

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

KATHY HUNLEY,

Claimant,

vs.

DILLARD-LEWIS, INC.,

Employer,

and

BERKSHIRE HATHAWAY
HOMESTATE INSURANCE CO.,Insurance Carrier,
Defendants.

File No. 5064297

ARBITRATION DECISION

Headnotes: 1108.20, 1402.20,
1402.40, 1704, 1803, 1804, 2907

Claimant Kathy Hunley filed a petition in arbitration on June 25, 2018, alleging she sustained injuries to her right hip, pelvis, ribs, lungs, right knee, and posttraumatic stress disorder while working for Defendant Dillard-Lewis, Inc. ("Dillard-Lewis") on February 5, 2018. Dillard-Lewis and its insurer, Defendant Berkshire Hathaway Homestate Insurance Company ("Hathaway"), filed an answer on June 26, 2018, admitting Hunley sustained a work injury.

An arbitration hearing was held *via* CourtCall video conference on December 10, 2020. Attorney Heather Carlson represented Hunley. Hunley appeared and testified. Attorney Robert Gainer represented Dillard-Lewis and Hathaway. Joint Exhibits ("JE") 1 through 17 and Exhibits 1 through 5 and A through G were admitted into the record. The parties submitted a hearing report, listing stipulations and issues to be decided. Dillard-Lewis and Hathaway waived all affirmative defenses. The record was held open through February 1, 2021, for the receipt of post-hearing briefs. The briefs were received and the record was closed.

STIPULATIONS

1. An employer-employee relationship existed between Dillard-Lewis and Hunley at the time of the alleged injury.
2. Hunley sustained an injury, which arose out of and in the course of her employment with Dillard-Lewis on February 5, 2018.

3. The alleged injury is a cause of temporary disability during a period of recovery.
4. Temporary benefits are no longer in dispute.
5. The alleged injury is a cause of permanent disability.
6. If the injury is found to be a cause of permanent disability, the disability is an industrial disability.
7. If the injury is found to be a cause of permanent disability, the commencement date for permanent partial disability benefits, if any are awarded, is September 3, 2019.
8. At the time of the alleged injury, Hunley's gross earnings were \$256.45 per week, she was single and entitled to one exemption, and the parties believe the weekly rate is \$201.69 based on the above, using the state minimum of \$301.00, given Hunley's earnings were less than 35% of the statewide average weekly wage.
9. Medical benefits are no longer in dispute.
10. The costs listed in Exhibit 4 have been paid.

ISSUES

1. What is the nature of the injury?
2. What is the extent of disability?
3. Has Hunley established she is permanently and totally disabled under the statute or common law odd-lot doctrine?
4. Are Dillard-Lewis and Hathaway entitled to a credit, and if so, what is the amount of the credit?
5. Should costs be assessed against either party?

FINDINGS OF FACT

Hunley lives in Davenport and at the time of the hearing she was fifty-eight. (Transcript, page 17) Hunley grew up in Ohio. (Tr., p. 17) During high school she attended a two year legal secretary course and graduated from high school in 1981. (Ex. B, p. 13; Tr., pp. 17-18) In 1984 or 1985, Hunley obtained a certified nursing assistant certification. (Tr., p. 22) In 1985 or 1986, Hunley completed an eighteen-month tractor-trailer course. (Tr., p. 21) Hunley has held a Class A CDL with hazmat, tanker, and passenger endorsements since 1986. (Ex. B, p. 13; Tr., pp. 21, 65) Around 2003, Hunley attended a fifteen-month program in heavy equipment and became certified as a heavy equipment operator. (Tr., p. 22)

Following high school, Hunley enrolled in a number of postsecondary institutions, attending a half-year secretarial program, one semester at the University of Cincinnati, one year of business management at ITT Tech, and one year at Cincinnati State and Technical where she studied business management. (Tr., pp. 18-20) Hunley did not complete any of these programs of study.

After moving to Davenport, Hunley attended Kaplan University and graduated in October 2010 with an associate's degree in criminal justice. (Tr., pp. 20, 93-94) Hunley performed one month of the program on-line. (Tr., p. 94) As part of her program of study, Hunley wrote two or three compositions using a word processing program. (Tr., p. 95)

In the mid-1980s, Hunley worked as an over-the-road tractor-trailer driver for about six months until she became pregnant and quit. (Tr., pp. 23-24) In 1996, Hunley returned to truck driving and worked as an over-the-road truck driver until 2008 for multiple companies. (Tr., p. 23) Hunley's last employer terminated her employment following an accident in Pennsylvania and suspension of her license for three months. (Tr., p. 24) Hunley reported she stopped driving because of a personal health condition and after her CDL was suspended for three months. (Tr., p. 25) At the time of the accident in this case, Hunley was living in Davenport and attending Kaplan University. (Tr., p. 25) Hunley's Class A CDL was current at the time of the hearing.

In addition to truck driving, Hunley has worked as an inbound telephone caller, approving and denying insurance claims, as a cashier, and as a stocker. (Tr., pp. 25-28)

Hunley was experiencing problems with her home in Davenport and she moved back to Ohio. (Tr., pp. 27-28) Hunley lived with her mother and worked for Kroger, full-time, as an associate. (Tr., pp. 28-29) After working for Kroger for about six months, Hunley sustained a work injury when a pallet fell on top of her. (Tr., p. 28) Hunley testified she injured her shoulder, arm, hip, neck, back, head, and ears. (Tr., p. 28) Hunley received right shoulder surgery in August or September 2011. (Tr., pp. 28-29) Hunley sought workers' compensation benefits from Kroger and Kroger terminated her employment. (Tr., p. 29) After Kroger terminated her employment, Hunley applied for Social Security Disability Insurance ("SSDI") benefits. (Tr., p. 29)

In December 2010, Hunley began attending counseling sessions for stress and her living situation with her mother. (JE 9, p. 105) During a session on January 11, 2011, Hunley relayed she had taken amitriptyline while in high school, but reported she had not had any psychological issues since that time. (JE 9, p. 109) Hunley complained of problems with her brain function and word finding. (JE 9, p. 109) Her counselor noted Hunley exhibited delusional thoughts and speed and recommended referral to a psychiatrist on more than one occasion, which Hunley refused. (JE 9, pp. 109-13) Hunley attended twenty-three counseling sessions between December 28, 2010 and April 12, 2011. (JE 9, p. 121)

Hunley sought medical treatment for right leg pain, low back pain, mid back pain, right hip pain, and numbness in both legs following her work injury at Kroger. (JE 8, p. 102-04; JE 12, p. 131-33) She also sought medical treatment for memory loss, vertigo, and headaches. (JE 11, pp. 126-29)

In her application for SSDI, Hunley reported she experienced numbness down her arm to her fingers, her arm was tired and weak, she had numbness in her right foot and leg, and that she had lower hip and back pain that affected her ability to sit, stand and walk. (Ex. B, p. 30)

As part of her SSDI application, Hunley underwent a psychological evaluation with Adrienne Swift, Ph.D., a licensed psychologist. (JE 1) Swift diagnosed Hunley with a personality disorder. (JE 1, p. 8)

Leon Hughes, M.D. reviewed Hunley's case for the Social Security Administration ("SSA") and diagnosed Hunley with dysfunction in the major joints and a personality disorder, opining her conditions were severe. (Ex. 5, p. 43) Dr. Hughes noted on July 18, 2010, Hunley was injured when twenty-five cases of groceries fell onto her, hitting her face, neck, chest, flank, shoulder, and elbow. (Ex. 5, pp. 46-47) Dr. Hughes found Hunley could occasionally lift and carry up to twenty pounds, frequently lift and carry up to ten pounds, stand six hours out of an eight hour workday with normal breaks, sit six hours out of an eight hour workday with normal breaks, occasionally climb ramps and stairs, and never climb ladders. (Ex. 5, pp. 45-46) Dr. Hughes determined Hunley had no limitations with balancing, stooping, kneeling, crouching, or crawling, but noted she had limitations with reaching and right hand handling. (Ex. 5, p. 46)

The SSA determined Hunley was disabled, effective August 12, 2011. (Ex. 5, pp. 47-48) During the hearing Hunley testified after her work injury at Kroger she was approved for SSDI because she "would never be able to lift anything above 20 pounds for the rest of [her] life," she was told she "would have a hard time lifting, period, in general," she could not handle the circumference of the steering wheel of a truck, and because of her mental state. (Tr. pp. 30-31)

After the SSA approved Hunley's application, Hunley worked part-time. (Tr., p. 31) Hunley worked for Hallmark putting cards into slots at Walgreens. (Tr., pp. 31-32) Hunley reported Hallmark terminated her employment when she "requested off a day to go to [her] settlement hearing in Cincinnati." (Tr., p. 32) Hunley worked as a merchandiser for Lawrence Service Company for one day earning \$10.00 per hour, but quit because she was not being reimbursed for gas. (Tr., p. 32) Hunley accepted a position with Kitchen Cooked, stocking potato chips at nine stores. (Tr., pp. 32-33) Hunley worked for Kitchen Cooked for one year and testified she quit because she was only being paid \$10.00 per hour and she was not being reimbursed for gas. (Tr., pp. 32-33) Hunley also worked for Durham Bus Services for a month and a half driving a

commercial bus six hours per day, but she was terminated during her probationary period. (Tr., p. 34)

In January 2015, Dillard-Lewis hired Hunley to drive a fifteen-person passenger van. (Tr., pp. 34, 36) Hunley transported passengers between Camp Dodge in Johnston, Iowa, and Davenport, Coralville, Cedar Rapids, Waterloo, and Dubuque for the military. (Tr., pp. 35-37) Hunley worked three days per week and Dillard-Lewis typically paid her \$80.00 per day, but she earned \$100.00 per day when she drove the Dubuque route. (Tr., pp. 35, 37) Hunley typically transported between four and six passengers for Dillard-Lewis, but sometimes transported up to fifteen people at a time. (Tr., p. 35)

After the SSA approved Hunley's application, she Hunley continued to seek medical care, both before and after she commenced her employment with Dillard-Lewis, complaining of foot numbness, right leg numbness, back pain, headaches and difficulties turning her head, balance issues, and chest pain. (JE 3, p. 12; JE 13, pp. 134, 137, 139) Christel Seemann, D.O., Hunley's family medicine physician, diagnosed Hunley with chronic back pain, confusion, degenerative disc disease, gastroesophageal reflux disease, headache, hypothyroidism, leg cramps, obesity, rotator cuff syndrome, shoulder pain, hypertension, and vitamin B12 and D deficiencies. (JE 3, pp. 16-17, 25) Hunley complained of chronic back pain with lower extremity paresthesias, right greater than left, and right lower extremity pain and vestibular complaints. (JE 5, p. 62) Hunley was examined by a physical therapist who recommended therapy twice per week to work on her vestibular symptoms, core strengthening, and stability and hip strength. (JE 5, p. 62) Hunley underwent an ultrasound-guided piriformis injection for hip pain and piriformis syndrome. (JE 6, p. 75) She also received chiropractic adjustments for soreness in her lower back, sides of her hips, neck, and for headaches. (JE 7, pp. 97-101)

On February 5, 2018, Hunley was involved in a multi-car accident on Interstate 80, when she ran into a stopped semi-trailer while driving four passengers in a van for Dillard-Lewis during a snow storm. (JE 2; JE 14, p. 140; Tr., pp. 39, 42) The front seat passenger, a woman, was deceased when paramedics arrived. (JE 2, p. 9; Tr., p. 44) Hunley testified she heard the passenger gasping for air and she could not assist her because the van had crushed around Hunley. (Tr., pp. 42-43) Hunley was removed from the van by the Jaws of Life and was in pain. (Tr., p. 43)

Hunley was transported to the emergency room at the University of Iowa Hospitals and Clinics ("UIHC"). (JE 2, p. 9; Tr., p. 44) At the UIHC, Hunley complained of chest pain, low back pain, and right hip pain and underwent imaging and testing. (JE 14, pp. 140-148) Emergency medicine physicians listed an impression of 2-7 bilateral rib fractures, left pneumothorax, pneumomediastinum, pulmonary contusions, posterior right hip dislocation, and right tibial plateau fracture and admitted Hunley to trauma surgery. (JE 14, p. 148)

Matthew Karam, M.D., an orthopedic surgeon with the UIHC, performed a right hip arthroplasty, open reduction internal fixation right posterior wall acetabular fracture, open reduction internal fixation right tibial plateau fracture, and removal skeletal traction pin distal femur. (JE 14, p. 149; Exs. 1, p. 2; A, p. 2) Dr. Karam ordered Hunley to be nonweightbearing for the right lower extremity for eight to twelve weeks. (JE 14, p. 150) Following surgery Hunley developed a pulmonary embolism, which required anticoagulation treatment and she received physical therapy. (JE 14, p. 154) Hunley was hospitalized at the UIHC for approximately two weeks. (Tr., p. 44)

On February 16, 2018, Hunley was transferred to Select Specialty Hospital in Davenport with a heparin drip and for rehabilitation. (JE 6, p. 81; Exs. 1, p. 2; A, p. 3; Tr., p. 46) UIHC physicians continued to monitor and treat Hunley while she was being treated at Select Specialty Hospital. (JE 14, pp. 159-60) During an appointment on May 25, 2018, Dr. Karam recommended Hunley advance to full weightbearing on her right lower extremity, continued her physical therapy and Voltaren cream, found she could begin driving her personal car when she could ambulate without crutches or a walker, and noted she was not cleared for military driving. (JE 14, p. 160) Hunley was transferred from Select Specialty Hospital to Genesis West on May 25, 2018, for approximately one week, until she was discharged to her home on May 31, 2018. (JE 16, p. 253; Exs. 1, p. 3; A, p.3; Tr., pp. 47-48) Hunley continued to work on rehabilitation after she returned home. (JE 16)

On July 12, 2018, Hunley attended an appointment with her family physician, Dr. Seemann, reporting she could not walk more than fifty feet without needing to stop and sit down, difficulty with stairs, and attending physical therapy three times per week. (JE 3, p. 32) Hunley relayed she was using a seated walker to prepare meals and do laundry and other household tasks. (JE 3, p. 32)

Hunley returned to Dr. Karam on July 24, 2018. (JE 14, p. 165) Dr. Karam documented Hunley had improved with physical therapy, but she had been experiencing shooting pain down her right lower extremity for the past three to four months, which her primary care physician had localized to her lumbar spine. (JE 14, p. 164) Hunley had not resumed driving or work and was ambulating with a walker. (JE 14, p. 165) Dr. Karam released Hunley to drive up to four hours at work. (JE 14, p. 167)

On August 7, 2018, August 29, 2018, September 18, 2018, and October 9, 2018, Hunley attended appointments with Ann O'Klock, a licensed social worker with Genesis Psychology Associates, complaining of anxiety following the accident. (JE 4)

On September 6, 2018 and September 10, 2018, Hunley attended an independent psychological examination with John Brooke, Ph.D., for Dillard-Lewis and Hathaway. (JE 10) Dr. Brooke administered psychological testing and opined,

[t]here are no indications of cognitive dysfunction related to her accident.
Significant emotional findings are largely related to long standing trust

issues (predating her accident). Ms. Hunley does express grief related to her accident, and it is suggested that she be given the opportunity to be seen for grief counseling through the Genesis Pastoral Department.

(JE 10, p. 122) Dr. Brooke opined Hunley would be at maximum medical improvement after a brief period of ten sessions or less of supportive counseling. (JE 10, p. 124)

During an appointment with Dr. Karam on September 11, 2018, Hunley complained of pain most of the time, noted she was struggling predominantly with her right knee and in physical therapy to gain full extension, noting she could walk and drive. (JE 14, p. 171) Dr. Karam noted Hunley was status post internal fixation of her right knee with posttraumatic arthritis and recommended a consultation with joint arthroplasty surgeons for a total knee arthroplasty, and released Hunley to return to work four hours per day until her appointment on November 13, 2018. (JE 14, pp. 170-173)

On October 30, 2018, Hunley attended a consultation with Nicolas Noiseux, M.D. an orthopedic surgeon with the UIHC, for her right knee pain. (JE 14, p. 179) Dr. Noiseux noted Hunley was initially treated for right femoral pain, but continued to struggle predominantly with her knee, including difficulty with full extension with physical therapy. (JE 14, p. 179) Dr. Noiseux noted Hunley reported sleep disturbance, had a wrap on her knee, and ambulated with a cane. (JE 14, p. 179) Dr. Noiseux examined Hunley, noted she walked with an antalgic gait on the right, and ordered x-rays. (JE 14, p. 184) Dr. Noiseux noted the joint was not completely anatomic and had developed posttraumatic arthritis, administered a corticosteroid injection, and recommended a home exercise program with lunges and squats. (JE 14, p. 184)

On November 13, 2018, Hunley returned to Dr. Karam, reporting she recently fell on October 23, 2018, which increased her lateral knee discomfort. (JE 14, p. 188) Dr. Karam released Hunley to full duty with ibuprofen for pain, and recommended she follow up with Dr. Noiseux. (JE 14, p. 190)

During an appointment with Dr. Seemann on December 12, 2018, Hunley relayed she was having a lot of issues with depression and insomnia and going to counseling, and had severe leg cramps and a sore ankle. (JE 3, p. 36) Dr. Seeman noted Hunley had osteoarthritis and examined her. (JE 3, p. 36)

Hunley returned to Dr. Noiseux on February 19, 2019, complaining of aching right anterolateral knee pain and daily buckling of her knee which nearly caused her to fall. (JE 14, p. 200) Hunley reported she was walking with a cane as a necessity and noted she received one to two days of pain relief following her previous injection, and then her pain returned to full severity. (JE 14, p. 200) Dr. Noiseux recommended a total knee arthroplasty, but noted Hunley needed to have the right tibial plateau hardware removed first, and referred her back to Dr. Karam for the hardware removal. (JE 14, p. 205) Dr. Karam removed the hardware on March 28, 2019. (JE 14, p. 218)

On May 12, 2019, Dr. Brooke issued a psychological treatment summary, noting he met with Hunley on five occasions from November 2018 through January 2019, when she was discharged from treatment with grief issues considered to be mild and emotional functioning at maximum medical improvement. (JE 10, p. 125)

On May 16, 2019, Dr. Noiseux performed a right knee arthroplasty on Hunley. (JE 14, p. 224) Dr. Noiseux listed a pre- and post-operative diagnosis of post-traumatic osteoarthritis of the right knee. (JE 14, p. 226)

On June 26, 2019, Hunley returned to Dr. Noiseux, reporting she was doing well and the pain in her knee was gone, but she continued to have weakness in her right thigh. (JE 14, p. 228) Dr. Noiseux recommended physical therapy, and imposed restrictions of sedentary work only, no lifting over ten pounds, no commercial driving, and to sit twice per day for ten to fifteen minutes and apply ice to her knee. (JE 14, pp. 228, 233)

Hunley returned to Dr. Noiseux on September 3, 2019, reporting pain at night and difficulty sleeping due to her knee pain. (JE 14, p. 234) Dr. Noiseux examined Hunley, found she was at maximum medical improvement, ordered her to continue to work on ambulation and rehabilitation, and released her to return to work and usual activities with no restrictions. (JE 14, pp. 234-35, 239)

Hunley contacted Dr. Seemann's office on June 19, 2019, stating she was very emotional and having good days, but more bad than good, noting "something is not right and I can't handle it" and requesting a referral to a psychologist, which Dr. Seemann arranged with Family Counseling and Psychology Center. (JE 3, pp. 47-48)

During an appointment with Dr. Seemann on September 10, 2019, Hunley reported she was struggling with depression, anxiety, and possibly post-traumatic stress disorder from the previous accident. (JE 3, p. 52) Hunley relayed she was struggling to get up and do anything, struggling with self-esteem, not sleeping, and feeling stuck and lost. (JE 3, p. 52) Hunley reported she had started therapy four weeks before her appointment and was taking her medication, but it was not working well. (JE 3, p. 52) Dr. Seemann assessed Hunley with depression and ordered her to continue with her therapist and noted she would adjust her medication. (JE 3, p. 53)

On March 25, 2020, Mark Taylor, M.D., an occupational medicine physician, conducted an independent medical examination for Hunley. (Ex. 1) Dr. Taylor examined Hunley and reviewed her medical records. (Ex. 1) Dr. Taylor deferred to Hunley's treating mental health professionals for mental health diagnoses. (Ex. 1, p. 7) Dr. Taylor opined Hunley reached maximum medical improvement as of her appointment with Dr. Noiseux on September 3, 2019. (Ex. 1, p. 8) Using the Guides to the Evaluation of Permanent Impairment (AMA Press, 5th Ed. 2001) ("AMA Guides"), Dr. Taylor assigned Hunley a thirty-seven percent permanent partial impairment rating to the lower extremity, which is equivalent to a fifteen percent whole person impairment

for her hip-related issues, using Tables 17-33 and 17-34. (JE 14, p. 240) For her right knee, using Table 17-35, Dr. Taylor found:

[s]he described pain that is between mild and occasional, depending on the day. 20 points are assigned for occasional moderate pain and 45 points for mild or occasional pain. I would place her toward the middle and recommend 30 points. She would be assigned an additional 23 points related to range of motion. There was no instability, which is an additional 25 points. There are no deductions.

When these values are added together, the result is 78 points. This is plugged into Table 17-33, on page 547, and she falls in the "fair results" category. This is assigned 50% lower extremity impairment, or 20% whole person impairment.

The whole person lower extremity impairments are then combined utilizing the Combined Values Chart on page 604. When 20% is combined with 15%, the result is 32% whole person impairment.

(Ex. 1, pp. 8-9) Dr. Taylor found Hunley's chest x-ray was normal and he did not recommend a rating for her lungs and ribs, and noted he deferred to a mental health professional regarding any mental health condition. (Ex. 1, p. 9)

Dr. Taylor noted Hunley underwent a functional capacity evaluation on December 29, 2019. (Exs. 1, p. 4; 3) Dr. Taylor found the test was valid, and using the functional capacity evaluation, Dr. Taylor recommended permanent lifting restrictions of ten pounds between floor and waist, ten to fifteen pounds with her arms close to her body, and carry ten to twenty pounds for fairly short distances on a rare to occasional basis, and additional restrictions of no climbing ladders, climbing stairs on a rare basis with a handrail and minimal added weight, avoiding kneeling and crouching, partial squatting on a rare basis with something to hold onto to assist, bending on a rare to occasional basis, depending on positioning. (Ex. 1, p. 9) Dr. Taylor noted Hunley should have the ability to alternate sitting, standing, and walking, as needed for comfort. (Ex. 1, p. 9)

On June 19, 2020, Dr. Karam issued an impairment rating for Dillard-Lewis and Hathaway, finding Hunley reached maximum medical improvement during her last appointment on September 11, 2018. (JE 14, p. 240) Using the AMA Guides, Dr. Karam assigned Hunley a permanent partial impairment rating of thirty-seven percent to the right lower extremity, which is equivalent to a fifteen percent whole person impairment, noting the rating was the result of a total hip replacement with good results under Table 17-34 on page 548. (JE 14, p. 240) Dr. Karam noted Hunley had been released to work without restrictions for her right hip and she may need future treatment for her hip. (JE 14, p. 240)

On June 23, 2020, Dr. Noiseux issued an impairment rating for Dillard-Lewis and Hathaway using the AMA Guides, finding Hunley reached maximum medical

improvement during her last appointment on September 3, 2019. (JE 14, p. 241) Dr. Noiseux assigned Hunley a permanent partial impairment rating of thirty-seven percent to the right lower extremity, which is equivalent to a fifteen percent whole person impairment, finding the rating was the result of a total knee arthroplasty with good results under Table 17-33 on page 546. (JE 14, p. 241) Dr. Noiseux opined,

[a]ccording to table 17-35 on page 549, Ms. Hunley had a knee replacement score of 95/100 which places her in the "Good" category. Ms. Hunley reported mild or occasional knee pain with walking (45/50 points in section a.), had range of motion of 0-125 degrees (25/25 points in section b.), no instability (25/25 points in section c.), and no deductions in sections d., e., or f. of table 17-35."

(JE 14, p. 241) Dr. Noiseux released Hunley to work without restrictions and noted she may need future treatment for her right knee. (JE 14, p. 241)

James Gallagher, M.D., a psychiatrist and neurologist, performed an independent psychiatric exam for Hunley on July 7, 2020, and issued his report on August 14, 2020. (Ex. 2, p. 12) Dr. Gallagher reviewed Hunley's counseling and mental health records and examined her. (Ex. 2) Dr. Gallagher noted Hunley has a historical diagnosis of post-traumatic stress disorder and opined the damage done during Hunley's developmental years is not related to the work injury, but her baseline anxiety has "surely been increased, hopefully temporarily if she is given the opportunity to try to manage it better." (Ex. 2, p. 23) Dr. Gallagher found her current problems relate to unresolved guilt and grief. (Ex. 2, pp. 23-24)

On August 5, 2020, Jonathon Fields, M.D., an occupational medicine physician, conducted an independent medical examination of Hunley for Dillard-Lewis and Hathaway. (Ex. A) Dr. Fields reviewed Hunley's medical records and examined her. (Ex. A) During Dr. Fields' interview, Hunley acknowledged a history of neck and back pain and a work incident where she injured her right shoulder, but denied a history of right knee or right hip issues before the February 5, 2018 work injury. (Ex. A, p. 2) Dr. Fields opined Hunley reached maximum medical improvement for her right hip condition on September 11, 2018, and for her right knee on September 3, 2019. (Ex. A, pp. 6-7) For her right hip, Dr. Fields assigned Hunley a thirty-seven percent permanent partial impairment rating to the lower extremity, which is equivalent to a fifteen percent whole person impairment using the Tables 17-33 and 17-34 of the AMA Guides. (Ex. A, p. 6) For her right knee, Dr. Fields assigned Hunley a permanent partial impairment rating of thirty-seven percent to the right lower extremity, which is equivalent to a fifteen percent whole person impairment, finding the rating was the result of a total knee arthroplasty with good result. (Ex. A, p. 7) Dr. Fields did not recommend any permanent restrictions in accord with Dr. Karam's and Dr. Noiseux's opinions. (Ex. A, pp. 6-7)

On December 4, 2020, Lana Sellner, M.S., C.R.C., completed a vocational report for Dillard-Lewis and Berkshire Hathaway. (Ex. G) Sellner reviewed Hunley's records and interviewed her via Zoom. (Ex. G, p. 65) Sellner opined there are several jobs in the Davenport area Hunley is capable of engaging in, including driver, claims trainee adjustor, customer service specialist, laboratory courier, claims tech II, freight bill entry clerk, order entry clerk, and member support specialist. (Ex. G, pp. 68-69) Sellner noted Hunley is employable in the sedentary to light physical demand work level consistent with Dr. Taylor's opinion, and admitted she may be capable of performing some prior employment, such as Hallmark. (Ex. G, p. 70) Sellner opined Hunley would be a viable candidate to potential employers because of her AA degree, basic secretarial, and business management knowledge. (Ex. G, p. 70)

Hunley testified there are a lot of movements she can no longer do with her right knee since the accident and undergoing a right knee replacement. (Tr., p. 50) Hunley relayed her right knee hurts daily and at night when she lies down. (Tr., p. 50) Hunley testified she stopped taking prescription pain medication for her right knee approximately six weeks after she received knee replacement surgery. (Tr., p. 52)

Hunley reported after the accident she did not feel or process anything until she was transferred to Select Specialty Hospital. (Tr., pp. 52-53) Hunley testified while she was at Select Specialty Hospital the insurance carrier and her family harassed her and she was not able to function. (Tr., p. 53) Hunley relayed the insurance company wanted her to go home and her family members had told her she was going to go to jail for causing the female passenger's death. (Tr., pp. 53, 56) Hunley testified when she returned home she started having flashbacks, reporting

[i]t's beyond anxiety. It's beyond – I would – I would act irrationally. I know no one has been in my home, but I would accuse my neighbors of stealing my stuff, even though I know that they wouldn't want it, but I went ballistically, started – my brain just started unravelling so fast. I couldn't control anything I'd say, anything I did. I would have crying spells, then I would have spells where I just wanted to be alone. I quit eating. I quit taking my medication. I was just – you name it, I did it. I quit taking showers.

(Tr., pp. 57-58)

Hunley testified that since the accident it is more difficult for her to do her yard work. (Tr., p. 60) Hunley relayed she loves gardening and now she has to use a shower chair to sit down while gardening and she uses her left leg when she digs instead of her right leg. (Tr., p. 60) When she vacuums Hunley has to sit down or take multiple breaks. (Tr., pp. 60-61) Hunley testified her routines are off due to her depression and anxiety and that her house is "hideous-looking right now in the inside" and that she is not showering regularly. (Tr., p. 61)

Hunley reported that since the February 2018 accident she has limitations in her hip with sitting down on the hard ground and being able to get herself back off of the yard when she performs yard work, noting she did not have any problems sitting before the accident. (Tr., pp. 73-74) Hunley relayed that at the time of the hearing she did not have any pain in her hip. (Tr., p. 74)

Hunley has not looked for work since the accident. (Tr., p. 63) Hunley testified she believes there are jobs she could perform, "but not until [her] mental state gets normal." (Tr., p. 63) Hunley relayed, "[b]ecause I literally don't think you want me coming into work when I don't have baths, and I don't know the routine of taking care of myself." (Tr., p. 63)

After being approved for SSDI, Hunley worked part-time for Hallmark as a merchandiser before the February 2018 work injury. (Tr., p. 70) When questioned whether she believed she could return to Hallmark, Hunley responded "[p]robably not . . . Because of my mental issues." (Tr., p. 70) During her deposition on August 28, 2020, counsel for Dillard-Lewis and Hathaway asked Hunley, "we talked a lot about the jobs that you had before you got hurt. Could you work for Hallmark now?," and Hunley replied, "I don't know if Hallmark would rehire me back. I probably could do Hallmark." (Tr., p. 70) During the hearing counsel for Dillard-Lewis and Hathaway inquired "[w]hat's changed since August and now?" and Hunley replied, "[n]othing." (Tr., p. 70)

Counsel for Dillard-Lewis and Hathaway also inquired whether Hunley could return to her job at Durham School Services. (Tr., p. 71) Hunley replied she could not and explained "[b]ecause there's kids on board, and that's – I just can't do anything with people in a passenger setting ever again." (Tr., p. 71) Hunley admitted on cross-examination no physician or medical practitioner had restricted her from driving passengers. (Tr., p. 71)

On cross-examination, counsel for Dillard-Lewis and Hathaway inquired whether Hunley believed she could return to her merchandiser job at Lawrence Service Company. (Tr., p. 71) Hunley responded, "I could possibly do it, but the way they have their policies, it wouldn't be reasonable to do it . . ." because the employer had refused to pay for gas money and it did not make sense for her to drive to Council Bluffs if she were only being paid \$10.00 per hour. (Tr., p. 71)

Hunley acknowledged she has restricted the amount of work she performs since she was approved for SSDI. (Tr., p. 69) When she worked for Kitchen Cooked and Dillard-Lewis, Hunley earned more than \$1,200.00 gross income several months and she was ordered to repay \$15,000.00 to the SSA. (Tr., p. 67)

Hunley testified she barely has any computer skills, noting she has a desktop and a tablet. (Tr., p. 59) Hunley reported she used the desktop to fax her paperwork to Dillard-Lewis and to receive e-mails. (Tr., p. 59) On cross-examination Hunley acknowledged when she attended ITT Tech she took a minor course where she learned

to operate Microsoft Word and Excel, but reported she never applied the programs. (Tr., pp. 77-78, 91)

CONCLUSIONS OF LAW

I. Applicable Law

This case involves the issues of nature of disability, extent of disability, and credit under Iowa Code section 85.34. In 2017, the Iowa Legislature enacted changes to Iowa Code chapters 85, 86, and 535 effecting workers' compensation cases. 2017 Iowa Acts chapter 23 (amending Iowa Code sections 85.16, 85.18, 85.23, 85.26, 85.33, 85.34, 85.39, 85.45, 85.70, 85.71, 86.26, 86.39, 86.42, and 535.3). Under 2017 Iowa Acts chapter 23 section 24, the changes to Iowa Code sections 85.16, 85.18, 85.23, 85.26, 85.33, 85.34, 85.39, 85.71, 86.26, 86.39, and 86.42 apply to injuries occurring on or after the effective date of the Act. This case involves an injury occurring after July 1, 2017, therefore, the provisions of the new statute involving nature and extent of disability under Iowa Code section 85.34 apply to this case.

The calculation of interest is governed by Sanchez v. Tyson, File No. 5052008 (Ruling on Defendant's Motion to Enlarge, Reconsider, or Amend Appeal Decision Re: Interest Rate Issue), which holds interest for all weekly benefits payable and not paid when due which accrued before July 1, 2017, is payable at the rate of ten percent; all interest on past due weekly compensation benefits accruing on or after July 1, 2017, is payable 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. Again, given this case concerns an injury occurring after July 1, 2017, the new provision on interest applies to this case.

II. Nature of the Injury – Mental Health Impairment

To receive workers' compensation benefits, an injured employee must prove, by a preponderance of the evidence, the employee's injuries arose out of and in the course of the employee's employment with the employer. 2800 Corp. v. Fernandez, 528 N.W.2d 124, 128 (Iowa 1995). An injury arises out of employment when a causal relationship exists between the employment and the injury. Quaker Oats Co. v. Ciha, 552 N.W.2d 143, 151 (Iowa 1996). The injury must be a rational consequence of a hazard connected with the employment, and not merely incidental to the employment. Koehler Elec. v. Wills, 608 N.W.2d 1, 3 (Iowa 2000). The Iowa Supreme Court has held, an injury occurs "in the course of employment" when:

it is within the period of employment at a place where the employee reasonably may be in performing his duties, and while he is fulfilling those duties or engaged in doing something incidental thereto. An injury in the course of employment embraces all injuries received while employed in furthering the employer's business and injuries received on the employer's premises, provided that the employee's presence must ordinarily be

required at the place of the injury, or, if not so required, employee's departure from the usual place of employment must not amount to an abandonment of employment or be an act wholly foreign to his usual work. An employee does not cease to be in the course of his employment merely because he is not actually engaged in doing some specifically prescribed task, if, in the course of his employment, he does some act which he deems necessary for the benefit or interest of his employer.

Farmers Elevator Co., Kingsley v. Manning, 286 N.W.2d 174, 177 (Iowa 1979). The parties have stipulated Hunley sustained permanent impairments to her right hip and right knee. The parties dispute whether Hunley sustained a permanent mental health impairment caused by the work injury. This raises an issue of causation.

The question of medical causation is "essentially within the domain of expert testimony." Cedar Rapids Cmty. Sch. Dist. v. Pease, 807 N.W.2d 839, 844-45 (Iowa 2011). The commissioner, as the trier of fact, must "weigh the evidence and measure the credibility of witnesses." Id. The trier of fact may accept or reject expert testimony, even if uncontroverted, in whole or in part. Frye, 569 N.W.2d at 156. When considering the weight of an expert opinion, the fact-finder may consider whether the examination occurred shortly after the claimant was injured, the compensation arrangement, the nature and extent of the examination, the expert's education, experience, training, and practice, and "all other factors which bear upon the weight and value" of the opinion. Rockwell Graphic Sys., Inc. v. Prince, 366 N.W.2d 187, 192 (Iowa 1985).

It is well-established in workers' compensation that "if a claimant had a preexisting condition or disability, aggravated, accelerated, worsened, or 'lighted up' by an injury which arose out of and in the course of employment resulting in a disability found to exist," the claimant is entitled to compensation. Iowa Dep't of Transp. v. Van Cannon, 459 N.W.2d 900, 904 (Iowa 1990). The Iowa Supreme Court has held,

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 our Workmen's Compensation Act merely because it reaches a point of disablement while work for an employer is being pursued. It is only when there is a direct causal connection between 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. Cent. Tel. Co., 261 Iowa 352, 359-60, 154 N.W.2d 128, 132 (1967).

Hunley alleges the work injury caused her to develop post-traumatic stress disorder, anxiety, and depression, or aggravated or lighted up post-traumatic stress disorder, anxiety, and depression. Dillard-Lewis and Hathaway reject her assertion.

Hunley has a history of mental illness before the February 2018 accident. In 2012, the SSA approved Hunley's application for SSDI benefits, finding she had dysfunction in the major joints and a personality disorder that were both severe. (Ex. 5, pp. 43, 47-48; JE 1)

Following the February 2018 accident, Hunley complained of mental health symptoms. She briefly received counseling for anxiety with O'Klock. (JE 4) In September 2018, Dr. Brooke conducted an independent psychological examination of Hunley for Dillard-Lewis and Hathaway. (JE 10) Dr. Brooke opined "[t]here are no indications of cognitive dysfunction related to her accident," noting she had "[s]ignificant emotional findings" that were largely related to longstanding trust issues predating the accident. (JE 10, p. 122-24) Dr. Brooke recommended Hunley receive grief counseling for the grief she expressed from the accident. (JE 10, pp. 122-24) Dr. Brooke met with Hunley on five occasions between November 2018 and January 2019, when he discharged Hunley from treatment, finding she had reached maximum medical improvement and noting her grief issues were mild. (JE 10, p. 125) Dr. Brooke did not diagnose Hunley with a permanent mental health condition caused by the work injury.

In July 2020, Dr. Gallagher, a psychiatrist, conducted an independent psychiatric examination for Hunley. (Ex. 2) In his report, Dr. Gallagher noted he reviewed Hunley's records from Professional Pastoral Counseling Institute, Dr. Seemann, the investigating officer's report of the motor vehicle accident, Dr. Brooke's records, records from Genesis Psychology Associates from October 2018, and a letter provided by counsel. (Ex. 2, p. 13) His report does not provide that he received copies of Hunley's records from the SSA, or that he was informed Hunley had been diagnosed with a personality disorder during her application for SSDI benefits. (Ex. 2) I find Dr. Gallagher was not provided with all of Hunley's mental health records or mental health history.

Dr. Gallagher found "[t]he likely historical diagnosis of [post-traumatic stress disorder] is noted and there may be some somatoform problems, but such are not really the issue." (Ex. 2, p. 22) Dr. Gallagher opined damage from Hunley's developmental years is not related to the work injury, but her baseline anxiety has "surely been increased, hopefully temporarily if she is given the opportunity to try to manage it better," finding her current problems relate to unresolved guilt and grief. (Ex. 2, p. 23) Dr. Gallagher found the work injury increased her anxiety level, but he did not opine Hunley has sustained a permanent impairment. Moreover, as found above, Hunley failed to provide Dr. Gallagher with a complete mental health history, and I do not find Dr. Gallagher's opinion persuasive. See Dunlavey v. Economy Fire & Cas. Co., 526 N.W.2d 845, 853 (Iowa 1995) (noting "[w]hen an expert's opinion is based upon an incomplete history, the opinion is not necessarily binding on the commissioner"). No expert has opined Hunley sustained a permanent mental health impairment caused by the work injury. I do not find Hunley has proven the work injury caused Hunley to sustain a permanent mental health impairment or permanently aggravated or lit up any preexisting mental condition.

III. Extent of Disability

Hunley did not return to Dillard-Lewis or to any other employer following the work injury. The parties stipulated if Hunley's injury is found to be a cause of permanent disability, the disability is an industrial disability.

"Industrial disability is determined by an evaluation of the employee's earning capacity." Cedar Rapids Cmty. Sch. Dist. v. Pease, 807 N.W.2d 839, 852 (Iowa 2011). In considering the employee's earning capacity, the deputy commissioner evaluates several factors, including "consideration of not only the claimant's functional disability, but also [his] age, education, qualifications, experience, and ability to engage in similar employment." Swiss Colony, Inc. v. Deutmeyer, 789 N.W.2d 129, 137-38 (Iowa 2010). The inquiry focuses on the injured employee's "ability to be gainfully employed." Id. at 138.

The determination of the extent of disability is a mixed issue of law and fact. Neal v. Annett Holdings, Inc., 814 N.W.2d 512, 525 (Iowa 2012). Compensation for permanent partial disability shall begin at the termination of the healing period. Iowa Code § 85.34(2). Compensation shall be paid in relation to 500 weeks as the disability bears to the body as a whole. Id. § 85.34(2)(v). When considering the extent of disability, the deputy commissioner considers all evidence, both medical and nonmedical. Evenson v. Winnebago Indus., Inc., 881 N.W.2d 360, 370 (Iowa 2016).

The Iowa Supreme Court has held, "it is a fundamental requirement that the commissioner consider all evidence, both medical and nonmedical. Lay witness testimony is both relevant and material upon the cause and extent of injury." Evenson, 881 N.W.2d 360, 369 (Iowa 2016) (quoting Gits Mfg. Co. v. Frank, 855 N.W.2d 195, 199 (Iowa 2014)).

Hunley alleges she is permanently and totally disabled under the statute or common law odd-lot doctrine. Dillard-Lewis and Hathaway argue Hunley has not established she has sustained an industrial disability, and if she has, her disability is minimal.

In Iowa, a claimant may establish permanent total disability under the statute, or through the common law odd-lot doctrine. Michael Eberhart Constr. v. Curtin, 674 N.W.2d 123, 126 (Iowa 2004) (discussing both theories of permanent total disability under Idaho law and concluding the deputy's ruling was not based on both theories, rather, it was only based on the odd-lot doctrine). Under the statute, the claimant may establish the claimant is totally and permanently disabled if the claimant's medical impairment together with nonmedical factors totals 100 percent. Id. The odd-lot doctrine applies when the claimant has established the claimant has sustained something less than 100 percent disability, but is so injured that the claimant is "unable to perform services other than 'those which are so limited in quality, dependability or quantity that a reasonably stable market for them does not exist.'" Id.

“Total disability does not mean a state of absolute helplessness.” Wal-Mart Stores, Inc. v. Caselman, 657 N.W.2d 493, 501 (Iowa 2003) (quoting IBP, Inc. v. Al-Gharib, 604 N.W.2d 621, 633 (Iowa 2000)). Total disability “occurs when the injury wholly disables the employee from performing work that the employee’s experience, training, intelligence, and physical capacity would otherwise permit the employee to perform.” IBP, Inc., 604 N.W.2d at 633.

Four physicians have opined Hunley sustained permanent functional impairments to her right hip and right knee, Dr. Karam, a treating orthopedic surgeon who operated on Hunley’s right hip and leg, Dr. Noiseux, a treating orthopedic surgeon who operated on Hunley’s right knee, Dr. Taylor, an occupational medicine physician who conducted an independent medical examination for Hunley, and Dr. Fields, an occupational medicine physician who performed an independent medical examination for Dillard-Lewis and Hathaway. I find the opinions of Drs. Karam and Noiseux, as supported by Dr. Fields, more persuasive than the opinion of Dr. Taylor.

For Hunley’s right hip injury, Dr. Karam assigned Hunley a permanent partial impairment rating of thirty-seven percent to the lower extremity, which is equivalent to a fifteen percent whole person impairment, and assigned no work restrictions. (JE 14, p. 240) Drs. Taylor and Fields also assigned Hunley a permanent partial impairment rating of thirty-seven percent to the lower extremity, which is equivalent to a fifteen percent whole person impairment. (Exs. 1, p 8; Ex. A, p. 6) Dr. Fields assigned no work restrictions and Dr. Taylor assigned work restrictions for both the right hip and the right knee. (Ex. A, p. 6; Ex. 1, p.9)

For Hunley’s right knee condition, Dr. Noiseux assigned Hunley a permanent partial impairment rating of thirty-seven percent to the right lower extremity, which is equivalent to a fifteen percent whole person impairment, finding the rating was the result of a total knee arthroplasty with good results under Table 17-33 on page 546. (JE 14, p. 241) Dr. Noiseux opined,

[a]ccording to table 17-35 on page 549, Ms. Hunley had a knee replacement score of 95/100 which places her in the “Good” category. Ms. Hunley reported mild or occasional knee pain with walking (45/50 points in section a.), had range of motion of 0-125 degrees (25/25 points in section b.), no instability (25/25 points in section c.), and no deductions in sections d., e., or f. of table 17-35.

(JE 14, p. 241) Dr. Noiseux did not assign Hunley any permanent restrictions. Dr. Fields also assigned Hunley a permanent partial impairment rating of thirty-seven percent to the right lower extremity, which is equivalent to a fifteen percent whole person impairment, finding the rating was the result of a total knee arthroplasty with good result, and did not assign any permanent work restrictions. (Ex. A, p. 6)

Dr. Taylor assigned Hunley a fifty percent lower extremity impairment for Hunley’s right knee condition, noting “20 points are assigned for occasional moderate

pain and 45 points for mild or occasional pain. I would place her toward the middle and recommend 30 points. She would be assigned an additional 23 points related to range of motion. There was no instability, which is an additional 25 points. There are no deductions.” (Ex. 1, p. 8)

Using the functional capacity evaluation ordered by Hunley’s counsel, Dr. Taylor recommended permanent lifting restrictions of ten pounds between floor and waist, ten to fifteen pounds with her arms close to her body, and carry ten to twenty pounds for fairly short distances on a rare to occasional basis, and additional restrictions of no climbing ladders, climbing stairs on a rare basis with a handrail and minimal added weight, avoiding kneeling and crouching, partial squatting on a rare basis with something to hold onto to assist, bending on a rare to occasional basis, depending on positioning. (Ex. 1, p. 9) Dr. Taylor noted Hunley should have the ability to alternate sitting, standing, and walking, as needed for comfort. (Ex. 1, p. 9)

Several of Dr. Taylor’s restrictions are similar to the permanent restrictions Dr. Hughes recommended in 2011 when Hunley applied for SSDI benefits. Dr. Hughes noted Hunley could occasionally lift and carry up to twenty pounds, frequently lift and carry up to ten pounds, stand six hours out of an eight hour workday with normal breaks, sit six hours out of an eight hour workday with normal breaks, occasionally climb ramps and stairs, never climb ladders. (Ex. 5, pp. 45-46)

In his report, Dr. Taylor did not discuss the prior restrictions issued by Dr. Hughes or explain his findings in light of the prior restrictions. There is no evidence Dr. Taylor was aware of the permanent restrictions recommended by Dr. Hughes, or that he had reviewed Hunley’s SSA records. I find Dr. Taylor was provided with an incomplete medical history in this case and I do not find his opinion persuasive.

Additionally, Drs. Karam and Noiseux are treating orthopedic surgeons working for a premier institution, the UIHC. Dr. Taylor examined Hunley on one occasion, for the purposes of an independent medical examination. Drs. Karam and Noiseux have superior training to Dr. Taylor and examined Hunley’s hip, leg, and knee while performing surgery. I find their opinions more persuasive than Dr. Taylor’s opinion for all of the above reasons and I find Hunley does not require any permanent restrictions as a result of the February 2018 work injury. Under the Combined Values Chart at page 604 of the AMA Guides, I find Hunley has sustained a twenty-eight percent whole person impairment.

Considering the functional impairment, I must also consider the additional factors of industrial disability. Hunley graduated from high school and she completed training for secretarial work during and after high school. In 2010, Hunley completed a two-year associate’s degree in criminal justice from Kaplan University. Hunley has experience working as a truck driver, merchandiser, in customer service, and as a driver.

In her post-hearing brief, Hunley avers she is incapable of returning to her past relevant work and that no market exists for her. Dillard-Lewis and Hathaway reject her assertion and question her credibility.

During the hearing I assessed Hunley's credibility by considering whether her testimony was reasonable and consistent with other evidence I believe, whether she had made inconsistent statements, her "appearance, conduct, memory and knowledge of the facts," and her interest in the case. State v. Frake, 450 N.W.2d 817, 819 (Iowa 1990). Hunley has an obvious interest in the outcome of this case. I had the opportunity to observe Hunley testify under oath. During her testimony Hunley engaged in direct eye contact, her rate of speech was appropriate, and she did not engage in any furtive movements. I find Hunley made inconsistent statements during her testimony and deposition testimony regarding her ability to use computers and to return to her past relevant work. I did not find her testimony reasonable and consistent with the other evidence I believe. I did not find her to be a credible witness. Claimants who are not credible do sustain compensable work injuries. I find Hunley has sustained a compensable work injury in this case.

Hunley lives in a major metropolitan area, Davenport. Hunley graduated with an associate's degree from Kaplan University in 2010. During her schooling she used a computer and she wrote compositions using a word processing program. She also completed one month of the program on line. I find Hunley has basic computer skills and she is capable of retraining.

Hunley has not looked for work since the February 2018 work injury. I do not find her to be motivated to return to work. Hunley acknowledged she has limited her work because she receives SSDI. Considering all of the factors of industrial disability, I find Hunley has sustained a fifty percent industrial disability, entitling Hunley to 250 weeks of permanent partial disability benefits, commencing on September 3, 2019. I do not find Hunley has established she is permanently and totally disabled under the statute or under the common law odd-lot doctrine.

IV. Credit

Dillard-Lewis and Hathaway seek a credit for permanent partial disability benefits paid to Hunley from September 3, 2019 through December 14, 2020. Hunley contends the benefits paid from September 3, 2019 through June 29, 2020, should only be considered healing period benefits and Dillard-Lewis and Hathaway are not entitled to a credit for these benefits because Drs. Karam and Noiseux did not provide impairment ratings until June 19, 2020 and June 23, 2020, respectively.

Iowa Code section 85.34, provides, in part, compensation for permanent partial disability benefits commences "when it is medically indicated that maximum medical improvement from the injury has been reached and the extent of loss or percentage of permanent impairment can be determined" under the AMA Guides. Hunley received

additional treatment from Dr. Noiseux after Dr. Karam found she had reached maximum medical improvement.

Drs. Noiseux, Fields, and Taylor all agree Hunley reached maximum medical improvement for her right knee condition on September 3, 2019, as stipulated by the parties. And while Hunley agrees temporary or healing period benefits are no longer in dispute, she alleges the conversion date from healing period to permanent partial disability benefits occurred after September 3, 2019.

Dr. Taylor was the first physician to conduct an independent medical examination of Hunley and issued his report on April 20, 2020. Dr. Noiseux issued his impairment rating on June 23, 2020, finding Hunley reached maximum medical improvement on September 3, 2019. I find under the plain language of the statute, the conversion date is September 3, 2019, as stipulated by the parties, the date Dr. Noiseux found Hunley reached maximum medical improvement. While an impairment rating was issued later in time, there is no evidence the rating could not have been issued on September 3, 2019, for purposes of determining the credit for permanent partial disability benefits. And, the parties did not dispute the commencement date for permanency on the hearing report. Unlike Dr. Taylor's report, Dr. Noiseux did not rely on a functional capacity evaluation or other evaluation in issuing his impairment rating. I find Dillard-Lewis and Hathaway are entitled to a credit for all permanent partial disability benefits paid from September 3, 2019, the conversion date, forward.

V. Costs

Hunley seeks to recover the \$100.00 filing fee. (Ex. 4, p. 34) Iowa Code section 86.40, provides, "[a]ll costs incurred in the hearing before the commissioner shall be taxed in the discretion of the commissioner." Rule 876 IAC 4.33(86), provides

[c]osts taxed by the workers' compensation commissioner or a deputy commissioner shall be (1) attendance of a certified shorthand reporter or presence of mechanical means at hearings and evidential depositions, (2) transcription costs when appropriate, (3) costs of service of the original notice and subpoenas, (4) witness fees and expenses as provided by Iowa Code sections 622.69 and 622.72, (5) the costs of doctors' and practitioners' deposition testimony, provided that said costs do not exceed the amounts provided by Iowa Code sections 622.69 and 622.72, (6) the reasonable costs of obtaining no more than two doctors' or practitioners' reports, (7) filing fees when appropriate, (8) costs of persons reviewing health service disputes.

Using my discretion, I find the \$100.00 filing fee should be assessed to Dillard-Lewis and Hathaway.

ORDER

IT IS THEREFORE ORDERED, THAT:

Defendants shall pay the claimant two hundred and fifty (250) weeks of permanent partial disability benefits at the stipulated weekly rate of two hundred one and 69/100 dollars (\$201.69) per week, commencing on the stipulated commencement date of September 3, 2019.


Defendants are entitled to a credit for all permanent partial disability payments made to the claimant from September 3, 2019, forward.

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 reimburse the claimant one hundred and 00/100 dollars (\$100.00) for the filing fee.

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

Signed and filed this 15th day of April, 2021.



HEATHER L. PALMER
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served as follows:

Heather Carlson (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.