BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JOANN GOCHETT,

Claimant,

vs.

BICKFORD SENIOR LIVING,

Employer,

and

CHURCH MUTUAL INSURANCE CO.,

Insurance Carrier,
Defendants.

File No. 5062267

ARBITRATION

DECISION

Headnotes: 1801.1, 1802, 1803

STATEMENT OF THE CASE

Joann Gochett, claimant, filed a petition in arbitration seeking workers' compensation benefits from Bickford Senior Living (Bickford) and its insurer, Church Mutual Insurance Company as a result of an injury she sustained on July 22, 2016 that allegedly arose out of and in the course of her employment. This case was heard in Des Moines, Iowa and fully submitted on January 2, 2018. The evidence in this case consists of the testimony of claimant, Angela Harris, Joint Exhibits 1 – 6, Defendants' Exhibits A – I and Claimant's Exhibit 1 – 4. Claimant was given permission to file an additional exhibit in an Order by the undersigned due to the defendants' failure to provide records to claimant in a timely manner. Claimant submitted a letter dated August 30, 2017 by Robin Sassman, M.D. which was admitted to the record as Exhibit 5.

ISSUES

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

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

3. The extent of claimant's disability.

4. The commencement date for permanent disability benefits.

5. Whether claimant is entitled to payment for an independent medical examination (IME).

6. Assessment of 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.

FINDINGS OF FACT

The deputy workers' compensation commissioner having heard the testimony and considered the evidence in the record finds that:

Joann Gochett, claimant, was fifty-seven years old at the time of the hearing. Claimant graduated from high school and obtained a medical assistant certificate. (Transcript, page 22) Claimant also obtained, through a community college, her CNA, CMA, and MM certificates. (Tr. pp. 22, 23)

Claimant has worked for a number of agencies that help the elderly and persons with physical or mental disabilities. Claimant worked assisting persons with activities of daily living (ADL) skills, transportation, medication and housekeeping. (Exhibit 3, page 8; Ex. D, p. 5)

Claimant was hired to be a CMA at Bickford. She started working for Bickford in May 2016. Claimant took and passed a physical before working for Bickford. (Tr. pp. 28, 29; Ex. 2, p. 4)

Claimant acknowledged that before her injury at Bickford on July 22, 2016 she had received treatment for back problems. (Tr. p. 32) Claimant saw her physician on July 15, 2016 about her back discomfort and was going to have an MRI scheduled. (Tr. pp. 33, 54, 61)

On July 22, 2016 claimant was working with patients/residents that had dementia and were on a locked floor. Claimant was working with two residents who were agitated that shift. Claimant was able to calm them for a time. However, one resident became agitated again and wanted to get into the room of another resident. Claimant said the resident went to swing at her, and claimant was trying to grab his hands to keep the resident from hitting her; she was ducking, twisting and trying to keep from falling. Claimant said that the resident hit her all over. (Tr. p. 66; Ex. G, pp. 46 – 49) Claimant reported the incident and then saw a physician. (Tr. p. 41) Claimant was sent to Concentra the day of the incident. (Tr. p. 74) Claimant said she had three injections for her back pain and was put on restrictions until February 2017. (Tr. pp. 42, 43)

Claimant was asked to return to work her regular position at Bickford in February 2017. (Tr. pp. 44, 79, 89) Claimant said she was offered her job back and was required to work 32 hours a week. Claimant stated that she told Bickford she wanted to work less hours and work herself back up to a 32-hour work week. Claimant did not want to perform the work due to her pain and did not return to work at Bickford. (Tr. pp. 44, 78)

Claimant started with Premier Payee in 2015 and was working a very limited number of hours. Because she needed additional income she applied for work at Bickford and worked at both jobs for a time. (Tr. pp. 46- 48; Ex. G, p.19) At the time of the hearing claimant was working as a community living coordinator for Premier Payee. Claimant would take persons to doctor appointments, senior centers and coach clients. Claimant's clients are independent and she does not need to do any physical work on behalf of her clients. (Tr. pp. 45, 46; Ex. D, p.1) A review of some of the hours claimant worked for Premier Payee follows. (Ex. D, pp. 6 - 8)

Pay period ending		Bimonthly pay periods	
Pay period ending	3/26/2016	Number of hours worked	35.09
Pay period ending	4/9/2016	Number of hours worked	41.22
Pay period ending	4/23/2016	Number of hours worked	44.75
Pay period ending	5/7/2016	Number of hours worked	53.45
Pay period ending	5/21/2016	Number of hours worked	42.42
Pay period ending	6/4/2016	Bonus paid no hours reported	
Pay period ending	6/18/2016	Number of hours worked	21.60
Pay period ending	7/2/2016	Number of hours worked	5.50
Pay period ending	7/16/2016	Number of hours worked	16.60
Claimant injured at Bickford	7/22/2016		
Pay period ending	7/30/2016	Number of hours worked	11.80
Pay period ending	8/27/2016	Number of hours worked	13.58
Pay period ending	9/10/2016	Number of hours worked	17.40
Pay period ending	9/24/2016	Number of hours worked	18.46

Pay period ending	10/6/2016	Number of hours worked	46.10
Pay period ending	10/22/2016	Number of hours worked	44.82
Pay period ending	11/5/2016	Number of hours worked	58.50
Pay period ending	11/19/2016	Number of hours worked	46.00
Pay period ending	12/3/2016	Bonus paid no hours reported	
Pay period ending	12/17/2016	Number of hours worked	55.78
Pay period ending	12/31/2016	Number of hours worked	35.09
Pay period ending	1/14/2017	Number of hours worked	47.25
Pay period ending	1/28/2017	Number of hours worked	45.65

Defendants paid claimant benefits for the periods of July 23, 2016 through July 25, 2016 and August 9, 2016 through February 13, 2017 at the weekly rate of $295.02 for a total of $8,091.98. (Ex. B, p. 2; Hearing Report)

Claimant testified that she currently works with back pain and does so as she has to earn a living. (Tr. p. 49)

Angela Harris, the director at Bickford testified at the hearing. Ms. Harris was the assistant director at the time of claimant's July 2016 injury. Ms. Harris testified that Bickford has a process to have employees return to work after an injury called transitional duty return to work. (Tr. p. 93) She explained the process which she, the director of the facility, and the injured worker would sit down and discuss what that person feels like they can do. (Tr. p. 93) Ms. Harris said claimant initially did light duty

after her injury and then stopped working. (Tr. pp. 94, 95) Ms. Harris said that claimant was offered her position back with her regular hours, regular title and all of her restrictions were to stay in place, although was not certain exactly when it happened. (Tr. p. 96) Ms. Harris and claimant engaged in a series of text messages regarding claimant's injury and return to work from July 22, 2016 and August 24, 2016. (Ex. H, pp. 1 – 12)

On July 22, 2016 claimant was seen by Terrance Kurtz, M.D. at Concentra Medical Center (Concentra). Claimant reported she had back pain after a resident began to punch her. Claimant reported first right-sided pain and then left-sided pain. The note of that visit also stated claimant was pushed into a wall. Dr. Kurtz's assessment was strain of both the right and left trapezius and strain of the lumbar paraspinal muscle. Claimant was referred to physical therapy. Claimant was allowed to return to work for her next shift with modified duty. (Joint Exhibit 1, pp. 2, 3, 24; Ex. C, p. 1) On July 29, 2016 claimant was allowed to return to work with limitations of lifting up to 20 pounds occasionally and push/pull 30 pounds occasionally and occasionally bend. She was allowed to stand and walk consistently and she was to ice every two hours for ten minutes. (JEx. 1, p. 14)

On August 2, 2016 claimant was restricted to desk work only by Dr. Moe. (JEx. 1, p. 15; Ex. C, p. 4) On August 8, 2016 Carlos Moe, D.O. of Concentra saw claimant due to complaints of significant back pain. Dr. Moe's assessment was acute thoracic strain and lumbar strain. Claimant was taken off work. (JEx 1, pp. 8, 9)

Dr. Moe referred claimant to Iowa Ortho, and she was seen on September 14, 2016 by John Rayburn, M.D. Dr. Rayburn assessed claimant with chronic pain syndrome, myalgia and low back pain. Dr. Rayburn noted that claimant's symptoms appear to be muscle pain/strain. (JEx. 4, p. 5) Dr. Rayburn saw claimant on October 17, 2016, added lumbar spondylosis to his assessment, and recommended bilateral injections and an MRI. (JEx 4, p. 10) On November 21, 2016 and December 6, 2016 Dr. Rayburn performed a bilateral L2-5 medial branch block. (JEx. 4, pp.12, 14) On December, 21, 2017 Dr. Rayburn noted that the MRI showed mild midline multilevel spondylosis and a small posterior annular tear at L2-L3. (JEx. 4, p. 16) Dr. Rayburn noted that claimant had moderate to severe pain and has failed conservative care. (JEx. 4, p. 20) On January 26, 2017 Dr. Rayburn provided bilateral sacroiliac joint injections. (JEx. 4, p. 21) Claimant was last seen by Dr. Rayburn on February 22, 2016. He noted the onset of the back pain was July 22, 2016. Dr. Rayburn's assessment was chronic pain syndrome, low back pain at multiple sites, lumbosacral spondylosis without myelopathy, myalgia and sacroiliitis. He recommended physical therapy for one more month and a non-opioid medication. (JEx. 4, p. 25) I find that claimant was at maximum medical improvement on March 22, 2017; that being one month after her last appointment with Dr. Rayburn and the end of the physical therapy period he prescribed.

On January 16, 2017 Dr. Moe recommended claimant have an IME. At that time claimant was to return to work sitting doing desk work only. (JEx. 1, p. 16) The IME was performed by Mark Kirkland, D.O. on May 22, 2017. Dr. Kirkland's impression was,

1. Bilateral sacroiliitis.

2. Lumbar spondylosis.

3. Resolved right and left trapezius strain.

4. Overweight/Deconditioned.

(Ex. E, p. 4) It was Dr. Kirkland's opinion that the incident of July 22, 2016 was not the cause of claimant's current back problems. He noted claimant was seen for back problems in 2011 and was seen at Broadlawns Medical Center on July 15, 2016 for back pain. (Ex. E, pp. 1, 4) He did not believe that the type of injury or mechanism of injury for the incident on July 22, 2016 was consistent with her diagnosis. He opined claimant's problems were age related. Dr. Kirkland found claimant reached maximum medical improvement on February 27, 2017. (Ex. E, p. 5)

On June 22, 2017 Dr. Rayburn answered in check-box form that he agreed with opinions found in Dr. Kirkland's IME. (Ex. F, p. 1)

Claimant's medical history is relevant in this case. In January 2008 claimant was involved in a motor vehicle accident which caused pain to claimant's upper back, neck, and left and right shoulders. X-rays revealed mild degenerative disk disease. (JEx 6, p. 5) On May 17, 2011 claimant was seen at Broadlawns for a thyroid issue and the note of that visit said she currently was not in pain but claimant had a history of chronic back pain. (JEx. 5, p. 1) On December 20, 2014 claimant went to Broadlawns with complaints of back pain for the last 24 hours. (JEx. 5, p. 5) On November 20, 2015 claimant was seen at Broadlawns for right shoulder pain. (JEx. 5, p. 9)

On July 15, 2016 claimant was seen at Broadlawns Medical Center for back pain. The claimant reported bilateral pain, worse on the right that started two months ago. (JEx. 5, p. 13) An MRI was recommended. (JEx. 5, p. 15) The diagnosis was low back pain with right sciatica and right foot pain possible secondary to flat arches. (Ex. 4, p. 13) On August 10, 2016 claimant was seen at Broadlawns for chronic pain. This visit noted that claimant was being seen by a workers' compensation physician for the assault of July 22, 2016. Claimant complained of neck and left shoulder pain as well as back pain. The note of that visit stated that a recent MRI had shown mild disk degeneration. (JEx. 5, p.18) The assessment was,

> Acute on chronic neck/low back pain due to assault resulting in muscle spams [*sic*]. Based on PE I do not feel that additional imaging is warranted at this time.

(JEx. 5, p. 20)

On June 26, 2017 Robin Sassman, M.D. issued an IME. (Ex. 4, pp. 11 - 22) Dr. Sassman's opinions concerning causation were;

> It is my opinion that the incident that occurred on or about July 22, 2016, was a substantial aggravating factor of the lumbar spine and the cause of her neck and shoulder pain (which has since resolved). While it is true that Ms. Gochett has a previous history of back pain and was seen the week prior for back pain, it was not until the assault occurred and she was repeatedly hit in the back that she noted a persistent worsening of her low back pain. She states that her pain prior to the assault would come and go. After the assault It because more persistent. Now she notes aching just with sitting. Prior to the assault she was able to work, lift and do all her activities of daily living without problems. Now she cannot do these things. This represents a worsening of her symptoms which, in my opinion, are as a result of the assault.

(Ex. 4, p. 18) Dr. Sassman recommended a second opinion from a pain management specialist. Dr. Sassman provided an impairment rating of 19 percent to the whole body. (Ex. 4, p. 19) Dr. Sassman found the following restrictions;

> Ms. Gochett should limit lifting, pushing, pulling and carrying to 10 pounds occasionally from floor to waist, 20 pounds occasionally from waist to shoulder, and 10 pounds occasionally above shoulder height. She should limit the use of vibratory and power tools to a rare basis.

(Ex. 4, p. 19) I find these restrictions to be claimant's restrictions. On August 30, 2017 Dr. Sassman wrote a letter commenting on the IME report of Dr. Kirkland and Dr. Rayburn's form. (Ex. 5, p. 1) Dr. Sassman stated,

> After reviewing Dr. Kirkland's report, and the form completed by Dr. Rayburn, my opinions have not changed; and, I respectfully disagree with Dr. Kirkland's assertions that Ms. Gochett's symptoms are age-related and degenerative in nature. My reasoning for this is as follows: 1) Ms. Gochett indicated to me that she was hit directly in the back during the altercation. The subsequent MRI indicated compression deformities of T12 and L3. 2) Additionally, as noted in my report, although she was seen prior to the incident for low back pain, the low back pain intensity changed and worsened after this incident. Therefore, as noted in the IME report, I continue to conclude that the incident that occurred on July 22, 2016, was a substantial aggravating factor of the lumbar spine and the cause of her neck and shoulder pain (which has since resolved).

(Ex. 5, p. 1)

I find that claimant has significant lifting restrictions due to her back injury. I find that claimant has a 50 percent loss of earning capacity.

Claimant has requested reimbursement of her filing fee costs in this case of $100.00. (Tr. p. 7)

CONCLUSIONS OF LAW

Causation

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).

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).

Claimant is not required to prove her current back condition was caused solely by the assault at work, or that none of it was the result of natural degenerative processes. She is only required to show that those natural degenerative processes were accelerated, speeded up or aggravated by her work activities, and that her work was at least a substantial cause, not necessarily the only or the primary cause, of her current back condition. See. Keeran v. Quaker Oats Co., 2018 WL 4360943 (Iowa Ct. App. 2018). I find the claimant has shown that her condition was permanently accelerated by the work injuries on July 22, 2016.

I find the opinion of Dr. Sassman most convincing of the medical opinions. Her two reports are the most consistent with the claimant's medical treatment and symptoms. It is true claimant was having back pain shortly before her assault on July 22, 2016. It is also clear from the medical records that her back pain and her ability to work was significantly adversely affected by her July 22, 2016 work injury. All medical providers until Dr. Kirkland's IME treated her injury as related to her assault. Claimant's ability to work for Bickford was compromised by the assault. Defendants made attempts to accommodate claimant's injury.

I did not find Dr. Kirkland and Dr. Rayburn's opinions as convincing as Dr. Sassman's.

Dr. Rayburn accepted that claimant had an injury as a result of her assault throughout his treatment of claimant. In his check-box letter Dr. Rayburn agreed with Dr. Kirkland that claimant's injury was not related to claimant's assault. Dr. Rayburn does not explain why he changed his opinion. I do not find Dr. Kirkland's opinion convincing. His report does not sufficiently explain the severity of claimant's back symptoms after her assault and throughout her course of treatment. Dr. Kirkland's IME does not adequately discuss aggravation of claimant's back condition. The convincing medical evidence shows her back condition was lit-up due to the assault.

Extent of Permanent Partial 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. 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.

In assessing an unscheduled, whole-body injury case, the claimant's loss of earning capacity is determined as of the time of the hearing based upon industrial disability factors then existing. The commissioner does not determine permanent disability, or industrial disability, based upon anticipated future developments. Kohlhaas v. Hog Slat, Inc., 777 N.W.2d 387, 392 (Iowa 2009).

I previously found that the restrictions provided by Dr. Sassman are claimant's restrictions. Claimant has a limited education. She is working providing assistance to persons who need help with ADLs and transportation, but the work is not physical and is generally part time. Her vocational history has been primarily working with persons with disabilities or the elderly. Claimant's age is not a positive factor. She is not a good candidate for extensive retraining.

Considering all the factors of industrial disability I find claimant has a 50 percent industrial disability. This entitles claimant to 250 weeks of permanent partial disability.

Temporary Benefits

Claimant has requested healing period benefits from July 22, 2016 through July 21, 2017. Claimant asserts that claimant was at maximum medical improvement (MMI) on July 22, 2017, one year after her assault. (Claimant's brief, p. 12) Defendants assert that claimant is not entitled to healing period benefits, as claimant continued to work for Premiere Payee and refused an offer of suitable work. (Defendants' brief, pp. 4, 5)

Healing period compensation describes temporary workers' compensation weekly benefits that precede an allowance of permanent partial disability benefits. Ellingson v. Fleetguard, Inc., 599 N.W.2d 440 (Iowa 1999). Section 85.34(1) provides that healing period benefits are payable to an injured worker who has suffered permanent partial disability until the first to occur of three events. These are: (1) the worker has returned to work; (2) the worker medically is capable of returning to substantially similar employment; or (3) the worker has achieved maximum medical recovery. Maximum medical recovery is achieved when healing is complete and the

extent of permanent disability can be determined. Armstrong Tire & Rubber Co. v. Kubli, Iowa App., 312 N.W.2d 60 (Iowa 1981). Neither maintenance medical care nor an employee's continuing to have pain or other symptoms necessarily prolongs the healing period.

Iowa Code section 85.33 governs temporary disability benefits, and Iowa Code section 85.34 governs healing period and permanent disability benefits. Dunlap v. Action Warehouse, 824 N.W.2d 545, 556 (Iowa Ct. App. 2012). As a general rule, "temporary total disability compensation benefits and healing-period compensation benefits refer to the same condition." Clark v. Vicorp Rest., Inc., 696 N.W.2d 596, 604 (Iowa 2005). The purpose of temporary total disability benefits and healing period benefits is to "partially reimburse the employee for the loss of earnings" during a period of recovery from the condition. Id. An award of healing period benefits or total temporary disability benefits is not dependent on a finding of permanent impairment. Dunlap, 824 N.W.2d at 556. The appropriate type of benefit depends on whether or not the employee has a permanent disability. Id.

An employee is entitled to appropriate temporary partial disability benefits during those periods in which the employee is temporarily, partially disabled. An employee is temporarily, partially disabled when the employee is not capable medically of returning to employment substantially similar to the employment in which the employee was engaged at the time of the injury, but is able to perform other work consistent with the employee's disability. Temporary partial benefits are not payable upon termination of temporary disability, healing period, or permanent partial disability simply because the employee is not able to secure work paying weekly earnings equal to the employee's weekly earnings at the time of the injury. Section 85.33(2).

Iowa Code section 85.33(2) provides:

> 2. "Temporary partial *disability*" or "*temporarily, partially disabled*" means the condition of an employee for whom it is medically indicated that the employee is not capable of returning to employment substantially similar to the employment in which the employee was engaged at the time of injury, but is able to perform other work consistent with the employee's disability. "Temporary partial benefits" means benefits payable, in lieu of temporary total disability and healing period benefits, to an employee because of the employee's temporary partial reduction in earning ability as a result of the employee's temporary partial disability. Temporary partial benefits shall not be considered benefits payable to an employee, upon termination of temporary partial or temporary total disability, the healing period, or permanent partial disability, because the employee is not able to secure work paying weekly earnings equal to the employee's weekly earnings at the time of injury.

In Mannes v. Fleetguard, 770 N.W.2d 826 (Iowa 2009) the court said:

> An employee is entitled to receive temporary partial benefits when the employee is temporarily, partially disabled and accepts suitable work consistent with his or her disability. Iowa Code § 85.33(3) (2001). Employers pay temporary partial benefits "because of the employee's temporary partial reduction in earning ability as a result of the employee's temporary partial disability." *Id.* § 85.33(2). Subsection 4 provides a means for calculating temporary partial benefits:
>
> > The temporary partial benefit shall be sixty-six and two-thirds percent of the difference between the employee's weekly earnings at the time of injury ... and the employee's actual gross weekly income from employment during the period of temporary partial disability.
>
> *Id.* § 85.33(4). The statute in itself suggests that temporary partial benefits can only be awarded if the employee experiences an actual reduction in wages. *Id.*

Mannes *Id.* p. 830.

I find that claimant is entitled to healing period benefits from July 22, 2016 through July 29, 2016. As set forth below, claimant returned to work at a different employer, healing period benefits stopped, and claimant is entitled to temporary partial benefits after July 29, 2016.

Iowa Code 85.33(4) provides:

> 4. If an employee is entitled to temporary partial benefits under subsection 3 of this section, the employer for whom the employee was working at the time of injury shall pay to the employee weekly compensation benefits, as provided in section 85.32, for and during the period of temporary partial disability. The temporary partial benefit shall be sixty-six and two-thirds percent of the difference between the employee's weekly earnings at the time of injury, computed in compliance with section 85.36, and the employee's actual gross weekly income from employment during the period of temporary partial disability. If at the time of injury an employee is paid on the basis of the output of the employee, with a minimum guarantee pursuant to a written employment agreement, the minimum guarantee shall be used as the employee's weekly earnings at the time of injury. However, the weekly compensation benefits shall not exceed the payments to which the employee would be entitled under section 85.36 or section 85.37, or under subsection 1 of this section.

As described in 15 James R. Lawyer, Iowa Practice: Workers' Compensation § 13:3 (2017) temporary partial benefits supplement wages when an employee returns to work and earns less wages.

> As defined in Iowa Code § 85.33(2), temporary partial disability means "the condition of an employee for whom it is medically indicated that the employee is not capable of returning to employment substantially similar to the employment in

> which the employee was engaged at the time of injury, but is able to perform other work consistent with the employee's disability." The reduction in earning ability must be a result of the work related injury and not for unrelated reasons. A return to full-time, full-duty work at which the injured worker earns less than actual wage is not a situation in which temporary partial disability should be paid.
>
> The formula for computing temporary partial disability benefits, except in cases of an employee paid on the basis of output, is two-thirds of the difference between the employee's weekly earnings at the time of injury and the employee's actual gross weekly income from employment during the period of temporary partial disability. For example, if an employee's gross weekly wages at the time of his injury were $400 per week and actual gross weekly wages during the time of temporary partial disability were $100 per week, the temporary partial disability rate would be $200. (Footnotes omitted)

Defendants argued that claimant returned to work at Premiere Payee and is therefore not entitled to any temporary benefits. The wage records in evidence of claimant's work at Premier Payee show that claimant is entitled to temporary partial benefits some weeks due to her low earnings at Premiere Payee. The pay information is not broken into sufficient detail to determine the exact amount claimant worked for each work. The defendants shall pay claimant healing period benefits from July 22, through July 29, 2016. Defendants shall receive credit for any indemnity benefits paid at that time.

Defendants shall pay temporary partial benefits for all weeks claimant is eligible pursuant to 85.33(4) from July 30, 2016 through February 27, 2017 and receive credit for indemnity paid during this time.

Refusal of Work as Disqualification for Temporary Benefits

The next issue to be resolved is whether claimant is disqualified from receiving the healing period benefits pursuant to Iowa Code section 85.33(3).

Iowa Code section 85.33(3) provides:

> 3. If an employee is temporarily, partially disabled and the employer for whom the employee was working at the time of injury offers to the employee suitable work consistent with the employee's disability the employee shall accept the suitable work, and be compensated with temporary partial benefits. If the employee refuses to accept the suitable work with the same employer, the employee shall not be compensated with temporary partial, temporary total, or healing period benefits during the period of the refusal. If suitable work is not offered by the employer for whom the employee was working at the time of the injury and the employee who is temporarily partially disabled elects to perform work with a different employer, the employee shall be compensated with temporary partial benefits.

> We agree the correct test is (1) whether the employee was offered suitable work, (2) which the employee refused. If so, benefits cannot be awarded, as provided in section 85.33(3).

Schutjer v. Algona Manor Care Center, 780 N.W.2d 549, 559 (Iowa 2010).

The record is not clear that a specific offer of work was made to claimant until she was released from care by Dr. Rayburn. Even then, the date of the offer is not clear from the record. The text messages and testimony of claimant and Ms. Harris show more of a negotiation about a return to work rather than a clear offer and refusal of work. The evidence does show that sometime in February 2017 the defendants offered claimant a return to her previous position and same number of hours, 32 hours. Claimant refused this offer of suitable work. I find that claimant refused work sometime after her February 22, 2017 visit with Dr. Rayburn. The first Monday after her visit to Dr. Rayburn was February 28, 2017. I find that this is the date claimant refused work and is not entitled to any additional temporary benefits.

Commencement Date of Permanent Partial Disability

In Evenson v. Winnebago Industries, Inc., 881 N.W.2d 360 (Iowa, 2016) the court held;

> Iowa Code section 85.34 provides the standard for determining when healing period benefits terminate. Iowa Code § 85.34(1). We have recognized that the statute presents a menu of options the fact finder shall consider when deciding that the healing period has ended. See, e.g., Waldinger Corp., 817 N.W.2d at 8-9. Section 85.34 provides that the healing period lasts until the employee has returned to work or it is medically indicated that significant improvement from the injury is not anticipated or until the employee is medically capable of returning to employment substantially similar to the employment in which the employee was engaged at the time of injury, whichever occurs first.
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> Iowa Code § 85.34(1) . We have previously recognized that there may be more than one healing period for a single injury. Waldinger Corp., 817 N.W.2d at 8.

Evenson Id. p. 372. The court further held:

> In this case, Evenson's entitlement to PPD benefits commenced when he first returned to work because that is when his entitlement to healing period benefits ended. See Iowa Code § 85.34(1)–(2) (providing healing period benefits are owed "until the employee has returned to work or it is medically indicated that significant improvement from the injury is not anticipated or until the employee is medically capable of returning to

> employment substantially similar to the employment in which the employee was engaged at the time of injury, whichever occurs first," and stating "[c]ompensation for permanent partial disability shall begin at the termination of the healing period" (emphasis added)). Because TPD benefits were paid to Evenson after he first returned to work following the injury, we conclude the commencement of Winnebago's obligation to pay PPD benefits cannot be delayed until after the TPD benefits subsequently terminated under the plain meaning of section 85.34.

Evenson Id. p. 374

I find that the commencement date for permanent partial disability benefits is July 30, 2016. The record shows that claimant worked 11 hours for the pay period ending July 30, 2016. The record is lacking as to what exact days claimant worked that pay period, so I have chosen the only firm date in the record as the date of return to work. This is the start of the time period of entitlement to permanent benefits, as claimant returned to work at Premier Payee.

Costs

In my discretion, I award the cost of $100.00 for the filing fee pursuant to 876 IAC 4.33.

In the hearing report the matter of payment of Dr. Sassman's IME was identified as an issue in dispute. In an order dated August 27, 2017, the defendants were ordered to pay the costs of Dr. Sassman's IME report and subsequent report as a sanction under 876 IAC 4.36. Defendants are required to pay these costs under the August 27, 2017 order as well as 876 IAC 4.33 and Iowa Code section 85.39.

ORDER

Defendants shall pay claimant healing period benefits from July 22, 2017 through July 29, 2017 at the weekly rate of three hundred eight and 25/100 dollars ($308.25).

Defendants shall pay claimant temporary partial disability for all weeks claimant is eligible from July 30, 2017 through February 28, 2017.

Defendants shall pay claimant two hundred fifty (250) weeks of permanent partial benefits at the weekly rate of three hundred eight and 25/100 dollars ($308.25) commencing July 30, 2016.

Defendants shall pay cost to claimant of one hundred dollars ($100.00) and the IME expense of Dr. Sassman.

Defendants shall have a credit for benefits previously paid.

Defendants shall pay accrued weekly benefits in a lump sum together with interest at the rate of ten percent for all weekly benefits payable and not paid when due which accrued before July 1, 2017, and all interest on past due weekly compensation benefits accruing on or after July 1, 2017, shall be 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. See. Gamble v. AG Leader Technology File No. 5054686 (App. Apr. 24, 2018).

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

Signed and filed this 24th day of September, 2018.

JAMES F. ELLIOTT
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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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 in writing and received by the commissioner's office 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 a legal holiday. The notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 1000 E. Grand Avenue, Des Moines, Iowa 50319-0209.