BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

ZINETA KUDIC, Claimant, vs. IOC BLACK HAWK COUNTY, INC., Employer, and LIBERTY MUTUAL, Insurance Carrier, Defendants.	File Nos. 5066504, 5066505 A R B I T R A T I O N D E C I S I O N Head Notes: 1100, 1108, 1403.3, 1403.3, 1801, 1802, 1803, 2800, 2802

STATEMENT OF THE CASE

Zineta Kudic, claimant, filed a petition in arbitration seeking workers' compensation benefits against IOC Black Hawk County, Inc., employer, and Liberty Mutual, insurer, both as defendants, for disputed work injury dates of February 16, 2018, and May 16, 2018.

This case was heard on October 15, 2019, in Des Moines, Iowa. The case was considered fully submitted on December 6, 2019, upon the simultaneous filing of briefs.

The record consists of Joint Exhibits 1-7; Claimant's Exhibits 1-8; Defendants' Exhibits A-F, and the testimony of claimant and Cory Kozelka.

ISSUES

1. Whether claimant sustained an injury on February 16, 2018 and/or May 16, 2018, which arose out of and in the course of employment;

2. Whether claimant's claim is barred for failure to give timely notice under Iowa Code section 85.23;

3. Whether the alleged injury is a cause of temporary disability and, if so, the extent;

4. Whether the alleged injury is a cause of permanent disability and, if so;

5. The appropriate commencement date of permanent disability benefits;

6. The extent of claimant's industrial disability;

7. Whether there is a causal connection between claimant's injury and the medical expenses claimed by claimant in Exhibit 7.

8. Costs.

STIPULATIONS

The parties filed a hearing report at the commencement of the arbitration hearing. On the hearing report, the parties entered into various stipulations. All of those stipulations were accepted and are hereby incorporated into this arbitration decision and no factual or legal issues relative to the parties' stipulations will be raised or discussed in this decision. The parties are now bound by their stipulations.

The parties agreed that at the time of the alleged injuries, claimant was an employee of the defendant.

While defendants do not agree that claimant is entitled to temporary benefits, they do concede that between March 26, 2018 and June 26, 2018 and October 31, 2018 and May 11, 2019, claimant was off work. If it is found that claimant has sustained a permanent disability, the parties agree that it is industrial in nature.

At the time of the alleged injuries, claimant's gross earnings were $469.36 per week. The claimant was married and entitled to two exemptions. Based on the foregoing number the weekly benefit rate is $322.86.

Defendants stipulate that the medical providers will testify as to the reasonableness of their fees and/or treatment set forth in the list of expenses and Exhibit 7 and that the defendants will not offer contrary evidence.

FINDINGS OF FACT

At the time of the hearing, claimant was a 51-year-old person. She was married with two adult children. She immigrated to the US from Bosnia. While in Bosnia, she was a homemaker. Her education consists of school through the eighth grade. After moving to the United States, she began working in food processing at IBP, sewed clothes at Powers Manufacturing, and worked for the Home Shopping Network.

In 2008, she began working for defendant employer first as a housekeeper and then as a house person. Her job duties included moving heavy supplies and equipment, moving and cleaning dirty linen, supplying towels to the pool area, stocking utility closets and cleaning supplies, wet mopping, vacuuming, stripping beds, shampooing carpet, and moving furniture. (Claimant's Exhibit 6: 5-7) The job description also listed lifting up to 50 pounds without assistance and over 50 pounds with assistance along

with pulling carts weighing up to 500 pounds without assistance. Id. During testimony, she reported having to strip up to 70 rooms per day or 8 rooms per hour. Ultimately, she was terminated when the defendant employer could not meet Lydia Mustafic, M.D.'s restriction of limiting the stripping of rooms to 30 per day. (CE 6, p. 10) The defendant employer's termination document stated, "As of today, January 17, 2019, The Isle Casino Hotel Waterloo is terminating Ms. Kudic's employment because she is unable to perform the essential functions of her position and no alternative reasonable accommodations exist." (CE 6: 10)

In another document, the defendant employer explained that each house person was required to strip 60-70 rooms, particularly on days when the hotel is booked to capacity. (CE 5:11) It would be detrimental to the defendant employer's business to accommodate the request of diminishing claimant's work to only 30 rooms per day. Id.

Claimant applied for unemployment benefits and asserted that she was willing and able to return to the workforce. (Hearing Testimony)

On or about November 4, 2015, claimant sought medical treatment from Cortney Klein, ARNP for multiple complaints including back and shoulder pain. (Defendants' Exhibit G:1-8) She was diagnosed with Bell's palsy and ordered to follow up with a neurologist. Id. Her low back pain was described as moderate and characterized as aching. Id. The symptoms waxed and waned but did not radiate. Claimant described her job as physically taxing and desired that her employer pay for treatment. Id.

> She has lower back, bilateral trapezius, and hamstring pain and tightness. She works as a housekeeper in the Isle of Capri Hotel. She has a physically demanding job where she is bending, reaching, and carrying heavy loads of laundry on a regular basis . . . She has not had an injury to her legs, back, or shoulders. She has been to physical therapy for this kind of pain in the past and thought that her employer would pay the bill since the pain was from her job, but they refused to do so. We spent 25 minutes, or so, going back and forth over this. The patient would like me to write a note to the Isle of Capri Hotel that this pain she is having is from her job so that they will pay her bills. I refused to do this. I explained many times that if she had an injury at work, that they would cover the cost, and she would be seen by an occupational medicine provider at a different location. If she is unable to do her job then she should look for a new job.

(DE G:2) The notes from the same visit go on to state, "The symptoms are aggravated by bending, standing, stress and twisting (Working)." (DE G:2) Claimant admitted at hearing that she attributed her pain to work. However, Nurse Practitioner Klein did not ascribe the back pain to claimant's work and claimant did not miss any work because of the back and shoulder complaints. Id.

On March 6, 2016, claimant consulted with Dr. Mustafic, for back and neck pain, fatigue and sinus infections. (Joint Exhibit 3:1) She was given prescriptions for her sinus

infections and for anxiety but no pain medication or muscle relaxers for her back pain. Id.

On April 11, 2016, claimant was seen by Sangeeta Shah, M.D., for multiple issues including back pain which claimant described as "severe." (JE 3:4) She believed that gabapentin was causing her back pain and stopped using it. Id. Dr. Shah explained that was not likely, but claimant did not believe him. Dr. Shah also noted that despite the cessation of the medication, claimant's back pain had worsened. Id. Despite the severe back pain, claimant did not miss any work nor receive any accommodations for pain.

On May 10, 2016, claimant sought treatment for back and leg pain that "[s]tarted yesterday." (JE 3:8) Ten days later, on May 20, 2016, claimant consulted her primary provider. The notes from that visit reference "[c]hronic low back pain with radiation into posterior buttocks and legs with [n]umbness and tingling off and on. Now for the last month more acute low back pain also w/o radiation and with radiation." (JE 3:13 – 3:14) Claimant testified that she thought it was related to her period, and Dr. Mustafic ordered a urinalysis to rule out a urinary tract infection. She had none.

On June 3, 2016, claimant underwent a CT scan of her lumbar spine, the results of which showed "[m]ild intervertebral disk disease at the L4-5 and L5-S1 levels" and "[m]ild right L4-5 neural foraminal narrowing." (JE 3:24) Dr. Mustafic recommended claimant stop working. (JE 1:5) At hearing, claimant denied that this message was relayed to her until after December 2017.

On December 4, 2017, claimant once again sought treatment for worsening back pain from Dr. Mustafic. (JE 3:26) The treatment notes reference a history of L4 to L5 disc extrusion. (JE 3:26) Dr. Mustafic notes that there is radiculopathy. (JE 3:29) Claimant was sent for a CT scan which showed that her spine was unchanged from the 2016 scan. (JE 3-25)

On January 12, 2018, claimant reported to Claro Palma, M.D., "low back pain and bilateral leg numbness and tingling the last 1 ½ years" and that it "[h]urts with prolonged standing [or] repeated bending." (JE 1:2) Dr. Palma's notes record treatment such as physical therapy and chiropractic care for the back pain. Dr. Palma suggested that overuse and repetitive work may be the cause of the claimant's symptomatology. Id.

On January 19, 2018, claimant saw Mahesh Mohan, M.D., at Covenant Clinic Pain Management regarding her back pain. (JE 3:32) The notes from that visit state that her pain had been "ongoing for last 1 year." (JE 3:32) The same notes list working as a worsening factor. (JE 3:32)

On January 28, 2018, claimant requested an accommodation from her employer and asked to abstain from stripping more than 30-40 rooms per day. (DE A) She believed she was being overworked.

On January 30, 2018, claimant took paperwork to Dr. Mustafic to fill out regarding claimant's back pain. (JE 3:36) The notes from that visit reveal that claimant "doesn't think she can strip more than 30-40 rooms due to exacerbation of back and neck pain since starting this job." (JE 3:37)

On February 21, 2018, claimant renewed her request for accommodations based on the recommendations of Dr. Mustafic. (DE A:6-7) The company was non-responsive. Cory Kozelka, who handled the workers' compensation claims for defendant employer, testified that unless an employee states that their injury happened because of work, the employer does not investigate. He maintained that the defendant was not aware of the existence of any claim by the claimant until May of 2019.

On March 9, 2018, a physical therapy evaluation was performed on claimant. (JE 6:1) The notes from that visit state, "Patient states that she has had low back pain for the last three months. Started when she began her job at the Isle Casino stripping down hotel rooms (up to 50 beds a day)." (JE 6:1) She continued to attend physical therapy until April 18, 2018. (JE 6:14-16)

On March 22, 2018, claimant requested early leave from her position due to her back pain. Claimant was then disciplined for this. She returned to work the next day but later saw Dr. Mustafic who, at the claimant's request, excused claimant from work for three months. (JE 2:2) During the March 26, 2018 visit, it was noted that "49 yr old female here for a follow up for chronic low back pain and chronic neck pain . . . Patient has been diagnosed with degenerative disc disease lumbar and cervical, lumbar radiculopathy." (JE 2:3)

Because this was not an accepted work injury, claimant was required to use FMLA. She checked "personal serious health condition that makes it unable for you to perform your job" on the form as FMLA is not used for a work injury. (DE E:2) She applied for disability benefits through the defendant employer's policy, but was denied, as the insurer considered it work related.

Upon this denial of disability benefits, defendant employer sent claimant to James Haag, PA. (JE 4) May 16, 2018, claimant was seen by James Haag, PA, with complaints of low back pain. (CE 2:7) Claimant reported that stripping sheets and removing garbage in 50 rooms caused back pain that developed 3-4 months previously. (CE 2:7) The form was marked as non-work related and claimant was advised to follow up with her personal physician. Id. Claimant returned to her treating physician, Dr. Mustafic, for regular care.

On October 12, 2018, claimant reported "low back pain and bilateral leg numbness and tingling the last 1 ½ years." (JE 5:1) On October 29, 2018, claimant reported that her back pain began on March 26, 2018. (JE 5:4) On January 2, 2019, Dr. Mustafic wrote a work excuse keeping claimant off work until May 1, 2019. (JE 2:10) Claimant was seen by Dr. Delbridge on February 21, 2019, who documented that claimant reported more pain than the previous visit. (JE 5:10) She was having difficulty

sleeping due to back and leg pain. Claimant was scheduled for an MRI and instructed to return after the test. (JE 5:11) Dr. Mustafic saw claimant on April 8, 2019, noting claimant's back pain improved during her period of rest but was worsened by doing day to day house work. (JE 3:57)

Claimant was approved for Social Security benefits due to a disability on August 26, 2019. (CE 8)

On September 11, 2019, Richard Kreiter, M.D., opined that the claimant's degenerative condition with symptoms of chronic pain and intermittent right sciatica was materially aggravated by claimant's job duties including but not limited to the physical duties of cleaning 18 to 24 rooms in an 8-hour period that required lifting, carrying, sweeping in a flexed forward position while making beds and/or turning mattresses. (CE 1:3) This opinion was based on the type of work claimant did, her degenerative condition, and the lack of pre-incident significant back pains. Id.

He felt that reasonable restrictions lessened the force and stress on her compromised lumbar spine and temporarily relieved symptoms. Id. Based on the accumulative injuries, radicular complaints, and CT scan with L4-5 changes, he estimated a 5-8 percent whole person impairment and set her maximum medical improvement (MMI) date at May or June of 2019. Id.

On October 14, 2019, Dr. Mustafic agreed with Dr. Kreiter's assessment that claimant's repetitive work worsened claimant's back pain to the point where work became difficult and she needed treatment. (CE 2:9) Dr. Mustafic did not agree that a 25 to 30 pound lifting restriction was adequate due to the L4-L5 diffusely bulging intervertebral disc contacting the L5 nerves bilaterally. Id. Dr. Mustafic felt that the restriction should be 10-15 pounds maximum and only occasionally. Id.

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. 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 both arose out of and in the course of the employment. Quaker Oats Co. v. Ciha, 552 N.W.2d 143 (Iowa 1996); Miedema v. Dial Corp., 551 N.W.2d 309 (Iowa 1996). The words "arising out of" referred to the cause or source of the injury. The words "in the course of" refer to the time, place, and circumstances of the injury. 2800 Corp. v. Fernandez, 528 N.W.2d 124 (Iowa 1995). An injury arises out of the employment when a causal relationship exists between the injury and the employment. Miedema, 551 N.W.2d 309. The injury must be a rational consequence of a hazard connected with the employment and not merely incidental to the employment. Koehler Electric v. Wills, 608 N.W.2d 1 (Iowa 2000); Miedema, 551 N.W.2d 309. An injury occurs "in the course of" employment when it happens within a period of employment at a place where the employee reasonably may be when

performing employment duties and while the employee is fulfilling those duties or doing an activity incidental to them. Ciha, 552 N.W.2d 143.

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).

There is no real dispute as to the cause of claimant's injury. Nearly every expert and treating physician agrees that the claimant's back injury was the result of repetitious work and overuse. Dr. Palma and Dr. Delbridge, both specialists, noted that work may have attributed to claimant's symptoms. Dr. Kreiter and Dr. Mustafic definitely state that the claimant's back complaints are the result of her work. Dr. Mustafic encouraged claimant to find a different job on more than one occasion. Only Physician Assistant Haag, after a cursory examination and no study of the medical records, concluded that the claimant's back injury was not work related. Thus, to the extent that this is in dispute, it is found that claimant's back complaints and her inability to perform the essential functions of her position arose out of and in the course of her employment.

The fighting issue is when the claimant knew or should have known of her injury. Defendants argue that the date of notice provided to the employer was May 15, 2018, when she informed her human resources manager, Tori Jemeland and Mr. Kozelka that she had been suffering with pain in her lower back for three to four months prior and she attributed it to her work for defendant employer. (DE F:1) However, on January 28, 2018, claimant requested an accommodation from her employer, requesting that she reduce her work load to only 30-40 rooms a day.

Iowa Code § 85.23 provides that an injury is not compensable unless, within 90 days of the "date of the occurrence of the injury," either (1) the employer had actual

knowledge of the occurrence of an injury or (2) notice of the occurrence of an injury was provided to the employer.

The purpose of the 90-day notice or actual knowledge requirement is to give the employer an opportunity to timely investigate the facts surrounding the injury.

Defendants read this to strictly require the defendants to have actual notice rather than imputed notice. However, the second part of section 85.23 allows for something less than actual notice. The actual knowledge alternative to notice is met when the employer, as a reasonably conscientious manager, is alerted to the possibility of a potential compensation claim through information which makes the employer aware that the injury occurred and that it may be work related. Dillinger v. City of Sioux City, 368 N.W.2d 176 (Iowa 1985); Robinson v. Department of Transp., 296 N.W.2d 809 (Iowa 1980).

In this case the request for accommodation is when a reasonably conscientious manager would have been alerted of a potential compensable claim. While defendants have certain procedures and forms to follow for reporting illnesses and injuries, these procedures and forms do not control whether a reasonably conscientious manager should engage in an investigation.

Claimant reported she needed an accommodation restricting the number of rooms she could do. A reasonably conscientious manager would have investigated whether this was due to a work-related reason. Instead, the defendant employer did nothing. Defendants provided no evidence to support their argument that the request for accommodation was not work-related, and in this affirmative defense, the burden is on the defendants to prove by a preponderance of the evidence that a reasonably conscientious manager would not have viewed a request for accommodation as an alert that there was a possibility of a potential compensable claim.

The question is then whether the notice given on January 28, 2018, was within 90 days of the injury.

In Baker v. Bridgestone, 872 N.W.2d 672 (Iowa 2015), the Iowa Supreme Court laid out the history of the workers' compensation statute and described it as a grand bargain between the employee who gives up certain tort rights in exchange "for a system designed to provide compensation benefits and medical services promptly, without protracted and expensive litigation." Id. at 677. Further, we are to "liberally construe workers' compensation statutes in claimants' favor to effectuate the statute's humanitarian and beneficent purpose." Id. at 679. Baker involved the question of whether the discovery rule should apply to a single traumatic incident causing a work-related injury or whether it should be limited to cumulative injuries. Id. at 672. The Supreme Court refuses to place the burden on a reasonable worker to know when every ache, pain, or symptom was the result of his work. Id. at 682.

Where claimant has a preexisting condition or disability that is aggravated, accelerated, worsened or "lighted up" by employment, the condition is compensable. See Nicks v. Davenport Produce Co., 254 Iowa, 130, 134-135, 115 N.W.2d 812, and citations. However, a disease which under any rational work is likely to progress so as to finally disable an employee does not become a "personal injury" under the Workers' Compensation Act merely because it reaches a point of disablement while work for an employer is pursued. It is only when there is a direct causal connection between the exertion of the employment and the injury that a compensation award can be made. The question is whether the diseased condition was the cause, or whether the employment was a proximate contributing cause. Musselman v. Central Telephone Company, 154 N.W.2d 128, 132 (Iowa 1967) citing Little v. Lagomarcino Grape Co., 235 Iowa 523, 529, 17 N.W.2d 120. Whether an injury or disease has a direct causal connection with the employment, or arises independently thereof, is essentially within the domain of expert testimony, and the weight to be given such an opinion is for the finder of facts. When an expert's opinion is based upon an incomplete history it is not necessarily binding on the commissioner or the court. It is then to be weighed together with the other facts and circumstances, the ultimate conclusion being for the finder of fact. Musselman, supra; Bodish v. Fischer, Inc., 257 Iowa 521, 133 N.W.2d 867.

In order to calculate the notice requirement, the date of manifestation must be set. Under the discovery rule, the 90-day notice period and statute of limitations do not begin to run until the employee, as a reasonable person, knows or should know the cumulative injury condition is serious enough to have a permanent adverse impact on his or her employment. See Herrera, 633 N.W.2d at 288. More specifically,

> a condition is implied in limitations provisions of most workers' compensation statutes that "(t)he time period for notice or claim does not begin to run until the claimant, as a reasonable man, should recognize the nature, seriousness and probable compensable character of his injury or disease." 3 A. Larson Workmen's Compensation § 78.41 at 15-65 to 15-66 (1976). This rule is applicable to the notice of claim provision in section 85.23 of our workers' compensation statute. Robinson v. Department of Transportation, 296 N.W.2d 809, 812 (Iowa 1980).

Orr v. Lewis Cent. Sch. Dist., 298 N.W.2d 256, 257 (Iowa 1980).

The long-standing rule of law since 1980 is that "the statute of limitations on a workers' compensation claim does not begin to run until the claimant knows or should recognize the nature, seriousness, and probable compensable character of his or her injury." (Id. at 680-81) More precisely, cumulative injury is deemed to have occurred when both the fact of the injury and the causal relationship of the injury to the claimant's employment would have become plainly apparent to a reasonable person. Id. at 681. This is called the manifestation point.

In Venenga v. John Deere Component Works, 498 N.W.2d 422 (Iowa App. 1993), the Iowa Court of Appeals overturned an agency ruling that pegged an injury date to the date claimant was hospitalized:

> When Venenga was hospitalized in October he had no compensable worker's [sic] compensation claim. Venenga did not miss work during his hospitalization [being on strike at the time]. Venenga first stopped work due to his back injury on July 24, 1987. Prior to that time, he would not have been eligible for worker's [sic] compensation benefits. We do not read Tasler to require an employee to stop working to make a cumulative injury worker's [sic] compensation claim. However, we find more is required than knowledge of an injury or receipt of medical care. The employee must realize his or her injury will have an impact on employment.

In George A. Hormel & Company v. Jordan, 569 N.W.2d 148 (Iowa 1997), the court held that substantial evidence supported an agency determination tying the date of injury to claimant learning from an orthopedic surgeon that he would not recover from a cumulative injury to his shoulder, and that permanent restrictions on work activities would be required. The court found that claimant having merely gained knowledge of his subluxated shoulder on prior medical visits was not dispositive; quoting Tasler, the court continued:

> We thus reject an interpretation of the term "manifestation" that will always require an employee suffering from a repetitive-trauma injury to fix, as the date of accident, the time at which the employee first became aware of the physical condition, presumably through medical consultation, since by their very nature, repetitive-trauma injuries often will take years to develop to the point where they will constitute a compensable workers' compensation injury.

Claimant initially began suspecting that her work was the cause of her low back pain in November 2015, although the health care practitioner did not tie the low back pain to claimant's work. Claimant treated off and on through 2016 and at one point wondered if her back pain was associated with taking gabapentin or her period. In the summer of 2016, she underwent a CT scan of her lumbar spine which revealed degenerative changes. According to Dr. Kreiter's summation of the records, Dr. Mustafic recommended claimant stop working as a result of her back pain. (JE 1:5) She did not receive more treatment until late 2017 and thus whatever impact Dr. Mustafic felt claimant's work had on her back abated. When the claimant's condition worsened, she sought out care again. Beginning in December 2017, claimant began to seriously question the causal connection between her work and her injury. When claimant asked for accommodations, a reasonable worker should have recognized the nature, seriousness and probable compensable nature of her injury or disease. It was plainly apparent as of January 28, 2018, that she had a possible work-related injury.

It is specifically found that the date of injury is January 28, 2018. Claimant requested accommodations on that date. Therefore, defendants' lack of notice claim must fail.

Turning to the benefits issue, the parties stipulate that claimant was off work from March 26, 2018 through June 26, 2018, and then again from October 31, 2018, to May 11, 2019. Claimant was ordered off work by Dr. Mustafic as a result of her back injury. However, temporary benefits are only appropriate until such time as claimant has returned to work, returned to substantially similar work or achieved MMI. Iowa Code section 85.34(1). The healing period can be considered the period during which there is a reasonable expectation of improvement of the disabling condition. See Armstrong Tire & Rubber Co. v. Kubli, 312 N.W.2d 60 (Iowa App. 1981). Healing period benefits can be interrupted or intermittent. Teel v. McCord, 394 N.W.2d 405 (Iowa 1986).

Claimant returned to work on June 27, 2018. Claimant was then taken off work again on October 31, 2018. She has not returned to work again. Defendants point out that most of claimant's care has been palliative and that her diagnostic tests have shown no changes from 2016 through 2018. The healing period is that period of time during which there is a reasonable expectation of healing. Dr. Kreiter estimated the time that claimant reached MMI was May or June 2019. Claimant argues that it is likely May 11, 2019, based on Dr. Kreiter's statement. However, claimant's care, particularly after physical therapy ended on April 18, 2018, has been the administration of medications and re-administration of tests which show no changes. Her care has been conservative and largely unchanged. There were no opinions as to whether claimant's condition was likely to improve during 2018 or early 2019. From the medical records, however, there was no improvement. If anything, claimant's condition worsened and the medical professionals did not provide prescriptions for further medical treatment except for medications after April 18, 2018. Thus it is determined that claimant's MMI date is April 18, 2018.

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

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

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

Dr. Kreiter assessed a 5-8 percent whole person impairment. Claimant knows some English but has worked primarily manual labor positions her entire relevant working career. Dr. Kreiter recommended restrictions of alternate standing, walking and sitting along with lifting limited to 25 to 30 pounds whereas Dr. Mustafic, claimant's family physician set the lifting restrictions at 10-15 pounds. The defendant employer terminated claimant for not being able to meet the essential requirements of her job. Thus hotel housekeeping is not within her physical abilities. Claimant argues she is totally and completely disabled, and while she argues that there is no evidence that claimant can be employed in any jobs or industries where she has experience or qualifications, there is also no evidence that the labor market is wholly closed to her. Claimant has full use of her extremities, albeit at a reduced work level. She is not in the sedentary duty category with her lifting restrictions. Based on the foregoing, claimant's industrial loss is 75%.

There was a dispute about the causal connection between some medical bills submitted by the claimant and the alleged work injury. Defendants were invited to file objections to Exhibit 7 which itemized the medical bills for which claimant sought reimbursement.

The employer shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance, and hospital services and supplies for all conditions compensable under the workers' compensation law. The employer shall also allow reasonable and necessary transportation expenses incurred for those services. The employer has the right to choose the provider of care, except where the employer has denied liability for the injury. Section 85.27. Holbert v. Townsend Engineering Co., Thirty-second Biennial Report of the Industrial Commissioner 78 (Review-Reopening October 1975).

To the extent that any of Exhibit 7 does not relate to claimant's low back injury with radiation down the leg, those bills are not awarded. Only the medical bills related to the claimant's low back injury and leg pain are awarded herein. Claimant is entitled to be reimbursed only what the medical providers were paid and not any gross charges. The evidence supports reimbursement for medical visits pertaining to claimant's low back pain and leg pain, medications, tests, examination, and treatments thereto.

ORDER

THEREFORE, IT IS ORDERED:

That defendants are to pay unto claimant three hundred seventy-five (375) weeks of permanent partial disability benefits at the rate of three hundred twenty-two and 86/100 dollars ($322.86) per week from April 19, 2018.

That claimant is entitled to temporary medical benefits from March 26, 2018, through April 18, 2018, at the rate of three hundred twenty-two and 86/100 dollars ($322.86) per week.

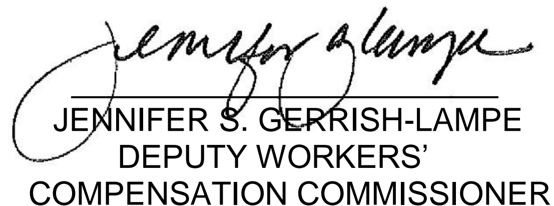
That defendants shall reimburse claimant for medical bills that were incurred for treatment, testing, or examination of claimant's work-related low back injury radiating into the leg.

That defendants shall pay accrued weekly benefits in a lump sum.

That defendants shall pay interest on unpaid weekly benefits awarded herein as set forth in Iowa Code section 85.30.

That defendants shall pay the costs of this matter pursuant to rule 876 IAC 4.33.

Signed and filed this 13th day of March, 2020.



JENNIFER S. GERRISH-LAMPE
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Jason Lehman (via WCES)
Adnan Mahmutagic (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.