BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

MELISSA SMALL, Claimant, vs. POMEROY CARE CENTER, Employer, and CORNHUSKER CASUALTY COMPANY, Insurance Carrier, Defendants.	FILED NOV 26 2012 WORKERS' COMPENSATION File No. 5031956 APPEAL DECISION Head Note Nos.: 1108; 1402.40; 2907; 4000.2

Claimant, Melissa Small, appeals from an arbitration decision filed July 21, 2011, in which the presiding deputy commissioner found that claimant had failed to prove by a preponderance of the evidence she had sustained a permanent disability as a result of an injury which occurred while assisting a patient on October 15, 2009. Defendants, Pomeroy Care Center and Cornhusker Casualty Company, initially filed a notice of cross-appeal, but withdrew the cross-appeal on August 23, 2011.

The arguments of the parties have been considered and the record of evidence has been reviewed de novo.

ISSUES

I. Did the presiding deputy commissioner err in his finding as to whether claimant sustained a permanent disability as a result of her work injury, and if so, what is the extent of claimant's industrial disability?

FACTUAL FINDINGS

The presiding deputy commissioner accurately set forth the factual background of this case in the arbitration decision. As the facts of this matter are not in significant

dispute, the factual background set forth by the deputy is largely adopted with minimal changes as set forth below.

Claimant, Melissa Small, was born in 1969 making her 41 years of age at the time of the evidentiary hearing. (Exhibit A, internal pages 3-4) Claimant quit high school in the 11th grade, later got her GED, and in 2000 earned a two-year associate nursing degree. (Ex. 13, p. 4 and Ex. A, int. pp. 4-5) She is currently licensed as a registered nurse (RN). (Ex. A, int. p. 6) Claimant's work history includes working two years as a CNA at one facility and approximately five years at Pomeroy Care Center, defendant-employer, (hereinafter Pomeroy Care), and working full-time for her parents in a restaurant/bar. (Ex. A, int. pp. 8-17) Claimant began working as an RN at Pomeroy Care Center on August 26, 2000 at a base hourly rate of pay of $22.05. (Ex. 10, p. 6 and Ex. 12, p. 3)

Claimant has well-documented, preexisting medical conditions which include conditions related to her low back. Claimant's medical history includes treatment for low back strain and right sciatica in July and October 2002. (Ex. B, pp. 2-3; Ex. D, p. 2; and Ex. I, pp. 1-4); right sacroiliac strain and sciatic neuralgia in June 2003 (Ex. 1, p. 1 and Ex. I, p. 5); acute pain tenderness along the lower sterna border in January 2005 (Ex. 1, p. 1); contusion of the left leg and shoulder in June 2005 (Ex. I, p. 6); left trapezius strain and spasms in July and August 2005 (Ex. H, pp. 1-2); muscle spasms secondary to lumbosacral strain in August 2005 (Ex. H, p. 2); cervical, thoracic and lumbar dysfunction in August 2006 (Ex. I, p. 6); carpal tunnel syndrome, low back sciatica and right knee pain in 2007; (Ex. 2, pp. 1-5, 8-12; Ex. H, pp. 3-19; and Ex. I, p. 7) a lumbar MRI on July 11, 2007 showed very mild degenerative change developing at L5-S1 and no evidence of significant disc herniation and/or protrusion at any level – read to be entirely within normal limits (Ex. H, p. 9); after an assessment of right sciatica and low back pain on August 13, 2007 claimant was cleared to return to full duties that day (Ex. 2, p. 12 and Ex. H, p. 13); pneumonia in August 2007 (Ex. K, pp. 1-2); acute vision loss in October 2007 and January 2008 (Ex. H, pp. 20-25, 27); probable multiple sclerosis (MS) in 2007 (Ex. K, p. 5); a laparoscopic appendectomy on September 15, 2008 (Ex. K, pp. 3-4); fall with left elbow contusion in November 2008 (Ex. K, pp. 5-7); back pain and symptoms of multiple sclerosis in February 2009 (Ex. 2, p. 13); recurrent right optic neuritis in March 2009 (Ex. M, pp. 3-7); leg pain attributable diabetic peripheral in April and June 2009 (Ex. 2, pp. 14-15); contusion of the coccyx and right ankle sprain following a slip and fall at work on July 10, 2009 after which she was released to return to regular duty work on July 15, 2009 (Ex. 2, p. 16; Ex. B, p. 1; and Ex. 10, pp. 1-2 and 12); and diabetic peripheral neuropathy on August 27, 2009. (Ex. H, p. 26)

After having recently been released to return to unrestricted, full-duty work subsequent to her prior work injury claimant sustained a stipulated injury on October 15, 2009. The injury occurred when claimant attempted to prevent a 300-pound resident from sliding out of a wheelchair and she felt a sharp pain in her back and down her leg.

(Tr., p. 40; Ex. 2, p. 17; Ex. 5, p. 1; Ex. 10, pp. 3-4; Ex. 13, p. 6; Ex. A, int. pp. 24-26; Ex. K, p. 8) A coworker of claimant also reported back pain in the same incident. At the time of the injury claimant was earning $22.05 per hour and in the prior 13 weeks had worked between 27.125 and 35.875 hours per week or 66.25 to 71.75 hours in a two week period. (Ex. 10, p. 8; Ex. B, p. 33; and Ex. N) On the date of injury claimant was working as a charge nurse and her shift hours were 5:45 a.m. to 6:00 p.m., 12 hours a day, three days a week. (Ex. A, int. pp. 34-35; Ex. B, pp. 4-5)

Following her injury claimant was transported to a hospital emergency room where thoracic x-rays were taken. The x-rays showed no obvious compression fracture or acute abnormality. Claimant was diagnosed as having acute back pain with muscle spasm, was prescribed medication, and was told to follow-up with her primary care provider, Paul Knouf, M.D., at a previously scheduled appointment. (Ex. 1, pp. 2-4; Ex. 5, pp. 1-4; Ex. H, p. 28; and Ex. K, pp. 8-10)

Dr. Knouf saw claimant on October 19, 2009. On that date he made an assessment of thoracic and lumbar pain with muscle spasm, prescribed medication, and directed claimant to physical therapy that started the next day. (Ex. 2, p. 17; Ex. 5, pp. 7-8, 11; Ex. H, pp. 29-30; and Ex. K, pp. 11-13)

A CT scan of the lumbar spine ordered by Dr. Knouf was done on November 20, 2009 and was interpreted to show particularly advanced facet joint osteoarthritic changes at the L4-5 level followed by the L5-S1 level which could definitely cause low back pain, but no nerve root compression nor displacement was observed. (Ex. 5, p. 5 and Ex. K, p. 14) The physical therapy that began October 20, 2009 ended on December 18, 2009 after 23 sessions. (Ex. 5, p. 11 and Ex. K, p. 11) When Dr. Knouf saw claimant on December 18, 2009 he noted claimant was not getting better, physical therapy had not helped, and he thought claimant should be seen by a back specialist. Dr. Knouf also ordered an MRI of the lumbar spine. (Ex. 2, p. 19; Ex. 5, p. 6; and Ex. K, p. 15) Dr. Knouf read the MRI showing a mild disc bulge central at 5-1. (Ex. 3, p. 7) Claimant was maintained on her OxyContin and Flexeril for pain. Claimant was referred to Grant Shumaker, M.D., a neurosurgeon. (Ex. 3, pp. 1-8, 24, 27 and Ex. 7, p. 19)

The MRI of the lumbar spine was performed on January 11, 2010 and was interpreted to show mild degenerative disc bulging at L5-S1 and otherwise negative. (Ex. 5, p. 6 and Ex. K, p. 15) Dr. Shumaker first saw claimant on January 15, 2010, at which time he made an assessment of low back pain and intermittent right leg pain, ordered EMG/nerve conduction testing of the right leg, prescribed medications, restricted her to sedentary work four hours a day, and referred her for two lumbar facet injections. (Ex. 3, pp. 1-8, 27-28)

The EMG/nerve conduction testing was done on January 26, 2010 and was interpreted to show no lumbar radiculopathy or mononeuropathy. (Ex. 4, pp. 28-29 and Ex. J, pp. 1-2) Bilateral lumbar facet blocks L4-5 through L5-S1 were

administered on February 12, 2010. (Ex. 4, pp. 32-33) The bilateral lumbar facet blocks L4-5 through L5-S1 were repeated on March 1, 2010. (Ex. 4, pp. 1-2, 20) Also on March 1, 2010, Dr. Shumaker's office gave claimant restrictions including lifting up to ten pounds occasionally. (Ex. 7, pp. 24-25 and Ex. J, pp. 3-4) On March 5, 2010, Dr. Shumaker's office adjusted claimant's medications. (Ex. 3, p. 9; Ex. 5, p. 9; and Ex. K, p. 16) On that same date claimant was evaluated for physical therapy. (Ex. 5, pp. 9-10 and Ex. K, pp. 16-17) The physical therapy ended on March 17, 2010 after five sessions. (Ex. 5, p. 12 and Ex. K, p. 18)

On or about March 19, 2010, Dr. Shumaker or his nurse raised the lifting restriction to 15 pounds occasionally and claimant's work hours to four hours per day and referred her to neuropsychiatric testing prior to considering a diagnostic discogram. (Ex. 3, pp. 10, 29 and Ex. J, p. 5) Claimant worked one and one-half hours on March 30, 2010 and had increased pain and four hours each on April 1, 2010 and April 6, 2010. (Ex. 3, pp. 11-12 and Ex. B, pp. 6-7, 32, 34-36)

The neuropsychological evaluation/behavioral medicine consultation was eventually agreed to by claimant and was completed on May 3, 2010 by Gary Dickinson, Ph.D., who felt she would be able to tolerate the discogram. (Ex. 3, pp. 13-14; Ex. 7, pp. 29-30; and Ex. 8, pp. 1-3) Dr. Dickinson noted on May 4, 2010 that claimant's scores on a questionnaire indicated she was reporting a moderate level of depressive symptoms, she might be at risk for psychological issues if the results of the discogram did not indicate any specific findings, and further evaluation could be called for if she demonstrated indications for further mood disturbance. (Ex. 8, p. 4) The discogram was done by Frederick Fisher, M.D., on May 19, 2010. (Ex. 4, pp. 3-4, 21 and Ex. J, p. 9) After seeing the claimant on May 21, 2010 and reviewing the lumbar discography, Dr. Shumaker noted the review of the discography showed discordant pain at 3-4, 4-5 and 5-1 levels, made an assessment of diffuse pain syndrome, thought there were no surgical intervention options for claimant, ordered a functional capacity evaluation, and prescribed medications. (Ex. 3, pp. 16-17) Claimant noted she had never heard of Dr. Fisher before he performed the discogram. (Tr., p. 64)

Claimant obtained care from Dr. Fisher on May 21, 2010 for severe postural headaches that likely resulted from an epidural leak during the discogram. Dr. Fisher addressed the postural headaches and took claimant as a pain patient. (Ex. 4, pp. 5-6) Dr. Shumaker responded to an inquiry from nurse case manager on June 1, 2010 that he did not refer claimant to Dr. Fisher for pain management or additional bilateral S1 injections. (Ex. 3, p. 34; Ex. 7, p. 34; and Ex. J, p. 10) However, the nurse case manager, Christine Stolze, RN, did subsequently schedule appointments for claimant with Dr. Fisher at Siouxland Surgery Center. (Ex. 7, pp. 39, 45) The nurse case manager also referred claimant to Julia White for a functional capacity evaluation that was done on June 10, 2010 and June 11, 2010. (Ex. 7, p. 35; Ex. 9, pp. 1-12; and Ex. A, int. p. 37) Ms. White noted claimant's job in nursing was classified within the heavy physical demand level, found claimant's material handling abilities were lifting 35

pounds, carrying 30 pounds, shoulder lifting 25 pounds, pushing 15 "HFP" and pulling 10 "HFP", and she could tolerate occasional bending, firm grasping, and walking; frequent simple grasping; continuous above shoulder reaching, forward reaching and pinching, and should avoid sustained kneeling and repetitive squatting. (Ex. 9, pp. 1-2)

Based on the functional capacity evaluation, on June 18, 2010, Dr. Shumaker increased claimant's work to six hours a day twice a week increasing to ten hours a day twice a week over the following six weeks. (Ex. 3, p. 32 and Ex. J, p. 11) Also on June 18, 2010 Dr. Shumaker noted claimant reported a significant decrease in back pain from the S1 injection by Dr. Fisher. (Ex. 3, p. 18) Dr. Shumaker stated in his report that it is reasonable to consider possible SI joint radiofrequency treatment if she does have recurrence of low back pain. (Ex. 3, p. 18) His assessment was:

> Patient with manageable pain. We will release her to return to work restrictions per FCE dated 6/10/2010 full time. Patient may potentially require repeat SI joint injection and/or possible radiofrequency treatment. Otherwise, she is assigned MMI as of this time.

(Ex. 3, p. 19)

When Dr. Fisher saw claimant on June 23, 2010 he noted he agreed with Dr. Shumaker's return to work schedule for her. (Ex. 4, pp. 7-8) In the period April 1, 2010 through June 24, 2010 claimant generally worked four hours a day, two days a week. (Ex. 10, pp. 15-26) Dr. Fisher noted that for her pain and inability to sleep that claimant was on Methadone 10 twice a day with OxyContin 10 and Marinol 2.5 QHS. (Ex. 4, p. 7)

When claimant was deposed on July 15, 2010 she was working as a charge nurse eight hours a day and got assistance doing some tasks. (Ex. A, int. pp. 37-39)

At the time of her deposition, claimant's symptoms were low back pain which occasionally radiated into both legs and some numbness in the legs. (Ex. A, int. pp. 42-45) She had not looked for work outside of Pomeroy Care. (Ex. A, int. p. 49)

When Dr. Fisher examined claimant on July 19, 2010 he noted he had "inadvertently messed up" Dr. Shumaker's plan to get her back to work and off medications and he refilled medication prescriptions. (Ex. 4, p 9) He noted that the patient "is not doing well at all." When Dr. Shumaker saw claimant on August 5, 2010 he made an assessment of manageable pain, released her to return to work full time with restrictions based on the June 10, 2010 functional capacity evaluation, noted she was at maximum medical improvement, and directed claimant have a repeat of bilateral SI injections that were done that same day. (Ex. 3, pp. 19, 26, 33 and Ex. 4, p. 12) Medial branch block injections were thereafter administered for claimant on August 19, 2010 by a colleague of Dr. Fisher. (Ex. 4, pp. 13-15)

In a letter dated August 29, 2010, defendants' attorney asked Dr. Shumaker to respond to certain questions and the doctor responded on August 31, 2010 and wrote:

> Based on review, Ms. Small had a temporary aggravation in relationship to her October 15, 2009 work injury. I would not be able to base any rating or restrictions to her work event. The medical documentation you sent for my review relates to the same symptoms that existed prior to the reported work injury.

(Ex. 3, pp. 35-37; Ex. E, pp. 1-2; and Ex. F)

On September 13, 2010, Dr. Fisher administered a lumbar facet joint block/rhizotomy. (Ex. 3, p. 20; Ex. 4, pp. 16-17; and Ex. 6, p. 8) Claimant returned to Dr. Shumaker on September 17, 2010 and he incorrectly claimed in his reporting that the lumbar facet rhizotomy was not ordered or authorized by him (Dr. Shumaker); he was unclear why claimant was seeing him that day; claimant had had a functional capacity evaluation and was assigned a zero percent impairment rating; claimant had no surgical issues; and he had nothing to offer claimant and would not see her again. (Ex. 3, p. 20)

Claimant's attorney wrote a letter to defendants' attorney dated September 21, 2010 requesting that defendants pay for claimant's medication and pay weekly benefits. (Ex. 11, p 5) Defendants' attorney responded in a letter dated September 22, 2010 that based on Dr. Shumaker's opinion that claimant's care after August 5, 2010, when Dr. Shumaker placed her at maximum medical improvement, would not be work-related and claimant would be owed no further weekly benefits other than the period from July 9, 2010 to August 5, 2010. (Ex. 11, p. 6)

When Dr. Fisher saw claimant on October 4, 2010 he prescribed medication for her complaints of not sleeping well. (Ex. 4, pp. 35-36)

In a letter dated October 19, 2010 to claimant's attorney the medical case manager stated she was closing claimant's file at the request of the insurance carrier. (Ex. 7, p. 49)

Dr. Fisher saw claimant on November 29, 2010 for complaints of chronic cervical and lumbar pain and he prescribed medications. (Ex. 4, pp. 37-38) Claimant returned to Dr. Fisher on January 24, 2011 for chronic pain management and he again prescribed medications, had her work on weight reduction and regular exercise, and told her to use an Ace wrap to secure the pads on the TENS unit and to use it regularly. (Ex. 4, pp. 39-41)

Dr. Fisher's impressions on January 24, 2011 were:

Medical management of chronic pain; Chronic pain management; Lumbar facet arthropathy; Peripheral neuropathy; and Stable on chronic pain management.

(Ex. 4, p. 40)

Claimant's attorney referred her to Jacqueline Stoken, D.O., Diplomat of the American Board of Holistic Medicine, Fellow of the American Academy of Physical Medicine & Rehabilitation and board certified as an independent medical examiner, for an independent medical examination. (Ex. 6, pp. 1-2, 12) Dr. Stoken reviewed medical records, took claimant's history, did a physical examination of claimant on March 1, 2011, and prepared a report dated March 7, 2011. (Ex. 6, pp. 3-11) Dr. Stoken noted in her report that claimant reported she was working at Pomeroy Care with work restrictions of working less than eight hours per day, three days per week, lifting less than 35 pounds and was to be on her feet only occasionally. (Ex. 6, p. 10) Dr. Stoken also wrote in her report:

Impression:

1. Status post work injury on 10/15/09 with acute low back strain and right sacroiliac joint dysfunction exacerbating underlying degenerative disease of the lumbar spine.
2. Chronic low back pain.

Discussion: . . . .

1. Ms. Small's current symptoms are related to the injury she sustained at work on in [sic] October of 2009.

2. Ms. Small has sustained permanent partial impairment to the body as a whole as a result of this injury.

Using the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, . . . She does have asymmetrical loss of ROM and muscle spasms. I would award her 8% Impairment of the Whole Person due to the lumbar injury and the sacroiliac joint dysfunction.

3. Reasonable work restrictions would be as per the Functional Capacity Evaluation. She should avoid repetitive bending, lifting, and twisting. She should limit lifting to 35 lbs. on an occasional basis, 15 lbs on a frequent basis and 7 lbs on a constant basis.

4. Reasonable future medical care would be pain management. . . .

5. The work injury of October of 2009 was an aggravation to a preexisting condition. In addition it caused a new condition of a sacroiliac joint dysfunction. The aggravation/injury is now permanent.

6. I have reviewed the Functional Capacity Evaluation done in June of 2010. I do not feel that she would be able to function with the limits that they stated that she could work. I would recommend that she avoid repetitive bending, lifting, and twisting. She should avoid lifting more than 7 lbs. on a constant basis, 15 lbs. on a frequent basis, and 35 lbs. on an occasional basis.

(Ex. 6, pp. 10-11)

Dr. Fisher saw claimant on March 21, 2011 and he refilled her medications and noted she was doing fairly well on medication. (Ex. 4, pp. 42-43; Tr., p. 72) At that time her medications were Methadone 10 four times a day, Elavil 50 QHS, OxyContin 20 QHS, and Zanaflex 4 QHS. Claimant continues to treat with Dr. Fisher for her pain control and medication management. (Tr., p. 51) Claimant noted that she continues to treat with Dr. Fisher even though workers' compensation no longer pays for the treatment as:

> [H]e is the only one that's helped me. He is the only one that listened to really where I was hurting and understood and knew what was going on and what he could do to help me get some relief.

(Tr., p. 73)

Claimant testified to the following at the evidentiary hearing on April 7, 2011: She now works eight hours a day three days a week at Pomeroy Care for a total of 24 hours per week. (Tr., pp. 36, 38) Claimant noted improvement in her constant leg pain after undergoing the rhizotomy procedure with Dr. Fisher. (Tr., 48) The eight hour limitation was given to her orally but not in writing by Dr. Shumaker and that Dr. Fisher told her that she would never be able to work her 36 hours again. (Tr., p. 77) Dr. Fisher told her that she should quit her job and find other employment. (Tr., p. 78) She does not believe she could work more than 24 hours per week in her current employment position. (Tr., p. 80) She no longer does some of the treatments that she performed on residents prior to her injury. (Tr., pp. 103-104) Dr. Shumaker recommended pain management by Dr. Fisher and the nurse case manager scheduled the appointments with Dr. Shumaker and Dr. Fisher. Her current symptoms are constant sharp, aching low back pain and occasional radiating pain into the legs and shoulders. (Tr., p. 75) She has difficulty carrying laundry up and down stairs, vacuuming, and dusting.

Susan Juilfs, administrator at Pomeroy Care, testified to the following at the evidentiary hearing. Claimant does the same job duties now as before the injury on

October 15, 2009 in an excellent manner, but does them slower. (Tr., p. 130) As claimant is limited to an 8 hour day, the employer has a nurse work the 4 hours per day that claimant cannot work, as an accommodation for claimant. (Tr., p. 132) She was not sure if there was written documentation of claimant being restricted to working no more than eight hours a day but claimant was assigned to work eight hours a day. (Tr., p. 133) If claimant were not limited to the 24 hours per week the employer would have her working her former, full 36 hour per week schedule. (Tr., p. 133)

The parties stipulated the weekly compensation rate is $486.26. (Hearing report)

CONCLUSIONS OF LAW

The primary issue for consideration on appeal is whether claimant has proven by a preponderance of the evidence that she sustained a permanent disability as a result of her work injury of October 15, 2009.

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 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).

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).

There is no dispute that claimant had preexisting episodes of considerable back and leg pain and that prior to the stipulated work injury in this matter that claimant had a prior fall at work from which she recovered and returned to full duty employment at 36 hours per week. The inquiry in this matter is whether claimant has sustained a permanent disability as a result of the October 15, 2009 injury, or whether she returned to a level of physical ability equal to that prior to her injury. In other words, is claimant the same worker with the same physical and vocational abilities as when she reported to work at Pomeroy Care Center on the morning of October 15, 2009, before sustaining her injury? That question can be answered not only by review of the medical opinions in this matter, but also by consideration of claimant's ongoing medical needs, as well as the credible testimony of claimant and her supervisor, Ms. Juilfs.

The preponderance of the evidence does support the conclusion that claimant has sustained a permanent impairment and resulting disability due to her work injury of October 15, 2009. While Dr. Fisher has not formally provided an opinion letter, his ongoing treatment for pain management evinces that claimant remains hindered by pain substantially greater than prior to her October 15, 2009 injury. Dr. Fisher has performed a rhizotomy, provided injections, prescribed physical therapy, and continues claimant on significant narcotic and other medications which interfere with her ability to function. Dr. Stoken's evaluation report provides further evidence in support of the conclusion that claimant's condition has been substantially and permanently lighted-up or made worse resulting from the work injury. Dr. Shumaker's opinions are contradicted by claimant's continuing complaints of pain which are greater than her pre-injury complaints, by Dr. Fisher's ongoing pain treatment, claimant's current reliance on significant levels of narcotic medication, and claimant's inability to perform more than eight hours of employment post-injury. Dr. Shumaker's opinion as to the temporary nature of claimant's disability does not correlate with his own assignment of permanent work restrictions, with his own treatment recommendations (including the rhizotomy referral), or with claimant's ongoing treatment regime. Claimant has continued to obtain treatment on her own after her workers' compensation authorized treatment was terminated. Claimant's valid functional capacity evaluation as well as the restrictions from Dr. Stoken and Dr. Fisher preclude claimant from many physical activities she freely performed before her injury – namely more than 24 hours of work per week. Following a de novo review of the record it is concluded that claimant has proven by a preponderance of the evidence that she has sustained a permanent disability as a result of her injury at work on October 15, 2009.

The next issue for consideration is the extent of claimant's permanent disability.

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.2d 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.

Claimant is 41 years of age with a limited education. She has done well working as an RN despite prior physical ailments. Claimant has been a long-term employee of Pomeroy Care. It is evident that Pomeroy Care has been an accommodating employer, allowing claimant to limit her work hours, work at a slower pace, and limit her duties during the work day. Pomeroy Care and Ms. Juilfs are commended for their accommodations of claimant's disability. Claimant has lost approximately 12 hours per week, by transitioning from a 12 hour work day to an 8 hour work day. Claimant would be highly unlikely to find an alternate employment position as an RN at a care facility with her hourly and physical limitations. Claimant appears, from the record, to be a motivated and hard-working employee who does not anticipate voluntary termination from her present employment. If claimant would be required to find other employment, such work would likely pay far less than claimant's currently hourly wages. Claimant has a non-surgical condition, but her injury continues to require significant prescription medications to manage her pain. Following consideration of the many factors of industrial disability it is concluded that claimant has, as of the date of the arbitration hearing, sustained a 35 percent loss of earning capacity. Such a finding entitles claimant to 175 weeks of permanent partial disability benefits as a matter of law under Iowa Code section 85.34(2)(u), which is 35 percent of 500 weeks, the maximum allowable number of weeks for an injury to the body as a whole in that subsection. The parties have stipulated that claimant's weekly compensation rate is $486.26 and that rate is confirmed by the agency.

ORDER

IT IS THEREFORE ORDERED that the arbitration decision is REVERSED as to claimant's permanent disability and AFFIRMED in all other respects and the following is ordered:

Defendants shall pay unto claimant one hundred seventy-five (175) weeks of permanent partial disability benefits at the weekly rate of four hundred eighty-six and 26/100 dollars ($486.26).

Defendants shall pay accrued weekly benefits in a lump sum.

Defendants shall pay interest on unpaid weekly benefits awarded herein pursuant to Iowa Code section 85.30.

Defendants shall file reports with this agency on the payment of this award pursuant to rule 876 IAC 3.1.

Defendants shall pay the costs of the appeal, including the preparation of the hearing transcript.

Signed and filed this 26TH day of November, 2012.

CHRISTOPHER J. GODFREY
WORKERS' COMPENSATION
COMMISSIONER

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