ELECTRONICALLY FILED 2020-Feb-03 10:20:54 DIVISION OF WORKERS' COMPENSATION

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

MICHELLE FLATTERY, Claimant, vs. PERFICUT LANDSCAPE, Employer, and NATIONWIDE MUTUAL INSURANCE COMPANY, Insurance Carrier, Defendants.	File Nos. 5059302, 5059303 A R B I T R A T I O N D E C I S I O N Head Note No. 1108, 1803

STATEMENT OF THE CASE

The claimant, Michelle Flattery, filed two petitions for arbitration and seeks workers' compensation benefits from Perficut Landscape, employer, and Nationwide Mutual Insurance Company, insurance carrier. The claimant was represented by Jason Neifert. The defendants were represented by Jessica Cleereman.

The matter came on for hearing on September 10, 2018, before Deputy Workers' Compensation Commissioner Joe Walsh in Des Moines, Iowa. The record in the case consists of joint exhibits 1 through 12. The claimant testified under oath at hearing. Debra Hoadley was appointed the official reporter and custodian of the notes of the proceeding. The matter was fully submitted on November 2, 2018, after helpful briefing by the parties. The parties did an excellent job of managing the record with relevant exhibits and narrowing the issues.

ISSUES

The parties submitted the following issues for determination:

File No. 5059302:

1. Whether the claimant sustained an injury on either July 22, 2016, or July 26, 2016, which arose out of and in the course of her employment. The date the alleged injury occurred is, itself, in dispute.

2. Whether the claimant is entitled to healing period benefits between July 26, 2016, and August 4, 2016.

3. Whether the alleged injury is a cause of permanent disability, and, if so, the nature and extent of such disability.

4. Whether the claimant is entitled to medical expenses under Iowa Code section 85.27.

File No. 5059303:

1. Whether the claimant is entitled to healing period benefits between July 26, 2016, and August 4, 2016.

2. Whether the claimant sustained any permanent disability as a result of the stipulated May 23, 2016, work injury.

3. Whether the claimant is entitled to any permanent partial disability benefits, and if so, the nature and extent of the disability, and the commencement date.

4. Whether the claimant is entitled to medical expenses under Iowa Code section 85.27.

STIPULATIONS

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

File No. 5059302:

1. The parties had an employer-employee relationship.

2. Temporary disability/healing period and medical benefits are no longer in dispute.

3. The commencement date for any permanent disability benefits is August 5, 2016.

4. The parties stipulate to the elements comprising the rate (AWW $520.00, S3) and believe the weekly rate of compensation is $348.65.

5. There is no issues regarding credit.

6. Affirmative defenses have been waived.

File No. 5059303:

1. The parties had an employer-employee relationship.

2. Claimant sustained an injury, which arose out of and in the course of her employment on May 23, 2016. This injury date was originally pled as May 22, 2016, however was amended at hearing without objection to May 23, 2016.

3. The injury is a cause of some temporary disability during a period of recovery. While the defendants contest that they are responsible for temporary disability benefits between July 26, 2016, and August 4, 2016, they stipulate that she was off work during this period.

4. The parties stipulate to the elements comprising the rate (AWW $520.00, S3) and believe the weekly rate of compensation is $348.65.

5. There is no issues regarding credit.

6. Affirmative defenses have been waived.

FINDINGS OF FACT

Claimant, Michelle Flattery, was 48 years old as of the date of hearing. She testified live and under oath at hearing. I find her testimony to be generally credible. Her testimony appears to be generally consistent with the remainder of the record and there was nothing about her demeanor at hearing which caused the undersigned concern regarding her truthfulness. She did, at times, appear nervous and provided informal answers to questions.

Ms. Flattery is divorced and has three children. She was a stay at home mom for a period of time. She has a Bachelor's Degree from Iowa State University in art and design. She is bright and articulate. She worked on and off as a receptionist for McFarland Clinic from 1993 to 2015. She has also performed part-time work as a fitness instructor and personal trainer for a variety of employers in the Ames, Iowa area. She has taught biking, spinning, yoga and weight training classes. She continued to work as a fitness instructor as of the date of hearing.

Perficut hired Ms. Flattery to perform general landscaping work in May 2016. She testified that she had undergone chemotherapy and radiation treatment and she was looking for work which would keep her active. (Transcript, page 19) She was hired to perform work such as planting, weeding and maintaining landscaping in the Des Moines area.

On her first day of employment she was involved in a rather serious workplace accident. While performing work tasks for a residential customer, a coworker asked her to move a work truck. She did so, however, after she put the truck in park, the vehicle began to roll backward down a hill. She was unable to stop it. Ultimately, Ms. Flattery jumped from the moving vehicle and landed face down on the road. Photos of Ms. Flattery immediately following the accident confirm the injury was significant. The fact of an injury which arose out of and in the course of her employment is stipulated by the parties.

Ms. Flattery testified that her whole body hurt immediately following the accident. She was taken to Mercy Hospital for treatment. The emergency room records documented that the vehicle was traveling less than 15 to 20 miles per hour when she jumped from it. (Joint Exhibit 1, page 1) She was diagnosed with a left knee contusion, a jaw contusion, facial abrasions and a right upper shoulder abrasion. (Jt. Ex. 1, p. 3) She was released with medications and instructed to follow up in a few days. A week later, Ms. Flattery sought emergency treatment at Mary Greeley in Ames for symptoms of dizziness, nausea, headache and excessive sleeping. (Jt. Ex. 2) She was diagnosed with a concussion. (Jt. Ex. 2, p. 6) At that time, she complained of hearing loss, however, there is not a detailed explanation of this. (Jt. Ex. 2, p. 6)

On June 7, 2016, Charles Mooney, M.D., at McFarland Clinic evaluated Ms. Flattery. She reported some improvement, however, she still complained of neck and upper back pain and swelling in her left leg. Dr. Mooney diagnosed multiple contusions mild post-concussive symptoms, cervical strain and some infection in her left leg wound. (Jt. Ex. 3, p. 13) He reevaluated her on June 11, 2016, and documented improvement in her symptoms. She was allowed to return to work with sedentary restrictions on June 20, 2016.

On June 24, 2016, Ms. Flattery reported concerns regarding her hearing. "She is doing very well. She is a little concerned that she has had some hearing changes. However, her screening hearing exam here is entirely normal, and she has also been suffering with some allergies." (Jt. Ex. 3, p. 16) Dr. Mooney continued to follow her as her contusions and infection healed over the next several weeks. Dr. Mooney kept her on restrictions but allowed her to do more physical activities. The treatment for her contusions and infection lasted longer than initially expected by Dr. Mooney because the infection recurred. (Jt. Ex. 3, p. 18) By mid-July she returned to some of her work as a fitness instructor as well. (Tr., pp. 31-32) She was on light-duty at Perficut during this timeframe.

At hearing, Ms. Flattery testified to the following:

> A. I was back at work, and I was working or doing flowers, pulling weeds. And that day after work I felt pain here in my bellybutton area and showed my supervisor, and she said get – probably should get it looked at.

(Tr., pp. 29-30) She testified the conversation with her supervisor happened at the end of the workday but she did not testify as to which day precisely.

On July 26, 2016, Ms. Flattery called McFarland Clinic.

> Patient called on Tuesday July 26th stating she noticed last night that her belly button was sore. Hurt to touch, she had just started teaching exercise classes again as she is a Fitness Instructor. Starting using her muscles again after not using for A [sic] few weeks. Per Dr. Mooney he

> did not feel it was related to her June 2016 injury since she just noticed it on Monday July 25th.

(Jt. Ex. 3, p. 20) She went to Mark Taylor, M.D., at McFarland Clinic the following day, July 27, 2016. He documented the following:

> Very painful and somewhat erythematous incarcerated UH after lifting at work yesterday
>
> No GI symptoms
>
> Very stoic patient, but gentle attempts at reduction unsuccessful.
>
> Does not appear to be part of old midline incision.
>
> Recommend outpatient reduction and repair
>
> Too urgent to get approval from Work Comp

(Jt. Ex. 3, p. 19) Thereafter, medical notes document ongoing conversations about the compensability of this claim through workers' compensation. (Jt. Ex. 3, pp. 20-21)

On July 29, 2016, Ms. Flattery wrote an email to Perficut, stating her "hernia came from weakened muscles from accident and everyday duties at work… Pruning (bending) pulling weeds etc." (Jt. Ex. 10, p. 62) She sought to turn in a claim form for the injury. On August 4, 2016, Ms. Flattery followed up with Dr. Taylor on August 4, 2016. The parties have stipulated that she was off work from June 26, 2016, through August 4, 2016. Dr. Taylor noted that her wound looked great and allowed her to return to work the following day, August 5, 2016. (Jt. Ex. 3, pp. 22-23) Dr. Taylor also documented the following. "She is after me about teaching hot yoga and spin class and I don't really trust her not to strain, so I read her the law about no straining for 4 weeks postop". (Jt. Ex. 3, p. 22) On August 5, 2016, she returned to Dr. Mooney. At that time he listed three diagnoses, including symptoms of thoracic and lumbar back pain, contusion of the left knee (resolved), and closed head trauma. He recommended physical therapy and some spine x-rays. (Jt. Ex. 3, p. 24) He placed some light-duty restrictions on her as well.

Ms. Flattery started physical therapy on August 8, 2016. (Jt. Ex. 5) On August 9, 2016, the insurance carrier wrote to Dr. Taylor seeking a medical causation opinion regarding her hernia condition. (Jt. Ex. 4, p. 37) Dr. Taylor responded with a lengthy explanation of all of the reasons it was impossible for him to provide a medical causation opinion.

> To Whom It May Concern:
>
> This is in response to your letter from August 9th, 2016, which I received today, August 26th, 2016. Ms. Flattery presented to me on July

> 27th, 2016 complaining of a painful umbilicus. Exam clearly showed a painful erythematous, incarcerated umbilical hernia. It could not be reduced by an aggressive, experienced surgeon (me), so she required urgent reduction and repair.
>
> Patient stated at that time that she had been operating within weight restrictions at work, and she has an otherwise active lifestyle. I have observed her over the years with several surgical interventions, to be a stoic and truthful individual.
>
> Your request to "state within a reasonable degree of medical certainty the cause of the hernia" places me in an untenable professional conundrum, as usual in these cases. I can no more tell you the cause of a hernia by looking at it than I could tell you the color of the cow if you showed me a glass of milk.
>
> Both you and the employee obviously have ulterior financial motives to get me to say the hernia happened for one reason or the other, but scientifically and ethically I can only verify that the hernia happened and was incarcerated and required repair, and was not present the previous time I examined her.
>
> I cannot and will not participate in the "who said what happened when" game. I hope you can appreciate this earnest respectful dialogue.

(Jt. Ex. 4, p. 38)

By August 25, 2016, she called Dr. Taylor's office to ask when she could start yoga again. (Jt. Ex. 3, p. 26) On August 31, 2016, Dr. Mooney followed up with her for her ongoing back and left knee symptoms, as well as her hearing loss complaints. "She reports that since the time of her injury, she has been having intermittent difficulties with her hearing. She does not know whether one side or the other is affected, just has general difficulties in hearing and understanding speech." (Jt. Ex. 3, p. 27) His diagnosis was symptoms of hearing loss, with a history of minor closed head trauma. (Jt. Ex. 3, p. 27) He ordered a baseline audiogram and kept her on restrictions for her back and left knee. The audiogram was performed the same day and did demonstrate evidence of bilateral hearing loss "most prominent between 3000 and 8000 Hz, right is somewhat greater affected than left. No previous baseline is available." (Jt. Ex. 3, p. 28) Dr. Mooney told her he felt this is "most consistent with exposure to chemotherapy agents or other types of toxins rather than the minor head trauma which she sustained." (Jt. Ex. 3, p. 28) In September 2016, he discussed the audiogram with her in more detail and reiterated that her hearing loss was not likely related to head trauma. (Jt. Ex. 3, p. 32) At this time, Ms. Flattery was also complaining of changes in her vision. Dr. Mooney released her without restrictions for her back and knee conditions but recommended she follow up with the orthopedist and complete her physical therapy.

On September 22, 2016, Dr. Taylor wrote a letter which simply stated, "Michelle Flattery's hernia was probably work related." (Jt. Ex. 4, p. 39) There is little explanation or context for this letter in the record. Ms. Flattery testified under oath that she believed the insurance carrier had pressed Dr. Taylor for a more definitive answer. (Tr., pp. 50-51) In their brief, defendants seem to contest this, pointing out there is no evidence they asked for further opinion after his August 2016, letter. (Def. Brief, p. 9) The defendants, however, called no witnesses.

In October 2016, Ms. Flattery saw an orthopedist at McFarland for her left knee who released her from care without medical restrictions. (Jt. Ex. 3, p. 33)

On October 10, 2016, Ms. Flattery was evaluated by Richard Rinehart, M.D., at the Iowa Clinic for her hearing complaints. He took a full history and examined her. He documented that she "jumped from a truck going 30 mph". (Jt. Ex. 6, p. 46) He reviewed the audiometry testing and diagnosed sensorineural hearing loss of both ears. (Jt. Ex. 6, p. 47)

> I don't see anything obvious from a traumatic standpoint. She has some hearing loss that is a bit more than expected for an individual this age however she also has a history of probable loss of some degree since childhood. It is possible she had some slight deterioration from the accident but this is subjective without confirming audial. I also think that whether or not this is the case there really isn't much we can do for it at this time. Might have a temporary threshold shift recovery in months ahead. At some point she will have to consider hearing aid.

(Jt. Ex. 6, p. 47)

Ms. Flattery has had no further medical treatment for any of her conditions since being released. In the summer of 2017, Ms. Flattery quit employment with Perficut. (Tr., p. 44) She continues to work as a fitness instructor and has expanded the scope of this work to teaching Wellness classes at Mary Greely. (Tr., p. 43) Neither of Ms. Flattery's ongoing medical conditions, hearing loss or hernia, have had significant ongoing impacts on her employability.

Ms. Flattery did have an independent medical evaluation (IME) arranged by her attorney with Tom Hansen, M.D., in July 2018. Dr. Hansen is Board Certified in Anesthesiology, as well as Board Certified American Board of Independent Medical Examiners. (Jt. Ex. 7, p. 54) Dr. Hansen reviewed her medical records, took a medical history and performed an examination on claimant. (Jt. Ex. 7, pp. 49-52) He evaluated all of her conditions, including her knee sprain and facial contusions (for which he found no permanent impairment). Regarding her hearing loss, he diagnosed high "frequency hearing loss on the right ear which occurred immediately after the accident, noted on 5/23/16." He also diagnosed "labyrinthine concussion with hearing loss in the right ear." (Jt. Ex. 7, p. 52) He provided a three percent whole body impairment rating for this

condition using The AMA Guides based upon the audiogram. (Jt. Ex. 7, p. 52) He opined her hearing loss was related to her work accident. (Jt. Ex. 7, p. 53)

Regarding the hernia, he rated her umbilical hernia, again using The Guides. "There was a palpable defect that remains, yet no presence of persistent hernia." (Jt. Ex. 7, p. 52) He assigned a three percent whole body rating for this as well. He opined she was at maximum medical improvement and did not need restrictions. He opined her hernia was related to claimant's "work related activities" for the employer, relying upon her statements, as well as the medical opinion of Dr. Taylor. (Jt. Ex. 7, p. 53)

CONCLUSIONS OF LAW

The first question is whether claimant's May 23, 2016, work injury is a cause of any permanent disability, and, if so, the nature and extent of the disability.

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).

The parties stipulated that claimant suffered an injury which arose out of and in the course of her employment on May 23, 2016. On that date, she moved a company water truck and attempted to park it on a hill. The truck rolled backward down the hill and Ms. Flattery was unable to stop it from rolling. There is some dispute regarding how fast it was traveling when she jumped out, however, whether it was traveling 15 or 25 miles per hour, the accident itself was not insignificant. She landed face down in the street and suffered numerous contusions over her whole body. (Jt. Ex. 9) Fortunately, after a period of time, her left knee, as well as her low and mid back healed up quite nicely. She makes no claim for permanency benefits based upon those injuries. The

fighting dispute regarding the May 23, 2016, work injury revolves around her head injury and hearing loss.

Ms. Flattery testified that she noticed hearing loss on the date of the accident. (Tr., p. 28) Her complaints about hearing difficulties were documented in a visit to the emergency room a week later when she was diagnosed with a concussion. Over the next few months she was provided treatment for what Dr. Mooney diagnosed as a minor closed head trauma. Dr. Mooney documented and described her hearing loss symptoms as intermittent, rather than consistent. She underwent two separate audiograms, both of which demonstrated some mild bilateral hearing loss "most prominent between 3000 and 8000 Hz, right is somewhat greater affected than left. No previous baseline is available." (Jt. Ex. 3, p. 28) Neither Dr. Mooney, nor Dr. Rinehart were willing to connect the hearing loss documented in the audiogram with her closed head trauma suffered in the injury. Both physicians wrote credible medical causation opinions indicating their opinions regarding underlying causes of her hearing loss. (Jt. Ex. 3, p. 28; Jt. Ex. 6, p. 47)

The claimant did present an expert opinion from her expert, Dr. Hansen. He diagnosed labyrinthine concussion with hearing loss in the right ear. He opined the condition is permanent and assigned a 3 percent whole body impairment rating for this condition.

It is noted that I believe Ms. Flattery. I believe her that she first noticed her hearing loss most prominently after her work accident. I also believe her that she believes this unfortunate accident caused her hearing loss. I find, however, that she has failed to meet her burden of proof for medical causation with regard to her hearing loss claim. There are a number of other possible explanations in this record for how her hearing loss may have developed. Dr. Mooney suggested it may have been due to various exposures to toxins related to her chemotherapy and radiation treatment. Dr. Rinehart indicated there was a family history of hearing loss issues, which claimant had related to him. (See Tr., pp. 53-54) Moreover, Dr. Hansen seemed to rely fairly heavily in his analysis upon the fact that the hearing loss was localized to the right ear, while the audiograms, Dr. Mooney and Dr. Rinehart all opined that the hearing loss was relatively bilateral. When these factors are combined with the fact that the hearing loss symptoms appear to have been intermittent in the record of evidence, I find that the claimant has failed to meet her burden of proof as it relates to medical causation. Consequently, I conclude that the claimant has been paid all benefits owed as it relates to the May 23, 2016, work injury.

The next issue is whether the claimant suffered an injury which arose out of and in the course of her employment on either July 22, 2016, or July 26, 2016.

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.

A personal injury contemplated by the workers' compensation law means an injury, the impairment of health or a disease resulting from an injury which comes about, not through the natural building up and tearing down of the human body, but because of trauma. The injury must be something that acts extraneously to the natural processes of nature and thereby impairs the health, interrupts or otherwise destroys or damages a part or all of the body. Although many injuries have a traumatic onset, there is no requirement for a special incident or an unusual occurrence. Injuries which result from cumulative trauma are compensable. Increased disability from a prior injury, even if brought about by further work, does not constitute a new injury, however. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); Ellingson v. Fleetguard, Inc., 599 N.W.2d 440 (Iowa 1999); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995); McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985). An occupational disease covered by chapter 85A is specifically excluded from the definition of personal injury. Iowa Code section 85.61(4) (b); Iowa Code section 85A.8; Iowa Code section 85A.14.

I find that claimant did suffer an injury which arose out of and in the course of her employment on or about July 25, 2016.[1] This is based upon the claimant's credible testimony. It is noted that Ms. Flattery was informal with some of her testimony and was not a particularly precise historian with dates. Nevertheless, I have found her testimony to be generally credible. I believe her testimony that she felt pain just above her bellybutton while she was performing landscaping work of doing flowers and pulling weeds. I believe her that she told her supervisor, and that her supervisor told her to get it checked out. The history of the injury is immediately documented in Dr. Taylor's medical records. (Jt. Ex. 3, p. 19) She also documented her claims in a message to her supervisor on July 29, 2016. (Jt. Ex. 10, p. 62) The evidence in the record which somewhat contradicts this is the note from Dr. Mooney's nurse on July 26, 2016, where it was documented that the claimant mentioned her work as a fitness instructor when she first called in about the condition. (Jt. Ex. 3, p. 20) While this medical note does

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[1] Claimant pled either July 22, 2016, or July 26, 2016. Based upon the documentation from McFarland Clinic records, I find the date was most likely July 25, 2016. This is the date which shall be used as the date of injury for File No. 5059302.

cast some doubt upon Ms. Flattery's claim, I find that she has met her burden of proof that she suffered an injury which arose out of and in the course of her employment.[2] Ms. Flattery testified credibly and in detail about the type of fitness instruction she was doing during this period of time. She did not notice any hernia symptoms as a result of those activities. (Tr., pp. 32-33)

The next issue is whether the July 2016 work injury is a substantial causal factor of temporary or permanent disability, or her need for surgery on July 27, 2016.

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).

The expert opinions are conflicted. In August 2016, Dr. Taylor opined that there was no way he could "state within a reasonable degree of medical certainty the cause of the hernia." (Jt. Ex. 4, p. 38) Reading the full context of Dr. Taylor's opinion, I find that what he was really stating is that he did not want to be involved in determining whether an injury occurred at work or otherwise resolving credibility disputes. It is a relatively lengthy letter which specifically discusses credibility. In September 2016, a little less than a month later, Dr. Taylor wrote a very simple letter wherein he stated "Michelle

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[2] This nurse's documentation is not accompanied with enough context or explanation to defeat her unrebutted, credible testimony which is supported by other credible documentation. It is also noted that this telephone call was made on Tuesday July 26, 2016, however was not entered into the medical file until July 28, 2016, after she had undergone surgery with Dr. Taylor. (See Jt. Ex. 3, p. 20; *compared with* Jt. Ex. 2, p. 9) Simply stated, this piece of documentation, by itself, does not carry enough weight to defeat claimant's allegation.

Flattery's hernia was probably work-related." (Jt. Ex. 4, p. 39) It is evident from Dr. Taylor's first note documenting Ms. Flattery's complaint of hernia pain, that if she was to be believed that the pain developed while she was working, he believed the condition, treatment and associated symptoms were work-connected.

In October 2016, Dr. Mooney opined that the May 23, 2016, work injury was not a substantial cause of her hernia or her need for surgery. (Jt. Ex. 3, p. 34) It appears that Dr. Mooney simply reviewed medical records but never spoke with Ms. Flattery regarding how the condition developed. I do not find his opinion reliable for medical causation because he seemed to be primarily focused upon the May 23, 2016, injury and it is unclear from his opinion whether he even discussed the history of events with Ms. Flattery.

Claimant's IME physician, Dr. Hansen concurred with Dr. Taylor and opined that the landscaping work was the cause of the injury. He fully understood Ms. Flattery's credible explanation of the injury. He opined claimant suffered a three percent whole body impairment rating. I have reviewed Table 6-9, page 136 of the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, and I find support in the record for this modest impairment rating. I find the opinions of Dr. Taylor and Dr. Hansen to be the most credible causation opinions in the record.

Having found that the claimant suffered an injury which arose out of and in the course of her employment which has caused some level of temporary and permanent disability, I must next determine what benefits the claimant is entitled to.

When an injured worker has been unable to work during a period of recuperation from an injury that did not produce permanent disability, the worker is entitled to temporary total disability benefits during the time the worker is disabled by the injury. Those benefits are payable until the employee has returned to work, or is medically capable of returning to work substantially similar to the work performed at the time of injury. Section 85.33(1).

I find claimant is entitled to healing period benefits from July 26, 2016, through August 4, 2016.

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 Ry. Co. of Iowa, 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.

I find the claimant has suffered some permanent impairment associated with her work injury. It has had a minimal impact on her employability. While her disability is certainly not severe it undoubtedly has some minor impact on her employability. I find that she has suffered a 5 percent loss of earning capacity associated with her work injury. I conclude this entitles claimant to 25 weeks of benefits commencing August 5, 2016.

The final issue is medical expenses.

The employer shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance, and hospital services and supplies for all conditions compensable under the workers' compensation law. The employer shall also allow reasonable and necessary transportation expenses incurred for those services. The employer has the right to choose the provider of care, except where the employer has denied liability for the injury. Section 85.27. Holbert v. Townsend Engineering Co., Thirty-second Biennial Report of the Industrial Commissioner 78 (Review-Reopening October 1975).

Evidence in administrative proceedings is governed by section 17A.14. The agency's experience, technical competence, and specialized knowledge may be utilized in the evaluation of evidence. The rules of evidence followed in the courts are not controlling. Findings are to be based upon the kind of evidence on which reasonably prudent persons customarily rely in the conduct of serious affairs. Health care is a serious affair.

Prudent persons customarily rely upon their physician's recommendation for medical care without expressly asking the physician if that care is reasonable. Proof of reasonableness and necessity of the treatment can be based on the injured person's testimony. Sister M. Benedict v. St. Mary's Corp., 255 Iowa 847, 124 N.W.2d 548 (1963).

It is said that "actions speak louder than words." When a licensed physician prescribes and actually provides a course of treatment, doing so manifests the physician's opinion that the treatment being provided is reasonable. A physician practices medicine under standards of professional competence and ethics. Knowingly providing unreasonable care would likely violate those standards. Actually providing care is a nonverbal manifestation that the physician considers the care actually provided

to be reasonable. A verbal expression of that professional opinion is not legally mandated in a workers' compensation proceeding to support a finding that the care provided was reasonable. The success, or lack thereof, of the care provided is evidence that can be considered when deciding the issue of reasonableness of the care. A treating physician's conduct in actually providing care is a manifestation of the physician's opinion that the care provided is reasonable and creates an inference that can support a finding of reasonableness. Jones v. United Gypsum, File 1254118 (App. May 2002); Kleinman v. BMS Contract Services, Ltd., File No. 1019099 (App. September 1995); McClellon v. Iowa Southern Utilities, File No. 894090 (App. January 1992). This inference also applies to the reasonableness of the fees actually charged for that treatment.

Claimant is entitled to an order of reimbursement only if she has paid treatment costs; otherwise, to an order directing the responsible defendants to make payments directly to the provider. See, Krohn v. State, 420 N.W.2d 463 (Iowa 1988). Defendants should also pay any lawful late payment fees imposed by providers. Laughlin v. IBP, Inc., File No. 1020226 (App., February 27, 1995).

Having reviewed the file and all relevant documents attached to the hearing report, I find defendants are responsible for the medical expenses outlined in the attachment to the hearing report in the amount $13,936.94.

ORDER

THEREFORE, IT IS ORDERED:

File No. 5059303 (Date of injury, May 23, 2016):

Claimant shall take nothing further on this file.

File No. 5059302 (Date of injury, July 25, 2016):

Defendants shall pay the claimant healing period benefits from July 26, 2016, through August 4, 2016, at the rate of three hundred forty-eight and 65/100 ($348.65).

Defendants shall pay the claimant twenty-five (25) weeks of permanent partial disability benefits at the rate of three hundred forty-eight and 65/100 ($348.65), commencing on August 5, 2016.

Defendants shall pay accrued weekly benefits in a lump sum.

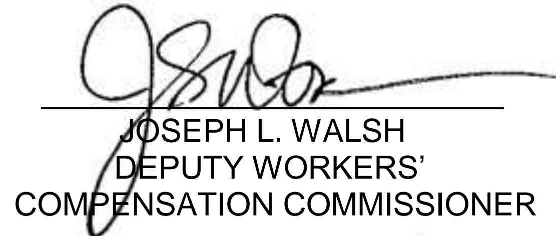
Defendants shall pay interest on unpaid weekly benefits awarded herein as set forth in Iowa Code section 85.30.

Defendants shall pay past medical expenses as attached to the hearing report in the amount of thirteen thousand nine hundred thirty-six and 94/100 ($13,936.94), consistent with this decision.

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 _3rd_ day of February, 2020.



JOSEPH L. WALSH
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Jason Neifert (via WCES)

Deborah Stein (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.