BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

SONIA CASTILLO, Claimant, vs. SONSTEGARD FOODS CO., INC. d/b/a ESTHERVILLE FOODS, INC., Employer, and REDWOOD FIRE & CASUALTY INSURANCE CO., Insurance Carrier, Defendants.	File No. 21004984.01 ARBITRATION DECISION Head Notes: 1402.40; 1803; 2701

STATEMENT OF THE CASE

Claimant Sonia Castillo filed a petition in arbitration seeking worker's compensation benefits against Sonstegard Foods Company, d/b/a Estherville Foods, Inc., employer, and Redwood Fire & Casualty Insurance Company, insurer, for an accepted work injury date of March 18, 2021. The case came before the undersigned for an arbitration hearing on June 1, 2022. This case was scheduled to be an in-person hearing occurring in Des Moines. However, due to the outbreak of a pandemic in Iowa, the Iowa Workers' Compensation Commissioner ordered all hearings to occur via internet-based video. Accordingly, this case proceeded to a live video hearing via Zoom, with all parties and the court reporter appearing remotely. The hearing proceeded without significant difficulties.

The parties filed a hearing report prior to 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 includes Joint Exhibits 1 through 2, Claimant's Exhibits 1 through 4, and Defendants' Exhibits A through G.

Claimant testified on her own behalf, with the assistance of sworn interpreter Elizabeth Tirado. The evidentiary record closed at the conclusion of the evidentiary

hearing on June 1, 2022. The parties submitted post-hearing briefs on June 30, 2022, and the case was considered fully submitted on that date.

ISSUES

1. Whether claimant's work injury resulted in permanent disability;

2. If so, the extent of permanent disability;

3. Whether claimant is entitled to alternate medical care pursuant to Iowa Code section 85.27; and

4. Taxation of costs.

FINDINGS OF FACT

The undersigned, having considered all of the evidence and testimony in the record, finds:

Claimant's testimony was consistent as compared to the evidentiary record, and her demeanor at the time of hearing gave the undersigned no reason to doubt her veracity. Claimant is found credible.

At the time of hearing, claimant was a 44-year old person. (Hearing Transcript, p. 10). She is married with four children, three of whom were still dependents at the time of hearing. (Tr., pp. 10-11) Claimant was born in Mexico, and moved to the United States in 1994 at age 16. (Tr., p. 11) She received a GED in 2014, and earned her administrative assistant certificate in 2021. (Tr., p. 12) Her primary language is Spanish, although she understands and speaks some English.

At the time of hearing, claimant was employed at Iowa Lakes Community College ("Iowa Lakes"). She began working in the cleaning department at Iowa Lakes in 2013. (Tr., p. 13) Her job duties include cleaning tables, cleaning bathrooms, mopping, vacuuming, cleaning windows and chalkboards, changing light bulbs, and moving and cleaning furniture. (Tr., p. 14) It is a physically demanding job. Claimant made $10.50 per hour when she started at Iowa Lakes; at the time of hearing she was earning $15.00 per hour. (Tr., p. 13)

In 2021, claimant was working toward her administrative assistant certificate through Iowa Lakes. (Tr., p. 15) To receive her diploma, she was required to complete an internship. As such, she started at Estherville Foods in an internship position in January 2021. Her job consisted of putting notes into a computer and filing paperwork. (Tr., p. 16) She worked five days per week, about three to four hours per day. She could not remember her pay but thought it was either $10.50 or $12.00 per hour. She was required to complete 150 hours in order to complete the internship. (Tr., p. 32)

On March 18, 2021, claimant was working at Estherville Foods, and another employee was giving her a tour of the facility. (Tr., pp. 17-18) Claimant testified there was a small room with a large industrial fan where they dried eggs to make them into powder. (Tr., p. 18) As claimant was leaving the room, she walked by the fan, and her hair, which was in a ponytail, got sucked into the fan. (Tr., pp. 18-19) Claimant described the fan as a large and powerful fan that almost looked like "turbines from an airplane." (Tr., p. 39) When the fan caught her ponytail, it quickly pulled her entire body very hard against the fan as well, and claimant was then stuck. She testified that she grabbed her head with both hands in an attempt to free herself, and the woman with her tried to help free her as well, but they were unsuccessful. (Tr., p. 18) The employees with claimant could not find the power switch to turn the fan off, and eventually someone left to get scissors. (Tr., pp. 18-19) Claimant is not sure how long she was caught in the fan, but thought it was between six and ten minutes. (Tr., p. 19) Finally, her hair was cut in order to free her from the fan.

Claimant is not sure if she lost consciousness when she was pulled into the fan, but said she noticed that her pants were wet at some point. She testified that she felt like she was going to die during the time she was stuck against the fan and it kept pulling against her. (Tr., pp. 19-20; 39) When she was released from the fan the employees with her laid her on the floor to wait for an ambulance. (Tr., p. 20)

Claimant was taken by ambulance to Avera Holy Family Hospital in Estherville. (Tr., p. 20) [1] She complained of head and neck pain, as well as right shoulder and upper arm pain. (Claimant's Exhibit 2, p. 2) There were contusions and lacerations over her scalp, including areas where her hair was pulled out. She was also noted to have muscle spasms in her neck. X-rays showed no acute osseus abnormalities, and claimant was diagnosed with a soft tissue injury to the neck, as well as contusion to the scalp and scapula. She was provided with a soft cervical collar and medications, including tramadol.

Claimant returned to the emergency room a few days later with worsening headache and vomiting. (Cl. Ex. 2, p. 2) The headache was on the left side but wrapped around to the occiput. She also complained of neck pain at a level 8 out of 10, and demonstrated decreased range of motion. A head CT showed an arachnoid cyst, but no acute abnormalities. She was provided a dose of Zofran in the emergency room, and her neurological examination was normal. She was taken off Tramadol as that was thought to have caused the nausea, and it was recommended she follow up with her primary care provider the next day.

Claimant followed up with her primary care provider, Meshia Waleh, M.D., on March 22, 2021. (Cl. Ex. 2, p. 3) She complained of scalp pain due to scalp trauma, neck pain, nausea and vomiting, ongoing headache, and neck pain. She reported being unable to use the soft collar due to it pressing on an area of her scalp that was tender.

[1] Records from the hospital are not in evidence but are summarized in the report of Mark Taylor, M.D. (Claimant's Exhibit 2)

Exam revealed bruising in the right parietal and occipital scalp, extending inferior to the occiput. She had tenderness over the lateral neck, as well as over the trapezius and scalene muscles, and palpable spasms were identified. She was diagnosed with a whiplash injury and scalp pain, and encouraged to use muscle relaxers and the soft cervical collar.

On March 26, 2021, claimant saw Amber Bynes, DNP, at Estherville Medical Clinic. (Joint Exhibit 2, p. 33) She complained of continued muscular tightness in her neck and shoulders, especially if lifting her arms above her head. She also complained of headaches. She was noted to have a small bald area to the occiput, which was fairly healed with scabbing at that time. On physical exam, she had full range of motion in her neck although it was painful. (Jt. Ex. 2, p. 35) Claimant was concerned about medications causing nausea, so she was prescribed a lidocaine patch for pain. DNP Bynes also recommended physical therapy for her neck, as well as routine ibuprofen for an anti-inflammatory. (Jt. Ex. 2, p. 36) Finally, she told claimant to remain off work for a few days, and then wanted physical therapy to have input regarding her work schedule and limitations.

Claimant began physical therapy on March 30, 2021. (Jt. Ex. 1, p. 19) She continued to describe pain across her back at her shoulders and behind her neck. She did not have a headache that day, but advised she was getting headaches she did not have prior to the incident. She also complained of pain in the front of her neck and chest, which indicated SCM muscle involvement. (Jt. Ex. 1, pp. 19, 21)

The physical therapy assessment noted claimant had tightness in her bilateral upper trapezius muscles and neck pain, which limited her range of motion; pain down the right side into her upper back; and headaches. (Jt. Ex. 1, p. 23) Her therapy would include gentle range of motion exercise and ultrasound, as well as manual therapy to improve range of motion and pain and return to normal activities of daily living and work.

It is unclear when claimant returned to work, but she testified at her deposition that she continued working at Estherville Foods for about another month or month and a half following the injury. (Defendants' Exhibit G, p. 87; Deposition Transcript, p. 13) She left sometime in April of 2021, after completing her internship. (Tr., p. 37) She continued to work at Iowa Lakes in the same position. (Tr., p. 37)

Claimant returned to Dr. Waleh on April 1, 2021, with continued persistent neck and scalp pain, as well as daily headaches, especially when turning her head to the right. (Cl. Ex. 2, p. 3) She was having trouble sleeping and was worried about her housekeeping job at Iowa Lakes. She was prescribed amitriptyline in addition to the muscle relaxer, and given a 10-pound lifting restriction.

Claimant continued with physical therapy. She continued to complain of headaches, neck and upper trapezius pain, and bilateral shoulder pain, although the right side was becoming worse than the left. (Cl. Ex. 2, p. 3) By April 20, 2021, she reported that her headaches were improving such that she was only getting one per

day, but she was having more pain in her right shoulder and it was becoming difficult to work. (Jt. Ex. 1, p. 26) [2] There was reference to her noticing more pain the prior Saturday when helping her husband with branches in the yard. (Jt. Ex. 1, p. 27)

Claimant returned to Dr. Waleh on April 30, 2021, with continued complaints of pain in her anterior chest, right shoulder, neck, and left ear, but her symptoms were less severe. (Cl. Ex. 2, p. 3) She continued to experience headaches, and had discontinued the amitriptyline as it was not helping. Dr. Waleh continued the medications and physical therapy, and noted it may take several months to completely resolve. (Cl. Ex. 2, p. 4) He also noted a possible element of post-traumatic stress disorder.

Claimant continued with physical therapy. On May 5, 2021, she had tenderness over the right scapular area and neck pain at the base of the head and neck. (Cl. Ex. 2, p. 4) On May 14, 2021, she was only having headaches "once in a while," and rated her pain at a level 5 of 10. (Jt. Ex. 1, p. 28) On May 20, 2021, she was feeling better and rated her pain at a level 4 out of 10. (Cl. Ex. 2, p. 4) On June 2, 2021, it was noted claimant was improving. On June 10, 2021, claimant's neck was "ok," and she did not have pain unless turning her head. (Jt. Ex. 1, p. 31) She was not regularly taking anything for pain relief at that time.

At her last physical therapy appointment on June 21, 2021, her pain was recorded at a level 3 of 10 in the base of her neck and into the shoulder blade. (Cl. Ex. 2, p. 4) The record indicates her neck was about 50 percent better and headaches were occurring once or twice a day at a level 7 of 10. Claimant denies these numbers, and testified that she did not believe she was 50 percent improved at that time. (Tr., pp. 24-25) While she agrees she was "a little bit" better, she does not think she was that much better, and believes the defendants did not want to pay for any additional treatment. (Tr., p. 25) In any event, claimant did not have any additional medical treatment related to the work injury after that date.

Claimant appears to have been in good health prior to the work injury. The parties submitted medical records noting that claimant had some complaints of low back pain with left-sided sciatica in June of 2017. (Jt. Ex. 1, p. 1) At that time, plain films were unremarkable, showing no signs of significant degenerative change or any other abnormalities. On September 24, 2019, claimant saw Dr. Waleh with complaints of low back and left leg pain that had gotten worse since she first noticed it. (Jt. Ex. 1, p. 2) Dr. Waleh's assessment was chronic low back pain, but noted no signs of radiculopathy and recommended physical therapy. (Jt. Ex. 1, p. 5) Claimant returned to Dr. Waleh on December 3, 2020, this time complaining of pain on the left side of her thoracic spine. (Jt. Ex. 1, p. 8) She stated she had the pain for a long time. On physical examination, she had full thoracic and shoulder range of motion, which did not reproduce her pain. (Jt. Ex. 1, p. 11) Dr. Waleh recommended physical therapy.

[2] I note the physical therapy record states the increased pain was on the left side. (Jt. Ex. 1, p. 26) However, all other records and claimant's testimony indicate the increased pain was on the right side, so it is assumed to be a typographical error in the physical therapy record. (See Cl. Ex. 2, p. 3; Tr., pp. 22-23)

It appears claimant attended at least 9 sessions of physical therapy for her thoracic spine pain between December 2020 and January 19, 2021. (Jt. Ex. 1, p. 14) The discharge summary indicates her pain was still there, and radiated to her anterior chest when lying flat or sitting in a chair. She reported the therapy helped decrease her pain, but the pain then returned later the same night. She was to follow up with Dr. Waleh regarding the pain, but there are no records of that follow up in evidence.

On March 1, 2022, claimant saw David Archer, M.D., for an independent medical evaluation (IME) at defendants' request. (Def. Ex. A, p. 1) The IME was conducted in Spanish with a certified interpreter. Dr. Archer briefly reviewed the medical history and noted claimant was discharged from physical therapy in June of 2021. He noted her only treatment at that time was occasional over-the-counter Tylenol. He documented her functional capacity as being able to stand for 60 minutes before needing to sit and rest for 10 minutes, and being able to walk for 60 minutes or 8 to 10 blocks before needing to sit and rest for 10 to 15 minutes. She was able to sit in a comfortable chair or vehicle for about 30 minutes before needing to get out and stretch for 10 minutes. His notes indicate she could lift 20 pounds "floor to bench," as recommended by physical therapy, and 20 pounds "bench to bench." Finally, he noted problems with vacuuming and mopping, as well as pain with shampooing her hair. (Def. Ex. A, pp. 1-2)

At the time of Dr. Archer's IME, claimant was still working her regular job at Iowa Lakes with no restrictions. Dr. Archer's assessment was strain of the neck muscle and right shoulder strain. (Def. Ex. A, p. 4) He noted she was treated appropriately after her work injury and "improved by about 50% by her report." He noted she continued to have subjective pain and palpable spasm in the back of her head and posterior cervical spine into the right upper trapezius area, but then states that she "had similar symptoms and work time loss prior to her injury." (Def. Ex. A, p. 4) It is unclear how he determined this information. He notes that she only used Tylenol at that time, and also did her exercises from physical therapy but notes he did not believe she "really understands" the exercises. Again, it is unclear what led him to that particular conclusion. He noted that she is able to work full duty as a custodian but works with pain, especially with vacuuming or mopping. Her sleep is affected by pain. Dr. Archer noted that claimant has presented to her primary care physician with her complaints but was told it will "just take time." As such, he opined that she had reached maximum medical improvement (MMI), but that she had not had advanced imagining of her neck or evaluation by an orthopedist or neurologist. He thought she might benefit from muscle relaxers but noted claimant declined to use them. Finally, Dr. Archer opined that claimant did not have a ratable impairment due to the injury, and did not require any work restrictions. (Def. Ex. A, p. 4)

On March 20, 2022, claimant had an IME at her attorney's request with Mark Taylor, M.D. (Cl. Ex. 2, p. 1) His IME was also conducted with an interpreter present to assist. Dr. Taylor reviewed medical records and noted claimant's pre-injury complaints of low back and left leg pain in 2019, as well as the thoracic spine pain complaints in

2020. (Cl. Ex. 2, p. 2) With respect to the thoracic spine pain, he noted that her pain generally improved with physical therapy, which extended into mid-January 2021.

Dr. Taylor provided a detailed review of the medical records related to claimant's work injury. (Cl. Ex. 2, pp. 2-4) At the time of his IME, claimant did not have any additional follow-up appointments scheduled regarding her injury or ongoing symptoms. (Cl. Ex. 2, p. 4) She reported ongoing symptoms at that time as persistent pain over the back of her scalp and into the neck, but mainly in the right side of her neck and into the right trapezius and scapular region. She also reported pain extending over the right shoulder area. She stated that the pain generally fluctuated between a level 5 and 7 out of 10, depending on her activities. Finally, she complained of ongoing headaches, and noted she had no problems with headaches prior to the injury.

With respect to her work activities at Iowa Lakes, claimant reported that during the school year, she cleaned classrooms, which included vacuuming and wiping tables, emptying garbage as needed, and sweeping and mopping. She described pain while vacuuming and difficulties with overhead reaching on the right side. (Cl. Ex. 2, pp. 4-5)

On physical examination, claimant demonstrated decreased range of motion in the right shoulder compared to the left. (Cl. Ex. 2, p. 6) She had pain with cervical spine range of motion. Her hair had had grown back, but she demonstrated increased sensitivity and tenderness over the posterior scalp. She had tenderness over her cervical spine, most pronounced over the mid to lower paracervical muscles and into the upper trapezius and over the levator scapula. She also had tenderness over the right AC joint and anterior glenohumeral areas.

Dr. Taylor's diagnoses were:

1) Scalp trauma related to an incident with an industrial fan, and resulted in a portion of her hair getting forcefully pulled out.
2) Persistent scalp sensitivity and tenderness.
3) Whiplash-type injury to the cervical spine with chronic cervicalgia and increased tone and guarding on exam.
4) Residual right parascapular pain, as well as right shoulder arthralgia with a possible element of impingement and AC-related pain.
5) Headaches.

(Cl. Ex. 2, p. 6)

With respect to causation, Dr. Taylor noted that prior to the injury claimant had attended physical therapy for a mid to lower back issue, mainly on the left side. She denied prior head or neck injuries, or any prior shoulder or right scapular injuries. (Cl. Ex. 2, p. 7) Given the mechanism of injury of being forcefully pulled into or against the fan while her hair was stuck, as well as her history and the medical records, Dr. Taylor opined that his diagnoses were all causally related to the work injury.

Given her residual symptoms, Dr. Taylor recommended claimant discuss her ongoing symptoms with Dr. Waleh, and that she may require a referral to a specialist such as physical medicine or physiatry. He also opined that there may be treatments available to help with claimant's shoulder impingement and AC pain. He thought additional physical therapy and medications could be considered, as well as possible injections if medically indicated.

Assuming no further care, Dr. Taylor placed claimant at MMI on the day of her last therapy appointment, June 21, 2021. (Cl. Ex. 2, p. 8) Using the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, he provided a 5 percent right upper extremity impairment rating related to claimant's right shoulder, due to the decrements in range of motion. This converts to 3 percent whole person impairment. With respect to the cervical spine and whiplash injury, and in light of her residual pain and guarding on exam, he opined claimant fits within DRE Cervical Category II, and recommended 6 percent whole person impairment. He included her headaches within that rating, as they may be cervicogenic in nature. Combining the two ratings, Dr. Taylor provided a total 9 percent whole person impairment.

Finally, Dr. Taylor recommended restrictions of lifting 30 to 35 pounds occasionally up to waist or chest level. He noted that most lifting should preferentially occur with the right arm as close to her body as possible to avoid strain over the glenohumeral area. He also recommended she have the ability to alternate positions and tasks as needed, and only rare to occasional overhead reaching with the right side. Overall, he opined that as long as she is able to continue self-restriction in her activities at work and slowing down and changing tasks as needed, she should be able to successfully continue her job at Iowa Lakes.

Dr. Taylor's IME report includes a pain diagram that claimant completed on March 30, 2022. (Cl. Ex. 2, p. 10) On the pain diagram, claimant indicated aching pain present across the upper front portion of her chest and from the base of her skull down the right side of her neck, shoulder, and back. She indicated stabbing pain in the front and sides of her head, and a pins and needles sensation in her right neck and shoulder. She also noted a burning sensation over her middle and lower back. When comparing those pain diagrams to the ones from her pre-injury medical visits, none of the same locations are indicated. For example, on September 24, 2019, the pain diagram only shows pain in her left lumbar spine area, extending down the left buttock and leg just above the back of her left knee. (Jt. Ex. 1, p. 3) Again on December 8, 2020, the pain diagram only shows pain in the left thoracic area. (Jt. Ex. 1, p. 9) Claimant has not complained of pain in any of those areas related to the work injury on March 18, 2021.

The lack of any evidence of similar complaints prior to the work injury makes Dr. Archer's opinions regarding impairment unreliable. He noted palpable spasms in the back of claimant's head and posterior cervical spine into the upper trapezius area, but stated that she "had similar symptoms and work time loss prior to the injury." (Def. Ex. A, p. 4) This statement is not supported by the medical evidence or claimant's credible

testimony. There are no medical records that indicate claimant previously had pain in her chest, neck, right trapezius muscles, or shoulder/scapular area.

Defendants also argue that claimant "repeatedly" took sick time while working at Iowa Lakes due to headaches prior to the injury. (Def. Brief, p. 5) However, the employment records from Iowa Lakes actually show that in the three-year period prior to the date of injury, claimant left work early or called in sick due to a headache ten times. (Def. Ex. D, p. 19). Three of those ten occasions note symptoms of a cold or flu in addition to the headache. Having a headache ten times over the course of three years, especially in conjunction with a common respiratory illness, is hardly evidence of a preexisting condition. Additionally, there is no medical evidence indicating those headaches were severe enough in nature to cause claimant to seek medical attention, or that she had any kind of documented problem with persistent headaches prior to the work injury.

Based on the evidence as a whole, I find Dr. Taylor's opinions to be more credible. His report demonstrates a more accurate understanding of claimant's pre-injury status, and more detailed review of the records both before and after the work injury occurred. As such, I adopt his report as a more accurate reflection of claimant's permanent functional impairment and restrictions.

At the time of hearing, claimant testified that she does not believe she is capable of lifting or carrying 30 to 35 pounds. (Tr., p. 30) She testified that her supervisor at Iowa Lakes knows about her accident, and does not allow her to lift heavy things as a result. She testified that she continues to have head and neck pain, and her chest and right shoulder continue to hurt as well. She does not sleep well at night because she cannot lay on her right side. (Tr., pp. 30-31) She believes she needs to see a specialist. (Tr., p. 31) She testified that her work injury has impacted her ability to perform her job duties at Iowa Lakes because she can no longer lift heavy items, and cannot vacuum like she used to. Additionally, for most of the things she does, she has pain. The pain and limitations also affect her daily activities outside of work.

Claimant left the job at Estherville Foods at the end of her internship. (Tr., p. 41) She was not offered a permanent position there, but was told they had a position available for which she could apply. (Tr., p. 41; Cl. Ex. 4, p. 1) She decided not to apply, as she did not want to leave Iowa Lakes in the event an administrative position came open, and she did not like the hours the job at Estherville required. (Cl. Ex. 4, p. 2) She continues to work at Iowa Lakes and is waiting for a full-time administrative position to open. (Tr., p. 37) She has also applied at some banks, but was told she did not have enough experience. (Tr., pp. 37-38) At the time of hearing, she was earning $15.00 per hour at Iowa Lakes. (Tr., p. 38)

While claimant did return to work at Estherville Foods following the work injury in order to complete her internship hours, she was not offered a permanent position there when her internship ended. (Tr., p. 41) As such, claimant is entitled to industrial disability. She continues to work at Iowa Lakes in the same position she had prior to the

injury, although with pain. She testified that her supervisor makes accommodations for her so that she does not have to lift or carry anything heavy. While claimant's ongoing symptoms have caused to her to lose some earning capacity, overall she is largely able to continue performing the same job and tasks as she did prior to the work injury. Based on the evidence as a whole, I find claimant has sustained a 10 percent loss of earning capacity due to the injury at Estherville Foods.

CONCLUSIONS OF LAW

The party who would suffer loss if an issue were not established ordinarily has the burden of proving that issue by a preponderance of the evidence. Iowa R. App. P. 6.904(3)(e). 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).

The first issue to determine is whether claimant's March 18, 2021 work injury resulted in permanent disability. Defendants argue that claimant is not entitled to permanent disability based on the opinions of Dr. Archer. However, as noted above, I do not find Dr. Archer's opinions to be based on an accurate understanding of claimant's medical history. Specifically, Dr. Archer's statement that claimant had similar symptoms and work time loss prior to the date of injury is simply not supported by any of the medical or other evidence in the file. To the contrary, Dr. Taylor provided a more accurate representation of claimant's prior medical history, as supported by the records in evidence, and a detailed review of her medical treatment and symptoms post-injury. Based on Dr. Taylor's opinions, I found claimant did sustain permanent disability as a result of her March 18, 2021 injury.

Since the injury resulted in permanent disability, the next issue to determine is the nature and extent of disability claimant has sustained. An injury to the neck is an unscheduled injury and thus considered an injury to the body as a whole. Defendants argue that claimant's recovery, if any, should be limited to the impairment rating. Claimant argues that she is entitled to industrial disability.

In 2017, the Iowa legislature amended the Iowa Workers' Compensation Act. See 2017 Iowa Acts, ch. 23. The 2017 amendments apply to cases in which the date of an alleged injury is on or after July 1, 2017. Id. at § 24(1); see also Iowa Code § 3.7(1). Because the injury at issue in this case occurred after July 1, 2017, the Iowa Workers' Compensation Act, as amended in 2017, applies. Smidt v. JKB Restaurants, LC, File No. 5067766 (App. Dec. 11, 2020).

Before 2017, permanent partial disability to an unscheduled body part caused by a work injury was "compensated by the industrial disability method which takes into account the loss of earning capacity." Gilleland v. Armstrong Rubber Co., 524 N.W.2d 404, 407 (Iowa 1994) (citing Mortimer, 502 N.W.2d at 14–15). With the 2017 amendments, the legislature carved out an exception to this general rule and created a mandatory bifurcated litigation process on the issue of permanent disability under certain circumstances. See 2017 Iowa Acts ch. 23, § 8 (now codified at Iowa Code § 85.34(2)(v)). The statute now articulates an exception and the circumstances triggering the bifurcated litigation process as follows:

> If an employee who is eligible for compensation under this paragraph returns to work or is offered work for which the employee receives or would receive the same or greater salary, wages, or earnings than the employee received at the time of the injury, the employee shall be compensated based only upon the employee's functional impairment resulting from the injury, and not in relation to the employee's earning capacity. Notwithstanding section 85.26, subsection 2, if an employee who is eligible for compensation under this paragraph returns to work with the same employer and is compensated based only upon the employee's functional impairment resulting from the injury as provided in this paragraph and is terminated from employment by that employer, the award or agreement for settlement for benefits under this chapter shall be reviewed upon commencement of reopening proceedings by the employee for a determination of any reduction in the employee's earning capacity caused by the employee's permanent partial disability.

Iowa Code § 85.34(2)(v).

The Commissioner has held that in cases in which a claimant's voluntary separation from defendant-employer occurs prior to hearing, the claimant is still entitled to industrial disability under section 85.34(2)(v) even if the claimant is earning greater wages with a different employer at the time of hearing than at the time of injury. Martinez v. Pavlich, Inc., File No 5063900 (App., July 30, 2020) As such, claimant is entitled to an industrial disability evaluation in this case.

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

Based on all of those factors, I found that claimant has sustained a 10 percent loss of earning capacity due to the injury at Estherville Foods. A 10 percent loss of earning capacity is equal to 50 weeks of benefits.

The next issue to determine is whether claimant is entitled to alternate medical care under Iowa Code section 85.27. Under Iowa law, the employer is required to provide care to an injured employee and is permitted to choose the care. Pirelli-Armstrong Tire Co. v. Reynolds, 562 N.W.2d 433 (Iowa 1997).

> [T]he employer is obliged to furnish reasonable services and supplies to treat an injured employee, and has the right to choose the care. . . . The treatment must be offered promptly and be reasonably suited to treat the injury without undue inconvenience to the employee. If the employee has reason to be dissatisfied with the care offered, the employee should communicate the basis of such dissatisfaction to the employer, in writing if requested, following which the employer and the employee may agree to alternate care reasonably suited to treat the injury. If the employer and employee cannot agree on such alternate care, the commissioner may, upon application and reasonable proofs of the necessity therefor, allow and order other care.

By challenging the employer's choice of treatment – and seeking alternate care – claimant assumes the burden of proving the authorized care is unreasonable. See Iowa R. App. P. 14(f)(5); Long v. Roberts Dairy Co., 528 N.W.2d 122 (Iowa 1995). Determining what care is reasonable under the statute is a question of fact. Id. The employer's obligation turns on the question of reasonable necessity, not desirability. Id.; Harned v. Farmland Foods, Inc., 331 N.W.2d 98 (Iowa 1983). In Pirelli-Armstrong Tire Co., 562 N.W.2d at 433, the court approvingly quoted Bowles v. Los Lunas Schools, 109 N.M. 100, 781 P.2d 1178 (App. 1989):

> [T]he words "reasonable" and "adequate" appear to describe the same standard.
>
> [The New Mexico rule] requires the employer to provide a certain standard of care and excuses the employer from any obligation to provide other services only if that standard is met. We construe the terms "reasonable"

> and "adequate" as describing care that is both appropriate to the injury and sufficient to bring the worker to maximum recovery.

The commissioner is justified in ordering alternate care when employer-authorized care has not been effective and evidence shows that such care is "inferior or less extensive" care than other available care requested by the employee. Long, 528 N.W.2d at 124; Pirelli-Armstrong Tire Co., 562 N.W.2d at 437. In this case, defendants are not authorizing any medical care, and have not offered care since June of 2021, despite the therapist documenting claimant's symptoms had only improved by about 50 percent at that time. (Tr., p. 25) Claimant testified she had not experienced even 50 percent relief at that time, but defendants did not want to approve any additional therapy. Regardless, claimant has requested additional care and is entitled to ongoing treatment for her injuries.

Claimant specifically requests authorization of a follow-up visit with Dr. Waleh, as well as authorization for an appointment with a physiatrist for her continued pain complaints. However, Dr. Taylor, who was not a treating physician, is the only doctor who has suggested seeing a physiatrist. He also recommended claimant return to Dr. Waleh to discuss her ongoing symptoms. Because no treating physician has specifically recommended claimant see a physiatrist, her request for that specific treatment is denied at this time. However, her request to return to Dr. Waleh is granted. Defendants shall authorize claimant to return to Dr. Waleh for follow up regarding her ongoing complaints related to the work injury. Should Dr. Waleh agree that claimant should see a physiatrist or other specialist, defendants will abide by her recommendations.

Finally, claimant requests costs. Iowa Code section 86.40 states that costs are taxed in the discretion of the commissioner. As claimant was successful in her claim, I award costs. Claimant is awarded the $103.00 filing fee. (Cl. Ex. 1, p. 1) Medical record retrieval is not an allowable cost pursuant to Iowa Administrative Code Rule 876—4.33(86); thus, the costs regarding records requests from Avera Holy Family Hospital are not awarded. With respect to the IME report, the parties previously stipulated that defendants would reimburse that cost.

ORDER

THEREFORE, IT IS ORDERED:

Defendants shall pay claimant fifty (50) weeks of permanent partial disability benefits, commencing June 21 2021, at the stipulated rate of two hundred ninety-five and 72/100 dollars ($295.72).

Defendants shall pay accrued weekly benefits in a lump sum together with interest at an annual rate equal to the one-year treasury constant maturity published by the federal reserve in the most recent H15 report settled as of the date of injury, plus two percent.

Defendants shall immediately authorize and timely pay for all reasonable and causally related medical treatment with Dr. Waleh.

Defendants shall pay claimant one hundred three and 00/100 dollars ($103.00) in costs.

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 ___24th___ day of October, 2022.

JESSICA L. CLEEREMAN
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Dustin Mueller (via WCES)

Robert Gainer (via WCES)

Right to Appeal: This decision shall become final unless you or another interested party appeals within 20 days from the date above, pursuant to rule 876-4.27 (17A, 86) of the Iowa Administrative Code. The notice of appeal must be 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.