BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

SAMANTHA RANNEY, Claimant, vs. GOOD SAMARITAN CENTER, Employer, and SENTRY INSURANCE A MUTUAL CO., Insurance Carrier, Defendants.	File No. 5067407 ARBITRATION DECISION Head Notes: 1402.40, 1803, 2206, 2907

STATEMENT OF THE CASE

Claimant Samantha Ranney filed a petition in arbitration seeking workers' compensation benefits against Good Samaritan Center, employer, and Sentry Insurance Company, insurer, for an accepted work injury date of April 12, 2018. The case came before the undersigned for an arbitration hearing on January 13, 2021. This case was scheduled to be an in-person hearing occurring in Des Moines. However, due to the outbreak of a pandemic in Iowa, the Iowa Workers' Compensation Commissioner ordered all hearings to occur via video means, using CourtCall. Accordingly, this case proceeded to a live video hearing via CourtCall with all parties and the court reporter appearing remotely. The hearing proceeded without significant difficulties.

The parties filed a hearing report prior to the commencement of the hearing. On the hearing report, the parties entered into numerous stipulations. Those stipulations were accepted and no factual or legal issues relative to the parties' stipulations will be made or discussed. The parties are now bound by their stipulations.

The evidentiary record includes Joint Exhibits 1 through 5, and Claimant's Exhibits 1 through 5.

Claimant testified on her own behalf. The evidentiary record closed at the conclusion of the evidentiary hearing on January 13, 2021. The parties submitted post-hearing briefs on February 26, 2021, and the case was considered fully submitted on that date.

ISSUES[1]

1. Whether claimant has sustained permanent disability to her back as a result of the accepted work injury on April 12, 2018;
2. If so, the nature and extent of permanent disability;
3. Whether claimant is entitled to reimbursement for her independent medical examination (IME) pursuant to Iowa Code section 85.39; and
4. Taxation of costs.

FINDINGS OF FACT

The undersigned, having considered all of the evidence and testimony in the record, finds:

At the time of hearing, claimant was a 31-year-old person. (Hearing Transcript, p. 12) She is married with one child, and lives in Red Oak, Iowa. (Tr., pp. 11-12) Claimant graduated from Red Oak High School in 2008. (Tr., p. 13) She describes herself as a good student, but her grades were in the C-minus to D-plus range in high school. (Tr., pp. 13-14)

Defendants challenged claimant's credibility as a witness in their brief. Defendants attempt to attack claimant's credibility by pointing out some inconsistencies in her testimony and some memory problems. For example, on direct examination, claimant neglected to mention that she had applied for employment at 2 or 3 nursing homes after her termination from Good Samaritan. (Tr., p. 69) This was corrected on cross-examination. (Tr., pp. 70-73) However, the way in which claimant's attorney phrased the question was confusing. Claimant's attorney asked:

> Q: Ms. Ranney, why, when you were looking for jobs, were you not looking for CNA jobs? You said that was your dream.

(Tr., p. 69) Rather than correcting her attorney, claimant simply explained that she did not believe she would be able to do the physical work of a CNA any longer. However, on cross-examination, defense counsel pointed out that after her termination from Good Samaritan, claimant did actually apply for CNA positions. (Tr., pp. 70-73) Claimant had previously testified in her deposition about applying for those positions, which was conducted by defense counsel just over 2 months prior to hearing. (Claimant's exhibit 3, pp. 17-18) It does not make sense that claimant would be intentionally attempting to hide this information, which was already known to defense counsel. Rather, I find it is more likely that she was confused by her attorney's question and nervous about the hearing process in general.

Overall, from my observation of claimant's demeanor at hearing, she appeared sincere. In reviewing the record as a whole, it appears that claimant is a somewhat poor

[1] The issue of penalty benefits is also listed on the hearing report, but neither party briefed the issue. As such, it is considered waived and will not be addressed.

historian. However, I do not find this to be an indication of dishonesty. Poor historians can be credible witnesses. The issues defendants bring up in an attempt to discredit claimant's testimony are insignificant compared to her overall demeanor. I do not believe there was any intent to mislead. Claimant is found credible.

Claimant's first job at age 16 was as a carryout worker at Fareway grocery store. (Tr., p. 14) She eventually moved up to a cashier position. She worked at Fareway for just over one year. (Tr., p. 15) She then went to work at HyVee grocery store as a cashier. (Tr., p. 16) Both positions were part-time work. When she left HyVee, she went back to live with her parents for a period of time to help care for her two youngest brothers so her father could work while her mother attended school. Her brothers were 6 and 8 years old at the time. (Tr., p. 19)

Claimant later started working at Red Oak Rehab, a nursing home. (Tr., p. 18) She worked as a housekeeper, and her duties involved sweeping, mopping, cleaning bathrooms, dusting, stripping and sanitizing beds, trash removal, and laundry. (Tr., pp. 20-21) Her position was part-time. (Tr., p. 20) Claimant resigned her employment at the nursing home after an argument with her supervisor. (Tr., pp. 22-23)

Claimant next went to work at Red Oak Pizza Hut as a cook. (Tr., p. 23) Her job duties included stocking the "prep table" with pizza sauces and toppings, as well as making the pizzas and other menu items. (Tr., pp. 24-25) Claimant testified that the job involved a lot of bending, twisting, lifting, and reaching, especially since she is smaller in stature and only 5' 1" tall. (Tr., pp. 24-25) Her job at Pizza Hut was also part-time. (Tr., p. 26)

While claimant was working at Pizza Hut, she also started taking classes to obtain her certified nursing assistant (CNA) license. (Tr., pp. 28-29) Claimant testified that becoming a CNA had been a passion of hers. Her husband found out that Southwestern Community College was doing a CNA program due to a shortage in the area, so he surprised her by signing her up for the class. (Tr., p. 29) Good Samaritan Center, the defendant employer, was offering to pay for the class, in exchange for an agreement to work for the facility for at least one year following completion. (Tr., p. 35)

Once claimant completed the class and obtained her CNA license, she went to work at Good Samaritan as agreed. (Tr., p. 36) She started there on November 4, 2015. (Tr., p. 37) Her job duties at Good Samaritan included helping residents with a variety of activities of daily living. Because claimant worked the evening shift, she had to get residents ready for bed and help them get into bed. (Tr., p. 39) Some residents required lift assistance using either a sit-to-stand lift or a Hoyer lift. (Tr., pp. 37; 39) Other duties included helping residents eat if needed; helping them with brushing their teeth and/or cleaning dentures; helping them wash their faces; and at times, helping them bathe and helping them walk. (Tr., pp. 38-39) Claimant was also responsible for stripping and sanitizing beds and remaking beds with fresh bedding. (Tr., p. 38) Claimant also had some charting duties, which involved standing at a kiosk mounted to a wall in order to chart residents' activities of daily living. (Tr., p. 40)

Claimant worked at Good Samaritan for about two and a half years. (Tr., p. 43) Claimant worked full-time hours at Good Samaritan, plus overtime, and started at $11.50 per hour. (Tr., p. 40) She eventually received a wage increase to $12.00 per hour. (Tr., pp. 41-42) She had health insurance and life insurance benefits. (Tr., p. 41) There was about one month during the summer of 2017 during which claimant left Good Samaritan to work at Stanton Care Center in Stanton, Iowa. (Tr., p. 43) Claimant testified that she wanted to see what other nursing home experiences were available, when she took the job. However, after about a month, she was terminated, so she went back to her job at Good Samaritan. (Tr., pp. 43; 86)

Claimant testified that she loved her job as a CNA, and got along with her coworkers. (Tr., pp. 41-42) She had a few disciplinary issues involving hygiene, including an incident in which she forgot to put gloves on prior to handling dirty laundry. (Tr., p. 42) She did not remember any other issues, although on cross-examination it was revealed there may have been others. (Tr., pp. 75-80) Claimant denied or did not recall many of the other incidents, and the physical records were not offered as exhibits. Additionally, when claimant left in 2017 to work at Stanton Care Center, she was rehired at Good Samaritan after one month. (Tr., p. 115) Overall, it appears claimant was a fine employee, and enjoyed her job at Good Samaritan.

Claimant was injured while working her usual shift on April 12, 2018. (Tr., p. 44) After the residents ate dinner, claimant went to put one resident to bed around 7 or 8 p.m. The resident required a sit-to-stand lift, which only requires one person to operate. (Tr., p. 44) After claimant got the resident ready for bed, she positioned her on the lift and got her into a standing position. Claimant testified that she then pushed the lift away from the resident's wheelchair and stepped to the side of the lift in order to sit the resident on her bed. (Tr., p. 44) At that point, claimant heard a pop in her lower back. (Tr., p. 45) It did not hurt at the time, so she finished putting the resident to bed.

Claimant then went to the nurse's station and sat down and began to notice numbness in her low back. (Tr., p. 45) She told the charge nurse what happened and completed an incident report. As it was a Friday evening, claimant put the incident report in the mailbox for human resources and went home after completing the remainder of her shift. (Tr., p. 45)

The following Monday, claimant returned to work and spoke with someone in human resources. She was then scheduled for an appointment with Rhonda Purdy, ARNP, at Heartland Mobile Health. (Tr., p. 45) Claimant's first appointment with ARNP Purdy was April 17, 2018. (Joint Exhibit 1, p. 1) Claimant reported pain in the area between L1 and L5 in the midline of her back. She stated that she did not have any radiculopathy down her legs from her back. She did note, however, that for the past 10 years she had experienced left hip pain radiating to the left ankle, as well as left foot numbness. (Jt. Ex. 1, p. 1) She had never sought treatment for the left hip problem, but she was noted to walk with a limp as a result. (Jt. Ex. 1, pp. 1-2) She was encouraged

to seek treatment for this from her primary care physician. She also noted chronic right shoulder pain from an injury she had as a child. (Jt. Ex. 1, p. 1)

With respect to her low back, ARNP Purdy noted that claimant appeared to be uncomfortable, and stood up at times throughout the appointment because sitting caused too much pain. (Jt. Ex. 1, p. 2) ARNP Purdy prescribed medications, including prednisone, Flexeril, and Tramadol, and ordered physical therapy 3 times per week for 3 weeks. (Jt. Ex. 1, p. 3) She also provided claimant with work restrictions until her next follow up appointment. (Jt. Ex. 1, pp. 3; 5)

At her next visit with ARNP Purdy on April 24, 2018, claimant had only been to one physical therapy appointment. (Jt. Ex. 1, p. 7) She also noted that because they were often short-staffed at work, she had been having difficulty working within in her restrictions. (Jt. Ex. 1, pp. 6-7) She reported that her pain was aggravated by standing or sitting too long and by bending. (Jt. Ex. 1, p. 6) She had been taking her prednisone and Flexeril but had not taken any Tramadol yet as she did not know how it would affect her ability to drive and to work and had not had an opportunity yet. (Jt. Ex. 1, p. 7) It is also noted that claimant was only able to attend physical therapy twice per week as opposed to three times due to her son's schedule. After physical examination, ARNP Purdy kept claimant's restrictions in place, and called claimant's employer to try to help keep her within her work restrictions. (Jt. Ex. 1, p. 8) She advised claimant to continue her medications and physical therapy.

Her next visit was on May 1, 2018, at which time she reported pain at a level 3 of 10. (Jt. Ex. 1, p. 10) Her preexisting left hip radicular pain with numbness into the left foot was again noted, and claimant said those symptoms had not changed or worsened with the work injury to her low back. ARNP Purdy notes that after calling claimant's employer the previous week, they had been able to keep claimant within her restrictions, which was helpful to claimant. (Jt. Ex. 1, pp. 10-11) Claimant also reported that the Flexeril and physical therapy were both "very helpful." (Jt. Ex. 1, p. 11) ARNP Purdy extended claimant's physical therapy and restrictions and noted that both are "very crucial in her recovery." (Jt. Ex. 1, p. 12)

At her next visit on May 15, 2018, claimant continued to report improvement with physical therapy and maintaining her work restrictions. (Jt. Ex. 1, p. 14) At that time, her physical therapist felt she had improved 70 percent since the start of her care, and that her efforts in the clinic and with her home exercises had been excellent and consistent. (Jt. Ex. 1, p. 14; Jt. Ex. 2, p. 39) The primary concern at that time was claimant's lack of pelvic stability, as her alignment was off at each therapy session. (Jt. Ex. 1, p. 14) However, she was continuing to progress, so an additional 4 weeks of therapy was ordered. Claimant had discontinued taking Flexeril and was waking up stiff in the morning, so ARNP Purdy advised her to resume taking it. (Jt. Ex. 1, p. 14)

Claimant's next follow up took place on May 30, 2018. (Jt. Ex. 1, p. 19) At that time she reported pain at level 3 or 4 of 10, which she said was unusual as her pain had not more than 1 of 10 over the last week. As a result of the decreased pain, she had not

been taking the Flexeril over the past week. ARNP Purdy asked her to resume the medication while still in physical therapy. (Jt. Ex. 1, p. 19) Her restrictions were also lightened at that time to allow her to do more at work. (Jt. Ex. 1, pp. 20; 22) It is noted in that record that while claimant was frustrated she was not getting better quicker, ARNP Purdy thought of her as a "model patient" and was "convinced that she is doing everything she can to get better as soon as possible." (Jt. Ex. 1, p. 20)

At the end of May, 2018, claimant was terminated from her position at Good Samaritan. Claimant testified that she was terminated because she was eating ice cream in the dining room while feeding residents, and for asking another CNA to do her "transitional duties." (Tr., p. 52) Claimant received unemployment benefits following her termination. (Tr., pp. 120-121)

At claimant's next follow up visit on June 13, 2018, she advised that she had been terminated from employment. (Jt. Ex. 1, p. 23) At her appointment with ARNP Purdy, she advised that her pain was at a level 3 or 4 and going into the left hip. (Jt. Ex. 1, p. 23) She had completed 14 visits of physical therapy, and the physical therapist did not know what more they could do for her. (Jt. Ex. 1, p. 23) She had not resumed her Flexeril as instructed. It is noted that claimant advised she wanted to get an MRI, and ARNP Purdy told her that she might be able to get an MRI for the radicular hip pain she had for the past 10 years, but that was prior to this injury. (Jt. Ex. 1, pp. 23-24) It is noted that claimant responded that she no longer had insurance due to being fired, and "I need someone to pay for this." (Jt. Ex. 1, p. 24) Claimant testified that she did not say "I need someone to pay for this," but rather said she did not know how she was going to pay for it. (Tr., p. 54) Claimant explained that she did not understand at the time that workers' compensation would continue to pay for her medical treatment after her termination from employment. (Tr., pp. 53; 99-100)

In any event, ARNP Purdy noted that because claimant's condition had not improved, she would refer her to a spine specialist, specifically J. Brian Gill, M.D. at Nebraska Spine Center, as she knew that was who defendant employer typically used. (Jt. Ex. 1, p. 25)

Claimant saw Dr. Gill on July 24, 2018. (Jt. Ex. 4) Claimant testified that Dr. Gill spoke to her for about 10 to 15 minutes, and it did not seem like he was paying attention to what she said. (Tr., p. 55) His record notes that claimant's chief complaint is "low back pain radiating into bilateral hips and legs." (Jt. Ex. 4, p. 47) His note further states that she has had "back and left leg pain for 24 years, but this became worse on April 12, 2018." (Jt. Ex. 4, p. 47) Claimant testified that she did not tell Dr. Gill that she had back pain for 24 years, but that she had left hip pain for 10 years. (Tr., p. 56) Claimant also pointed out that she was 29 years old at the time of Dr. Gill's appointment, which means she would have been 4 or 5 years old when her back pain started if his note was accurate. (Tr., p. 56) In any event, Dr. Gill ordered an MRI, which demonstrated disc degeneration at L4-5 and L5-S1, with no evidence of spinal stenosis or disc herniation. (Jt. Ex. 4, pp. 50; 53-54) Dr. Gill stated that claimant's back pain was likely related to the disc degeneration, and it was temporarily aggravated during her job. (Jt. Ex. 4, p. 50)

He had no surgery to recommend, and stated that treatment would consist of symptomatic care only. He released claimant to return to work with no restrictions. (Jt. Ex. 4, pp. 50; 52)

Claimant's back pain continued, and she asked for a second opinion. (Tr., p. 58) On October 8, 2018, she was seen at Red Oak Methodist Physicians Clinic by Claudia Balta, PA-C. (Jt. Ex. 5, p. 61) The record notes that claimant was trying to get employed at Griswold Care Center, and thought she was there for a physical for work. PA-C Balta noted that claimant had a work-related back injury and conservative treatment. The record also states that claimant represented her MRI showed "2 lumbar discs that were 'shot.'" (Jt. Ex. 5, p. 61) Claimant advised that her low back pain ranged from a 2 to 6 out of 10, and if she sits for long periods of time, she gets numbness down her left leg. PA-C Balta asked claimant to obtain and provide copies of the records from Nebraska Spine, as well as the MRI, prior to making any recommendations. She changed claimant's medication, but other than that, no additional treatment was offered. (Jt. Ex. 5, pp. 61-62)

Claimant had one additional appointment at Methodist Physicians Clinic on April 9, 2019, this time with Warren Hayes, M.D. (Jt. Ex. 5, p. 66) Dr. Hayes noted symptoms of low back pain with radiation to the left leg. There is no mention of her preexisting left hip and leg pain. Claimant testified that if she did not tell Dr. Hayes about the preexisting hip pain, it was because it was not relevant to why she was there. (Tr., p. 106) Dr. Hayes notes that claimant's low back pain has been persistent since the work injury on April 12, 2018. (Jt. Ex. 5, p. 66) Claimant reported pain between 1 and 2 out of 10 on a daily basis, and up to an 8 of 10 at worst. (Jt. Ex. 5, p. 66) Dr. Hayes noted that the records from Nebraska Spine had not been provided, nor the findings of the MRI. (Jt. Ex. 5, p. 68) However, he concluded that clinically, claimant had "chronic back pain stemming likely from this injury based on the patient's history." He did not recommend any specific treatment as he did not have the MRI results. (Jt. Ex. 5, pp. 68-69) Claimant has not had any other treatment related to her low back since that time. She testified that she does not feel any of the doctors can help, so she has not sought additional treatment. (Tr., pp. 58-59)

In February of 2019, claimant began working at HyVee in Red Oak once again. (Tr., p. 60) At that time, she was working part-time hours and made $9.50 per hour. Claimant testified that since she had last worked at HyVee, the store had gotten hand-held scanners, so she was able to scan heavier items without the need to lift them. (Tr., p. 61) In October of 2019, she was given the option to go to a full-time position in the kitchen. The kitchen job did not require any heavy lifting, and claimant was able to do the job. (Tr., pp. 61-62) Unfortunately, claimant's position was eventually eliminated, and she was laid off. (Tr., pp. 63; 87)

In July of 2020, claimant started working at a gas station called Lincoln Farm and Home – BP. (Tr., p. 64) She was still employed there at the time of hearing. She works as a cashier, and also makes the pizzas and lunch sandwiches that are put out for customers. (Tr., p. 64) When she was hired, she explained to the manager that with her

back injury, there were certain tasks she would not be able to perform, such as heavy lifting, pushing, and pulling. (Tr., p. 65) Her manager accepted those limitations and claimant is not required to do certain tasks that she feels will aggravate her pain. For example, claimant helps wipe down the few tables in the building, but the manager does all of the sweeping and mopping. (Tr., p. 65) Claimant helps stock lighter inventory, such as chips, snacks, and candy, but her manager stocks the freezer and coolers. (Tr., p. 66) Claimant works part-time, about 31 hours per week, and makes $11.00 per hour. (Tr., pp. 66-67) She does not have benefits. She was offered full-time work, but the hours were such that claimant would not be able to see her young son, so she turned it down to continue her current part-time day shift. (Tr., p. 67)

On October 6, 2020, Dr. Gill authored a letter to claimant's attorney in response to her questions. (Jt. Ex. 4, pp. 59-60) He noted his diagnoses were lumbago, lumbosacral disc degeneration, and pain in the left leg. He did not provide any work restrictions and believed claimant's prognosis was good and she does not have any impairment rating. When asked about causation, Dr. Gill stated as follows:

> The patient states that she had had back pain and left leg pain for 24 years. At the time patient was 29 years old. She was simply at work helping a patient stand up. The patient did not disclose any type of information where she fell or sustained any type of traumatic event. The patient had a temporary aggravation of underlying degenerative disc.

(Jt. Ex. 4, p. 59)

Dr. Gill went on to state that claimant "likely had a flare up of her underlying symptoms," and stated she was able to return in a full duty capacity. (Jt. Ex. 4, p. 60) He did not believe she needed any surgery or other treatment.

On December 2, 2020, claimant had an independent medical evaluation (IME) with Charles Taylon, M.D. (Cl. Ex. 1) Claimant testified that her appointment with Dr. Taylon lasted about 30 to 40 minutes. (Tr., pp. 117-118)[2] Dr. Taylon's report is dated December 3, 2020. (Cl. Ex. 1, p. 1) Dr. Taylon notes that claimant sustained a low back injury at work, and further makes note of claimant's "separate chronic problem related to her left hip and leg." At the time of the IME, claimant complained of ongoing, constant, midline low back pain. She did not have any complaints of radicular pain, paresthesias, or weakness related to the back injury. (Cl. Ex. 1, pp. 1-2)

Dr. Taylon reviewed the medical records and performed a physical examination. He noted decreased range of motion of the lumbar spine. (Cl. Ex. 1, p. 2) Dr. Taylon concluded that due to the work injury on April 12, 2018, claimant sustained a mechanical musculoligamentous injury to her lumbar spine. (Cl. Ex. 1, p. 2) That injury is separate from her long-standing left hip and leg pain, and her current pain symptoms are not related to her past condition. Dr. Taylon recommended permanent restrictions of

[2] It is noted that throughout the hearing transcript, Dr. Taylon is mistakenly referred to as Dr. Kalar.

40 pounds lifting, with no repetitive bending or twisting, directly related to the work injury. (Cl. Ex. 1, p. 2) He provided a 5 percent impairment rating to the body as a whole and did not anticipate significant future medical expenses. (Cl. Ex. 1, p. 2)

I find Dr. Taylon's opinions to be more convincing than those of Dr. Gill. While claimant has made it clear that she had experienced left hip and leg issues for about 10 years prior to the work injury, there is no evidence that she ever experienced back pain prior to the work injury. Her unrebutted testimony is that prior to the work injury, she had never had any treatment for her low back. (Tr., p. 121) Dr. Gill's statement that claimant had back and left leg pain for 24 years is incorrect. He notes that claimant's back pain is likely related to the disc degeneration seen on the MRI, but states it is only a temporary aggravation or flare up of her underlying symptoms. The evidence establishes, however, that claimant did not have any low back symptoms prior to the work injury. Dr. Gill's opinions are based on an incorrect understanding of claimant's history and are not reliable as a result.

To the contrary, Dr. Taylon's opinions are based on a more accurate understanding of claimant's preexisting condition related to her hip and leg. With the understanding that the hip and leg pain is a separate and distinct issue from her low back pain, Dr. Taylon found that claimant should have permanent work restrictions and found permanent functional impairment. Dr. Taylon's opinions are supported by claimant's testimony that she continues to have pain. Again, there is no evidence that claimant ever had treatment or any significant problems with her low back prior to the work injury. There is no additional treatment recommended that will help her to improve. As such, I find that the evidence in the record proves that the work injury caused a permanent injury to claimant's low back.

Claimant lives in a small town with limited job opportunities, especially given claimant's physical restrictions. (Tr., p. 59) She did apply for other jobs as a CNA following her termination from Good Samaritan, but was turned down for one job based on her pre-employment physical. (Tr., p. 71) She was offered one position, but it was in a retirement home as opposed to a nursing home, which did not require her CNA license. (Tr., pp. 118-119) As such, it did not require any heavy lifting or as much physical work as a nursing home, where the residents require more assistance. (Tr., p. 119) Claimant declined the job offer when she discovered a CNA license was not required, as she worried that if something were to happen on her shift, she could lose her license. (Tr., pp. 119; 121-123)

Claimant testified that she does not believe she is physically capable of performing many of the jobs she has held in the past. For example, she does not believe she could physically perform the grocery carryout job, due to her back injury. (Tr., p. 15) She could not perform the housekeeping job she had at Red Oak Rehab, due to the physical nature of the job. (Tr., pp. 21-22) She does not believe she could perform the job as a cook at Pizza Hut, due to the lifting, reaching, twisting, and bending. (Tr., pp. 26-27) Finally, claimant does not believe she is capable of working as a CNA any longer, due to the physical nature of the job. (Tr., p. 69) While claimant

agreed that her job at Good Samaritan had a 40-pound lifting requirement, she also testified that the patient lift devices weigh 50 pounds on their own. (Tr., pp. 74-75; 90; 110-111) Additionally, she has been turned down for employment by at least one nursing home based on her physical condition. (Tr., p. 71)

While claimant is currently employed, she makes significantly less than she did as a CNA at Good Samaritan. At the time of her injury, claimant was working full time, plus overtime, earning $12.00 per hour, and had benefits. The parties stipulated that her average weekly wage was about $562.00. (See Hearing Report) At the time of hearing, claimant was working part time, approximately 31 hours per week, and making $11.00 per hour, meaning her gross pay is around $341.00 per week, a reduction of nearly 40 percent. While claimant was offered full-time hours, had she accepted she would still have a reduction of approximately 22 percent due to the decreased hourly wage and lack of overtime hours. She no longer has benefits. Dr. Taylon has recommended permanent restrictions of 40 pounds lifting, with no repetitive bending or twisting. Her manager is making informal accommodations so that claimant does not have to perform any tasks that will aggravate her pain. Prior to her current job, claimant was working at HyVee, making only $9.50 per hour. Based on all of the above factors, I find that claimant has sustained a 25 percent loss of earning capacity.

CONCLUSIONS OF LAW

Defendants have challenged claimant's credibility as a witness. When assessing witness credibility, the trier of fact "may consider whether the testimony is reasonable and consistent with other evidence, whether a witness has made inconsistent statements, the witness's appearance, conduct, memory and knowledge of the facts, and the witness's interest in the [matter]." State v. Frake, 450 N.W.2d 817, 819 (Iowa 1990). Claimant has an obvious interest in the outcome of this case. However, I had the opportunity to observe her testify, under oath, during the hearing. During her testimony, she did engage in appropriate eye contact, her rate of speech was appropriate, and she did not make any furtive movements. She appeared sincere. While she is a somewhat poor historian, I do not find this to be an indication of dishonesty. Poor historians can be credible witnesses. I do not believe there was any intent to mislead. I found her testimony reasonable and consistent with the other evidence I believe. Claimant is found credible.

Claimant has alleged that the work injury that occurred on April 12, 2018 caused permanent disability to her low back. Defendants argue that claimant's injury only resulted in a temporary aggravation of her preexisting degenerative condition.

The party who would suffer loss if an issue were not established ordinarily has the burden of proving that issue by a preponderance of the evidence. Iowa R. App. P. 6.904(3)(e). 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).

I found Dr. Taylon's opinions more reliable than those of Dr. Gill. Dr. Taylon expressed a more accurate understanding of claimant's prior condition, specifically that her long-term complaints related to her left hip and leg are separate and distinct from the work-related back injury. Dr. Gill incorrectly believed that claimant had suffered from low back pain for 24 years. As such, he opined that the work injury only caused a temporary aggravation or flare up of her preexisting condition. Because his opinion is based on inaccurate information, it is not reliable.

Claimant had no complaints of or treatment for low back pain prior to the work incident on April 12, 2018. While she had a long history of left hip and left leg pain, she has always maintained those issues are separate and distinct from her low back injury. Claimant has been through conservative treatment. Her condition is not surgical. There is no additional treatment recommended at this time that will help her to improve. She continues to have pain in her low back. Based on those factors, and Dr. Taylon's opinions, I found that the work injury caused a permanent injury to claimant's low back.

The next issue to determine is the extent of permanent disability. Because claimant sustained an injury to the body as a whole, it is compensated pursuant to Iowa Code section 85.34(2)(v). That section states:

> In all cases of permanent partial disability other than those hereinabove described or referred to in paragraphs 'a' through 'u' hereof, the

> compensation shall be paid during the number of weeks in relation to five hundred weeks as the reduction in the employee's earning capacity caused by the disability bears in relation to the earning capacity that the employee possessed when the injury occurred. A determination of the reduction in the employee's earning capacity caused by the disability shall take into account the permanent partial disability of the employee and the number of years in the future it was reasonably anticipated that the employee would work at the time of the injury. If an employee who is eligible for compensation under this paragraph returns to work or is offered work for which the employee receives or would receive the same or greater salary, wages, or earnings than the employee received at the time of the injury, the employee shall be compensated based only upon the employee's functional impairment resulting from the injury, and not in relation to the employee's earning capacity.

In this case, claimant did not return to work at the same or greater salary, wages, or earning that she received at the time of the injury. At the time of the injury, she was working a full-time job, with opportunities for overtime, and making $12.00 per hour. She was terminated from employment while still on light duty restrictions. At the time of hearing, claimant was working a part-time job making $11.00 per hour. As such, claimant's permanent partial disability is measured by her lost earning capacity.

As defendants point out, Dr. Taylon did not provide any information as to whether his rating is based upon the AMA Guides to the Evaluation of Permanent Impairment, nor the basis for the rating. However, because claimant's permanent partial disability is measured by her lost earning capacity, and not her functional impairment, Iowa Code section 85.34(2)(x) does not apply. That section states that permanent impairment shall be determined solely by using the AMA Guides "when determining functional disability *and not loss of earning capacity*." Iowa Code section 85.34(2)(x) (emphasis added). As such, while Dr. Taylon's impairment rating is considered, it is not the sole basis for claimant's award in this case.

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 [her] 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. A determination of the reduction in an employee's earning capacity must additionally consider the employee's permanent partial disability and the number of years in the future it was reasonably anticipated that the employee would work at the time of the injury. Iowa Code § 85.34(2)(v).

At the time of hearing, claimant was 31 years old. She is a high school graduate who got Cs and Ds in school. She obtained her CNA license, but it has since lapsed as she has not worked as a CNA since 2018. Claimant testified that many of the jobs she has previously held, she would not be able to do today due to her back pain and physical limitations. Dr. Taylon has recommended permanent restrictions of 40 pounds

lifting, with no repetitive bending or twisting, directly related to the work injury. While she is currently employed, her earnings have decreased by nearly 40 percent. While she was offered full time hours, had she accepted, her reduction in earnings would still be around 22 percent. Her manager is making informal accommodations so that claimant does not have to perform any tasks that will aggravate her pain. Prior to her current job, claimant was working at HyVee, making only $9.50 per hour. There are not many other jobs in the small community where claimant lives that she can do with her physical limitations, prior experience, and education.

Considering all the relevant factors of industrial disability, I find that claimant has sustained a 25 percent loss of earning capacity. I therefore conclude that claimant is entitled to 25 percent industrial disability, for which she is entitled to 125 weeks of permanent partial disability (PPD) benefits. Based on the parties' stipulation, PPD benefits commence on July 24, 2018.

The next issue to determine is claimant's entitlement to payment of her independent medical examination (IME) pursuant to Iowa Code section 85.39. Defendants conceded in their brief that claimant is entitled to reimbursement. As such, to the extent they have not done so previously, defendants shall reimburse claimant's IME with Dr. Taylon in the amount of $2,500.00. (Cl. Ex. 5, pp. 34-35)

The final issue to determine is claimant's request for taxation of costs. Assessment of costs is a discretionary function of this agency. Iowa Code § 86.40. Costs are to be assessed at the discretion of the deputy commissioner or workers' compensation commissioner hearing the case. 876 IAC 4.33.

Claimant seeks reimbursement for copies of medical records from Nebraska Spine Center; the filing fee for filing her petition; payment for Dr. Gill's report; and payment of the deposition transcript. (Cl. Ex. 5, p. 33) Pursuant to 876 IAC 4.33(86), copies of medical records are not an appropriate item to tax as a cost. However, the remainder of claimant's claimed costs are appropriate, and as she was successful in her claim, I use my discretion to award them. As such, defendants shall reimburse claimant for the $100.00 filing fee; $700.00 for Dr. Gill's report; and $92.40 for the deposition transcript. (Cl. Ex. 5, p. 33)

ORDER

THEREFORE, IT IS ORDERED:

Defendants shall pay claimant one hundred twenty-five (125) weeks of permanent partial disability benefits, commencing on the stipulated date of July 24, 2018.

All benefits shall be paid at the stipulated rate of three hundred eighty-six and 23/100 dollars ($386.23).

Per Defendants' agreement, defendants shall reimburse the cost of Dr. Taylon's IME in the amount of two thousand five hundred and 00/100 dollars ($2,500.00).

Defendants shall reimburse claimant's costs in the amount of eight hundred ninety-two and 40/100 dollars ($892.40), representing $100.00 for the filing fee; $700.00 for Dr. Gill's report; and $92.40 for the deposition transcript.

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 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 16th day of November, 2021.

JESSICA L. CLEEREMAN
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Laura Pattermann (via WCES)

M. Anne McAttee (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.