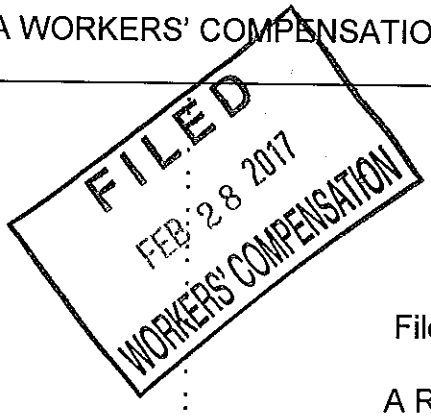
BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER



AMY STOURAC-FLOYD,

Claimant,

vs.

MDF ENDEAVORS, INC.,

Employer,

and

ACCIDENT FUND INSURANCE COMPANY OF AMERICA,

Insurance Carrier,
Defendants.

File No. 5053328

ARBITRATION

DECISION

Head Note Nos.: 1803, 3000, 3701

STATEMENT OF THE CASE

Amy Stourac Floyd, claimant, filed a petition in arbitration seeking workers' compensation benefits from MDF Endeavors, Inc. and its insurer, Accident Fund Insurance Company of America as a result of an injury she sustained on October 19, 2012 that arose out of and in the course of her employment. This case was heard in Des Moines, Iowa and fully submitted on September 1, 2016. The evidence in this case consists of the testimony of claimant, Karen Harrison, Sheila Groenwold and claimant's Exhibits 1 through 24 and defendants' Exhibits A through O. Both parties submitted briefs.[1]

ISSUES

1. Whether the alleged injury is a cause of permanent disability and, if so;
2. The extent of claimant's disability.
3. The claimant's gross earnings and weekly rate.

[1] Claimant cited to Exhibit 26 in her brief which was excluded from the record. No weight was given to evidence from excluded exhibits. [Claimant incorrectly cited to Ex. 25, p. 6, but meant Ex. 26, p. 6. Claimant's brief p. 16]

4. Whether defendants underpaid temporary benefits.

5. Commencement date for permanent partial benefits.

6. Whether defendants are liable for certain medical expenses.

7. Whether claimant is entitled to medical care.

8. Assessment of costs.

STIPULATIONS

The parties filed a hearing report at the commencement of the arbitration hearing. On the hearing report, the parties entered into various stipulations. All of those stipulations were accepted and are hereby incorporated into this arbitration decision and no factual or legal issues relative to the parties' stipulations will be raised or discussed in this decision. The parties are now bound by their stipulations.

FINDINGS OF FACT

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

Amy Stourac-Floyd, claimant, was 44 years old at the time of the hearing. She fell while working as a waitress for MDF Endeavors, Inc. (d/b/a Landmark Restaurant, hereinafter Landmark).

Claimant graduated from high school and first obtained an Associate of Arts degree in Communications Media through a community college in 2010. (Exhibit A, page 3) Claimant has a Bachelor's Degree in English from Mount Mercy College that she obtained in 2013. (Transcript, p. 20; Ex. G, p. 2)

Claimant's employment history included food service, assembly and work for the U.S. Post Office. She worked for the postal service for about 15 years and had a variety of jobs from sorting mail to being a postmaster in Homestead, Iowa. (Ex. 20, p. 4) She earned at her peak $42,000.00 at the post office. Claimant left this position to return to college.

At the time of the hearing claimant was writing articles for some local publications, earning $50.00 - $60.00 per article. She was not earning substantial income from writing these articles. (Tr. p. 22) At the time of the hearing claimant was working for various testing services. The work was seasonal. She was working 50 hours per week at the time of the hearing. (Tr. p. 85)

Claimant has applied for a number of positions after she left Landmark. Claimant testified she applied for a number of scoring jobs. Claimant worked for the College

Board scoring tests from February 2014 to June 2014 and May 2015 to August 2015. Claimant described the job as a full-time temporary position.

Claimant worked for Pearson scoring tests at the same time as she worked for the College Board: This was an at-home position. (Ex. A, p. 6)

Claimant worked as an administrative assistant for a licensed massage therapist from October 2014 through March 2015. Claimant worked from home for this position. (Ex. A, p. 6)

Claimant also worked for Educational Testing Services scoring the SAT. She was earning $15.00 per hour in this job. It is a temporary full-time job that claimant can do at home. (Ex. A, p. 7) Claimant testified that she applied for about five jobs a week but was not sure of the number. (Tr. p. 27) Claimant had a motor vehicle accident in 2006. Claimant said that she had right-sided sciatica that had totally healed by the time of her 2012 work injury. (Ex. A, p. 9) Claimant testified that she had a couple of flare-ups of sciatica that came and went. She described the flare-ups as inconvenient, but not debilitating. (Ex. A, p. 10) Claimant injured her back lifting boxes at home in 2007, which caused some right leg sciatica. (Tr. p. 89) In December 2009 claimant was knocked down in the Landmark parking lot, and in May 2012 claimant was seen in an emergency department for worsening back pain and sciatica. (Tr. pp. 89, 90)

Claimant testified that due to her current health condition she has modified how she does laundry and has difficulty sitting through dinner. She has modified her work station where she writes and corrects tests, and driving is very difficult for her. (Ex. A, p. 10)

Claimant was hired by Landmark as a part-time server in June or July 2009. (Ex. A, p. 3) Claimant was attending college at this time. Claimant said after her injury she returned to work. She was working modified duty in the coffee shop. Claimant testified that the medication she was taking worked well for a time but became less effective and her condition got worse. (Tr. p. 34) She said that after attempting to work Frederick Dery, M.D. took her back off work and requested a functional capacity examination (FCE). Claimant said that the defendants denied the FCE so she was not able to return to work. (Ex. A, p. 4; Tr. pp. 29, 30) Landmark has not terminated claimant; claimant testified she was waiting for restrictions before she could return to Landmark. (Tr. p. 80) Claimant did not believe she could return to Landmark due to the weight she had to carry as a server and the constant walking. (Ex. A, p. 5; Tr. p. 67) Claimant said that sitting is one of the most problematic issues for her. After she sits for 5 to 10 minutes she gets a twinge in her right leg that makes it go numb. (Tr. 49) Claimant said that she could not work for the post office or her assembly job, as she believed the twisting, bending and standing was outside of her restrictions. (Tr. pp. 68, 69)

Claimant was at work on October 19, 2012 when she slipped on a wet floor and fell. (Tr. p. 78) Claimant first obtained medical care on October 22, 2012. Claimant testified that the work accident has increased her depression. (Tr. p. 92) Claimant

acknowledged she received mental health treatment before her 2012 injury at Landmark. She had not seen a psychiatrist or psychologist for any condition after her injury at Landmark. (Tr. p. 94) Claimant testified that Richard Kreiter, M.D. diagnosed her with post-traumatic stress syndrome with aggravation of claimant's bi-polar depression. (Tr. p. 98) Claimant did not know of any specific testing he provided to make this diagnosis, other than the hour and 20 minutes he spent with her. (Tr. p. 98)

Claimant said the Dr. Dery recommended a neurotransmitter for her back pain. Claimant felt that procedure was too invasive, as it would be first implanted on a trial basis and if successful it would be implanted permanently. (Tr. p. 97) Dr. Dery referred claimant to the Steindeler Clinic. The defendants decided to send claimant to Chad Abernathey, M.D for an evaluation.

Claimant testified that she had a short visit, less than 5 minutes with Dr. Abernathey. Dr. Abernathey relied on the MRI and informed claimant there was nothing he could do for her surgically. Claimant testified that Dr. Abernathey asked her to cross her leg, which she could not do and told her she had a problem with her hip. (Ex. A, pp. 13, 14)

Claimant said that after her visit with Dr. Abernathey she was referred to Dr. Dery on September 5, 2013. Claimant said she was told by Dr. Dery she could not have a hip problem. (Tr. p. 46)

Defendants decided that she no longer had a work injury, and her medical care and payments were stopped in October 2013. (Tr. p. 40)

Claimant testified that she had an appointment with Dr. Dery in June 2016. Claimant said that Dr. Dery recommended that she have a nerurotransmitter and a pain pump. (Tr. p. 54) Claimant said that if she had insurance she would like to proceed and obtain these medical devices. (Tr. p. 55)

Claimant returned to Dr. Abernathey on May 9, 2016. Claimant said she had another short visit. (Tr. p. 62)

Claimant testified that Exhibit 19, page 1 was a result of compiling the wage and tip income she received at Landmark. (Tr. p. 43)

Claimant calculated the total wages and tips claimant earned between July 2, 2012 and October 7, 2012 – a 14-week period before the work injury. She arrived at an average weekly wage of $308.89 and with the status of married with 4 exemptions a workers' compensation rate of $229.72. (Ex. 19, p. 1) Defendants calculate claimant's wages and tips using a 6-week period. (Ex. B, p. 1) Defendants' calculation determines that claimant's average weekly rate is the wage minimum, and therefore with the status married with 4 exemptions her weekly workers' compensation is $196.01. (Ex B, p. 2)

Karen Harrison, claimant's mother testified. She confirmed claimant's testimony about the appointments with Dr. Abernathey. She stated that when claimant returned to

Dr. Abernathey in May 2016, Dr. Abernathey said he could not do anything because he did not have a current MRI. (Tr. p. 122) Ms. Harrison said that before claimant's injury at Landmark, claimant was able to keep up with her 4 children, housework and yard work. (Tr. pp. 125, 126)

Sheila Gronewold was a supervisor at Landmark. Ms. Gronewold had never noticed claimant with a right foot drop before the work injury in 2012. (Tr. p. 132) After claimant's injury on October 19, 2012 claimant was assigned to work in the coffee shop area so she did not need to walk and carry as much. (Tr. p. 133)

Claimant was seen by Leck Read, M.D. on October 22, 1012 for low back pain. Dr. Read noted claimant had had back problems since May of 2012. (Ex. 1, p. 1) He also noted that claimant was in a car accident in 2006 and had recurrent low back/sciatic since then and gets some episodes of right foot dragging. (Ex. 1, p, 1) His assessment was,

- Wrist sprain
- Prepatellar bursitis
- Lumbago
- Contusion of the knee with intact skin surface
- Condition was work-related

(Ex. 1, p. 3) He referred claimant to occupational medicine.

On October 23, 2012 claimant went to Mercy Occupational Health. Claimant indicated on her health history form that she has had back problems since May 2012 and previously had a back injury in 2006. (Ex. 2, p. 1) Malhar Gore, M.D. examined claimant and referred claimant for physical therapy and gave her work restrictions. (Ex. 2, p. 5) On November 6, 2012 Thomas Dean, PA-C examined claimant. He restricted claimant from work and recommended x-rays and an MRI. (Ex. 2, p. 7)

On November 9, 2012 claimant was seen by PA Dean and was complaining that her back pain was worse and the pain was constant. (Ex. 2, p. 9) PA Dean's notes were, "MRI of the lumbar spine shows lumbar disc degeneration at L3-L4, L4-L5, and L5-S1. There is no significant central canal or neuroforaminal compromise." (Ex. 2, p. 10) His impression was back pain and he was going to obtain permission to perform a facet joint injection. He kept claimant off work. (Ex. 2, pp. 10, 11) Claimant had a CT-guided right SI joint injection on November 27, 2012. (Ex. 2, p. 18) Claimant did not get relief from the November 27th injection and a CT-guided right L4-5 interlaminar epidural steroid injection was performed on December 12, 2012. (Ex. 2, p. 22) On December 21, 2012 claimant reported some improvement in her back pain. She was still kept off work and was referred to a work hardening program. (Ex, 2, p. 24) On

January 11, 2013 PA Dean noted that he had nothing further to offer claimant concerning her right lower back pain. He referred her to Dr. Dery, a pain management specialist. He kept claimant off work. (Ex. 2, p. 21)

On January 18, 2013 Dr. Dery examined claimant. Dr. Dery wrote,

> She admits to having back pain prior to the fall. It has been an ongoing issue for her. Typically it is not an intrusive problem. Occasionally it would radiate down the leg when she had a flare-up of her pain. The pain that she is experiencing right now is definitely different than her regular low back pain. It is different than any radicular symptoms that she might have had before this in that it is much more intense and much more intrusive.

(Ex. 3, p. 2) Dr. Dery's assessment was,

1. Lumbosacral radiculitis.
2. Lumbar facet arthropathy.
3. Bipolar disorder.

(Ex. 3, p. 3) Dr. Dery recommended another injection. He noted that it did not appear that claimant was a surgical candidate. On February 7, 2013 Dr. Dery performed a 2-level lumbar transforaminal epidural steroid injection. (Ex. 3, p. 6) On February 19, 2013 Dr. Dery noted she received no relief from the injection, recommended another MRI and prescribed gabapentin. (Ex. 3, p. 7) Claimant had a second MRI on February 28, 2013. The MRI showed,

> She has got a broad-based disk protrusion with a small annular tear at L5-S1. There is no significant central canal stenosis, lateral recess stenosis, or foraminal stenosis at any level to explain any of her symptoms. Beyond that she has got some mild multilevel bilateral facet arthropathy and no other significant abnormalities.

(Ex. 3, p. 9) His impression was,

1) Symptoms consistent with a lumbosacral radiculitis. Potential other causes would be sciatic neuritis from something like piriformis syndrome or something along those lines.
2) Significant mood disorder.

(Ex. 3, p. 9) Claimant was restricted from work. On April 3, 2013 Dr. Dery noted that an EMG did not show any evidence of abnormality. The last MRI done showed a small annular tear at L5-S1. He was unable to determine the reason for the discomfort she was having. He switched claimant's medication to Lyrica. He suggested if she could not get additional relief getting a second opinion or that claimant may be a candidate for

a neurostimulator. (Ex. 3, pp. 11, 12) On May 5, 2013 Dr. Dery wrote defendants' claims examiner that he did not believe claimant could return to work at that time due to significant difficulty walking and pain. (Ex. 3, p. 14)

On May 16, 2013 claimant reported to Dr. Dery that she was doing better, but had a lot of room for improvement. She told Dr. Dery she would like to try to go work in any type of gainful employment. Dr. Dery retuned claimant to work in the coffee shop at Landmark, as standing and a little walking helps manage her pain. She was released with those restrictions as of May 20, 2013. (Ex. 3, pp. 15, 16) On June 26, 2013 Dr. Dery examined claimant. He noted that claimant had returned to work and was doing well but had an acute exacerbation of her pain. Dr. Dery took claimant off work. He recommended claimant see Dr. MacLennan for a surgical evaluation and if she is not a surgical candidate, he considered her a candidate for neurostimulation. (Ex. 3, p. 17)

Defendants referred claimant to Dr. Abernathey for evaluation and treatment, rather than Dr. MacLennan. (Ex. 5, p. 2) Claimant was seen on July 29, 2013. On her intake sheet claimant wrote she was having back and leg pain. (Ex. 5, p. 3) Dr. Abernathey noted claimant presented with chronic lumbosacral strain following a work incident. He did not recommend surgery. He concluded that claimant was having hip pain and recommended an orthopedic assessment. (Ex. 5, p. 5) In a letter to the defendants Dr. Abernathey noted claimant had subjective complaints and no objective findings with minimal degenerative changes of the lumbar spine. He recommended an orthopedic evaluation for her hip and recommended conservative treatment. (Ex. 5, p. 6) On September 10, 2013 Dr. Abernathey responded to a request for additional information from defendants and wrote that claimant was at maximum medical improvement (MMI) 6 months from her work injury, March 19, 2013 and she had no permanent restrictions. (Ex. 5, p. 7; Ex M, p. 2) On May 13, 2014 Dr. Abernathey stated he reviewed the surveillance report and video and concluded that claimant did not require any ambulation aids or orthopedic management. (Ex. O, p. 1) He noted that claimant seemed limber. (Ex. O, p. 2)

On September 5, 2013 claimant returned to Dr. Dery. Dr. Dery noted

> **Special Tests:** Positive straight leg raise on the right with reproduction of concordant radicular symptoms which are exacerbated by Braggard's test. Straight leg raise is negative on the left.
>
> **Gait:** The patient walks with an antalgic gait.

(Ex. 3, p. 19) Dr. Dery noted claimant did not want to discuss the neurostimulator or intrathecal drug delivery systems. His impression was chronic lumbosacral radiculitis. He recommended a functional capacity examination (FCE). He found her at MMI. He recommended a short period of occupational therapy. (Ex. 3, pp. 19, 20)

Claimant was seen at the University of Iowa Hospitals and Clinics (UIHC) on October 8, 2013 BY Nicholas Butler, M.D. who noted, "Neurologic: Sensory: Decreased sensation along the SI distribution of the R leg, normal sensation throughout L leg and remaining R leg. Motor: Decreased inversion strength of her R foot." And assessed claimant with, "Lumbosacral radiculopathy." (Ex. 7, p. 3)

On March 11, 2014 Dr. Read provided restrictions of,

> No prolonged standing in one place more than 10 minutes, No lifting or carrying over 10 pounds, No sitting in one place longer than 5 minutes at a time. Moving around and position changes are encouraged.

(Ex. 1, p. 13) Dr. Read continued to provide follow up for back care with the last evidence in the record of care as November 16, 2015. (Ex. 1, p. 34)

On November 17, 2014 Joshua Kimelman, D.O. performed an IME at the request of the defendants. He diagnosed claimant with low back pain. He agreed with Dr. Abernathey as to claimant's MMI date. He gave claimant a zero rating under the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition. Based upon claimant's subjective complaints he stated claimant is not able to return to her waitressing job. (Ex. 6, p. 3)

On December 2, 2014 Richard Kreiter, M.D. performed an IME. Dr. Kreiter wrote,

> My diagnosis for Amy's present condition would be right sciatic nerve irritation with chronic pain, primarily the right thigh, lumbosacral back pain with facet arthritis, and degenerative lumbar disc disease, intermittent paresthesias into the right leg and foot. The fall on 10/19/12 seemed to light up or accelerate the lumbosacral condition. It has caused a permanent aggravation of a preexisting problem.

(Ex. 9, p. 1) Dr. Kreiter recommended conservative care and possible adjustment of medication. He stated claimant was at MMI around January 1, 2014 and provided an 8 percent whole body impairment rating. He recommended restrictions of allowing alternating between sitting, standing and walking. He recommended occasional lifting of 15 – 20 pounds and avoiding forward flexed position. (Ex. 9, p.1; Ex. 10, p. 5) On December 9, 2015 Dr. Kreiter wrote a letter to claimant's counsel. He had reviewed some additional medical records and the claimant on that date. His diagnosis was, "A) Degenerative lumbar disc disease, L3-4, L4-5, and L5-S1, with facet arthrosis, chronic pain, right sciatica, neurologically intact. B) Posttraumatic stress syndrome with marked aggravation of bipolar depression following the fall and injury of 10/19/12 at the Landmark Restaurant." (Ex. 11, p. 1) He stated that claimant was not at MMI. (Ex. 11, p. 1) In the clinical note of December 9, 2015 there is no indication of any testing. (Ex. 12, pp. 1, 2)

On March 26, 2016 claimant's attorney requested Dr. Dery respond to a number of questions. (Ex. 15, pp. 1, 2) In an undated response, Dr. Dery responded. He replied that his examinations and claimant's history lead him to make the diagnosis of lumbosacral radiculitis. (Ex. 16, p. 1)

On April 1, 2016 Dr. Read responded to a letter from claimant's attorney. Dr. Read wrote,

> I have been providing medical care, as her primary care physician, for Amy Stourac since 10/22/2012. Based on my medical training and experience, Amy's low back pain condition was felt to be episodic pain prior to her fall at work on 10/19/2012. Since the fall, her back pain condition has become more persistent and chronic.
>
> I feel that it is within a reasonable degree of medical certainty that her injury from the fall on 10/19/2012 aggravated the pre-existing back condition (likely degenerative disc). The resultant soft tissue damage has resulted in her low back pain becoming more chronic.

(Ex. 18, p. 1)

Claimant's past medical history is relevant to her current claim.

Claimant has a history of treatment for post-traumatic stress disorder (PTSD), bipolar affective disorder and depression. (Ex. J, p. 1) She received care for some of her behavioral health issues at the UIHC and Mercy Hospital. (Ex. L, p. 8) In April 2008 claimant received extensive behavioral health services at UIHC for depression. (Ex. J, pp. 1 – 6) While the records do not say when the claimant was taken off work the records for the UIHC shows that she was released to return to work without restrictions in September 2007. (Ex. J, p. 7) Claimant had behavioral health treatment at UIHC in 2009 and 2010 for depression issues. (Ex. J, pp, 8-18)

On October 22, 2017 claimant was seen at Mercy Services Williamsburg for an acute back strain due to lifting boxes. She was given medication and taken off work. (Ex. K, p. 1) Claimant requested additional medication for this injury on November 12, 2007. (Ex. K, p. 2)

On December 9, 2009 claimant was knocked down by a snow truck. She was seen by Charlotte Koenig, M.D. Dr. Koenig's assessment was,

- Lumbar strain
- Cervicalgia cervical strain from the injury, no sign of weakness or nerve injury, will get plain films to r/o occult fracture.
- Lumbar radiculopathy at L5 –right

Probably due to the injury.

(Ex. K, p. 3)

On May 3, 2012 claimant went to the UIHC Emergency Department for worsening back pain, which had started about two weeks ago. She had some radiation of pain into the right leg. (Ex. J, p. 19) Claimant was provided a prescription, and the impression of Amber Sheeley, PA-C was "Acute on chronic low back pain." (Ex. J, p. 20) Claimant returned to the UIHC Emergency Department on May 8, 2012 with the same symptoms as she had on May 3, 2012. She was prescribed medication and discharged. (Ex. J, p. 23)

Claimant is requesting reimbursement of medical expenses at Mercy Services Williamsburg and UIHC. It appears that $1,265.33 was paid by insurance and a balance of $128.00 remains unpaid. (Ex. 23, p. 1) I find these costs are related to claimant's October 19, 2012 work injury.

The defendants conducted surveillance of the claimant over two days in August 2014 and submitted a report and an approximately 8 minute DVD. (Ex. C, pp. 1- 15 & DVD) The DVD shows the claimant standing and sitting outside her home smoking cigarettes for a little over seven minutes. The rest of the DVD shows about 27 seconds of claimant entering a store, walking and getting into her car. (Ex. C; DVD)

Claimant has been able to obtain full-time seasonal work that she can perform with accommodation. Claimant needs to be able to stand and sit as needed. She is limited to sedentary lifting and is only able to rarely bend or squat. Claimant completed her college degree after her injury. I find that claimant has a 65 percent loss of earning capacity.

RATIONALE AND CONCLUSIONS OF LAW

The claimant has the burden of proving by a preponderance of the evidence that the alleged injury actually occurred and that it both arose out of and in the course of the employment. Quaker Oats Co. v. Ciha, 552 N.W.2d 143 (Iowa 1996); Miedema v. Dial Corp., 551 N.W.2d 309 (Iowa 1996). The words "arising out of" referred to the cause or source of the injury. The words "in the course of" refer to the time, place, and circumstances of the injury. 2800 Corp. v. Fernandez, 528 N.W.2d 124 (Iowa 1995). An injury arises out of the employment when a causal relationship exists between the injury and the employment. Miedema, 551 N.W.2d 309. The injury must be a rational consequence of a hazard connected with the employment and not merely incidental to the employment. Koehler Electric v. Wills, 608 N.W.2d 1 (Iowa 2000); Miedema, 551 N.W.2d 309. An injury occurs "in the course of" employment when it happens within a period of employment at a place where the employee reasonably may be when performing employment duties and while the employee is fulfilling those duties or doing an activity incidental to them. Ciha, 552 N.W.2d 143.

The claimant has the burden of proving by a preponderance of the evidence that the injury is a proximate cause of the disability on which the claim is based. A cause is proximate if it is a substantial factor in bringing about the result; it need not be the only cause. A preponderance of the evidence exists when the causal connection is probable rather than merely possible. George A. Hormel & Co. v. Jordan, 569 N.W.2d 148 (Iowa 1997); Frye v. Smith-Doyle Contractors, 569 N.W.2d 154 (Iowa App. 1997); Sanchez v. Blue Bird Midwest, 554 N.W.2d 283 (Iowa App. 1996).

The question of causal connection is essentially within the domain of expert testimony. The expert medical evidence must be considered with all other evidence introduced bearing on the causal connection between the injury and the disability. Supportive lay testimony may be used to buttress the expert testimony and, therefore, is also relevant and material to the causation question. The weight to be given to an expert opinion is determined by the finder of fact and may be affected by the accuracy of the facts the expert relied upon as well as other surrounding circumstances. The expert opinion may be accepted or rejected, in whole or in part. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); IBP, Inc. v. Harpole, 621 N.W.2d 410 (Iowa 2001); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995). Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417 (Iowa 1994). Unrebutted expert medical testimony cannot be summarily rejected. Poula v. Siouxland Wall & Ceiling, Inc., 516 N.W.2d 910 (Iowa App. 1994).

While a claimant is not entitled to compensation for the results of a preexisting injury or disease, its mere existence at the time of a subsequent injury is not a defense. Rose v. John Deere Ottumwa Works, 247 Iowa 900, 76 N.W.2d 756 (1956). If the claimant had a preexisting condition or disability that is materially aggravated, accelerated, worsened or lighted up so that it results in disability, claimant is entitled to recover. Nicks v. Davenport Produce Co., 254 Iowa 130, 115 N.W.2d 812 (1962); Yeager v. Firestone Tire & Rubber Co., 253 Iowa 369, 112 N.W.2d 299 (1961)

I find that claimant has proven by a preponderance of the evidence that she has a permanent impairment that arose out of and in the course of her employment on October 19, 2012. I find the opinions of Dr. Dery, Dr. Read and Dr. Kreiter the most convincing.

Both Dr. Dery and Dr. Read have the most experience and have spent more time examining claimant than Dr. Abernathey or Dr. Kimelman. Dr. Dery recommended implanting a neurostimulator. Dr. Kreiter spent more time with claimant than Dr. Abernathey. Claimant had a significant history of back and right leg pain. In 2012 claimant's back and sciatica did not prevent her working until she fell on October 19, 2014. Her condition has not returned to her pre-October 2012 condition. The fall permanently aggravated claimant's low back and right-sided sciatica.

I find Dr. Abernathey's opinions to be not convincing. His recommendation for a hip evaluation as a source of some of claimant's pain is counter to the weight of medical records and claimant's credible testimony about sciatic pain. Dr. Abernathey's

conclusion that claimant was at MMI as of March 19, 2013 is in conflict with the treatment and restrictions she had in March 2013. Dr. Dery had claimant totally off work and was still adjusting her medications. Dr. Dery did not let claimant go back to restricted work until May 20, 2013. After reviewing the surveillance DVD (7 ½ minutes sitting/standing and 27 seconds of claimant moving) I question the conclusion of Dr. Abernathey's that claimant is limber on such a limited and edited DVD. See Cedar Rapids Community School v. Pease, 807 N.W.2d 839, 848 (Iowa, 2011).

Claimant has not provided convincing evidence that her October 19, 2012 injury permanently aggravated her depression. Claimant has not actively sought out additional treatment for depression, and there is not convincing evidence that the depression was permanently aggravated by her work injury.

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

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

Compensation for permanent partial disability shall begin at the termination of the healing period. Compensation shall be paid in relation to 500 weeks as the disability bears to the body as a whole. Section 85.34.

I previously found that claimant has a 65 percent loss of earning capacity. Claimant has a college degree in English. She has been able to find accommodated work and at times works full time. While her articles she writes provide an outlet for her writing abilities, it is unlikely that it will lead to significant income. Claimant has shown initiative by obtaining work she can perform with her injury —testing and also as a remote office manager. The range of work is limited for claimant. She cannot perform the full range of sedentary work due to her sitting and standing limitations. I find claimant has a 65 percent industrial disability entitling her to 325 weeks of permanent partial benefits.

Claimant argues that the commencement date of permanent partial benefits the date that Dr. Dery said claimant was at MMI. Defendants argue that March 19, 2013 is the commencement date for permanent benefits.

Iowa Code section 85.34(2) provides that "[c]ompensation for permanent partial disability shall begin at the termination of the healing period provided in subsection 1." Iowa Code section 85.34(1) provides that healing period benefits are payable until the employee: (1) has returned to work; (2) reaches MMI; or (3) is medically capable of returning to substantially similar employment to that which the employee was engaged in at the time of the injury. The Iowa Supreme Court in June, 2016 issued its decision in Evenson v. Winnebago, and stated that the injured worker's "first return to work established the end of the healing period and the commencement of PPD benefits because it was the earliest of the three triggering events prescribed in section 85.34(1)." Evenson v. Winnebago, 881 N.W.2d 360, at 372 (Iowa 2016).

The Court went on to state that "[o]ur determination that Evenson's return to work . . . established the commencement date for PPD benefits is not precluded by the fact that he was entitled to TPD benefits for subsequent weeks . . ." Evenson, 881 N.W.2d at 372. The majority opinion held that temporary benefits can be paid at the same time as permanent benefits, noting that the purpose of temporary and permanent benefits are different in that the law allowed an overlapping of temporary and permanent benefits[2].

The evidence presented at hearing indicates that claimant was taken off work from October 20, 2012 through March 19, 2013. (Ex. 3, p. 15) Claimant returned to work on March 20, 2013. Claimant argues she returned to work with restriction and eventually was not able to continue her work in the restaurant, and the date claimant reached MMI is the correct date for the commencement of permanent benefits. That argument is counter to the Evenson case. Permanent partial benefits commence on March 20, 2013, the day claimant returned to work.

Claimant's return to work after her injury established the termination of a healing period. Evenson v. Winnebago Industries, Inc., 881 N.W.2d 360, 372-373 (Iowa 2016). Claimant's entitlement to permanent partial disability benefits commenced on May 20, 2013. Id.; Iowa Code section 85.34(1).

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

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[2] Evenson at 374 (Our conclusion that Evenson's entitlement to PPD benefits was not suspended beyond the end of the first healing period until after his period of temporary partial disability ended poses no risk of duplication or overpayment of benefits under the circumstances presented here. As we have noted, TPD payments are calculated to replace part of Evenson's loss of actual earnings after he returned to work during a period of partial disability. The PPD payments, by contrast, are intended to compensate him for a different loss: a permanent partial loss of his left arm. Thus, although we conclude today that PPD payments can be owed for periods during which a claimant was paid temporary partial disability, no duplication of benefits arises.)

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).

I found that the medical expenses in Exhibit 23 are related to her work injury. Defendants shall pay any outstanding bills and reimburse claimant any insurance carried for those expenses.

Defendants shall also provide medical care to claimant. Dr. Dery is determined to be claimant's authorized physician. Defendants shall provide care that he recommends or care that he has selected for the claimant's low back and right sciatica.

Section 85.36 states the basis of compensation is the weekly earnings of the employee at the time of the injury. The section defines weekly earnings as the gross salary, wages, or earnings to which an employee would have been entitled had the employee worked the customary hours for the full pay period in which the employee was injured as the employer regularly required for the work or employment. The various subsections of section 85.36 set forth methods of computing weekly earnings depending upon the type of earnings and employment.

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. Section 85.36(6).

I find that the weeks immediately preceding claimant's date of injury as identified by claimant are as representative and typical as any other weeks. I do not find that the weeks selected by the defendants are represented. There is no explanation by defendants why they chose so few weeks for their calculation. I concur with claimant's calculations of the weekly rate located at Exhibit 19, page. 1. I specifically find that claimant's gross average weekly wages prior to the October 19, 2012 injury date were $308.89 and using the rate book in effect at the time of the injury her weekly workers' compensation rate is $229.72.

The only issue the parties want a ruling on temporary/healing period benefits is the rate. (Tr. pp. 5, 6) Healing period benefits are to be paid at the rate of $229.72 per week.

Claimant has requested costs of $1,102.65. The costs are $100.00 for the filing fee; $600.00 for a report of Dr. Dery; $250.00 for a report by Dr. Read; and $152.65 in deposition costs. (Attachment to hearing report) Claimant is awarded these costs pursuant to 876 IAC 4.33.

ORDER

The parties are ordered to comply with all stipulations that have been accepted by this agency.

The defendants shall pay claimant temporary benefits at the weekly rate of two hundred twenty-nine dollars and 72/100 dollars ($229.72) per week.

The defendants shall pay claimant three hundred twenty-five (325) weeks of permanent partial disability benefits at the weekly rate of two hundred twenty-nine and 72/100 dollars ($229.72) per week commencing on May 20, 2013.

Defendants shall provide the medical care and medical expenses as set forth in this decision.

Defendants shall pay claimant costs of one thousand one hundred two and 65/100 dollars ($1,102.65).

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

Signed and filed this 28th day of February, 2017.

JAMES F. ELLIOTT
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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JFE/sam

Right to Appeal: This decision shall become final unless you or another interested party appeals within 20 days from the date above, pursuant to rule 876 4.27 (17A, 86) of the Iowa Administrative Code. The notice of appeal must be in writing and received by the commissioner's office within 20 days from the date of the decision. The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday. The notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 1000 E. Grand Avenue, Des Moines, Iowa 50319-0209.