appear and show cause at the time of hearing why a civil penalty should not be assessed pursuant to Iowa Code Section 86.12.

The workers' compensation file did not contain a first report of injury and defendant did not present one at the hearing to the hearing deputy to be placed in the workers' compensation file. Defendant did not show cause why a penalty should not be imposed.

Therefore, pursuant to Iowa Code Section 86.12 Failure to Report, a civil penalty in the amount of $100.00 is imposed on defendant and defendant is ordered to pay to the Second Injury Fund of Iowa the $100.00 civil penalty.

STIPULATIONS

The parties stipulated to the following matters at the time of the hearing.

1. That an employer-employee relationship existed between employer and claimant at the time of the alleged entry.

2. That claimant was seeking temporary disability benefits for February 4, 2000; February 7, 2000; February 11, 2000; April 3, 2000; April 19, 2000; and April 29, 2000 through July 30, 2001; and although entitlement cannot be stipulated, defendant did stipulate to the fact that claimant was off work during these periods of time.

3. That the type of permanent disability, if an award is made for permanent disability, is industrial disability for an injury to the body as a whole.

4. That the gross earnings of claimant were $470 per week, the claimant was married and entitled to three exemptions, and the parties believed that the correct rate of weekly workers' compensation is $311.66 per week based upon the foregoing data.

5. That Defendants were not asserting any affirmative defenses.

6. With respect to medical expenses:

    a. The fees or prices charged by providers are fair and reasonable;

    b. That the treatment was reasonable and necessary;

c. That the medical providers will testify as to the reasonableness of their fees and/or treatments set forth in the list of expenses and that defendant was not offering contrary evidence;

d. Although causal connection of the expenses to a work injury cannot be stipulated, the list of expenses are at least causally connected to the medical condition upon which the claim of injury is based;

7. That prior to hearing, claimant was paid 40 weeks of compensation at the rate of $311.66 per week; in the amount of $12,466.40.

8. That claimant has attached an itemized list of costs and defendant has stipulated that these costs have been paid.

ISSUES

The parties submitted the following issues for determination at the time of the hearing.

1. Whether claimant sustained an injury on January 20, 2000, which arose out of and in the course of employment with employer.

2. Whether the alleged injury was the cause of temporary disability during a period of recovery.

3. Whether the alleged injury was the cause of permanent disability.

4. Whether claimant is entitled to temporary disability benefits and if so, how much.

5. Whether claimant is entitled to permanent disability benefits and if so, how much.

6. What is the commencement date for permanent disability benefits, if any are awarded.

7. Whether claimant is entitled to the list of medical expenses attached to the hearing report in the gross amount of $18,775.53 less contract adjustments.

8. Whether the claimed medical expenses were authorized by defendants.

9. Whether claimant is entitled to penalty benefits pursuant to Iowa Code Section 86.13, fourth unnumbered paragraph.

10. Whether claimant is entitled to reimbursement for an independent medical examination pursuant to Iowa Code Section 85.39 in the amount of $325.00 shown on claimants list of costs.

FINDINGS OF FACT

Claimant, Barbara Robinson, born August 10, 1955, testified that she was 46 years old at the time of the hearing.

She stated that she completed the 11th grade, obtained a GED and entered the United States Army where she served for approximately four years before obtaining an honorable medical discharge due to a pregnancy. In the Army, claimant served as a cook, performed clerical work, and was a weapons person who took care of the armory.

She attended DMACC (Des Moines Area Community College) for two years and received a Word Processor and Clerical Certificate.

Past employments include in-home childcare, that is private childcare for approximately three years, and working for temporary agencies until she was hired permanently by the Principal Life Insurance Company. She had two other jobs prior to this employment (1) a permanent full time employee as a tax processor, and (2) payroll administrator.

Claimant started to work for employer on July 6, 1999, as a customer service representative assisting customers with their 401K plans. She testified that she was on the phone all day and she loved her job.

On January 20, 2000, Barbara became nauseated, the back of her throat became burning and itchy, her eyes were burning, and her skin was inflamed caused by an odor like when you pump gas at a filling station. It was also like the backdraft from the car in front of you. Claimant testified that she told Denyce (Johnson) Wingert, her manager. Claimant related that other employees were also affected by this odor. Claimant testified that she thought it would pass over, but when it did not, she saw her personal doctor on February 1, 2000.

The record of Karen Ravitz, D.O. on February 1, 2000, states that claimant saw her because she ran out of blood pressure medicine and she was out of breath. Also, it says that claimant stated that on December 1, 1991, she started feeling tired and more short of breath. Dr. Ravitz also recorded that on January 20, 2000, claimant related that she inhaled some diesel fuel fumes at work and began to have wheezing at times.

Claimant related that she was out of blood pressure medicine because of financial reasons and her blood pressure at that time was 200/116 with the large cuff on the right arm. She was not overly dyspneic. Her height was 64”, her weight was 265 pounds. Dr. Ravitz recorded that there was an occasional wheeze in the left upper lobe. Otherwise, her respiration was clear. Claimant did not use accessory muscles for respiration.

Dr. Ravitz assessed: (1) hypertension, uncontrolled due to lack of meds and (2) bronchospasm leading to dyspnea.

Under the caption PLAN, Dr. Ravitz recorded "1. She has used an Albuterol inhaler in the past and done well with it. We will refill Albuteral inhaler, two puffs up to four times per day as needed for tight cough and wheeze." *(Ex2 p.3)*

In a letter dated April 26, 2002, to defendant's counsel, Karin (Ravitz) Priefert, D.O. wrote that she had reviewed her note of February 1, 2000, and to the best of her knowledge it was accurate. She added that she had no other specific recollection about the clinic visit on February 1, 2000. (Ex.3 p.17a)

Claimant's testimony was that Dr. Ravitz treated the condition like a cold with cough syrup and stuff like that. This is not born out by Dr. Ravitz's office note of February 1, 2000. (Transcript page 29; Hicklin Exhibit 2.)

Claimant denied that she saw a doctor for shortness of breath in December 1999 but added that the shortness of breath passed when she took her blood pressure medication called Adalat.

Claimant could not recall telling Dr. Ravitz that she had previously used an Albuterol inhaler on February 1, 2000, but she did recall that once she was really sick with sinus infection in 1996 or 1997 and Dr. Ravitz prescribed an inhaler for claimant at that time. It had no refill. Dr. Ravitz did not tell her that she had asthma back then and claimant denied in her sworn testimony that she had ever had any serious problems with shortness of breath prior to January 20, 2000. (Tr., pp. 32 and 33). Or that she had used any asthma medications prior to January 20, 2000.

Joint Exhibit 1, p.1 is a medical sheet from the University of Osteopathic Medicine and Health Sciences and the Tower Clinic where Dr. Ravitz practiced osteopathy. This exhibit verifies that the first time that claimant was prescribed an Albuterol inhaler was on February 1, 2000. This medication sheet covers the period from December 30, 1998, through April 12, 2000. Claimant examined this exhibit and verified that it was correct. Claimant agreed that it was for asthma.

The medication sheet shows that Albuterol inhalers were prescribed for claimant five times between February 1, 2000, and April 12, 2000, as well as several other medications which had never been prescribed before. Claimant testified that she returned to work after January 20, 2000, but continued coughing and coughing up stuff. Claimant testified that she coughed so hard that it caused her to urinate on herself. Claimant testified that there was another occasion which she could not remember the date when she was exposed to diesel fumes at Principal.

The indoor air quality incident log dated January 20, 2000, (Ex. 27 pp. 1 and 2) verified that engineers indicate that during required MidAmerican Energy switch from natural gas to diesel fuel for boilers, that the boilers were not operating in top

efficiencies; and that in combination to an air inversion that kept the exhaust from dissipating; and that fumes were drawn back into the building from supply vents. The report adds that employees on the second floor were temporarily removed to another building while the building could be aired out. Also a number of employees indicated physical symptoms from the odors, but none required medical assistance at that time. A number of employees left for the day with their manager's approval.

Denyce Wingert testified that she personally did not notice the fumes on that day but she understood that other people reported it but not to her. (Tr., pp. 109, 110)

Dr. Ravitz saw claimant a total of eight times between February 1, 2000, and May 10, 2000.

On February 4, 2000, Dr. Ravitz assessed: (1) acute shortness of breath, (2) acute bronchospasm, (3) status post inhalation of diesel fumes on January 20, 2000. Among other things, Dr. Ravitz prescribed Prednisone, 10mg start at one qid and burst and taper. She was to continue with the Albuterol inhaler.

On February 7, 2000, Dr. Ravitz assessed: (1) bronchospasm, reversible airway disease probably secondary to inhalant exposure, (2) hypertension, essential, with moderate control. She planned to follow up with Donald Shumate, D.O. for pulmonary consultation.

On February 8, 2000, Dr. Ravitz assessed: (1) dyspnea, (2) bronchospasm, despite steroids and Albuterol, (3) hypertension, fair control.

On April 3, 2000, claimant saw Fred W. Strickland, Jr., M.A., D.O. Claimant said that diesel fuel or fluid was pumped into the building again. They evacuated the basement and floors one and two, but not the third floor where she worked. Claimant said she became ill again. Her throat burned, her eyes itched and she had trouble breathing. She had headache, nausea, fatigue, and sore ribs from coughing. She reported that later phlegm tasted like blood. The assessment on this occasion was status post exposure to chemicals at work, states causing her asthma. Also, Dr. Strickland reported on that date that after he had left to go to lunch a nurse called him to report that the patient wanted a breathing treatment. There was a doctor on staff on the floor, so they gave her Intal and Proventil breathing treatments.

On April 12, 2000, Dr. Ravitz reported that claimant had seen Dr. Gerard Matysik whose impression was bronchospasm and cough, and had also noted a marked reversibility on spirometry. (Ex. 2, p. 7) Dr. Matysik had instructed her to repeat oral Prednisone, continue Albuterol and continue Azmacort, two puffs qid. Dr. Ravitz also stated that claimant reports that despite medicine, she continues to have problems. Claimant stated that she has had several courses of Prednisone over the last few months but has not appreciated much improvement by using it. The assessment by Dr. Ravitz on this date was: (1) persistent dyspnea, (2) bronchospasm, (3) hypertension. Question whether ventricular dysfunction contributing to her symptoms.

On April 19, 2000, the claimant stated that the work place still utilizes a diesel product for the heating system and her symptoms worsen the longer she is exposed. Dr. Ravitz reported that she had been seen recently in cardiology and told that her heart function was normal.

On this occasion Dr. Ravitz's assessment was: (1) persistent dyspnea, (2) bronchospasm, (3) asthma, (4) abdominal pain, (5) possible gastroesophageal reflux which could worsen her symptoms, (6) hypertension, fair control. Dr. Ravitz also noted on that date, on her work note, that claimant should not be exposed to diesel fumes.

The last note from Dr. Ravitz is dated May 10, 2000. She related that claimant had continuing shortness of breath. Her assessment was from Exhibit 2 p. 11. (1) continued exertional dyspnea, (2) asthma, not yet under control, (3) hypertension, fair control, (4) post nasal discharge. She prescribed another burst and taper of Prednisone starting at 40mg and tapering to 10.

On July 21, 2000, claimant saw Ronnie Martin, D.O. Dr. Martin reported that claimant was seen by Dr. Randolph R. Rough, M.D. at Iowa Heart. She had a negative cardiac workup including an EKG and a 2-D echo. He stated an EKG at the Tower Clinic showed a normal sinus rhythm.

Dr. Martin reported that Mrs. Robinson stated that during the month of May she felt great, almost back to normal, not having to use her prn inhalers and nebulizers as much. Then about mid June or the end of June she started having exertional dyspnea again, and over the last couple of weeks it had gotten progressively worse. Dr. Martin's assessment was from Exhibit 2 p.14 (1) exacerbation of asthma and (2) severe dyspnea.

Dr. Martin said he consulted with Robert Wattleworth's, who reviewed the chest x-ray with him. He consulted with Dr. Shumate, a pulmonologist who agreed to see claimant. Dr. Martin admitted claimant to Mercy Hospital Medical Center.

With regard to temporary disability, there are off work slips signed by either Dr. Ravitz, Dr. Matysik, or Dr. Strickland with the following dates: February 4, 2000; February 7, 2000; February 11, 2000; April 3, 2000; and April 19, 2000.

Claimant was seen by William G. Eischen, D.O., on February 8, 2000, and was diagnosed with bronchospasm. Dr. Eischen said that he had discussed the case with Dr. Ravitz, her attending physician, as well as pulmonologist, Dr. Donald Shumate and they were scheduling claimant for pulmonary function tests on an outpatient basis.

On February 8, 2000, Donald R. Shumate, D.O. saw claimant and noted that complete pulmonary function testing was completed on February 8, 2000, requested by himself for diagnosis of chronic cough. He said lung volume studies appeared to be basically normal. The single-breath carbon dioxide diffusion capacity was likewise within normal limits.

His consulting impression was from Exhibits 5, p. 21. (1) Mild obstructive ventilatory defect without significant response to bronchodilater, (2) Normal lung volumes and diffusion capacity for carbon monoxide, (3) No evidence of significant inspiratory flow limitations on review of the flow volume loop.

On February 11, 2000, Gerard A. Matysik, noted that patient indicates that she has had a subjective need to use her Albuterol inhaler almost every two hours. She has been maintained on 40mg of Prednisone since February 4, 2000. Dr. Matysik found that a spirometry today, demonstrated a moderate obstructive defect with a significant component of reversibility. Lung volumes were still preserved although a mild diffusion impairment was noted. Dr. Matysik wrote that whether her present symptoms were precipitated or merely aggravated by her exposure to diesel fumes would be difficult to determine at this point in time. He added that post infectious cough is suggested by her history. The degree of reversibility appreciated on spirometry today was marked.

Dr. Matysik saw claimant again on February 25, 2000, at which time he wrote that Barbara still seems to be focused on the premise that exposure to diesel fumes in the work place appears to have triggered her present symptomatology. She is unaware of any ongoing exposure to diesel fumes in the workplace in the recent past. He offered claimant the choice of hospitalization treatment on this date but the patient indicated a preference to avoid hospitalization if at all possible.

On April 14, 2000, Randall R. Rough, M.D., of Iowa Heart Center, saw claimant and stated that her problem began in January with exposure to diesel fuel which caused extreme shortness of breath and she has been short of breath ever since. Dr. Rough wrote, “She has a history of migraine headaches and asthma.” (Ex.9, p. 29)

He also noted that she had recurrent syncope, about 12 episodes in the past, the last one being in 1994.

Dr. Rough performed an ECG, a chest x-ray and a 2-D echocardiogram. All of these tests were normal and he reassured the patient that she did not appear to have any significant cardiac problems. He concluded her problem stemmed from her asthma which appears to be exacerbated by environmental allergy (diesel fuel).

Claimant testified that she corresponded by e-mail with Denyce Wingert about her condition while she was treating with these doctors. This is evidenced by joint exhibit 28, pages 77-83.

Claimant testified that she did not ask to receive workers’ compensation and the company did not offer workers’ compensation, however, Denyce Wingert on February 10, 2000, suggested that claimant contact H.R. (Human Resources) to discuss FMLA and/or SITD. (Tr., p. 41) But she did not do that because she thought she had not been there long enough to have any employee benefits. Claimant testified that she did complete an incident report of some kind on April 28, 2000.

Claimant testified that she left her employment with Principal officially on May 15, 2000. She felt that if she quit that she would be re-hirable. She did not want to be fired because it took her so long to get a job there. The physical reason that she quit was because she could not retain herself while coughing on the telephone. She would cough so hard that it would cause her to urinate on herself and she couldn't make it to the bathroom quick enough. Her ribs were sore from coughing and it tasted like she was having blood in her mouth all the time. It was explained to her that she was breaking blood vessels from coughing so hard.

Exhibit 32 is a letter dated May 17, 2000, to claimant from the Principal Financial Group about her employment status with the company. The letter alleged that on May 8, 2000, Michelle Thies talked to claimant and Barbara indicated that she planned to return to work. However, on May 10, 11, and 12 they had not heard anything from claimant. The employee handbook provides that if you fail to contact your leader for three consecutive days you will be viewed as having resigned without notice. The letter then states that at 5:55 a.m. on May 15, 2000, Barbara left a voice message to management stating that she understood her benefits and wished to resign her employment and requested her leader to initiate the process as soon as possible. The letter then states: "We will accept your resignation effective May 15, 2000. " (Ex. 32, p. 86)

Subsequently, the claimant did file for and receive unemployment compensation benefits because working conditions were detrimental to her and her leaving was caused by the employer. (Ex. 35) The claim was dated July 16, 2000, and benefits were begun on August 11, 2000. Claimant testified she received unemployment compensation and benefits for approximately two months, maybe three.

Claimant testified that her first hospitalization after her resignation was in the last week of July, 2000. At that time, she was ambulanced from 3200 Grand (the Tower Medical Clinic) to Mercy Hospital.

Claimant testified that when she went to the clinic she was just down, they ordered an ambulance to transport her to Mercy Hospital, and she remembers them working on her giving her oxygen and shooting things in her arm. When she woke up she was in Mercy Hospital. Claimant testified that she subsequently was hospitalized at the VA Hospital on August 2, 2000, because she was unable to breathe.

She testified that she was hospitalized again at the VA Hospital on February 27, 2001, because she had an asthma attack. Her most recent visit was on April 18, 2002, just a few weeks ago. On that occasion, Gregory Hicklin, M.D., sent her for an x-ray and breathing test. Claimant's counsel stated for the record that he had attempted to obtain these hospitalization records but they had not been provided to him.

The evidence on the April 18, 2002, episode is as follows:

Q. Do you have an understanding - - did any of the doctors tell you what was going on with that?

A. No. All I have is what Doctor Hicklin gave me which scared me and put me in a frenzy, because I was supposed to be getting better and he tells me today that my heart is enlarged twice the size since I saw you last, and then my blood pressure is 204 over 100, and then you don't want to release me, and he sent me to emergency. And then when I called to get the results, I didn't get a call back.

(Tr. P. 53)

Claimant was hospitalized at Mercy Hospital Medical Center in Des Moines from July 21, 2000, until July 27, 2000, as a patient of Donald R. Shumate, D.O., at the request of Victor Kaylarian, D.O., for consultation for shortness of breath, possible reactive airway disease. Dr. Shumate noted there was a family history of allergies but not positive for asthma. Claimant had no known drug allergies, however. Dr. Shumate's impression was from exhibit 10 page 32: (1) probable reactive airway disease with exacerbation, (2) rule out sinusitis, (3) history of mild gastroesophageal reflux but rule out more significant disease that is asymptomatic for treated hypertension. Among his recommendations were IV corticosteroid therapy and nebulized Albuterol and Atrovent.

Dr. Shumate gave his final diagnosis and principal diagnosis of exacerbation of reactive airway disease on July 27, 2000. She had no acute sinusitis. She had gastroesophageal reflux disease. She had exogenous obesity. She had a history of essential hypertension and cephalgia, etiology undetermined, resolved prior to discharge. Dr. Shumate said claimant told him that she had never had a history of any chronic pulmonary complaints of any kind suggesting an asthma predisposition. While hospitalized she had an MRI of the sella turcica which showed only minimal pituitary cystic changes which were felt to be of negligible significance.

Claimant was treated a number of times at the Veteran Administration Medical Center from August 2, 2000, through June 11, 2001.

On August 2, 2000, claimant saw Shelley Jones, staff physician, who reported that she was discharged from Mercy Hospital on multiple medications which she did not fill due to lack of money. She was given these medications.

Claimant was seen again by Shelley Jones, staff physician, on December 6, 2000, who reported that the patient was in severe respiratory distress. She was unable to speak and was diaphoretic (perspiring). She was admitted to the hospital overnight for close observation and treatment. Her medications were listed as follows: (1) Triamcinolone, (2) Prednisone 40mg tapered dose, (3) Ipratropium Bromide nebulizer treatment, (4) Albuterol, (5) Salmeterol, (6) Ranitidine (7) Nifedipine, (8) Montelukast, (9) Albuterol Sulfate, (10) Combivent inhaler, (11) Albuterol nebulizer treatment, (12) Hydrochlorothiazide.

She was scheduled for various tests: (1) farmer's lung titer, (2) methocholine challenge, (3) upper GI to evaluate reflux disease. She was encouraged to keep an appointment with an allergist in Iowa City for allergy tests.

The treating physician commented in the notes that there was a question raised during her hospital stay about whether this asthma with an atypical presentation, which developed so late in life, without a family history, and being so severe, was consistent with a temporal relationship of exposure to diesel fumes, was actually RADS (Reactive Airway Disease Syndrome). The physician then stated therefore further workup is pending. To wit, methocholine challenge, allergy tests, upper GI tests to evaluate for reflux and farmer's lung disease battery. The diagnosis was stated as: (1) acute exacerbation of asthma with atypical presentation, (2) hypertension (Empasis Supplied)

It was also noted that the patient states that the only time she has felt good over the last year was while she was on Prednisone and after discontinuing Prednisone she quickly developed more wheezing.

On February 28, 2001, claimant was seen again at the Veterans Hospital with a diagnosis of: (1) acute asthma exacerbation, (2) hypkalemia (deficiency of potassium in the blood), (3) hypertension, (4) gastro esophageal reflux disease, and (5) obesity.

A CT Scan of the chest without contrast was performed. The notes state that review of records indicate that claimant had a PFT (Pulmonary Function Test) done in December of 2000, which showed good bronchodilator response, negative Farmer's lung battery, and an upper GI test last month showing mucosal changes consistent with antral gastritis, otherwise unremarkable. Claimant was still receiving 11 medications. The CT scan revealed no pulmonary infiltrates. She was discharged on February 28, 2001. Her lungs were clear, she felt good. The assessment was environmental asthma, obesity and history of GERD. An IGE (Impaired Gas Exchange) was ordered.

A summary of patient procedures June 11, 2001, showed only mild airflow obstruction.

On August 22, 2000, Dr. Shumate referred claimant to Fred Strickland, D.O. to be her primary care physician. Dr. Shumate's impression was: (1) reactive airway disease with recent exacerbation, probably in part secondary to discontinuation of an inhaled anti-inflammatory therapy and some corticosteroids, (2) exogenous obesity, (3) treated and controlled gastro esophageal reflux disease. Dr. Shumate put claimant on burst and taper prednisone with a 40mg dose and taper by 40mg every 72 hours to get down to a zero dose again if she is stable at that point. Dr. Shumate wrote to Dr. Strickland again on September 14, 2000, with his impression of: (1) reactive airway disease, moderate to severe, (2) controlled gastroesophageal reflux disease, (3) bloating, probably secondary to aerophagia from her pulmonary complaints, (4) controlled essential hypertension.

On December 12, 2000, Dr. Shumate wrote to claimant's counsel tracing the history of his treatment for her. In that letter, he stated that claimant's symptomology became manifested in January of this year after she was exposed to some diesel fumes while at work at Principal Financial. His current diagnosis was reactive airway disease although her last pulmonary function study did show some mild degree of possible fixed airway obstruction and limited response to a bronchodilator, suggesting that there may be some component, possibly chronic of a more persistent type of airway process such as chronic obstructive bronchitis. He says that the predominant symptoms of this complex appear to be that of bronchial hyperactivity or asthma.

With respect to causal connection, he stated that he had to make the assumption, which he thought was valid, that the January 2000 exposure triggered off a reactive airway disease process or it may have unmasked a previously undiagnosed tenancy toward bronchial hyperactivity.

He said that bronchial hyperactivity is synonymous with the diagnosis of asthma. Dr. Shumate added that as to whether these fumes are likely to cause this type of problem, he found the data to be quite limited, with no well-defined etiology for asthma, or for an asthma based process long-term with acute short-term diesel fume exposure.

Dr. Shumate did not think her previous smoking was affecting her current symptom complex. He did not think that she had reached the maximum medical improvement yet. With respect to gainful employment, it would be limited to occupations which do not expose her to any type of irritant, chemical, fume, sprays or fluctuations in environmental humidity and temperature. Her tendency to cough with prolonged talking was a limiting factor as to the employment she was doing at the time of when this problem arose.

On March 5, 2002, Dr. Shumate saw claimant for the last time and issued his last report by letter to claimant's attorney. This was his independent medical examination. He described the injury as what was felt to be an exacerbation of difficulties with reactive airway disease process. He said claimant had evidence of bronchial hyperactivity, exogenous, obesity, gastro esophageal reflux disease, and essential hypertension. His impression on this date was: (1) reactive airway disease with symptoms that suggest at least moderate to severe chronic asthma based on her daily exercise intolerance, wheezing, and non-productive cough, (2) exogenous obesity, (3) deconditioning, (4) probable degenerative arthritis, and (5) essential hypertension, elevated on today's examination.

With respect to causal connection, the doctor did not give an opinion within a reasonable decree of medical certainty; but rather, he expressed his opinion in terms of possibility. Dr. Shumate wrote as follows:

> Her symptoms seem to have begun after exposure to diesel fumes at her place of employment. I have seen nothing in the documentation provided that has changed my opinion that her symptoms seem to have

> had an abrupt onset after this exposure; therefore, the effect may have been one of an exacerbation of a pre-existing airway disease or induction of an airway process."

Dr. Shumate indicated that claimant was suffering from a steroid withdrawal syndrome.

On his examination on this date, he determined that the patient does have clinical evidence of bronchospasm which responds to a bronchodilator, corticosteroid, and other anti-inflammatory therapy in an appropriate fashion.

Again, on the subject of causal connection, Dr. Shumate wrote, "In regards as to whether all of these complications are a long-term event that was brought on by her initial work-related exposure, it is difficult to say whether or not indeed this work-related exposure precipitated the development of her symptoms entirely or not. " (Ex.19, p. 54)

Dr. Shumate gave the following opinion,

> I would agree that, based on the fact that the patient does not function on the low-dose corticosteroid because of symptoms of cough, wheezing, and shortness of breath probably indicates the patient, unfortunately, is psychologically dependent on some form of long-term anti-inflammatory therapy in the form of systemic steroids. Again, whether this is directly related to her single exposure at work or unrelated is difficult, if not impossible, to prove one way or the other."

(Ex. 19, pp. 54 and 55)

This pulmonary doctor stated that claimant has probably essentially derived maximum benefit from the therapies that we are able to render at this point, and that she has reached maximum medical improvement.

With respect to impairment, Dr. Shumate stated that based on her spirometrys, she appears to have only mild impairment. However, she can perform general clerical work and she should be able to do light sedentary activity with her restrictions without undo stress from the standpoint of her asthma. Dr. Shumate said she could not perform her former job as retirement specialist because prolonged talking causes coughing which prohibits her from being able to perform the job. He cautioned against physical exertion, prolonged talking, exposure to chemical, fumes, or irritants and extremes of humidity and temperature.

Next claimant saw Gregory A. Hicklin, M.D. (Ex. 20, p. 56) who reported that he saw Mrs. Robinson in the Pulmonary Clinic on March 29, 2001, with a diagnosis of bronchial asthma under poor control. She attributed her problems to the diesel fuel incident of January 20, 2000. He said she denied any prior respiratory problems. She described shortness of breath, increased sensitivity to any kind of strong odor or smells such as perfume, hair spray, or passive smoke.

Claimant weighed 276 pounds at that time. She had obvious increased respiratory effort. Chest x-ray was clear. Dr. Hicklin said that her problems are at least in part related to reversible airways obstruction or bronchial asthma. They have been refractory to therapy. He further stated that this is a somewhat unusual presentation for asthma, but he thought that at least part if not all of her symptoms were problems that were asthma related.

The doctor said specifically this single exposure was a result of exposure in the work place in January 2000. Dr. Hicklin distinguished the diesel fuel fumes from the combustion of them which contained a number of different chemicals and are irritating to mucous membranes such as burning in the eyes and throat. Dr. Hicklin further stated that clearly there must be significant individual factors in Mrs. Robinson that lead her to react in the fashion that she did. Dr. Hicklin related that there are multiple factors perpetuating this asthma and contributing to its refractoriness.

On September 14, 2001, Dr. Hicklin wrote that he had reviewed the medical records from the VA Hospital in Des Moines in regards to Barbara Robinson from August 18, 1997, to May 24, 2001, and there was no evidence of bronchodilator medication or systemic corticosteroid use prior to August 2000. He concluded by saying, “I see nothing in these records to support the diagnosis of asthma prior to her exposure at Principal on January 20, 2000.” (Ex. 20 P.60)

On September 24, 2001, Dr. Hicklin wrote that claimant underwent a cardiopulmonary stress test because of complaints of shortness of breath on exertion. She had markedly impaired cardiopulmonary response to exercise including severe deconditioning and exercise-worsened asthma. The tests confirmed some decree of asthma but a more significant factor was her severe cardiopulmonary deconditioning. Therefore, he planned to continue to work on minimizing asthma medications and helping her with regular exercise, weight reduction, and general cardiovascular health. He said based on her lung function she could return to work. However, based upon her cardiopulmonary deconditioning it would have to be a sedentary job.

On September 27, 2001, Dr. Hicklin noted that claimant weighed 288 pounds. He stated that he thought Barbara was doing fairly well. The major part of her symptoms is deconditioning, obesity and anxiety but clearly there is a small element of asthma as well. His plan was to decrease Prednisone slowly – 10mg qod for one month, 5mg qod for one month and then stop.

On November 28, 2001, Dr. Hicklin said that he thought Barbara had steroid withdrawal syndrome and was monitoring the effect of the withdrawal.

On January 7, 2002, Dr. Hicklin wrote to defendant’s counsel that based upon his examination and testing he thought she was fully capable of performing the job duties outlined in the job description submitted to him with regard to secretarial work.

Dr. Hicklin gave a deposition on April 2, 2002. At which time, he testified that he was internal medicine trained, specializing and board certified in pulmonary disease, critical care medicine, and sleep medicine. He said most of his time was taken up with the care of people with lung disease. He said that the cause of her condition was exposure to diesel fumes or diesel combustion products at the workplace.

When Dr. Hicklin saw Dr. Ravitz comment that she had used an Albuterol inhaler in the past and done well with it he thought that the January 2000 exposure would have been an exacerbating cause of her asthma but not the underlying cause. This would lead him to consider that instead of being normal compared to baseline, that she may now be back to her normal breathing status where she would have been prior to the exposure.

Dr. Hicklin stated that asthma is a treatable disease. People with asthma respond to treatment. People who have asthma from a single, rather mild exposure, like Mrs. Robinson have by history usually do very well with treatment. However, Mrs. Robinson reacted very abnormally to treatment of asthma in that nothing seemed to work. He said that was contradictory to the normal course of asthma. Therefore, he concluded that claimant's failure to respond to treatment was multifactorial and that there were many reasons.

Dr. Hicklin concluded she had asthma but her diagnosis of asthma did not explain all of her symptoms such as the severity of her shortness of breath. He also thought she had a lot of emotional overlay to her symptoms. On her pulmonary function tests, the degree of reversibility was nothing short of miraculous. She went from having severe obstruction to normal pulmonary function after inhaled bronchodilators. He determined that she was making a sub optimal effort. He said he thought that she did have asthma but there were other significant co-morbidities, including panic attack, reflux and obesity. Dr. Hicklin said he gave her a crisis plan which enabled her to come to either Lutheran Hospital or Methodist Hospital at any time while at the same time he tried to get her off Prednisone.

After the cardiopulmonary tests performed on September 17, 2001, Dr. Hicklin concluded that severe deconditioning of her vascular system was the cause of her breathing problems.

On November 28, 2001, Dr. Hicklin said that the Prednisone that had been prescribed by other physicians was another reason for her failure to get well. He explained that cortisone is a normal hormone made in the body by the adrenal gland. Continued use of Prednisone as a pill for a period of time causes the body to stop making cortisone. The adrenal gland actually atrophies as ability to make cortisone hormone goes down and the gland shrivels up. So when you take a person off cortisone who has been on it for a long time their body is starving for cortisone. The result is symptoms of joint pain, weakness, and fatigue when you are taken off of steroids. That is what is called steroid withdrawal syndrome.

Dr. Hicklin said claimant had been on prednisone for most of the year 2000 and most of the year 2001. Later he started her on a smaller dose of prednisone and had her evaluated by a rheumatologist, a specialist in that area who was Alan Braun, M.D. Claimant saw Dr. Braun on January 18 and February 19, and he thought she might have some osteoarthritis or bursitis more than a connective tissue disease. He treated her with non-steroidal antiinflammatories and she seemed to get better.

Claimant had missed two appointments so he hadn't seen her since November 28, 2001. He saw her again on January 15, 2002, and that is when he sent her to Dr. Braun.

Dr. Hicklin stated that his diagnosis at the time of the deposition within a reasonable degree of medical certainty was bronchial asthma, steroid myopathy, obesity, reflux, severe deconditioning and possible depression. The doctor added that he thought the event on January 20, 2000, caused an episode of asthma. Whether it was her first episode or a flare-up of a previous disease, he could not say. By history, it was her first episode. By the comments of Dr. Ravitz, it may have been a flare-up of a previous disease.

With respect to permanent impairment, Dr. Hicklin said that was a difficult question to answer because of the question of causality. The history she gave him of no prior symptoms, and no treatment, and no problems prior to this exposure, caused him to think there was some impairment related to this exposure.

He said it was difficult to quantify using the AMA Guides because they are based on optimal treatments, optimal evaluations, optimal pulmonary function tests and he didn't think he had those in the case of Mrs. Robinson's situation. He did not think it would be a fair thing to try to apply the guidelines to her case.

The reason he did not have optimal tests was because there are technical factors with her performing pulmonary function tests. He did not know whether it was understanding the tests or whether it was the effort she made, but the doctor stated, "I cannot get consistent or believable pulmonary function tests from her." (Ex. 25 p. 69; Deposition Exhibit, Page 29 lines 15 and 16.)

Dr. Hicklin testified that he believed that claimant could be gainfully employed based on her cardiopulmonary stress test and the description of the job that was provided to him in Hicklin Exhibit 3. This job is a Retirement Specialist II, Retirement and Investor Services which was prepared on August 12, 2001, which appears to be the work that claimant was performing at the time of this incident. The only limitations he would place upon her is common sense. Avoid situations that bother her whether it is diesel fumes or other caustic agents, otherwise, nothing specific.

When he referred to sedentary employment on September 24, 2001, he meant not doing heavy manual labor. The doctor said, "I think secretarial jobs, typist jobs, filing jobs, office jobs, things like that," and this was due to cardiopulmonary

deconditioning rather than asthma. He said her condition, general physical condition, would improve with weight loss and exercise and it would positively affect her breathing capacity or shortness of breath. (Ex 25, p. 69; Deposition Exhibit, p. 32 lines 2, 3, 4)

Dr. Hicklin thought claimant had attained maximum medical improvement on September 17, 2001, because she has shown no significant improvement or deterioration in her overall pulmonary status since then.

The doctor further testified that the fact that claimant worked from January 20, 2000, until May 15, 2000, indicated to him that what took Mrs. Robinson off work on May 15, was not necessarily her breathing problems. He explained that when you have an exacerbation of asthma from an exposure to a noxious agent, the worst part is immediately; and with treatment it gets better.

Later in his deposition, Dr. Hicklin stated that the mild asthma which claimant continues to have would probably be rated at 10 to 25 percent a lower level, not a medium or high level, knowing that she has more impairment of herself, but its not from the asthma.

Dr. Hicklin did not believe that the steroid withdrawal syndrome was a permanent problem. And that would begin to occur as soon as he could get her to come back to his office. She should not experience steroid withdrawal symptoms each time she attempts to go off steroids in his opinion. This is done by the use of nonsteroidals, not restarting them on steroids. He said the steroid withdrawal syndrome was not related to her asthma but it was causally related to her treatment with Prednisone and it was for symptoms that were not likely due to her asthma. He agreed that Prednisone can cause weight gain and that it was a contributing factor in her case.

Dr. Hicklin testified that he had claimant off of the steroids and that they were not restarted for asthma. They were restarted for joint pain and steroid withdrawal. Her lungs were fine off the prednisone.

> Dr. Hicklin was asked whether her asthma was permanently altered by the exposure of January 20, 2000, his answer was as follows:
>
> I don't know if it was or not. There's a lot of questions in my mind. This whole thing, this whole episode of asthma, doesn't add up straight for me. Could it be? Yeah, it could be. But I have questions in my mind.
>
> I know she has asthma. I know it got worse after the exposure. But, you know, seeing an exposure of that degree cause this much problems for this long a period of time being this refractory to medication, that doesn't add up in my book. Could it be? Yeah, it could. But I don't know for sure. I'm not certain to a reasonable degree of medical certainty." Ex 25 p.69,

(Deposition p. 59 lines 2-15)

Dr. Hicklin did agree to a reasonable degree of medical certainty that the asthma even if it was pre-existing was aggravated by the January 20th episode but he added he meant on a temporary basis. He didn't know whether it was aggravated on a permanent basis.

In conclusion, Dr. Hicklin was asked, that if claimant had been diagnosed, or was on medication for asthma prior to this event, would it be more likely that the present condition is baseline from what it was prior to January 20, 2000, and Dr. Hicklin said yes it would be more likely.

Claimant testified that she began performing childcare services in October 2000, in her home for the four children of her daughter. Subsequently, she expanded and now there are five others. They come at 10:30 in the evening and their mother's pick them up the following morning. In Exhibit 34, page 94 it indicates that claimant's gross earnings for 2001 childcare were $39,585 minus $16,422 in expenses and another $16,531 for expenses for business in the home expenses leaving her a net income of $6,632.

She does this work with difficulty. Dishwashing liquid and cleaning products are really overwhelming. Getting the kids in and out of her van is very strenuous. She frequently uses her inhalers. She lives in a two-story house and she avoids climbing the stairs except once a day.

Claimant identified Joint Exhibit 33, page 89 the job description for a Retirement Specialist I Business Unit Retirement Investor Services dated August 12, 2001, as a job that she performed for Principal Life Insurance Company. She testified that she cannot perform that job today because it requires extensive time on the telephone talking to members which creates shortness of breath and coughing and she can no longer do that.

After Thanksgiving 2001, she had painful aching and swollen joints and so Dr. Hicklin referred her to Dr. Braun and both doctors diagnosed steroid dependency. Celebrex was prescribed for the pain.

Due to the taper procedure of Prednisone she has up days and down days. Up days when she has Prednisone down days when she doesn't. Claimant denied that Dr. Hicklin ever prescribed a conditioning program or physical therapy or any specific weight loss program. She did not receive a referral to a dietician. She denies missing appointments because they were rescheduled. When she missed two times it was due to family emergencies, one with her granddaughter and one with her son. Claimant denied seeing a doctor for asthma or being diagnosed with asthma prior to January 20, 2000; nor did she previously have steroid withdrawal syndrome.

Claimant confirmed that she did file an injury report with security on April 28, 2000.

Claimant acknowledged that she was on Claritin for seasonal allergies before January 20, 2000. Claimant denied that she told Dr. Ravitz that she had taken Albuterol in the past and had done well with it.

On the day of the diesel fuel incident, claimant arrived at work around 8:45 a.m. She went to the basement to the training room and felt nauseated. About 10:00 a.m. she went to her own office on the third floor and she could smell the fumes on the elevator and on the third floor. She continued to be sick to her stomach from whatever it was that was in the air. She and other employees left the building for short periods of time.

Claimant admitted that her jobs for principal were all fairly sedentary types of jobs.

Denyce Wingert, defendant's manager, testified that most of claimant's work was on the telephone. There were a few times that she accommodated claimant by finding other work for her to do. Barbara never did express her inability to perform the job to Denyce Wingert.

Exhibit 31, page 84 is defendant's response to claimant's request for admissions served on March 19, 2002, in which defendant's admitted that claimant suffered an injury arising out of her employment and also in the course of her employment. And that employer had proper notice of the injury. However, defendant's denied that claimant was entitled to healing period benefits and industrial disability benefits and a permanent disability from this injury.

CONCLUSIONS OF LAW

The party who would suffer loss if an issue were not established has the burden of proving that issue by a preponderance of the evidence. Iowa R. of App. P. 6.14(6).

The claimant has the burden of proving by a preponderance of the evidence that the alleged injury actually occurred and that it arose out of and in the course of employment. McDowell v. Town of Clarksville, 241 N.W.2d 904 (Iowa 1976); Musselman v. Central Telephone Co., 261 Iowa 352, 154 N.W.2d 128 (1967). The words "arising out of" refer to the cause or source of the injury. The words "in the course of" refer to the time, place and circumstances of the injury. Sheerin v. Holin Co., 380 N.W.2d 415 (Iowa 1986); McClure v. Union Et. Al., Counties, 188 N.W.2d 283 (Iowa 1971).

Claimant did sustain the burden of proof by preponderance of the evidence that she sustained an injury on January 20, 2000, which arose out of and in the course of her employment with employer.

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).

The overwhelming weight of the evidence is that the release of diesel fumes, or the combustion from the fumes, on January 20, 2000, probably caused this injury and in addition there is also evidence that if it didn't cause it, it aggravated any pre-existing condition or predisposition to asthma.

The employer engineers verified there was a release of diesel fumes on that date, and that a number of employees were affected.

Denyce Wingert verified that there was a release of fumes on that date affecting a number of employees. Dr. Ravitz, Dr. Matysik, Dr. Friederich, who were the first doctors to treat claimant, diagnosed asthma from the release of diesel fumes on January 20, 2000.

Dr. Shumate stated that claimant's symptoms seem to have had an abrupt onset after this exposure; therefore, the effect may have been one of an exacerbation of a pre-existing airway disease or induction of an airway process.

Dr. Hicklin diagnosed bronchial asthma.

The physicians at the Veterans Administration Hospital in Des Moines treated asthma related to the exposure on January 20, 2000.

As to whether claimant had pre-existing asthma or breathing problems, Dr. Hicklin examined that Veterans Administration Hospital records from August 18, 1997, to May 24, 2001, and found no evidence of bronchodilator medication or systemic corticosteroid use prior to August of 2000.

The medication sheet of the Tower Medical Clinic show that Albuterol was first prescribed on February 1, 2000, and it was not prescribed at any time before that going back to December 30, 1998.

Dr. Hicklin testified in his deposition that he believed the cause of her condition was the exposure to diesel fumes or diesel combustion products at the workplace.

Therefore it is determined that claimant did in fact, sustain a burden of proof by preponderance of the evidence that the release of diesel fumes or combustion products on January 20, 2000, caused an injury of asthma which arose out of and in the course of her employment with employer.

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. Blacksmith v. All-American, Inc., 290 N.W.2d 348 (Iowa 1980); Holmes v. Bruce Motor Freight, Inc., 215 N.W.2d 296 (Iowa 1974).

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. The weight to be given to any expert opinion is determined by the finder of fact and may be affected by the accuracy of the facts relied upon by the expert as well as other surrounding circumstances. The expert opinion may be accepted or rejected, in whole or in part. Sondag v. Ferris Hardware, 220 N.W.2d 903 (Iowa 1974); Anderson v. Oscar Mayer & Co., 217 N.W.2d 531 (Iowa 1974); Bodish v. Fischer, Inc., 257 Iowa 516, 133 N.W.2d 867 (1965).

Claimant is not entitled to benefits for a single long term healing period with a reason (1) that no doctor took claimant off work initially and then (2) returned her to work at a later date or (3) said that she was medically capable of substantially similar employment and/or (4) had achieved maximum medical recovery. Claimant took herself off work and there is no verifiable medical evidence to substantiate the fact that she was actually unable to work. On the contrary there is evidence that she has been able to work since the date of the injury. However, she is entitled to temporary disability benefits for the short periods that she was taken off work by a doctor for treatment or for hospitalization.

The periods for which she is entitled to temporary disability benefits are as follows:

The injury caused claimant to be off work on these days and she is entitled to be paid temporary disability for these dates:

DAY (S)	DATE (S)	DOCTOR (S)	EXHIBIT (S)
1 day	02-04-00	Dr. Ravitz	Ex. 3, p.5
1 day	02-07-00	Dr. Ravitz	Ex. 3, p. 5
1 day	02-08-00	Dr. Ravitz	Ex. 2, p.5
1 day	02-11-00	Dr. Matysik	Ex. 4, p.18 & 19 Ex. 5, p. 20 Ex. 3, p. 16
1 day	04-03-00	Dr. Strickland	Ex. 3, p. 16
1 day	04-19-00	Dr. Ravitz	Ex. 2, p.9 Ex. 3, p. 17
7 days	07-21-00 to 07-27-00	Dr. Martin & Dr. Shumate	Ex. 2, p. 14 Ex. 10, p. 30 to 34
2 days	12-6-00 & 12-07-00	Dr. Jones	Ex. 13, p. 31
2 days	02-27-01 & 02-28-01	V.A. Physician	Ex. 14, p. 40 to 42

Total days lost for medical treatment are 17 days pursuant to the foregoing itemized chart.

Therefore it is determined that claimant is entitled to 17 days of temporary disability benefits for time lost due to medical treatment. Seventeen days times the agreed rate of $311.66 means the claimant is entitled to $5,298.22 in temporary disability benefits.

Claimant is asserting a claim for temporary partial disability benefits. Iowa Code Section 85.33 (2) provides in part as follows**:**

> "Temporary partial benefits means benefits payable, in lieu of temporary total disability and healing period benefits, to an employee because of the employee's temporary partial reduction in earning ability as a result of the employee's temporary partial disability."

Since the above award of temporary disability benefits is claimant's entire entitlement to temporary disability benefits, then no additional benefits can be awarded because there is no temporary partial reduction in earning ability as a result of the employees time off work.

In this case, claimant took herself off work and failed to prove by any verifiable medical evidence that she was unable to work other than the periods isolated out above where a medical doctor or doctor of osteopathy sent claimant for medical treatment. Wherefore, it is determined that claimant is not entitled to temporary partial disability benefits as a result of this injury.

With respect to permanent partial disability benefits the parties have stipulated that the type of permanent disability is industrial disability for an injury to the body as a whole.

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 and inability to engage in employment for which the employee is fitted. 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).

A finding of impairment to the body as a whole found by a medical evaluator does not equate to industrial disability. Impairment and disability are not synonymous. The degree of industrial disability can be much different than the degree of impairment because industrial disability references to loss of earning capacity and impairment references to anatomical or functional abnormality or loss. Although loss of function is to be considered and disability can rarely be found without it, it is not so that a degree of industrial disability is proportionally related to a degree of impairment of bodily function.

Factors to be considered in determining industrial disability include the employee's medical condition prior to the injury, immediately after the injury, and presently; the situs of the injury, its severity, and the length of the healing period; the

work experience of the employee prior to the injury and after the injury and the potential for rehabilitation; the employee's qualifications intellectually, emotionally, and physically; earnings prior and subsequent to the injury; age; education; motivation; functional impairment as a result of the injury; and inability because of the injury to engage in employment for which the employee is fitted. Loss of earnings caused by a job transfer for reasons related to the injury is also relevant. Likewise, an employer's refusal to give any sort of work to an impaired employee may justify an award of disability. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980). These are matters which the finder of fact considers collectively in arriving at the determination of the degree of industrial disability.

There are no weighting guidelines that indicate how each of the factors is to be considered. Neither does a rating of functional impairment directly correlate to a degree of industrial disability to the body as a whole. In other words, there are no formulae which can be applied and then added up to determine the degree of industrial disability. It therefore becomes necessary for the deputy or commissioner to draw upon prior experience as well as general and specialized knowledge to make the finding with regard to degree of industrial disability. See Christensen v. Hagen, Inc., Vol. 1 No. 3 State of Iowa Industrial Commissioner Decisions 529 (App. March 26, 1985); Peterson v. Truck Haven Cafe, Inc., Vol. 1 No. 3 State of Iowa Industrial Commissioner Decisions 654 (App. February 28, 1985).

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 was 44 years old at the time of the injury and 46 years old at the time of the hearing. Thus, claimant was at or near the peak of her earnings capacity in her working lifetime. This fact tends to increase an award of industrial disability.

Claimant has a high school education obtained by virtue of GED (General Education Development). She attended DMACC (Des Moines Area Community College) for two years and obtained a certificate as a word processor and clerical employee.

In the military, (Army) she served as a cook, clerical worker and an armorer taking care of weapons in the armory.

She has worked for temporary agencies which shows she has versatility. She had two previous very responsible jobs. One as a tax processor for approximately one and one-half years. The other one as a payroll administrator for approximately eight, nine or ten months.

She has also performed childcare. She qualified for a very responsible permanent job with this employer when she began work there in July 1999. She was

required to be on the telephone more than half the time and her manager, Denyce Wingert, testified that she was well liked by her clients.

Dr. Shumate did not give claimant a permanent impairment rating. Dr. Hicklin said he was unable to give her a permanent impairment rating based upon the AMA Guides because there were so many unknown variables in her case. However, he did accede to defendant's counsel question for an estimation and Dr. Hicklin responded that she has a 10-25 percent impairment, but it is not from the asthma, but rather she has more impairment of herself. This is interpreted to be in an impairment rating for all of her many problems.

Dr. Hicklin stated that he could not use the AMA Guides because it uses optimal treatment, optimal evaluation, optimal pulmonary function tests and he did not think that he had those in this case. He stated therefore it would be very difficult to apply those guidelines and he did not think it would be a fair thing to do.

Dr. Hicklin said the reason he did not have optimal tests was because there are technical factors with her performing the pulmonary function tests. He did not know if it was her understanding or whether it was her effort. The doctor then stated, "I cannot get consistent or believable pulmonary function tests from her. " (Ex. 25, p. 69 Dep. Ex., p. 29 line 15)

Thus, claimant does not have a permanent functional impairment rating from either Dr. Shumate or Dr. Hicklin based upon the AMA Guides, or otherwise, or from any other physician involved in this case.

With respect to restrictions, Dr. Shumate stated on December 12, 2000, that claimant would be limited to occupations which would not expose her to any type of irritants, chemical, fume, sprays, and fluctuations in environmental humidity and temperature. Dr. Shumate added unfortunately her previous job as a customer service representative which involved talking precipitated coughing, wheezing and shortness of breath. He repeated this again in his letter of March 5, 2002; he said she should be protected from environmental change, heat, temperature, humidity or exposure to any irritants or particulates in the environment. The only evidence that claimant had coughing episodes while talking on the telephone is claimant's testimony.

Dr. Hicklin testified that with a reasonable degree of medical certainty he believed that claimant could be gainfully employed based upon her cardiopulmonary stress tests and the description of the job that defendant had provided him in the past, Hicklin Exhibit 3, which was her former employment with Principal.

Dr. Hicklin said that there were no limitations that he would place on claimant's work activities, regardless of cause, nothing specific, other than common sense. He said he would tell her to avoid situations that bother her, whether those are diesel fumes or other caustic agents or noxious fumes, but nothing specific.

Thus, both Dr. Shumate and Dr. Hicklin said that claimant could perform general clerical work and Dr. Shumate limited that to sedentary type clerical work. Claimant was performing sedentary type clerical work at the time of this injury and both doctors thought she could perform it again but to use common sense and avoid things that she finds irritating.

Thus, the worst effect of this injury was that claimant has been sensitized to fuel oil fumes or the carbonization of them. She claimed sensitivity to other irritants such as dish washing and cleaning materials. However, this was not established by medical or any other evidence, other than claimant's testimony. Allergy tests were negative.

Dr. Hicklin did state that Dr. L. Al-Shash did allergy testing and claimant was found to have no allergies. Thus, claimant is able to perform general clerical work, preferably sedentary, and to avoid irritants.

A labor market survey was not a part of the evidence in this case but based on past experience as a deputy there should be numerous jobs fitting this description. Claimant had not searched for work in the competitive employment market. Rather, she chose to do private childcare in her home. Based on gross earnings for the year 2001 in the amount of $39,585.00 it cannot be said that this is not remunerative work.

Therefore, based upon the sensitization to fuel oil fumes and/or carbonization, and possibly other irritants, claimant does have limitations on her employment. These were not expressed in the form of permanent work restrictions but are probably akin to permanent work restrictions based on other odor sensitization cases before the workers' compensation commission.

Claimant has several other medical conditions. One of them is hypertension. She had that before this injury occurred. On her first visit to Dr. Ravitz on February 1, 2000, her blood pressure was 200/116 with the large cuff on the right arm. There was no medical evidence or other evidence that this injury has increased or otherwise affected her blood pressure.

Claimant has reflux esophogitis. There is no medical evidence that this was caused, aggravated, or otherwise affected by this injury.

Claimant is overweight and deconditioned. At the time claimant saw Dr. Ravitz on February 1, 2000, she weighed 265 pounds. When she saw Dr. Hicklin on September 27, 2001, she weighed 288 pounds.

Claimant had developed Prednisone dependency. Dr. Hicklin indicated that some of the weight gain could be attributed to Prednisone. Dr. Hicklin's final diagnosis at the time of his deposition was bronchial asthma and steroid myopathy. (Ex. 25, p. 69; Dep. Ex. 26, lines 7 and 8)

Her prednisone dependency has not been determined to be permanent. Dr. Hicklin said he had her off of it but had to put her back on measured doses. He said he

planned to continue with treatment for Prednisone dependency as soon as he could get her back into the office inasmuch she had missed one or two appointments just before the deposition.

Therefore, with respect to entitlement to permanent disability benefits the evidence indicates that claimant sustained a mild case of reversible asthma. There are no permanent functional impairment ratings. The only restrictions are to avoid fuel oil fumes or carbonization and any other substance that she finds irritating because of a sensitization to fuel oil and possibly other irritants.

Claimant can continue to do general clerical work which she was trained to do in the Army and for which she has an AA certificate from Des Moines Area Community College and approximately one year of experience with Principal Financial Life Insurance Company.

Wherefore, it is determined that claimant has sustained a 20 percent industrial disability and is entitled to 100 weeks of permanent partial disability benefits, less credit for 40 weeks of benefits paid prior to hearing at the same rate, leaving 60 weeks of new benefits to be paid at the rate of $311.66 per week in the total amount of $18,699.60.

With respect to medical benefits, the parties stipulated that the fees and prices charged by providers were fair and reasonable; that the treatment was reasonable and necessary; and although disputed the medical providers would testify as to the reasonableness of their fees and/or treatment set forth in the list of expenses and defendants are not offering contrary evidence. With further consideration of the medical expenses the following discussion has been considered by the deputy.

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 16, 2002); Kleinman v. BMS Contract Services, Ltd., No. 1019099 (App. September 8, 1995); McClellon v. Iowa Southern Utilities, File No. 894090 (App. January 31, 1992). This inference also applies to the reasonableness of the fees actually charged for that treatment.

With respect to causal connection, obviously all the charges for asthma treatment is owed by defendant. Likewise, the treatment for Prednisone dependency is owed by defendant because it is a sequella of claimant's asthma treatment. Oldham v. Scofield & Welch, 222 Iowa 764, 767-68, 266 N.W. 480, 482 (1936).

Defendants are also responsible when treatment aggravates or increases claimant's condition and the worker is not negligent in selecting the person who administers the treatment. Bradshaw v. Iowa Methodist Hosp., 251 Iowa 375, 386, 101 N.W. 2d 167, 173 (1960). Hoover v. Iowa Dep't of Agric., II-2 Iowa Indus. Comm'r Dec. 565 (1985).

Dr. Hicklin stated there was emotional overlay affecting claimant and that she was subject to panic attacks. Psychological problems may develop as a result of a physical trauma and when they do the medical treatment for them is compensable. Gosek v. Garmer & Stiles Co., 158 N.W. 2d 731, 733 (Iowa 1968).

Therefore all of claimant's medical expenses attached to the hearing report are determined to be compensable because they were either caused by, or sequella of, or so inextricably related to the asthma diagnosis and treatment that they are inseparable.

Likewise, defendants denied liability for an injury arising out of and in the course of employment in the answer filed February 5, 2001 and continued to deny liability until the request for admissions was filed on March 19, 2002, and therefore they are not entitled to assert the authorization defense.

Barnhart v. MAQ, Incorporated., Iowa Indus. Comm'r Report, 16 (App. March 9, 1981); Holbert v. Townsend Eng'r Co., 32 Biennial Rep., Iowa Industrial. Comm'r 78 (1975).

The gross medical expenses are shown as $18,775.53.

With respect to penalty benefits, Iowa Code Section 86.13 4th unnumbered paragraph provides as follows:

> If a delay in commencement or termination of benefits occurs without reasonable or probable cause or excuse, 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 unreasonably delayed or denied.

"Decisions of the workers' compensation commissioner have used a 'fairly debatable' standard to determine whether penalty benefits are appropriate."

Lawyer and Higgs, Iowa Workers' Compensation – Law and Practice (Third Edition), §13-8 page 160

"The employer can establish a reasonable cause or excuse to exist if: (1) the delay was necessary for the insurer to investigate the claim, or (2) the employer had a reasonable basis to contest the employee's entitlement to benefits. " Christensen v. Snap-On Tools Corp., 554 N.W.2d 254 -2 (Iowa 1996).

Claimant did not seek medical care for the injury of January 20, 2000, until February 1, 2000. A period of 11 days. Dr. Ravitz opens her notes on that day by saying that claimant stated that on December 1, 1999, she started feeling tired and more short of breath. That was 28 days before this injury occurred. Then Dr. Ravitz said on February 1, 2000, in her notes that claimant has used an Albuterol inhaler in the past and has done well with it. Therefore, liability for the injury was more than fairly debtable.

Claimant had a history of being a cigarette smoker. As it was eventually determined, cigarette smoking had not contributed to this problem. However, defendants were entitled to have more investigation on this point.

In addition to being exposed to fumes, claimant began treating for hypertension, reflux esophogitis, allergies, cardiopulmonary disease.

Even at the Veterans Administration Hospital in Des Moines, Iowa, who is totally disinterested in the outcome of this particular workers' compensation case, the physician commented on December 6, 2000, that there was a question in that physician's mind whether this asthma, with an atypical presentation, which was developed so very late in life, without a family history, and being so severe as well had a temporal relationship with the exposure to diesel fumes and actually caused RADS (Reactive Airway Disease Syndrome).

When Dr. Hicklin was asked whether claimant's asthma was permanently altered by the January 20, 2000, exposure he said he didn't know if it was or not. His complete answer was as follows:

> I don't know if it is or not. There's a lot of questions in my mind. This whole thing, this whole episode of asthma, doesn't add up straight for me. Could it be? Yeah, it could be. But I have questions in my mind. I know

> she has asthma. I know it got worse after the exposure. But, you know, seeing an exposure of that degree cause this much problems for this long a period of time, being this refractory to medication, that doesn't add up in my book. Could it be? Yeah, it could. But I don't know for sure. I'm not certain to a reasonable degree of medical certainty.

(Ex. 25, p. 59, Dep. Ex., p. 59, lines 2-15)

Defendant hired Dr. Hicklin to take over this case. He first saw claimant on March 29, 2001. Immediately, in his first report, March 29, 2001, Dr. Hicklin concluded, "I believe there are multiple factors perpetuating this asthma and contributing to its refractoriness. These include probable gastro esophageal reflux, possible ongoing aspiration, weight gain, anxiety and question vocal cord dysfunction syndrome. " (Ex. 20, p. 59)

Defendant was still justified in denying benefits on July 30, 2001, when Dr. Hicklin wrote to defendant's counsel, "I think Mrs. Robinson has asthma, but I think there are other factors contributing to her dyspnea as well. The PFT's showing such reversible change is hard to believe and probably represents either some degree of miscoordination or variable effort." (Joint Exhibit 25, p. 69a)

Thus, even up to July of 2001, defendant had medical evidence to question whether claimant was manipulating test results either knowingly or unknowingly.

Wherefore, when defendant began paying benefits on July 31, 2001, defendant still had good cause to dispute the claim and assert that it was fairly debatable.

Wherefore, it is found that defendants are not liable for penalty benefits for delaying the commencement of benefits without reasonable or probable cause or excuse.

Claimant is not entitled to be paid by defendant for the independent medical examination of Dr. Shumate of March 5, 2002 in the amount of $325.00 pursuant to Iowa Code Section 85.39 for the reason that the only defendant doctor in the case, Dr. Hicklin, had not given an impairment rating the claimant could think was too low, because Dr. Hicklin never did give an impairment rating at any time.

ORDER

THEREFORE IT IS ORDERED:

That defendant pay to claimant temporary disability benefits for seventeen (17) days at the rate of three hundred eleven and 66/100 dollars ($311.66) in the total amount of five thousand two hundred ninety-eight and 2/100 dollars ($5,298.22).

That defendant pay to claimant sixty (60) weeks of new workers' compensation benefits after the credit for what they have already paid for permanent partial industrial

disability benefits at the rate of three hundred eleven and 66/100 dollars ($311.66) per week in the total amount of eighteen thousand six hundred ninety-nine and 60/100 dollars ($18,699.60) commencing on March 5, 2002, which is the maximum medical improvement date set by Dr. Shumate.

That interest will accrue pursuant to Iowa Code Section 85.30.

That all accrued benefits are to be paid in a lump sum.

That defendant pay to claimant or the provider of medical services medical benefits shown in the list of medical expenses attached in the hearing report in the gross amount of eighteen thousand seven hundred seventy-five and 53/100 dollars ($18,775.53).

That the cost of this action including the cost of the attendance of the court reporter at hearing, and the transcript of hearing, and claimant's costs allowable under rule 876 IAC 4.33 are charged to defendant. The parties stipulated on the hearing report that these costs had been paid at that time by claimant.

That defendant file claim activity reports as requested by this agency pursuant to rule 876 IAC 3.1.

Signed and filed this __30th__ day of September, 2002.

_____
WALTER R. MCMANUS, JR.
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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