

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

KIMBERLY FLIPPO,

Claimant,

vs.

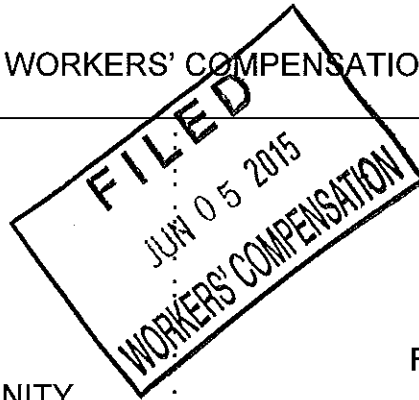
SOUTHEAST POLK COMMUNITY
SCHOOL DISTRICT,

Employer,

and

EMCASCO INSURANCE COMPANY,

Insurance Carrier,
Defendants.



File No. 5046659

ARBITRATION

DECISION

Head Note No. 1803

STATEMENT OF THE CASE

The claimant, Kimberly Flippo, filed a petition for arbitration and seeks workers' compensation benefits from Southeast Polk School District, employer, and EMCASCO Insurance Company, insurance carrier. The claimant was represented by David Drake. The defendants were represented by Steve Augspurger.

The matter came on for hearing on February 17, 2015, before Deputy Workers' Compensation Commissioner Joe Walsh in Des Moines, Iowa. The record in the case consists of joint exhibits 1 through 16. The claimant testified at hearing. Chris Quinlan was appointed the official reporter and custodian of the notes of the proceeding. The matter was fully submitted on March 4, 2015 after helpful briefing by the parties.

ISSUE

The parties submitted the following issue for determination:

The nature and extent of the disability.

STIPULATIONS

Through the hearing report, the parties stipulated to the following:

1. The parties had an employer-employee relationship.

2. Claimant sustained an injury which arose out of and in the course of employment on February 14, 2012.
3. Temporary disability/healing period and medical benefits are no longer in dispute.
4. The commencement date for any permanent disability benefits is January 9, 2013.
5. The weekly rate of compensation is \$426.70 per week based upon gross earnings of \$626.00, married with two exemptions.
6. Defendants have paid and are entitled to a credit of 41.145 weeks of compensation (permanent partial disability).
7. Affirmative defenses have been waived.
8. Medical care is not in dispute.
9. The defendants are entitled to a credit of 45 weeks of permanent partial disability.

FINDINGS OF FACT

Claimant, Kimberly Flippo, is 56 years old as of the date of hearing. She lives in Runnells, Iowa. Kim grew up in Des Moines, Iowa on the east side. She graduated from Southeast Polk High in 1976. She was an above average student, and she earned a CNA certificate while in high school. After high school, Kim attended DMACC for nursing.

Kim worked as a certified nurses' aide after receiving her CNA certificate. She was placed for various employers assisting patients. She had a variety of duties which mostly revolved around caring for patients. She ultimately decided that nursing was not for her. In 1981, Kim got married to her husband, George, and started a family. She stopped doing nursing work at that time. She stayed home for three years with her young child.

In 1984, Kim completed training to become a licensed cosmetologist through the Iowa School of Beauty. She began working for Green Apple as a cosmetologist after she achieved her license. In approximately 1990, Kim and a partner opened a business, Creatif X. In addition to working as a cosmetologist, Kim was a part owner and had all the responsibilities of ownership. In approximately 1992, she sold her interest in the business.

Kim began working part-time at Hy-Vee for a period of time before landing a job at Park Ridge, a nursing home, as a beautician. This was a very busy job which she performed for approximately 13 years until 2003. Kim found the work to be physically

strenuous. She received no retirement benefits.

In 2003, Kim began working for Southeast Polk Schools as a part-time bus driver. She worked a morning route and an afternoon route, which allowed her to work some hours at a beauty salon during the day. In approximately 2006, Kim was offered a new route, which included student deliveries to Four Oaks, a school for children and young adults with various behavioral issues. It was a longer route such that Kim eventually stopped doing hair. It became a full-time job. Kim has particular skills and talents working with youth with behavioral issues. These skills were recognized by her employer.

On February 14, 2012, Kim was performing her normal jobs as a bus driver. The roads were slick. She was driving East on Broadway near Hubbell. The bus was rear-ended by a car which then drove off. The bus was impacted again, this time rocking the bus very hard. The students were upset. Kim called in and followed protocol telling her superiors, "We are going to need some help out here." She acknowledged she was shaken up. Her boss came to the accident scene and helped. Kim was given a drug test, which was negative. She went home to take the remainder of the day off, but after being home for a short period her neck and upper back started to tighten up. She was directed to Richard S. McCaughey, D.O. Dr. McCaughey diagnosed a strain of her upper back and neck. He prescribed stretching, Skelaxin, cool compresses and a work restriction of no driving. "I advised Ms. Flippo that most such strains resolve in a few days to a few weeks." (Exhibit 2-2)

A few days later, Kim tried to get a release to return to work from Brian Haults, PA-C. (Ex. 3-3) He reported that her symptoms were somewhat better at that time. He performed an examination and released her to attempt to drive, although he provided some lifting restrictions. (Ex. 3-4) He prescribed Ultram and recommended stretching. Based upon the records, it does not appear that Mr. Haults was consulting with Dr. McCaughey.

Kim attempted to return to driving but then returned to Mr. Haults almost immediately on February 22, 2012. "Pt. went back Monday driving school bus, states she put over 200 miles on. Pain and stiffness increased throughout the day. She was unable to drive on Tues. Neck symptoms had been minimal until that point. She came to Altoona Doctors Now yesterday but was not evaluated." (Ex. 3-5) Mr. Haults wanted an x-ray, but Kim left before it happened. (Ex. 3-6)

Later the same day on February 22, 2012, Kim went to Mercy East Family Practice & Urgent Care. The following is documented: Kim "states 'was in a bus accident last week . . . went to dr this AM et waited 2 hours et got mad and walked out and now im here.'" (Ex. 4-1) Kim recited her history to Priscilla Ruhe, M.D. At that time, she was not having headaches. Her symptoms were neck pain, stiffness and decreased range of motion. (Ex. 4-1) She was taken off work for a few more days. (Ex. 4-3) She was referred to physical therapy. (Ex. 4-4)

She started therapy with Mercy East Physical Therapy on February 27, 2012. (Ex. 5-1) She attended therapy sessions regularly through June 2012. (Ex. 5-1 through 5-36) On her first visit it was indicated her disability was "severe." (Ex. 5-1) The records document that Kim had consistent neck and thoracic pain and stiffness, poor posture, muscle tightness and weakness, impaired functional ability and decreased range of motion. By March, Kim had developed headaches in addition to this constellation of disabling symptoms. (Ex. 5-10) She made some progress but her symptoms waxed and waned depending upon her activity level, especially at work. She attempted to return to work a few times during this period unsuccessfully. Kim was prescribed narcotics by Joseph McCargill, M.D., in March 2012 for the headaches. (Ex. 4-10)

On June 29, 2012, Kim returned to see Dr. McCaughey. (Ex. 2-4) He documented Kim's treatment history for the injury and restricted her from driving. (Ex. 2-6) He diagnosed strains in her neck and upper back. He further stated he is "uncertain how to account for her hand dysesthesias and headaches at this juncture." (Ex. 2-4) He ordered an MRI and reviewed all of her medications.

An MRI was performed July 12, 2012. (Ex. 6) It showed "multilevel mild degenerative disk disease without focal disk herniation or high-grade central canal or neuroforaminal stenosis." (Ex. 2-7) Since being off work, Kim's symptoms had lessened at this time. (Ex. 2-7) Dr. McCaughey essentially told her he would allow her to attempt to return to her bus driving duties but warned her that the "jostling and jarring from piloting a bus (as well as riding her horse) could aggravate" her condition. (Ex. 2-7) He suggested she could check with the employer to see if there were other options off the bus. He did not recommend further treatment, including physical therapy. On July 24, 2012, Dr. McCaughey documented a phone conversation he had with Kim. He did not feel that her headaches were related to her accident. He also felt as though she should no longer be on medications for her neck strain. (Ex. 2-9) Dr. McCaughey referred Kim to a physiatrist at the end of July 2012. (Ex. 2-10)

On August 16, 2012, Kim visited Eden Murad, D.O., her family physician, and documented all of her ailments and complaints. (Ex. 7-2) The documentation is entirely consistent with her claims. She and Dr. Murad discussed whether driving a bus was too strenuous for her given the condition of her neck. (Ex. 7-3)

Kim returned to Dr. McCaughey on August 23, 2012. He documented the following:

(1) Explained to Ms. Flippo that options as I see it are to: (A) Stay off of her bus (horse too) indefinitely and avoid heavier lifting. (B) Return to bus driving duties and see if she can tolerate symptoms. (C) Look for alternative job. (D) Consult another doctor. To this, Ms. Flippo replied that her personal physician had essentially the same assessment. (2) I did not advocate any further medication at this point. (3) Ms. Flippo said that she remained reluctant to return to bus driving duties and will discuss

alternative duties with SE Polk; she felt confident that SE Polk Schools would offer her another job she could tolerate better. (4) No further appointments here were made; I personally can think of nothing further to offer. I wished her well.

(Ex. 2-12)

Kim was next referred to Daniel Miller, D.O. at Occupational Medicine Plus in September 2012. He reviewed Kim's file and diagnosed headaches, cervicgia and cervical degenerative disc disease. (Ex. 8-5) He recommended a CT scan of the brain and referred Kim to a neurosurgeon for review. Kim saw Thomas Carlstrom, M.D. in November 2012. Prior to seeing Dr. Carlstrom, Kim took a spill on her horse. She testified Dr. Miller had allowed her to attempt to ride. She fell from the horse and hit her head. She was diagnosed with a concussion. Kim testified that this was a temporary aggravation of her pain condition. She testified that her symptoms returned to baseline.

Dr. Carlstrom opined that there was nothing surgical and diagnosed myofascial neck pain. He conceded she has mild spondylosis as well. (Ex. 9-1) Dr. Carlstrom recommended attempting some types of injections for pain management and a trial to return to work. (Ex. 9-1) Kim returned to Dr. Miller in December. He performed a trigger point injection and continued to manage her medications. He also prescribed a TENS unit and continued her on her restriction of no driving school bus. (Ex. 8-13, 8-14) Dr. Miller also documented her difficulty sleeping at this time. (Ex. 8-13)

On December 17, 2012 Dr. Miller rechecked Kim and referred her to Younkers Rehabilitation for some testing to determine whether she should attempt to return to driving a bus. (Ex. 8-16) The evaluation concluded the following:

Plan: Based on this date's performance, pt is capable of driving a personal vehicle but it is felt it would be in the best interest of her as well as the students that she not return to driving bus. Her lack of neck ROM and the constant jarring motion of a bus that would most likely aggravate her neck issues as well as be a potential safety concern to the students. In speaking with her about her job she had a genuine interest in her students and it would be hoped she would be able to transition into an alternative job in the school system and utilize her skills.

(Ex. 10-1) On January 9, 2013, Dr. Miller provided a restriction of no driving school bus, which was indefinite or permanent. (Ex. 8-20) Dr. Miller wrote to the insurance carrier. He listed out Kim's diagnoses, restrictions, impairment, medications and he clearly opined that her headaches resulted from her work injury. (Ex. 8-22) He listed her impairment rating from the AMA Guides as 7 percent of the whole person. (Ex. 8-22)

Kim checked with her employer to determine whether any jobs were available. She was eventually offered a part-time job working with the librarian transporting books. As a bus driver she earned \$20.00 per hour with excellent benefits including health

insurance. The offer was for part-time work with no benefits at a lower hourly rate. The record reflects that formal offers of employment were tendered to Kim in June of 2013. (Ex. 16-1) It is unclear why the offers were made in June. Kim had actually accepted the fact that she needed to move on from bus driving before that and secured contract employment through Mosaic, a home care provider which works with special needs clients in approximately March 2013. Kim was hired as a contract employee through the Residential Host program. Apparently, clients with special needs are assigned to live with Mosaic contractors, who provide for their needs and care. Kim was assigned her first client in March 2013. Her first client was a high-maintenance, young adult who required significant attention. She worked with this individual for four months before he was reassigned due to his inappropriate behaviors. Kim described the physical requirements of the Mosaic job as being minimal. She testified she was paid \$211.00 per day to cover everything he needed. There is little evidence in the record to demonstrate Kim's profits in this venture.

It is noted that Kim was offered and declined positions as a part-time Bus Aide, part-time Library Clerk, secretary and custodian. (Ex. 16) These are viable jobs in the competitive job market which demonstrate she has some earning capacity.

Kim testified that she moved to a ranch-style home with no stairs and she gave up her horses in approximately August 2013. This was obviously difficult for Kim who was skilled with horses and has had a long-time passion for her horses. This evidence is strong evidence of the severity of Kim's neck discomfort and headaches.

Kim returned to Dr. Miller in August 2013 due to a flare-up of pain and symptoms. At that time the additional diagnosis/assessment was made of high risk medication management. She was prescribed Vicodin and Diazepam. (Ex. 8-28) He noted her continued difficulties sleeping. Kim has continued to see Dr. Miller who manages her medications and monitors her continued use of narcotic pain medications. (Ex. 8-43)

In March 2014, Kim had been attempting to care for a young woman who required the use of a wheelchair. Kim overdid it attempting to move the wheel chair. She ended up at the Mercy Hospital Emergency Room, where the following was documented: "... patient works with homecare for a child with CP, and she did move around heavy objects yesterday and states that she probably overdid it and strained her muscles." (Ex. 11-1) Kim had to have this client reassigned because of the lifting of the wheelchair. Kim testified that prior to her work injury, she would have had no difficulty moving a wheelchair.

In August 2014, she was assigned a new client who is diagnosed with Down's Syndrome. He functions at a high level but requires supervision and prompting. She earns \$196.00 per day as a contract home health aide. Kim's earnings records are included in Exhibit 16. At Mosaic, Kim grossed in excess of \$5,400.00 in her best month and less than \$600.00 in her worst month. The payments appear to represent the gross pay she received without any deduction of expenses, including expenses for the care of the client. As a contractor, taxes are not withheld, and she receives no

benefits. On the whole, it is evident that Kim has a decrease of overall earnings in her position with Mosaic, in spite of her listed gross pay. Based upon the record before the undersigned, the precise loss of actual earnings is somewhat unclear.

It is undisputed that Kim has struggled with depression and anxiety for years pre-dating her work injury. She had also experienced some sleeping problems prior to developing her current conditions; however, she had lost weight and resolved those issues.

Kim was evaluated by Sunil Bansal, M.D., in December 2014. He reviewed her records and performed a thorough examination. He largely agreed with Dr. Miller regarding most aspects of Kim's conditions. He diagnosed aggravation of cervical spondylosis and thoracic strain. He provided an 8 percent whole body impairment rating based upon loss of range of motion (compared to Dr. Miller's 7 percent). (Ex. 1-18) He did recommend restrictions of no lifting greater than 15 pounds occasionally and 5 pounds overhead. (Ex. 1-20)

Kim testified that the work injury has been devastating on her life. In addition to losing the ability to keep, ride and care for her horses, she has great difficulty gardening and performing other past hobbies. She has difficulty cleaning her house. Where it used to take her an hour to clean the house, it may now take up to an entire day. She continues the use of narcotic pain medication to control her pain, and she is fearful of discontinuing the use of such medication for fear of a return of stronger, unbearable pain. (Ex. 8-49)

Kim's testimony at hearing was convincing and credible. Her presentation was low energy and slow. She appeared thoughtful, and she repeatedly rubbed her right shoulder. Her testimony is consistent with the medical documentation.

CONCLUSIONS OF LAW

The only question submitted is the nature and extent of Kim's work-related disability. Her conditions, being in the neck and head, are evaluated with the industrial method.

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).

Kim's diagnoses are: (1) cervicalgia, (2) headaches, (3) degenerative disc disease and (4) high risk medication management. These conditions are permanent and have resulted in a 7 percent whole body impairment rating from her treating physician. Kim was under active medical care for her condition for nearly a year, from the time of injury through January 9, 2013. This was a lengthy healing period where she made numerous, unsuccessful efforts to return to her job as a bus driver. She has been permanently restricted from driving a bus or commercial vehicle due to her lack of range of motion and the aggravation to her conditions. Her use of narcotics would also inhibit her ability to drive a bus. In addition, I find that Dr. Bansal's recommended lifting restrictions are very reasonable in this case. It is apparent that Kim would have difficulty performing any type of job with regular lifting.

Kim is 56 years old and has driven a bus for the employer since 2003. She developed a valuable skill set in working with young people with behavior issues. She now has permanent restrictions which prevent her from driving a bus, or any commercial vehicle. Kim earned good wages and benefits working for Southeast Polk School District. The School District did offer her optional employment opportunities approximately six months after she was released to work with her permanent restrictions. Kim had already accepted contract employment in the home health field with Mosaic. The record is clear that Kim could have performed some of the work offered by the employer, although it is doubtful she would be successful as a custodian because of her chronic pain as well as the fact that she has never worked as a custodian in the past. Two of the positions offered her were part time.

Kim is suitably employed based upon her skills and work history. Kim is trained as a CNA and has substantial skills in working with young people with behavioral issues. Her current position is more flexible and manageable for Kim because she works at home; however, she is limited in that she is unable to accept physically-challenging clients such as the young woman who used a wheelchair. Realistically, there are numerous clients she would likely not be suited to work with based upon her conditions and limitations, and it is unclear how long she will have this client assigned. The defendants argue strongly that Kim's current earnings are substantial, nearly \$1,000.00 per week. These, however, are gross earnings. Kim is required to pay for the care of the client from these funds. As a contract employee, she is also required to pay her own Social Security taxes and perform her own withholding. In addition, she

receives no benefits, such as health insurance, retirement, or paid time off. Based upon the record, it is apparent that her current position is a step down for her financially, but it is unclear exactly how far down. The earnings comparison is not particularly helpful between her wages as a bus driver employee and a home health aide contractor. Kim's other significant work history included cutting hair, which she would no longer be suited for given the symptoms in her upper back, neck and head.

The fact that Kim has had to give up her horses and move to a home with fewer stairs, is strong evidence of the disabling nature of her condition. She used to care for a large garden and numerous flowers, which she now cannot do. Kim has significant difficulties sleeping and headaches. She requires the use of narcotic pain medications to function on a daily basis. All of these factors point to a substantial loss in her capacity to earn wages in the competitive job market.

When considering these, and all of the other factors of industrial disability, I find that Kim has suffered a sixty (60) percent loss of earning capacity. Sixty percent of 500 weeks is three hundred weeks of benefits owed.

ORDER

THEREFORE IT IS ORDERED:

Defendants shall pay the claimant three hundred (300) weeks of permanent partial disability benefits at the rate of four hundred twenty-six and 70/100 dollars (\$426.70) per week commencing January 9, 2013.

Defendants shall pay accrued weekly benefits in a lump sum.

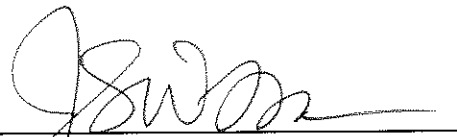
Defendants shall pay interest on unpaid weekly benefits awarded herein as set forth in Iowa Code section 85.30.

Defendants shall be given credit for the weeks previously paid.

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

Costs are taxed to defendants.

Signed and filed this 5th day of June, 2015.



JOSEPH L. WALSH
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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JLW/sam

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.