BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

AMY STOURAC-FLOYD, Claimant, vs. MDF ENDEAVORS, INC., Employer, and ACCIDENT FUND INSURANCE COMPANY OF AMERICA, Insurance Carrier, Defendants.	:	File No. 5053328 A P P E A L D E C I S I O N Head Note Nos.: 1402, 1802, 1803, 2601, 2904, 3000

Defendants MDF Endeavors, Inc., employer, and Accident Fund Insurance Company of America, insurer, timely appeal from an arbitration decision filed on February 28, 2017. Claimant, Amy Stourac-Floyd, cross-appeals.

On August 27, 2018, the Iowa Workers' Compensation Commissioner delegated authority to the undersigned to enter a final agency decision in this matter. Therefore, this appeal decision is entered as final agency action pursuant to Iowa Code section 17A.15(3) and Iowa Code section 86.24. Pursuant to Iowa Code section 17A.15 and Iowa Code section 86.24, I performed a de novo review of the evidentiary record before the presiding deputy workers' compensation commissioner.

In the arbitration decision, the deputy commissioner determined claimant's stipulated October 19, 2012 work injury permanently aggravated claimant's low back and right-sided sciatica conditions. The deputy commissioner also determined, however, that claimant failed to carry her burden to prove the October 19, 2012 work injury permanently aggravated her depression. The deputy commissioner ultimately found claimant sustained a 65 percent industrial disability.

The deputy commissioner determined the commencement date for claimant's permanent partial disability (PPD) benefits is March 20, 2013, and he adopted claimant's rate calculation of $229.72. Finally, the deputy commissioner determined defendants are responsible for all medical expenses in Exhibit 23, and he selected Dr. Dery as the authorized treating physician.

On appeal, defendants argue the deputy commissioner erred when he determined claimant's October 19, 2012 injury resulted in permanent disability. Defendants also assert the deputy commissioner erred by adopting claimant's rate of $229.72 and awarding claimant the medical expenses listed in Exhibit 23.

On cross-appeal, claimant argues the deputy commissioner should have awarded claimant 75 percent industrial disability, in part because the deputy erred when he determined claimant did not sustain a permanent aggravation of her mental condition. Claimant also asserts the deputy commissioner erred when he did not award claimant a second healing period from June 27, 2013 through September 5, 2013.

Those portions of the proposed agency decision pertaining to issues not raised on appeal are adopted as a part of this appeal decision.

After my de novo review of the evidentiary record and the detailed arguments of the parties, the arbitration decision filed on February 28, 2017 is affirmed in part and modified in part.

FINDINGS OF FACT

The first issue to be decided on appeal is whether claimant sustained a permanent disability as a result of her October 19, 2012 fall. While I ultimately agree with the deputy commissioner's finding that claimant's fall on October 19, 2012 permanently aggravated her low back and sciatica conditions, a summary of claimant's medical treatment is warranted for purposes of clarity.

After claimant's October 19, 2012 fall, she was initially evaluated by her primary care provider, Leck Read, M.D., on October 22, 2012. (Exhibit 1, p. 1) Dr. Read noted claimant's prior back pain in 2006 and May of 2012. (Ex. 1, p. 1) He referred claimant for follow-up with occupational medicine. (Ex. 1, p. 4)

Claimant was evaluated at the Mercy Occupational Health Clinic the next day, on October 23, 2013. (Ex. 2, p. 4) Her back pain from 2006 and May of 2012 was again referenced in her intake form and the initial treatment record. (Ex. 2, pp. 1-3) After an examination, claimant was referred for physical therapy and assigned work restrictions. (Ex. 2, p. 5)

When claimant's low back and radiating pain persisted, Thomas Dean, PA-C, ordered an MRI and restricted claimant from returning to work. (Ex. 2, p. 7) The MRI revealed disc degeneration but no significant central canal or neuroforaminal compromise. (Ex. 2, p. 10; Ex. 4, p. 3) PA Dean recommended continued physical therapy, continued time off work, and a referral for a facet joint injection. (Ex. 2, p. 10)

It does not appear that PA Dean's recommendation for an injection was carried out by the time claimant returned to him in late November of 2012, however. Based on claimant's low back pain with sacroilial irritation, PA Dean again indicated he wanted claimant to proceed with an SI joint injection. (Ex. 2, p. 16)

That injection was performed on November 27, 2012. (Ex. 2, p. 18) An epidural steroid injection (ESI) was then performed on December 12, 2012. (Ex. 2, p. 22) When claimant returned to PA Dean after the injection on December 12, 2012, she was reporting some improvement of her back pain. (Ex. 2, p. 24)

Unfortunately, by January 11, 2013, claimant was again complaining of a sharp, shooting pain that radiated into her buttocks and right leg. (Ex. 2, p. 26) Because of claimant's continued complaints, PA Dean referred claimant to a pain specialist, Fred Dery, M.D. (Ex. 2, p. 27) PA Dean continued to keep claimant off work. (Ex. 2, p. 28)

Claimant was first evaluated by Dr. Dery on January 18, 2013. (Ex. 3, p. 2) Claimant admitted to Dr. Dery that she had experienced back pain prior to her work-related fall. (Ex. 3, p. 2) However, she also explained that her pain after the fall was "definitely different than her regular low back pain . . . in that it is much more intense and much more intrusive." (Ex. 3, p. 2) This is consistent with Dr. Read's description of claimant's low back pain as "episodic" before her October 19, 2012 fall and "more persistent and chronic" after the October 19, 2012 fall. (Ex. 18) Notably, Dr. Dery reviewed PA Dean's treatment records and stated they "corroborate[d] the patient's history." (Ex. 3, p. 3)

Dr. Dery also reviewed claimant's MRI and diagnosed claimant with lumbosacral radiculitis and lumbar facet arthropathy. (Ex. 3, p. 3) He explained that claimant most likely had irritation of the nerve root in her back, and he recommended another ESI. (Ex. 3, p. 3) That ESI was performed on February 7, 2013 (Ex. 3, p. 6) Unfortunately, claimant reported no benefit from the injection. (Ex. 3, p. 7) In fact, claimant was actually reporting more pronounced pain at her follow-up on February 23, 2013. (Ex. 3, p. 7) In response to claimant's complaints of increasing low back and radiating pain, Dr. Dery recommended an updated MRI to rule out the possibility that one of her pre-existing disk bulges had become more pronounced or herniated. (Ex. 3, p. 7) He noted that he would proceed with an EMG of claimant's right leg to rule out a more distal lesion if the MRI was normal. (Ex. 3, p. 8)

Dr. Dery reviewed claimant's updated MRI on March 5, 2013. (Ex. 3, p. 9) Because the MRI did not sufficiently explain claimant's symptoms, he recommended proceeding with the EMG as planned. (Ex. 3, p. 9; see Ex. 4, p. 8)

The EMG showed no evidence of abnormalities. (Ex. L; Ex. 3, p. 11) Dr. Dery told claimant he did not see any reason for her discomfort except for the possibility that a mild disk herniation caused an annular tear that was in turn causing chemical irritation on her nerve roots. (Ex. 3, p. 11) He switched claimant's pain medications but opined that additional injections and surgery would likely not provide relief. (Ex. 3, p. 11) He did, however, mention the possibility of a neurostimulator. (Ex. 3, p. 12)

In a letter to defendants dated May 6, 2013, Dr. Dery clarified he was not yet ready to determine whether it was appropriate for claimant to return to work. (Ex. 3, p. 14) He indicated he was concerned about claimant's difficulty with walking, which

would in turn make waitressing a challenge. (Ex. 3, p. 14) He told defendants he would address claimant's ability to return to work at her next appointment, which was scheduled for May 16, 2013. (Ex. 3, p. 14)

At the May 16, 2013 appointment, claimant indicated she was interested in returning to work. (Ex. 3, p. 15) As a result, Dr. Dery increased claimant's Lyrica prescription and released claimant to return to the coffee shop portion of defendant-employer's restaurant. (Ex. 3, p. 15)

Unfortunately, the Lyrica lost its effectiveness within a few weeks of claimant's return to work. (Hearing Transcript p. 34) Sometime in June claimant was unable to complete her shift. (Hrg. Tr. p. 34) Claimant then returned to Dr. Dery on June 26, 2013 reporting an "acute exacerbation of her pain with worsening over the last few weeks." (Ex. 3, p. 17) In response, Dr. Dery took claimant off of work and referred her to Benjamin MacLennan, M.D., for a surgical consultation. (Ex. 3, p. 17)

Instead of Dr. MacLennan, defendant authorized an appointment with Chad Abernathey, M.D. Claimant testified at hearing that Dr. Abernathey only spent a few minutes with her. (Hrg. Tr. pp. 37-39) Interestingly, Dr. Abernathey's treatment note indicates claimant "denies radicular features," which is wholly inconsistent with the notes from PA Dean and Dr. Dery. (Ex. 5, p. 5) Dr. Abernathey recommended an assessment of claimant's right hip "since a component of her pain seems to originate in the hip joint," but he recommended against surgery. (Ex, 5, p. 5)

In a letter to defendants written on the same day of claimant's examination, Dr. Abernathey stated claimant "has only subjective complaints and does not have any objective findings" and that her complaints did not correlate with her MRI. (Ex. 5, p. 6) He subsequently stated on September 10, 2013 that claimant was at MMI six months after her injury (March 19, 2013) and that he did not believe she sustained any permanent impairment or required any permanent restrictions due to her work-related fall. (Ex. 5, p. 7)

Claimant returned to Dr. Dery on September 5, 2013 with continued complaints of radiating low back pain. (Ex. 3, p. 18) Claimant told Dr. Dery that she was not interested in any additional treatment, including the neurostimulator. (Ex. 3, p. 19) Dr. Dery then placed claimant at maximum medical improvement (MMI) and ordered a functional capacity evaluation (FCE), presumably to determine claimant's permanent restrictions. (Ex. 3, p. 20)

The FCE was never performed, however. Instead, in reliance on Dr. Abernathey's September 10, 2013 letter, defendants denied liability for claimant's ongoing complaints. (Hrg. Tr. pp. 29-30, 105)

After defendants' denial of liability, from January of 2014 through November of 2015, claimant obtained treatment for her radiating low back pain with Dr. Read, her primary care provider. (Ex. 1, pp. 8-36)

In November of 2014, defendants sent claimant to Joshua Kimelman, D.O., for purposes of an independent medical examination (IME). (Ex. 6) He agreed with Dr. Abernathey that claimant reached MMI six months after her injury and sustained no permanent impairment as a result of her fall. (Ex. 6, p. 3) Importantly, however, when asked whether claimant required work restrictions "as a result of any injury she sustained on October 19, 2012," he stated as follows: "I believe that, based on her subjective complaints, she is unable to walk and she drags her leg. I do not believe she should return to her previous job waitressing." (Ex. 6, p. 3)

In December of 2014, claimant was evaluated by Richard Kreiter, M.D., for purposes of claimant's IME. (Ex. 9) He diagnosed claimant with "right sciatic nerve irritation with chronic pain, primarily the right thigh, lumbosacral back pain with facet arthritis, and degenerative lumbar disc disease [with] intermittent paresthesias into the right leg and foot." (Ex. 9) He stated claimant's fall on October 19, 2012 "seemed to light up or accelerate the lumbosacral condition." (Ex. 9) He placed claimant at MMI "around" January 1, 2014 and assigned an 8 percent whole body impairment rating. (Ex. 9) Finally, he recommended permanent restrictions of lifting and carrying no more than 15 to 20 pounds occasionally and alternating between standing, sitting, and walking. (Ex. 9)

Dr. Read, in a letter dated April 1, 2016, also opined that claimant's October 19, 2012 fall "aggravated the pre-existing back condition" and caused claimant's low back pain to become more chronic. (Ex. 18)

With this history in mind, I, like the deputy commissioner, find the permanency opinions of Dr. Read and Dr. Kreiter more convincing than the opinions of Dr. Abernathey and Dr. Kimelman.

Dr. Abernathey's opinion is problematic first because he spent very little time actually examining claimant. Claimant's assertion that Dr. Abernathey spent no more than a couple of minutes in his examination is consistent throughout the entirety of the record, including Dr. Dery's treatment notes, claimant's deposition testimony, and claimant's hearing testimony. (Ex. 3, p. 18; Ex. A, pp. 13-14; Hrg. Tr. pp. 37-39) Dr. Dery also questioned whether Dr. Abernathey performed a full physical examination of claimant. (Ex. 16) These concerns about the comprehensiveness of Dr. Abernathey's exam cut against the credibility of Dr. Abernathey's opinions.

Further weakening the credibility of Dr. Abernathey's report is Dr. Dery's opinion that Dr. Abernathey's diagnosis of occasional hip pain does not explain any of claimant's primary exam findings. (Ex. 16) I agree with the deputy commissioner's finding that Dr. Abernathey's opinion about claimant's hip being a possible source of her pain is counter to the weight of the medical records. (See Arb. Dec. p. 11) For these reasons, I agree with the deputy commissioner and do not find Dr. Abernathey's opinion convincing.

Dr. Kimelman's opinion that claimant did not sustain any permanent impairment due to her October 19, 2012 fall is problematic in light of his opinion just a few paragraphs later in the same document that claimant is unable to walk and should not return to her previous job waitressing. (Ex. 6, p. 3) It is hard to reconcile those two opinions, particularly when claimant had no such restrictions before her work-related injury. For these reasons, I do not find Dr. Kimelman's opinion persuasive.

Dr. Read and Dr. Kreiter, on the other hand, both opined claimant permanently aggravated her pre-existing back condition. This opinion is consistent with the worsening of claimant's symptoms after her October 19, 2012 fall compared to the "episodic" symptoms she experienced beforehand. The deputy commissioner correctly noted, for example, that claimant's back symptoms prior to her October 19, 2012 fall did not prevent her from working, but she was restricted from working for several weeks after the fall. (Arbitration Decision p. 11) For these reasons, I agree with the deputy commissioner and adopt the permanency opinions of Dr. Read and Dr. Kreiter. Thus, with this additional analysis, I affirm the deputy commissioner's finding that claimant's fall on October 19, 2012 permanently aggravated her low back and right-sided sciatica conditions and that she therefore sustained a permanent disability arising out of and in the course of her employment on October 19, 2012.

I also affirm the deputy commissioner's determination that there was insufficient evidence to find that claimant's depression was permanently aggravated by the October 19, 2012 work injury. (Arb. Dec., p. 12) The only doctor to issue an opinion regarding the permanency of claimant's mental condition was Dr. Kreiter, and Dr. Kreiter is an orthopedist. Thus, I do not find his opinion convincing in this respect. I therefore affirm the deputy commissioner's finding that claimant did not provide convincing evidence that her October 19, 2012 injury permanently aggravated her depression.

Having affirmed the deputy commissioner's finding that claimant sustained a permanent disability, and in light of the parties' stipulation that any disability is industrial in nature, the next issue to be addressed on appeal is the extent of claimant's industrial disability. The deputy commissioner found claimant sustained a 65 percent industrial disability. For the reasons that follow, I respectfully disagree with the deputy commissioner and instead find claimant sustained a 40 percent industrial disability due to the October 19, 2012 work injury.

Like the deputy commissioner, I find claimant's October 19, 2012 work injury resulted in permanent restrictions that damaged her employability. I adopt Dr. Kreiter's recommended permanent restrictions of lifting and carrying no more than 15 to 20 pounds occasionally and alternating between standing, sitting, and walking. (Ex. 9) These restrictions are consistent with claimant's failed attempt to return to her waitressing job and her ongoing symptoms.

Claimant credibly testified her back injury and resulting limitations would prevent her from returning to her waitressing job and the jobs she performed prior to her waitressing job with defendant-employer. (Hrg. Tr. pp. 67-69) Thus, like the deputy

commissioner, I find claimant's October 19, 2012 work injury and resulting restrictions have negatively impacted her ability to engage in the type of work for which claimant was formerly fitted.

Although claimant never returned to her waitressing job with defendant-employer after Dr. Dery removed her from work in June of 2013 (Ex. A, p. 4 [Depo. Tr. p. 13]), she went on to obtain her bachelor's degree in English that same year. (Hrg. Tr. p. 20) Claimant had actually started taking classes prior to her October 19, 2012 work injury, and afterwards she continued attending college full-time through her graduation in 2013. (Hrg. Tr. pp. 82, 113; Ex. G, p. 2)

After obtaining her degree, she was hired by The College Board in 2014 as an essay scorer. (Hrg. Tr. pp. 82) This essay scoring position was a seasonal full-time position in which claimant earned $18.00 per hour. (Hrg. Tr. p. 83; Ex. 20, p. 4) Claimant performed the same seasonal full-time work again in 2015. (Hrg. Tr. p. 83; Ex. 20, p. 4)

Claimant also worked for a time as an administrative assistant in 2015 for roughly $15.00 per hour, but she quit this position to return to essay scoring for The College Board. (Hrg. Tr. pp. 84, 87)

At the time of the hearing, claimant was again working as an essay scorer for The College Board and two other companies known as Education Testing Systems and Pearson (Hrg. Tr. p. 84) She was averaging 50-hour workweeks at the time of the hearing, and depending on the particular project she was working on, she was earning anywhere from $12.00 per hour to $20.00 per hour. (Hrg. Tr. p. 85) Even assuming the lower rate of $12.00 per hour, claimant's earnings at the time of the hearing would have been roughly $600.00 per week ($12.00 x 50); this is in comparison to claimant's average weekly wage on the date of injury, which is $308.89 per claimant's calculation.

In addition to her essay scoring work, claimant was also writing articles for two small publications at the time of the hearing. (Hrg. Tr. pp. 20-23) She was earning $50.00 to $60.00 per article, which amounted to roughly $100.00 per month at the time of the hearing. (Hrg. Tr. p. 22)

Based on claimant's testimony, I find claimant was earning more at the time of the hearing than she was when she was injured in 2012. While I acknowledge the seasonal/temporary nature of claimant's essay scoring jobs, claimant testified she gets these job every year and intends to keep applying for them. (Hrg. Tr. pp. 71, 85)

Ultimately, claimant's ability to find meaningful employment after her work injury at higher hourly rates cuts against a finding of substantial industrial disability. However, claimant's ability to find meaningful employment after her work is due substantially, if not wholly, to claimant obtaining a degree in 2013 that opened up career opportunities that were not available to her at the time of the injury. Claimant is commended for her commitment to obtaining her degree even after her work injury occurred. The essay

scoring jobs for which claimant was hired after obtaining her degree are higher-paying and less physically demanding than her waitressing job with defendant-employer, and claimant testified she plans to continue the essay scoring jobs going forward. It is clear claimant is motivated to work and is willing and able to be retrained.

In finding claimant sustained a 65 percent industrial disability, the deputy commissioner noted claimant's "range of work is limited." (Arb. Dec., p. 12) I agree. However, I place greater significance than the deputy commissioner on the fact that claimant's October 19, 2012 injury did not interfere with her ability to remain a full-time student and eventually obtain her college degree—a goal she initiated before and was working toward at the time of her work injury. Further, claimant's back injury has not prevented her from using her degree to obtain higher-paying employment; in fact, higher-paying employment is exactly what claimant was able to find.

I also acknowledge claimant's work injury negatively impacted her ability to waitress—a job she enjoyed and a job for which she was suited. But this factor is greatly mitigated by the fact that claimant, with her degree, is no longer limited to work for which she was previously fitted, and claimant's back injury has not significantly deterred her from finding higher-paying work that utilizes her degree. For these reasons, I respectfully disagree with the deputy commissioner and find claimant sustained a 40 percent industrial disability.

Having found claimant sustained a 40 percent industrial disability, the next issues to be decided on appeal are the commencement date for claimant's PPD benefits and claimant's entitlement to additional healing period benefits. Regarding the commencement date for PPD benefits, I affirm the deputy commissioner's finding that claimant was off of work through March 19, 2013. I also affirm the deputy commissioner's finding that claimant returned to work on March 20, 2013. Both Dr. Abernathey and Dr. Kimelman placed claimant at MMI as of March 19, 2013, but I agree with the deputy commissioner that this MMI date is not convincing given its conflict with claimant's continued treatment with Dr. Dery in March of 2013 and beyond. Thus, I reject the opinion that claimant was at MMI on March 19, 2013. As a result, I affirm the deputy commissioner's finding that claimant's return to work on March 20, 2013 ended claimant's initial period of healing and marked the start of her entitlement to PPD benefits. However, the deputy commissioner did not address claimant's argument that there was a second period during which she was off work and/or incapable of returning to substantially similar work.

Dr. Dery originally released claimant to return to modified duty on March 20, 2013. (Ex. 3, p. 16) When claimant returned to Dr. Dery on June 26, 2013 with worsening complaints of radiating low back pain, however, Dr. Dery took claimant off of work. (Ex. 3, p. 17) After Dr. Dery took claimant off of work on June 26, 2013, claimant never returned to work with defendant-employer. (Ex. A, p. 4 [Depo. Tr. p. 13]) Claimant did not return to any work in any capacity nor was she capable of doing so until 2014, when she became an essay scorer. (Hrg. Tr. p. 82) However, on September 5, 2013—before claimant returned to work—Dr. Dery placed claimant at MMI. Thus, I

find claimant entered a subsequent healing period from June 26, 2013 through September 5, 2013.

Claimant's rate is also disputed on appeal. Based on claimant's testimony that her rate calculation contained an accurate rendition of the hours worked in the weeks preceding her injury (Hrg. Tr. p. 43), I affirm the deputy commissioner's finding that the weeks identified by claimant in her rate calculation are representative and typical while the weeks undefended by defendants are not. Thus, I also adopt the claimant's rate calculation and thus affirm the deputy commissioner's finding that claimant's gross average weekly wage is $308.89 and her rate is $229.72.

The last issue to be addressed is claimant's entitlement to alternate medical care and medical expenses. I affirm the deputy commissioner's selection of Fred Dery, M.D., as claimant's authorized physician. However, I respectfully disagree with deputy commissioner's finding that all medical expenses in Exhibit 23 are related to claimant's work injury. I concur with the deputy commissioner that the expenses listed on pages 2 and 3 of Exhibit 23 are related to claimant's work injury, but I respectfully disagree with the deputy commissioner's determination regarding pages 4 and 5.

Pages 4 and 5 of Exhibit 23 list expenses from the University of Iowa Hospitals and Clinics for a service date of August 12, 2013. (Ex. 23, p. 4) More specifically, it appears to pertain to expenses for an emergency room (ER) visit for claimant's knee. (Ex. 23, p. 4)

My review of the record reveals no treatment note corresponding to this particular service date. However, claimant's November 25, 2014 letter to Richard Kreiter, M.D., includes a medical summary that describes the August 12, 2013 appointment as follows:

> Pt presents to ER today with acute on chronic knee pain with effusion on exam. *Pt reports onset of L knee pain yesterday*. Unable to bear weight. Pt also reports continued low back pain. **A:** Knee pain. Knee effusion. Arthritis of knee. **P:** No indication of any acute interventions, provided with crutches since having difficulty walking, a note to be off work for three days. . . .

(Ex. 8, p. 12) (italics added) While I acknowledge claimant fell on her left knee on October 19, 2012, claimant's own summary of the ER note states claimant's left knee pain for which she presented to the ER *started* on August 11, 2013. I therefore have insufficient information to find that the expenses listed on pages 4 and 5 of Exhibit 23 are related to claimant's work injury. Thus, the deputy commissioner's finding that all of the medical expenses listed in Exhibit 23 are related to her work injuries is modified. I find only the medical expenses listed on pages 2 and 3 of Exhibit 23 are related to claimant's work injuries.

I find the expenses listed on pages 2 and 3 of Exhibit 23 correspond to treatment rendered between November of 2013 and November of 2015. (Ex. 23, pp. 2-3) Claimant testified she received a letter from defendants in October of 2013 in which they denied liability for her ongoing complaints based on the opinion of Dr. Abernathey. Based on this testimony, I further find defendants denied liability for claimant's ongoing complaints before any of the treatment at issue in pages 2 and 3 of Exhibit 23. (Hrg. Tr. pp. 29-30, 105) Because I found this treatment to be related to claimant's work injury, I find defendants are responsible for the expenses contained in pages 2 and 3 of Exhibit 23. The deputy commissioner's finding regarding reimbursement for medical expenses is thus modified.

CONCLUSIONS OF LAW

The first issue to be addressed on appeal is whether claimant sustained a permanent disability as a result of her October 19, 2012 work injury.

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.

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).

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).

Having affirmed the deputy commissioner's finding that claimant sustained a permanent aggravation of her back and sciatica conditions, I also affirm the deputy commissioner's conclusion that claimant satisfied her burden to prove by a preponderance of the evidence that she sustained a permanent disability arising out of and in the course of her employment on October 19, 2012.

Based on the parties' stipulation that any permanent disability is industrial in nature, the next issue to be decided on appeal is the extent of claimant's industrial disability.

Industrial disability was defined in Diederich v. Tri-City R. Co., 219 Iowa 587, 258 N.W. 899 (1935) as follows: "It is therefore plain that the legislature intended the term 'disability' to mean 'industrial disability' or loss of earning capacity and not a mere 'functional disability' to be computed in the terms of percentages of the total physical and mental ability of a normal man."

Functional impairment is an element to be considered in determining industrial disability which is the reduction of earning capacity, but consideration must also be given to the injured employee's age, education, qualifications, experience, motivation, loss of earnings, severity and situs of the injury, work restrictions, inability to engage in employment for which the employee is fitted and the employer's offer of work or failure to so offer. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963); Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961).

Compensation shall be paid in relation to 500 weeks as the disability bears to the body as a whole. Iowa Code section 85.34.

Considering all the relevant factors for industrial disability, I found claimant sustained a 40 percent industrial disability. The deputy commissioner's award of 65 percent industrial disability is therefore modified. A 40 percent industrial disability entitles claimant to 200 weeks of benefits.

Having concluded claimant is entitled to 200 weeks of PPD benefits, the next issue to be addressed is the commencement date for those benefits and claimant's entitlement to additional healing period benefits. The Iowa Supreme Court has specifically noted that permanent partial disability benefits commence whenever the first factor of Iowa Code section 85.34(1) is met. Evenson v. Winnebago Industries, Inc., 881 N.W.2d 360 (Iowa 2016). In other words, once a claimant achieves one of the factors outlined in Iowa Code section 85.34(1), permanent disability benefits should commence.

Although permanent partial disability benefits commenced, claimant may also be entitled to payment of intermittent healing period benefits that are payable concurrently with permanent partial disability benefits. Id.

Claimant returned to modified duty on March 20, 2013. I found she was not yet at MMI or medically capable of performing substantially similar employment prior to that date. Therefore, her return to work on March 20, 2013 represented the first factor to be achieved pursuant to Iowa Code section 85.34(1) to terminate healing period benefits. Thus, I affirm the deputy commissioner's determination that PPD benefits should commence on March 20, 2013 and be paid continuously thereafter until paid in full. Evenson v. Winnebago Industries, Inc., 881 N.W.2d 360 (Iowa 2016).

As discussed above, however, the deputy commissioner did not address whether claimant was entitled to payment of temporary benefits during a subsequent healing period. In this instance, claimant seeks additional healing period benefits from June 26, 2013, when she was taken off of work by Dr. Dery, through September 5, 2013, when Dr. Dery placed claimant at MMI.

I found claimant did not return to work and remained incapable of returning to substantially similar employment during this period of time. I also found claimant did not achieve MMI until September 5, 2013. Therefore, I conclude claimant is entitled to healing period benefits from June 26, 2013 through September 5, 2013, payable concurrently with the accrued permanent partial disability benefits. Iowa Code section 85.34(1); Evenson, 881 N.W.2d 360 (Iowa 2016).

The next issue to address on appeal is claimant's rate. If the employee is paid on a daily or hourly basis or by output, weekly earnings are computed by dividing by 13 the earnings over the 13-week period immediately preceding the injury. Any week that does not fairly reflect the employee's customary earnings is excluded, however. Iowa Code section 85.36(6).

I, like the deputy commissioner, found the weeks identified by claimant in her rate calculation to be representative of her customary earnings. As a result, I affirmed the deputy commissioner's adoption of the rate asserted by claimant. Thus, I conclude claimant's rate is $229.72.

The final issue to be addressed is claimant's entitlement to reimbursement for 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. Iowa Code section 85.27.

Because I did not find the expenses listed on pages 4 and 5 of Exhibit 23 to be related to claimant's work injury, I conclude claimant failed to satisfy her burden to prove defendants are responsible for those expenses.

With respect to the expenses listed on pages 2 and 3 of Exhibit 23, which I found to be related to claimant's work injury, defendants argue claimant is not entitled to reimbursement because the corresponding treatment was unauthorized and claimant failed to prove the treatment was reasonable and/or beneficial. However, I found the expenses contained in pages 2 and 3 of Exhibit 2 were for treatment received by claimant after defendants denied liability.

The employer has the right to choose the provider of care, except where the employer has denied liability for the injury, Iowa Code section 85.27; Holbert v. Townsend Engineering Co., Thirty-second Biennial Report of the Industrial Commissioner, 78 (Review-Reopening 1975). Upon an employer's denial of liability, the employer loses the right to control the medical care sought by claimant during the period of denial, and the claimant is free to choose his care. Bell Bros. Heating v. Gwinn, 779 N.W.2d 193, 206 (Iowa 2010). In other words, when liability is denied, defendants are precluded from asserting an authorization defense as to any future treatment during the period of denial. Id.

Because I found defendants in the instant case had denied liability for claimant's ongoing complaints by November of 2013, I conclude they cannot raise an authorization defense for treatment rendered during their period of denial. Without a valid authorization defense, claimant is not required to show that care received in and after November of 2013 was beneficial. Instead, claimant must show only that the care received was related to her work injury.

Having found the expenses on pages 2 and 3 of Exhibit 23 are related to treatment for claimant's work injury, I conclude defendants are responsible for these expenses. The deputy commissioner's determination that defendants are responsible for all of the medical expenses in Exhibit 23 is thus modified; I conclude defendants are only responsible for the expenses listed in pages 2 and 3 of Exhibit 23.

ORDER

IT IS THEREFORE ORDERED:

This appeal decision is issued as final agency action pursuant to the August 27, 2018 delegation of authority from the Iowa Workers' Compensation Commissioner and Iowa Code section 86.3.

The arbitration decision, filed on February 28, 2017 is affirmed in part and modified in part.

Defendants shall pay to claimant healing period benefits from June 26, 2013 through September 5, 2013.

Defendants shall pay two hundred (200) weeks of permanent partial disability benefits commencing on March 20, 2013 and continuously thereafter until paid in full.

All weekly benefits shall be paid at the rate of two hundred twenty-nine and 72/100 dollars ($229.72) per week.

Defendants shall pay all accrued weekly benefits in a lump sum. Defendants shall pay accrued weekly benefits in a lump sum together with interest at the rate of ten percent for all weekly benefits payable and not paid when due which accrued before July 1, 2017, and all interest on past due weekly compensation benefits accruing on or after July 1, 2017, shall be payable at an annual rate equal to the one-year treasury constant maturity published by the federal reserve in the most recent H15 report settled as of the date of injury, plus two percent. See Gamble v. AG Leader Technology, File No. 5054686 (App. Apr. 24, 2018).

Defendants shall be given credit for benefits previously paid.

Defendants are responsible for the medical expenses contained on pages 2 and 3 of Exhibit 23. Defendants shall pay directly to any medical providers, reimburse any third-party payers, or reimburse claimant for any out-of-pocket expenses and shall hold claimant harmless for such medical expenses and claims.

Defendants shall file subsequent reports of injury (SROI) as required by our administrative rule 876 IAC 3.1(2).

The parties shall split the cost of appeal.

Signed and filed on this 11th day of September, 2018.

STEPHANIE J. COPLEY
DEPUTY WORKERS' COMPENSATION
COMMISSIONER

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