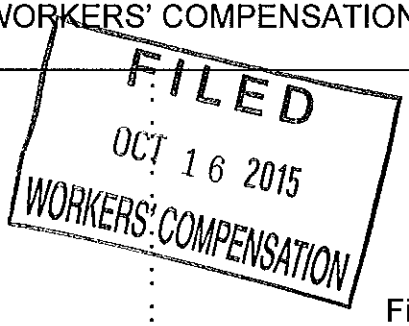
BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER



KATHY SNODGRASS,

Claimant,

vs.

FIRST STUDENT, INC.,

Employer,

and

NEW HAMPSHIRE INSURANCE COMPANY,

Insurance Carrier,
Defendants.

File No. 5049340

ARBITRATION

DECISION

Head Note Nos.: 1100, 1803, 1700

STATEMENT OF THE CASE

Kathy Snodgrass, claimant, filed a petition in arbitration seeking workers compensation benefits against First Student, Inc., employer, and New Hampshire Insurance Company, insurance carrier, for a work injury date of April 1, 2014.

This case was heard on August 4, 2015, in Council Bluffs, Iowa.

The record consists of exhibits 1-18 from the claimant and exhibits A-CC from the defendants along with the testimony of Kathy Snodgrass, Jeff Jensen, Josh Miller. The case was deemed fully submitted on August 25, 2015, upon the simultaneous filing of briefs.

ISSUES

1. Whether the alleged injury was the cause of permanent disability and if so, the extent of said disability.

2. Whether claimant has sustained an odd-lot disability loss;

3. Whether defendants are entitled to a credit for overpayment of permanent partial disability benefits.

STIPULATIONS

The parties agree claimant sustained an injury on April 1, 2014. Entitlement to temporary benefits was no longer in dispute at the time of the hearing. The parties agree that the disability, if one was found, was an industrial loss with the commencement date of permanent partial disability benefits to be September 8, 2014.

At the time of the injury, claimant's gross earnings were $270.00 per week and she was entitled to two exemptions. Based on those foregoing numbers, the weekly benefit rate is $190.24.

Prior to the hearing, the claimant was paid 32 weeks of benefits at $346.58 and the defendants are pursuing a credit for the overpayment.

FINDINGS OF FACT

Claimant was a 51 year old person at the time of the hearing. Her educational background includes a high school diploma. Claimant has difficulty reading and writing. Her mathematical skills are limited to simple addition and subtraction. In addition to her academic difficulties, she struggles with mild symptoms of depression. (Exhibit 3, page 2) Claimant asserted that she has a reading level of a third grader.

According to a psychological assessment in 2010:

> Ms. Snodgrass was oriented to person, place, date, and situation. She was able to name important political figures and understand simple proverbs. Her abstract thinking was intact. Ms. Snodgrass's expressive and receptive language were adequate. Rambling, flight of ideas, or loose associations were not noted. Ms. Snodgrass described her mood as "depressed." She reported significant concentration difficulties and described her short-term memory as poor. Ms. Snodgrass reported that she remembers "bits and pieces" of her past. Ms. Snodgrass reported one incident of an auditory hallucination approximately a week ago (in which she heard someone talking to her in the restroom when no one was really there), but denied any other history of such. Ms. Snodgrass described her energy level as fair. She described sleep difficulties that have been present for many years and which she attributes to physical health difficulties (i.e.g. pain). Ms. Snodgrass's insight and judgment appear to be fair. She denied current suicidal ideation.

(Ex. 3, p. 3)

> There appears to be significant restrictions of activities of daily living related to reading difficulty. Ms. Snodgrass appears to have mild

> difficulties in maintaining social functioning. Stress does exacerbate her symptoms. Ms. Snodgrass would be able to interact with coworkers and supervisors appropriately. She would be able to with [sic] understand and remember simple instructions if delivered orally, but would struggle with anything that was written down. Ms. Snodgrass appears to have moderate attention and concentration difficulties. Ms. Snodgrass would likely struggle with adapting to changes in her environment.

(Ex. 3, p. 3)

She can use her phone to write a note. She can speak into it and it will "spell out the word" for her.

> PROGNOSIS:
>
> Prognosis is guarded for Ms. Snodgrass. She appears to struggle with significant academic difficulties that have negatively impacted her ability to gain/maintain employment. In addition, she appears to struggle with symptoms of mild depression. With consistent, appropriate mental health treatment she would likely experience an improvement in her depressive symptoms; however, her reading difficulties may be more resistant to any type of remediation at this point.
>
> ABILITY TO MANAGE FUNDS:
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> Ms. Snodgrass would need assistance with managing any funds should they be awarded.

(Ex. 3, p. 4) However, Myrna Tashner, Ed.D., determined that claimant did not have a medially determinable impairment in 2009 to prevent her from working. (Ex. F, p. 28)

> This 46 year old claimant alleges back, legs, knee, and illiterate. AOD is 2/23/09. She completed the 12th grade in 1982. ADLS show that she lives alone and is able to cook complete meals on good days, drive, shop, pay bills, count change, and handle a savings account. She has made SGA in the past. Due to this no further testing was done. No mental or learning diagnosis has been given. Therefore, due to the above, she does not have medically determinable mental impairment that would prevent her from working at this time.

(Ex. F, p. 28)

Claimant's employment background includes housecleaning at a nursing home, work at a fast food location, an industrial seamstress, mail sorter, production worker, and a laundress.

She began having problems in her low back in 1986 following a motor vehicle accident. In 2005, the pain became serious enough that she needed additional care. (Ex. A, p. 1) Eric Phillips, M.D., performed union surgery on April 1, 2005. (Ex. A, p. 7) Because of a loss of insurance, claimant was not able to return to Dr. Phillips until February 2006. (Ex. A, p. 12) She was diagnosed with chronic back pain and was seen by Huy D. Trinh, M.D., whom she had consulted with in 2001 and earlier. (Ex. C, p. 18) She received injections and ultimately a prescription for a TENS unit. (Ex. C p. 12-20)

On November 11, 2009, she had a surgical repair of a torn meniscus. The injury occurred as a result of being dragged backward by her hair and subsequently falling. (Ex. D, p. 23)

In 2009, claimant reported to a psychologist that she quit her job, in part because of her husband's death, as well as declining physical health.

A self-report was included as a part of claimant's 2010 SSD application. (Ex. S, p. 129) In that report, claimant expressed difficulty with lifting, squatting, bending, standing, reaching, walking, sitting, kneeling, stair climbing, completion tasks, concentration, understanding, and following instructions. She felt she could not lift more than five pounds. (Ex S, p, 134)

Claimant was examined Ibrahim Aldoss, MBBS, for her back pain and right knee pain. (Ex. G, p. 29) She had decreased range of motion due to pain and tenderness at the paraspinous upon palpation along with decreased lumbar spine flexion. (Ex. G, p. 31) She was given work restrictions of no lifting more than 20 pounds, no frequent carrying of more than 10 pounds and no standing or walking more than 6 hours. (Ex. H, p. 35)

A medical professional for the SSA, Dr. Jan Hunter, noted that the claimant's credibility was placed in question by the fact that her pain questionnaire did not match claimant's activities of daily living:

> The credibility of the claimant's allegations is partially eroded as on the ADLS and pain questionnaire in 5/10 she states that she can only lift 5 lbs and walk a half block, however, at the CE she states that she can lift 10 lbs and walk 1 block. She also lives alone and is able to do her own self-care, prepare meals, launder, clean, drive, and shop.

(Ex. H, p. 39)

Treatment picked up in 2013 with claimant reporting significant pain again in her back and legs to Sara Rygol, PAC, a health professional from claimant's family physician's office. The condition was so serious she explained that sometimes her husband had to pick claimant up from the toilet and couch because claimant was unable to move. (Ex. L, p. 53) In 2013, it was noted that claimant's right leg was shorter than

her left. This was an observation made in later medical records post injury. (Ex. L, p. 55) On January 6, 2014, claimant was seen by Ms. Rygol for complaints of back pain. Claimant was tender upon palpation of the paraspinous muscles of the lumbar area with SI joint tenderness and decreased range of motion due to pain. (Ex. L, p. 57) She was prescribed Meloxicam 15 mg for back pain. (Ex. L, p. 58)

She began working for defendant employer in 2011 as a part-time employee. She was hired to be a monitor on a school bus and would work, on average, approximately 24 hours a week. At the time of her injuries, she had certain physical requirements such as being able to lift a 40 pound bag, climb and descend bus steps three times in 30 seconds, or exit a bus within 20 seconds.

She took a pre-employment physical and passed it. She felt that she did a good job and was well liked by the bus drivers. The job could be physically demanding. She worked seven hours a day, four to five days a week. Her rate of pay was $9.90 per hour.

On April 1, 2014, claimant was riding on one of the buses when she believes the driver hit a bump which caused an injury to her back. During testimony, she explained that there were two potholes struck. The Alegent Clinic records identify the onset as "precipitated by jerks". (Ex. 6, p. 1) She finished out the route but reported the injury. She was sent to Arthur D. West, M.D., at Concentra Medical Centers on April 2, 2014 where she was diagnosed with a lumbar strain. (Ex. 4, p. 3) Claimant was instructed to forgo riding on a bus and restricted from bending more than four times per hour. (Ex. 4, p. 2) She returned five days later on April 7, 2014, after three physical therapy sessions. Claimant reported persistent physical pain. On examination, she exhibited decreased range of motion but positive Waddells' tests. (Ex. 4, p. 4) On the same day she presented to her family physician, Kavish Rohatgi, MBBS, with intense complaints of pain. (Ex. 6) Due to unresolved symptoms, claimant was referred for an orthopedic consult on April 11, 2014. (Ex. 4, p. 5)

Claimant was seen by Eric D. Phillips, M.D and Jennifer Chavez, PA-C, on April 14, 2014. Her examination was largely normal. (Ex. 7, p. 4-5) She was diagnosed with right lower limb pain and lumbar pain. An MRI was ordered which revealed no injury and claimant was returned to work. (Ex. 7, p. 9)

> I will allow her to return to work to 40 pound maximum lifting. She does not believe she can do this work and is somewhat distraught by this today. I explained to her that NIOSH guidelines for moderate back condition would allow someone to lift up to that weight. We will send her for a course of therapy and follow up in six weeks time. She is to continue on the ibuprofen.

(Ex. 7, p. 9)

Her specific restrictions were as follows:

> Able to return to work on: 4/29/14
>
> Able to return to work with restrictions
>
> > Restricted to light duty. No lifting over 40 lbs. No excessive or repetitive bending, twisting or stooping. Ability to change positions as needed for comfort.

(Ex. 7, p. 10) Dr. Phillips had originally operated on claimant on April 1, 2005, performing a lumbar spine fusion. (Ex. 7, p. 1)

During the same time period, claimant had right knee pain for which she underwent surgery. That was unrelated to her work injury. (See Ex. L, pp. 60-63)

The defendant employer called to see if the claimant could ride on the bus under her work restrictions and Dr. Phillips agreed. (Ex. 7, p. 11) After one day of work, however, claimant called Dr. Phillips to request a change in her work restrictions. The office complied:

> [P]atient called and stated that she tried riding on the bus at her job yesterday and it made her back much worse. I spoke with Dr. Phillips and he said that is fine to have her unable to ride the bus for work.

(Ex. 7, p. 12)

She returned to Alegent with repeated complaints of back pain down the right side of her lower back and into her buttocks along with tingling sensation in her leg. (Ex. 6, p. 4) Sara Rygol referred claimant to a chiropractor for alignment issues and recommended claimant be taken off of work from April 29 - May 6 for back pain. (Ex. 6, p. 5)

On July 2, 2014, claimant was seen by James Devney, D.O., at the request of defendant employer. Dr. Devney noted claimant had tenderness in the lumbar region upon palpation and that the claimant expressed pain with flexion. (Ex. 9, p. 2) He recommended claimant undergo physical therapy. He saw claimant again on July 14, 2014, and due to her continuing complaints of symptomatology, he ordered a corticosteroid injection. (Ex. 9, p. 7) Unfortunately, the injection appeared to have only minimal relief lasting a scant 2-3 days. (Ex. 9, p. 10)

When Dr. Devney saw claimant again on August 4, 2014, he recommended she be placed on a 20-pound weight restriction with orders to not ride on the bus. (Ex. 9, p. 12) He further recommended that she undergo a course of osteopathic manipulation. (Ex. 9, p. 11) She underwent osteopathic manipulation with Mark Shirley, D.O., who

found her to have pain at the right SI joint upon movement. He did note that she had positive Waddell's signs for over-reaction. (Ex. 11, p. 2)

Dr. Devney saw claimant once more on September 26, 2014. At that time, claimant's objective signs of pain included painful internal and external rotation of the right hip, tenderness over the L5 and S1 spinous processes and some limited range of motion in the lumbar spine. (Ex. 9, p. 14-15) Other than that, claimant exhibited normal sensation, normal bulk and tone, normal gait pattern, and negative straight leg testing. (Ex. 9, p. 15)

> In brief, Kathy underwent a successful L5-S1 arthrodesis back in the year 2005. According to her, she was doing well up until April 1st of this year at which time she experienced recurrent right-sided low back and buttock pain in association with usual work-related activities. She underwent a subsequent fluoro-guided, dye-confirmed intraarticular right sacroiliac joint anesthetic/corticosteroid injection which provided significant, although short-lived benefit. She was subsequently referred for a course of osteopathic manipulative treatment. Despite this effort, her symptoms remain. Treatment options moving forward were discussed to include moving forward with a sacroiliac joint radiofrequency neurotomy versus the establishment of maximal medical improvement. She elected to proceed with the latter and was referred for a formal functional capacity evaluation in an effort to objectify outstanding physical capability. Ms. Snodgrass was encouraged to continue with daily independent home exercise in addition to over-the-counter analgesics as needed. Kathy is released from my care.

(Ex. 9, p. 15) After claimant declined future treatment, claimant was sent for an FCE. The FCE results were deemed valid although she did have exaggerated pain complaints and she was categorized as capable of light physical demand work.

> Based on her test results, I recommend the following guideline restrictions within the LIGHT physical demand level:
>
> 1. Spinal forward bending should be limited to an occasional basis through her end range motion but she is capable of frequent bending through mid range. Prolonged forward bent spinal postures should be avoided.
>
> 2. She displayed the ability to sit and stand/walk on a frequent basis during testing. I recommend she occasionally alter her position to minimize the effects of prolonged postures. She reported a lower tolerance level for these activities than she displayed during the exam.
>
> 3. Full squatting (hand touch to the floor) should be limited to an occasional basis secondary to limited lumbar motion, lower extremity inflexibility and low trunk/abdominal strength. She is capable of frequent partial squatting.

(Ex. 12, p. 2) Following the FCE, it was advised that claimant could not meet the qualifications of a bus monitor under her current restrictions. Claimant's last day of employment was September 30, 2014.

On October 8, 2014, Dr. Devney adopted the FCE restrictions placing claimant in the light duty physical demand category on a permanent basis and assessed a 3 percent body as a whole (BAW) impairment rating. (Ex. 14, p. 1)

Claimant returned to her family doctor on October 17, 2014, with repeated complaints of pain and Dr. Rohatgi recommend claimant be seen at the pain clinic for her back pain. (Ex. 6, p. 8)

Richard P. Bose, M.D., saw claimant for chronic pain on February 11, 2015. (Ex. 6, p. 9) A new MRI showed normal alignment of the vertebra along with no compression fractures. There was some degenerative disc disease but nothing had changed significantly when compared to the August 2002 examination. (Ex. 6, p. 10) On examination, she had good range of motion in her cervical spine with no spontaneous complaints of pain despite informing the nurse that her pain range was 11 on a 0-10 scale. (Ex. 6, p. 11, 15) She did have limited range of motion in the lumbar spine and increased pain. Dr. Bose recommended a right sacroiliac joint injection for diagnostic and therapeutic purposes. (Ex. 6, p. 16)

In the physical therapy records, claimant reported back surgery that completely resolved.

> Pre-Injury Status: Patient working at a regular duty status prior to injury. She had back surgery around 1999. She had a lumbar fusion at L5-S1. She had leg pain prior to the surgery which was completely resolved after the surgery. She would have intermittent soreness into her back after significant activity which would resolve.

(Ex. 5, p. 2)

To Kavish Rohatig, MBBS, she said she had no surgery:

> Kathy E. Snodgrass is a 50 y.o. female who presents for evaluation of low back pain. The patient has had history of lumbar disc disease with h/o back surgery. Symptoms have been present for 7 days and are not getting any better. Onset was related to / precipitated by jerks while riding on bus as monitor. The pain is located in the right lumbar area and radiates to the right hip, right thigh. The pain is described as burning and occurs all day. She rates her pain as severe. Symptoms are exacerbated by flexion, sitting, standing for more than 10 minutes, twisting and walking for more than 100 steps. Symptoms are improved by nothing. She have [sic] already seen by a doctor from her work who have cleared her to go back to work with restriction of not riding on the bus. But she is not even

> able to sit anywhere for prolonged periods and needs note to work. She has also tried muscle relaxants, NSAIDs and PT which provided no symptoms relief, prescribed by them. She has no other symptoms associated with the back pain. The patient has no "red flag" history indicative of complicate back pain.

(Ex. 6, p. 1)

Eric D. Phillips, M.D., saw claimant on April 14, 2014. It was reported that claimant was pain free following her ALIF L5-S1 surgery with Dr. Phillips in 2005. (Ex. 7, p. 1)

IME

Claimant underwent an independent medical examination (IME) with Michael McGuire, M.D., a physician of her choosing, at the Gallagher Law Firm. (Ex. 16, p. 1) The examination was relatively short, lasting approximately 25-30 minutes. (Ex. CC, p. 234) Dr. McGuire recorded that claimant had been pain free and fully functional for a number of years following the fusion surgery in 2005. (Ex. 16, p. 2) Dr. McGuire diagnosed claimant as suffering mechanical low back pain secondary to lumbar strain and assigned a 6 percent BAW impairment. (Ex. 16, p. 3)

On April 28, 2015, claimant was seen by Dean Wampler, an examiner retained by defendants. Dr. Wampler felt claimant's lumbar mobility was markedly diminished by poor effort. Further, his opinion, was adversely impacted by what he perceived to be her dishonest response to her previous back pain:

> The preinjury medical records clearly show that Ms. Snodgrass' assertion that she did not have any difficulties after her 2005 surgery are not true. When I asked her today how she recovered from that surgery, her response was "I did fine". When I asked again if she had any aches or pains after surgery, she responded that she would once in a while have some aches or pains but it was never anything that lasted and never anything she went to the doctor for. Her response is not compatible or consistent with the preinjury medical records.
>
> Both Drs. Devney and McGuire issued impairment ratings on the understanding that Ms. Snodgrass did not have any chronic low back problems after her fusion surgery. This makes the impairment ratings invalid based on inadequate and false information.

(Ex. Q, p. 88) He concluded that claimant sustained only a temporary exacerbation of a chronic problem.

Amanda Ruhland, MA, a rehabilitation consultant, reviewed records and met with claimant on May 21, 2015. (Ex. 17) Based on her age, limited intellectual ability, and work restrictions, Ms. Ruhland found that claimant was totally and permanently

disabled. Ms. Ruhland classified all previous work by claimant as in the medium work category. At the time of her injury, claimant was earning approximately $9.80 per hour and an average weekly wage of $256.38.

> Examples of jobs that were initially identified as potential placement options for Ms. Snodgrass based upon her work history, educational background, demonstrated aptitudes and physical restrictions included the following types of positions: General Office Worker; Telemarketer; Automobile Detailer; Lot Attendant; Light Assembler; and Food Deliverer. When further research was completed to determine whether Ms. Snodgrass would be a candidate for these jobs, it was determined that employers would either not be able to accommodate Ms. Snodgrass' physical restrictions in these positions or that these positions required computer skills and/or reading/spelling/math skills which Ms. Snodgrass does not possess.

(Ex. 17, p. 19) Ms. Ruhland further concluded that "labor market research" found that the positions required lifting in excess of her weight restrictions on occasion and keyboarding skills along with reading, spelling and math skills that were beyond claimant's ability. (Ex. 17, p. 19) Ms. Ruhland specified that she relied upon the FCE results that were accepted by Devney and McGuire. (Ex. 17, p. 8)

On June 19, 2015, Ronald Schmidt provided an industrial disability and vocational evaluation of the claimant. He reviewed medical records and interviewed claimant. (Ex. R, p. 95) Mr. Schmidt classified claimant's work as a bus monitor as light duty work, but claimant testified (and later paperwork confirmed) that the bus monitor job required lifting up to 40 pounds which would push the position of bus monitor for the defendant employer outside of the light duty work category. All of claimant's other past work Mr. Schmidt categorized as medium duty.

Mr. Schmidt conducted an analysis and determined that pre injury, her employment possibilities was 4,671 and post injury there was a reduction to 2,214 or a 53 percent reduction in her employment possibilities. (Ex. R, p. 101)

Based on the FCE restrictions, he found her loss of access to the labor market to be approximately 53 percent but only approximately 15 percent to 20 percent of her earning power. (Ex. R, p. 103) Mr. Schmidt felt that there were unskilled positions within claimant's work abilities such as housekeeper, cashier, or order filler. (Ex. R, p. 104). Mr. Schmidt questioned Ruhland's decision to include categories like Office Worker and Telemarketer which would be skilled positions that claimant would not have been able to do prior to her injury. (Ex. R, p. 104)

In her SSD application of April 6, 2010, claimant described several of her past work positions as falling within the light duty category. For instance, in helping at the day care, she walked 30 minutes a day and stood 1 and 1/2 hours a day and sat for 4 hours a day. The heaviest weight she lifted was 12 pounds. (Ex. S, p. 115) In laundry

and housekeeping, the most she lifted was 12 pounds and she walked and sat for 1 hour per day and stood for 6 hours per day. (Ex. S, p. 116) As a mail sorter, the heaviest weight she lifted was 5 pounds and walked and stood for 1 hour and sat for 6. (Ex. S, p. 117) In fact, all the positions that claimant described in her 2010 SSD application met and/or fell within her post injury work restrictions.

Claimant has twice applied for SSD. She claims that due to her learning disability she has not reviewed the applications.

On April 6, 2010, claimant's sister-in-law filled out an application and the claimant acknowledged that her relative knew claimant sufficiently to fill the report out. During the testimony at hearing, it was apparent claimant was trying to diminish the statements made in the SSD application or distance herself from them by claiming she was unaware of the statements made on her behalf.

In the April 2010, SSD application, filed on claimant's behalf, she asserted she had been unable to work for five years preceding the application due to debilitating knee and back pain. (Ex. S, P. 106, 132) In the application she signed, she asserted several severe and disabling conditions. On some days she would remain in bed with a heating pad. (Ex. S, p. 128) She could not engage in sports, walking, standing, taking care of household duties, or working. (Ex. S, p. 126) She had difficulty eating, taking a bath, going to the bathroom and would wake up multiple times during the night. (Ex. S, p. 127)

Her claim was denied:

> As you have requested, we have reviewed your claim for disability benefits. You say you are unable to work due to back, legs, knee, and being illiterate. There is limited information regarding your condition prior to 9/2009. Therefore we have insufficient evidence prior to 9/2009. Although your condition may cause you some pain, you are able to move your arms, legs and back satisfactorily. You are able to work without assistance or assistive devices. Although you may have some learning problems, you are able to handle your own affairs and interact appropriately. You are able to care for your personal needs and think and act in your own interest. Considering your overall condition, you would be capable of performing work similar to your past work as a mail sorter as it is normally performed in the national economy.

(Ex. S, p. 140)

In 2014, claimant re-applied following her work injury. She complained of severe lower back pain that extended into both legs. (Ex. T, p. 145) Her prescription for Meloxicam was unchanged at 15 mg. (Ex. T, p 146) She had additional prescriptions for Tramadol and cyclobenzaprine. (Ex. T, p. 146) Her itemized list of activity reduction matched that of her application in 2010. Interestingly, her work descriptions changed.

For instance, instead of the heaviest weight lifted as a day care worker being 12 pounds, she indicated it would be from 6 to 45 pounds. (Ex. T, p. 150) The laundry work changed from 12 pounds to 50 pounds. (Ex. T, p. 151) She claimed to play horseshoes, bowling, softball and that she could engage in none of these activities since her injury on 2014.

The juxtaposition of the 2010 and 2014 applications are striking in their similarities. Claimant purports the same injuries, the same debilitating pain, and the same decrease in activities. The only material changes appear to be in the weights she asserted she lifted in her previous jobs.

Her 2014 application was denied as well.

Claimant's former significant other testified at the hearing along with her son. At the time of her injury, claimant was caring for her grandson and hoping to adopt him. She testified that because of her injury, she was unable to care for him and ultimately the grandson was moved to claimant's sister about three or four months following the injury. Claimant currently lives with her son, Joshua Miller.

She has not sought any additional employment and believes herself to be unemployable.

CONCLUSIONS OF LAW

The party who would suffer loss if an issue were not established has the burden of proving that issue by a preponderance of the evidence. Iowa R. App. P. 6.14(6).

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).

The greater weight of the evidence supports that claimant had a long-standing chronic back problem. There was only one doctor out of the many who saw claimant who concluded that claimant's current symptoms are the result of a long standing chronic back problem and that was the expert retained by the defendants. The defendants argue that Dr. Wampler's opinions are the most reasoned in the case because he, of all the doctors, was fully aware of claimant's previous medical history. Dr. McGuire, hired by the claimant, was unaware of the full extent of claimant's back complaints including the most recent complaints just a few months prior to the claimant's work injury.

Yet claimant was able to pass the defendants' work physical more than once despite the work exceeding previously imposed work restrictions recommended only a year or so prior to claimant's employment with defendant employer. She worked without restrictions from 2011 until 2014. She performed all the duties required of her and was dismissed from her job when it was noted that her restrictions exceeded the job requirements.

Her treating physician, Dr. Devney, found that claimant had sustained a 3 percent BAW impairment. Dr. Phillips who had done the 2005 lumbar fusion agreed with restrictions of no more than 20 pounds of lifting which was generally consistent with her work restrictions set forth by the 2014 FCE.

Claimant asserts that all the doctors found that her injury was work related. The undersigned is unconvinced that Dr. Rohatgi's note of April 7, 2014, that patient has no 'red flag' history indicative of complicated back pain means that claimant is pain free. In fact, it could easily be another example of claimant not being fully forthcoming with her past medical history. Further noting that claimant has a work injury as did Dr. Phillips or Dr. West does not mean that claimant has a permanent injury. The defendants admit to

an injury, only arguing that the injury resulted in a temporary flare rather than a permanent and disabling impairment.

That said, the testimony of the non-party witnesses corroborate claimant's preinjury behavior of working without restrictions and being capable of at least part-time employment in an unskilled medium work category position. The greater weight of the evidence supports a finding that claimant has sustained a permanent industrial disability as a result of an aggravation of a pre-existing condition.

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.

In Guyton v. Irving Jensen Co., 373 N.W.2d 101 (Iowa 1985), the Iowa court formally adopted the "odd-lot doctrine." Under that doctrine a worker becomes an odd- lot employee when an injury makes the worker incapable of obtaining employment in any well-known branch of the labor market. An odd-lot worker is thus totally disabled if the only services the worker can perform are "so limited in quality, dependability, or quantity that a reasonably stable market for them does not exist." Id. at 105.

Under the odd-lot doctrine, the burden of persuasion on the issue of industrial disability always remains with the worker. Nevertheless, when a worker makes a prima facie case of total disability by producing substantial evidence that the worker is not employable in the competitive labor market, the burden to produce evidence showing availability of suitable employment shifts to the employer. If the employer fails to produce such evidence and the trier of facts finds the worker does fall in the odd-lot category, the worker is entitled to a finding of total disability. Guyton, 373 N.W.2d at 106. Factors to be considered in determining whether a worker is an odd-lot employee include the worker's reasonable but unsuccessful effort to find steady employment, vocational or other expert evidence demonstrating suitable work is not available for the

worker, the extent of the worker's physical impairment, intelligence, education, age, training, and potential for retraining. No factor is necessarily dispositive on the issue. Second Injury Fund of Iowa v. Nelson, 544 N.W.2d 258 (Iowa 1995). Even under the odd-lot doctrine, the trier of fact is free to determine the weight and credibility of evidence in determining whether the worker's burden of persuasion has been carried, and only in an exceptional case would evidence be sufficiently strong as to compel a finding of total disability as a matter of law. Guyton, 373 N.W.2d at 106.

Claimant maintains she is an odd-lot employee and points to the vocational report of Ms. Ruhland. Ms. Ruhland's report does not explain the methodology used to arrive at her conclusions. Further, as pointed out by Mr. Schmidt, Ms. Ruhland included positions in her rubric which claimant would not have been qualified for before the 2014 injury.

Additionally, by claimant's own statements, all of the jobs she held prior to the 2014 injury excluding the bus monitor position were positions within claimant's restrictions. In her 2010 SSD application, none of her prior jobs including mail handler, production worker, day care provider, or launderess required more than 20 pounds of lifting and had six or less hours of standing.

By claimant's own sworn statement, most of her prior work history was light duty work.

Claimant tries to disclaim any responsibility for her 2010 SSD application but admitted that her sister-in-law who filled it out knew claimant well.

Claimant also attempted to downplay her past injuries to her treating physicians and independent medical examiners. She claimed no previous back pain since her fusion surgery, conveniently omitting her 2010 SSD application where she swore she was permanently and totally disabled from work.

Her questionable credibility impacted the extent of her injury and impairment determination.

Over the years, a pattern of over exaggeration of pain complaints exist, found in the 2010 SSA examination and during the examinations of the claimant following the work injury.

Her condition in 2010 was not largely different than it was post 2014. However, one job is excluded from her access to the labor market and that is the bus monitor position.

Mr. Schmidt opined that claimant's loss of access to the labor market was approximately 53 percent. Based on claimant's own sworn statement to the SSA, her past work history, her educational background, her low motivation to return to work, along with her termination from her bus monitor position, it is determined that claimant's industrial disability is 50 percent.

Claimant has not met her burden to trigger an odd-lot analysis.

The final issue is whether defendants are entitled to a credit for the overpayment of permanent partial disability benefits.

> If an employee is paid any weekly benefits in excess of that required by this chapter . . . , the excess paid by the employer shall be credited against the liability of the employer for any future weekly benefits due pursuant to subsection 2, for a subsequent injury to the same employee.

Iowa Code section 85.34(5).

The Duetmeyer court analyzed the statute and concluded that an employer is entitled to a credit for overpayments against future benefits for a subsequent injury and not against future benefits for the present injury. Swiss Colony Inc. v. Deutmeyer, 789 N.W.2d 129 (Iowa 2010).

Therefore, defendants' overpayment is to be credited against a future injury, not this present one.

ORDER:

That defendants are to pay unto claimant two hundred fifty (250) weeks of permanent partial disability benefits at the rate of one hundred ninety and 24/100 dollars ($190.24) per week from September 8, 2014.

That defendants shall pay accrued weekly benefits in a lump sum.

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

That defendants are to be given credit for benefits previously paid subject to the Deutmeyer limitation described above.

That defendant shall pay the costs of this matter pursuant to rule 876 IAC 4.33.

Signed and filed this 16th day of October, 2015.

JENNIFER S. GERRISH-LAMPE
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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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.