IN THE COURT OF APPEALS OF IOWA

No. 0-323 / 09-1633
Filed June 30, 2010

HILLTOP CARE CENTER and
IOWA LONG TERM CARE RISK
MANAGEMENT ASSOCIATION,
Petitioners-Appellees/Cross-Appellants,

vs.

JULIE K. BURTON,
Respondent-Appellant/Cross-Appellee.

Appeal from the Iowa District Court for Polk County, D.J. Stovall, Judge.

An employee appeals, and an employer and insurer cross-appeal, from a district court judicial review ruling affirming in part, reversing in part, and remanding the appeal decision of the workers' compensation commissioner. **AFFIRMED IN PART AND REVERSED IN PART.**

Harry W. Dahl, Des Moines, and E.W. Wilcke, Spirit Lake, for appellant.

Michael L. Mock and Ann C. Spellman of Bradshaw, Fowler, Proctor & Fairgrave, P.C., Des Moines, for appellees.

Heard by Sackett, C.J., and Vogel, Doyle, Danilson, and Tabor, JJ.

DOYLE, J.

Julie Burton appeals, and Hilltop Care Center along with its insurer, Iowa Long Term Care Risk Management Association (collectively Hilltop), cross-appeal, from a district court judicial review ruling affirming in part, reversing in part, and remanding the appeal decision of the workers' compensation commissioner. The dispute primarily centers on the correct compensation rate for the weekly benefits awarded to Burton. We conclude the district court erred in reversing and remanding on that issue, but affirm its ruling in all other respects.

I. Background Facts and Proceedings.

Julie Burton began working for Hilltop Care Center in December 2002 as a dietary supervisor. She was a salaried employee paid on a semimonthly basis. Some of Burton's responsibilities at Hilltop included ordering and unloading food for the facility. She routinely lifted heavy items, such as one-hundred-pound boxes of frozen hamburger meat and fifty-pound sacks of sugar or flour, when stocking the facility's kitchen.

On January 28, 2006, Burton was standing on the second rung of a ladder at work when the ladder collapsed, trapping her left foot. She went to the emergency room that night and followed up with her family physician, Dr. Brian Ford, two days later. He referred her to podiatrist Dr. Timothy Blankers, who examined Burton on January 31.

Dr. Blankers diagnosed Burton with a tendon injury and questionable non-displaced fracture. He placed her in an equalizer boot and recommended she refrain from putting weight on her foot for two weeks. Burton saw Dr. Blankers

again on February 14. She informed him that her foot had improved slightly, although she was still having some discomfort. Dr. Blankers recommended Burton begin a physical therapy and home exercise program. He told her she could gradually return to weight-bearing as tolerated, which she was able to do soon after that appointment.

Around this same time, Burton was struggling with bleeding and incontinence problems. She saw Dr. Ford in May 2005, complaining of problems with mood changes and occasional heavy bleeding. Dr. Ford diagnosed her with menopausal syndrome and menometrorrhagia.[1] He also observed she had a cystocele[2] "that does give her some symptoms but she doesn't want to do anything surgical about it at this time." Burton returned to Dr. Ford about a year later, in April 2006, with worsened symptoms. She reported having urinary incontinence problems at work and persistent heavy bleeding. Dr. Ford immediately referred her to a gynecologist, Dr. Jane Gaetze, who examined Burton on May 11.

Dr. Gaetze recommended that Burton undergo a total vaginal hysterectomy, along with anterior and posterior repair. Those procedures were performed on May 24, 2006. During the surgery, Dr. Gaetze discovered Burton had several hernia sacs, which she informed Burton "were made worse by continued heavy labor over the past several years." At a follow-up appointment with Dr. Ford on May 31, Burton stated she was feeling great with no discomfort

[1] Menometrorrhagia is abnormal uterine bleeding. Dorland's Illustrated Medical Dictionary 815 (23rd ed. 1957).

[2] A cystocele is a hernial protrusion of the urinary bladder through the vaginal wall. Dorland's Illustrated Medical Dictionary 347 (23rd ed. 1957).

or complaints. Dr. Gaetze released her to work on July 14, but later placed permanent lifting restrictions on Burton, opining Burton "would be putting herself at risk for a repeat hernia of the entire vaginal vault should she lift greater than [fifty pounds] in the future."

Burton's employment with Hilltop ended on April 24, 2006. She filed a petition with the Iowa Workers' Compensation Commissioner two months later, alleging she had suffered an injury to her left foot/ankle on January 28, 2006. She filed a second petition in August 2006, alleging she had suffered cumulative "injuries to blood vessels, soft tissues, abdomen, hernias and uterus while working in kitchen for employer and doing manual labor activity."

Following an arbitration hearing, the deputy workers' compensation commissioner awarded Burton benefits for her left foot/ankle and abdominal injuries. The deputy found Burton's weekly earnings were $822.30, resulting in a weekly compensation rate of $547.10. Hilltop paid Burton a lower weekly rate before the arbitration hearing because it discovered she had inadvertently been overpaid for the last fifteen months she worked at Hilltop. The administrator of the facility, Sandra Ferguson, testified that in 2005, Burton

> was given a raise that was incorrect. . . . A raise that was supposed to have been [a] total of $1,000 for the year was paid out at $1,000 per month. So that increased her salary [by] $12,000.
>
> . . . .
>
> That error was discovered when we received the unemployment papers for Julie after she left employment.

The deputy found Hilltop did not have a justifiable reason for not paying Burton weekly benefits based on her actual earnings and imposed $500 in penalty benefits.

Both parties filed motions for rehearing, which the deputy denied. Hilltop appealed, and Burton cross-appealed. The workers' compensation commissioner affirmed and adopted the deputy's decision. Hilltop then filed a petition for judicial review, as did Burton.

Hilltop claimed the agency erred in calculating Burton's compensation rate, arguing that her weekly benefits should have been based on the wages she should have received, not those that she actually received. The district court agreed, stating:

> The Court finds the agency erred in calculating Ms. Burton's weekly rate using the wages she received rather than the wages to which she was entitled. The Court holds that the accounting error is not tantamount to an entitlement to the elevated wage to Hilltop's detriment. The Court concludes that the weekly rate of compensation should have been calculated using the earnings she was entitled to receive not the wages she actually received.

Hilltop additionally claimed the agency erred in including a $270.71 Christmas bonus Burton received in December 2005 in calculating her compensation rate. The district court determined the agency did not provide sufficient findings or analysis on that issue and remanded for application of the factors set forth in *Noel v. Rolscreen Co.*, 475 N.W.2d 666 (Iowa Ct. App. 1991), in determining whether the bonus should be included in Burton's gross earnings. The court also reversed the agency's award of penalty benefits, finding the calculation of Burton's weekly compensation rate was fairly debatable.

The court affirmed the agency on all other issues. It concluded substantial evidence supported the agency's determination as to the extent of permanent partial disability resulting from Burton's left foot/ankle injury. The court further concluded substantial evidence supported the agency's determination that

Burton's abdominal injuries were work-related and resulted in an industrial disability of thirty percent.

Burton appeals, claiming the district court erred in (1) reversing and remanding the compensation rate issue and (2) reversing the award of penalty benefits. Hilltop cross-appeals, claiming the court erred in (1) affirming the agency's determination as to the extent of permanent partial disability resulting from Burton's left foot/ankle injury and (2) concluding Burton's abdominal injuries were compensable and resulted in permanent partial disability.

II. Scope and Standards of Review.

> Our review of a decision of the workers' compensation commissioner varies depending on the type of error allegedly committed by the commissioner. If the error is one of fact, we must determine if the commissioner's findings are supported by substantial evidence. If the error is one of interpretation of law, we will determine whether the commissioner's interpretation is erroneous and substitute our judgment for that of the commissioner. If, however, the claimed error lies in the commissioner's application of the law to the facts, we will disturb the commissioner's decision if it is "[b]ased upon an irrational, illogical, or wholly unjustifiable application of law to fact."

Jacobson Transp. Co. v. Harris, 778 N.W.2d 192, 196 (Iowa 2010) (internal citations omitted); *see also* Iowa Code § 17A.19(10)(c), (f), (m) (2007).

> We are bound by the commissioner's findings of fact so long as those findings are supported by substantial evidence. . . .
>
> > "*Substantial evidence*" means the quantity and quality of evidence that would be deemed sufficient by a neutral, detached, and reasonable person, to establish the fact at issue when the consequences resulting from the establishment of that fact are understood to be serious and of great importance.

IBP, Inc. v. Burress, 779 N.W.2d 210, 213-14 (Iowa 2010) (internal citations omitted).

III. Discussion.

A. Compensation Rate.

We begin with the issue of Burton's compensation rate, which requires us to first examine Iowa's statutory scheme for workers' compensation benefit calculation. Iowa Code section 85.36 provides:

> The basis of compensation shall be the weekly earnings of the injured employee at the time of the injury. Weekly earnings means gross salary, wages, or earnings of an employee to which such employee would have been entitled had the employee worked the customary hours for the full pay period in which the employee was injured, as regularly required by the employee's employer for the work or employment for which the employee was employed, computed or determined as follows and then rounded to the nearest dollar:
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> . . . .
>
> 3. In the case of an employee who is paid on a semimonthly pay period basis, the semimonthly gross earnings multiplied by twenty-four and subsequently divided by fifty-two.

"Gross earnings" is defined as:

> recurring payments by employer to the employee for employment, before any authorized or lawfully required deduction or withholding of funds by the employer, excluding irregular bonuses, retroactive pay, overtime, penalty pay, reimbursement of expenses, expense allowances, and the employer's contribution for welfare benefits.

Iowa Code § 85.61(3). With this scheme in mind, we turn to the first issue raised by Burton: whether the district court erred in ruling that Burton's "weekly rate of compensation should have been calculated using the earnings she was entitled to receive not the wages she actually received."

1. "Entitled" versus paid wages. Hilltop focuses on the first portion of the second sentence in section 85.36 in arguing that "Burton's weekly rate of compensation should be calculated using the gross wages to which she was *entitled*, not the artificially inflated wages she received due to the accounting

error." *Id.* § 85.36 ("Weekly earnings means gross salary, wages, or earnings of an employee to which such employee would have been entitled . . . ."). We conclude otherwise.

"Our goal, when interpreting a statute, is to give effect to the intent of the legislature." *Jacobson Transp. Co.*, 778 N.W.2d at 197. To determine that intent, "we look first to the words of the statute itself as well as the context of the language at issue." *Id.* We attempt to interpret the provision in a manner consistent with the statute as a whole. *Id.* This requires us to be mindful "that a fundamental purpose of the workers' compensation statute is to benefit the injured workers." *Id.* Chapter 85 is accordingly interpreted liberally in favor of the employee. *Id.*

> Consistent with the remedial nature of workers' compensation laws, statutes for computation of wage bases are "meant to be applied, not mechanically nor technically, but flexibly, with a view always to achieving the ultimate objective of reflecting fairly the claimant's probable future earning loss."

Id. (citations omitted).

In view of these principles, we conclude Hilltop's interpretation of section 85.36, which was adopted by the district court on judicial review, cannot be sustained. Hilltop's argument takes a phrase of the statute out of context, to the exclusion of other language in section 85.36 that does not support its position. When the statute is read as a whole, it is clear the agency was correct in basing Burton's compensation on the weekly earnings she was paid, not those that Hilltop asserts it meant to pay her.

As noted, the first sentence in section 85.36 mandates that the "basis of compensation shall be the weekly earnings of the injured employee *at the time of*

the injury." Iowa Code § 85.36 (emphasis added). The second sentence, when read in its entirety, speaks to a situation where an injured employee did not work "the customary hours for the full pay period in which the employee was injured." *Id.*; *see also Griffin Pipe Prods. Co. v. Guarino*, 663 N.W.2d 862, 866 (Iowa 2003) ("[T]he issue under section 85.36 'is whether the hours of work in any particular workweek are representative of the hours typically or customarily worked by an employee during a typical or customary full week of work.'" (emphasis removed)). In such an event, section 85.36 permits "the replacement of a nontypical workweek with a typical workweek in the wage base calculation." *Jacobson*, 778 N.W.2d at 198; *see also* Iowa Code § 85.36(6).

The focus of section 85.36 is accordingly on whether the employee's earnings are "customary." As the court in *Jacobson* explained,

> "Customary" means "based on or established by custom"; "commonly practiced, used or observed"; or "usual." *Merriam-Webster's Collegiate Dictionary* 285 (10th ed. 2002). We have previously defined "customary" as "typical." Ascertainment of an employee's customary earnings does not turn on a determination of what earnings are guaranteed or fixed; rather, it asks simply what earnings are usual or typical for that employee.

778 N.W.2d at 199 (citation omitted); *see also* Iowa Code § 85.61(3) (defining "gross earnings" as "*recurring payments* by employer to the employee for employment" (emphasis added)).

Hilltop paid Burton $1695 bimonthly from January 2005 through the last day of her employment in April 2006. Although Hilltop may have mistakenly overpaid Burton for those fifteen months,[3] its argument that Burton's weekly

[3] The agency appeared skeptical of Hilltop's mistake, finding:

compensation rate should be based on what Hilltop meant to pay her does not track with the goal of section 85.36, which is to replace what the injured employee would have earned but for the injury. *See Hartman v. Clarke County Homemakers*, 520 N.W.2d 323, 328 (Iowa Ct. App. 1994). Hilltop's argument is also contradicted by the language of the statute itself, as explained above, particularly the introductory directive that the "basis of compensation shall be the weekly earnings of the injured employee *at the time of the injury*." Iowa Code § 85.36 (emphasis added). The wages Burton was actually paid by Hilltop at the time of her injury represented her "customary," or usual and typical, earnings. The agency was accordingly correct in using those earnings, rather than the amount Hilltop maintains she should have been paid, in calculating her weekly compensation rate.

Hilltop's arguments otherwise, including its reliance on *Area Education Agency 7 v. Bauch*, 646 N.W.2d 398 (Iowa 2002), are unavailing. That case addresses a different factual situation and is not applicable here. *Area Educ. Agency 7*, 646 N.W.2d at 399 (analyzing the manner in which the compensation rate for a special education consultant whose wages are deferred should be calculated). For the foregoing reasons, we reverse the district court's contrary conclusion and turn to the issue of Burton's bonus.

> The record shows [Burton] was paid bimonthly with checks stamped with her employer's signature. The record shows also that [Burton] was evaluated annually and was subject to frequent monitoring by her supervisor. Further [Burton's] salary which included the raise was within the mean average wage of food service supervisors according to [Hilltop's] own expert.

2. Bonus. The agency determined that Burton's December 2005 bonus should be included in the wage calculation as it was a "regular annual bonus." *See* Iowa Code § 85.61(3) (excluding "irregular bonuses" from the definition of "gross earnings"); *Mycogen Seeds v. Sands*, 686 N.W.2d 457, 470 (Iowa 2004) ("[I]rregular bonuses are not considered as part of an employee's gross earnings as defined in Iowa Code section 85.36 . . . ."); *accord Noel v. Rolscreen Co.*, 475 N.W.2d 666, 668 (Iowa Ct. App. 1991). The district court remanded for additional analysis on the issue, stating the commissioner "failed to discuss any of the factors identified in *Noel* to be considered in determining whether a bonus is regular or irregular."

The employee in *Noel* challenged the commissioner's failure to include a Christmas bonus she had not yet received in her weekly compensation benefit. 475 N.W.2d at 667. In rejecting that challenge, this court concluded the bonus "was not earnings because, as the commissioner found, it was not paid or received within the period of time specified in section 85.36(6)." *Id.* at 668. We went on to state, "Additionally, the bonus is not a regular bonus" because it is "subject to a condition precedent, varies in amount, and is not fixed in terms of entitlement or amount until late in the fiscal year." *Id.* We find *Noel* distinguishable, as this case involves a bonus that was actually paid to the employee, rather than the anticipated bonus at issue in *Noel*. We believe the factors listed in *Noel* supported our decision in that case that an anticipated bonus not yet received by the employee at the time of the injury should not be included in the wage calculation.

The deputy determined "[a]ccording to the testimony at the hearing" that Burton's December 2005 bonus "was part of a regular annual bonus that the claimant received." Substantial evidence supports that finding. Burton began working at Hilltop in December 2002. She received a bonus in 2003, 2004, and 2005. Hilltop's administrator testified the bonuses were given to Burton as "a thank you for being part of the operation." We find no error in the inclusion of Burton's bonus in calculating her gross earnings, as it was consistently received each year of her employment with Hilltop and there was no contrary testimony such that would require a remand to apply the other *Noel* factors. Because there were adequate factual findings by the agency as to why the bonus was included in the wage calculation, we find no need to remand this issue to the commissioner. *Cf. IBP, Inc. v. Burress*, 779 N.W.2d 210, 220 (Iowa 2010) (remanding where there were no factual findings by the commissioner); *Armstrong v. State of Iowa Bldgs. & Grounds*, 382 N.W.2d 161, 165 (Iowa 1986) ("When the commissioner fails to weigh and consider all the evidence and thus errs, the district court should return the case to the commissioner for a decision on the record already made rather than to find the facts.").

B. Penalty Benefits.

The agency awarded Burton $500 in penalty benefits "for the underpayment caused by the deliberate decision to not include the claimant's wages." *See Robbennolt v. Snap-On Tools Corp.*, 555 N.W.2d 229, 237 (Iowa 1996) (stating penalty benefits can be awarded "when the full amount of compensation is not paid"). It determined Hilltop

> did not have a justifiable reason for paying [Burton] at the lower rate. [Hilltop's] argument that they could base the rate upon what they 'should have' paid the claimant is not supported by Iowa Code section 85.36 or any other law.

The district court reversed the award of penalty benefits on judicial review, finding the issue was fairly debatable. Burton argues this was in error. We do not agree.[4]

Iowa Code section 86.13 provides in part:

> If a delay in commencement or termination of benefits occurs without reasonable or probable cause or excuse, the workers' compensation commissioner shall award benefits in addition to those benefits payable under this chapter, or chapter 85, 85A, or 85B, up to fifty percent of the amount of benefits that were unreasonably delayed or denied.

The standard for assessing a penalty is whether the employer has reasonable cause or excuse, which

> exists if either (1) the delay was necessary for the insurer to investigate the claim or (2) the employer had a reasonable basis to contest the employee's entitlement to benefits. A "reasonable basis" for denial of the claim exists if the claim is "fairly debatable."

IBP, Inc., 779 N.W.2d at 222 (citation omitted). "A claim is 'fairly debatable' when it is open to dispute on any logical basis. Stated another way, if reasonable minds can differ on the coverage-determining facts or law, then the claim is fairly debatable." *Bellville v. Farm Bureau Mut. Ins. Co.*, 702 N.W.2d 468, 473 (Iowa 2005) (internal citations omitted). The reasonableness of the employer's position "does not turn on whether the employer was right." *Keystone Nursing Care Ctr. v. Craddock*, 705 N.W.2d 299, 307-08 (Iowa 2005).

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[4] We find no merit to Hilltop's initial argument that the issue of penalty benefits was not properly presented to the agency. Both of Burton's petitions identified penalty benefits as an issue and, at the arbitration hearing, the deputy clarified that penalty benefits would be litigated.

As Hilltop observes, our supreme court has stated:

> Perhaps the most reliable method of establishing that the insurer's legal position is reasonable is to show that some judge in the relevant jurisdiction has accepted it as correct. . . . After all, if an impartial judicial officer informed by adversarial presentation has agreed with the insurer's position, it is hard to argue that the insurer could not reasonably have thought that position viable.

Rodda v. Vermeer Mfg., 734 N.W.2d 480, 485 (Iowa 2007) (citation omitted). Because the district court agreed with Hilltop's position on the compensation rate, even though we did not, we conclude the agency's award of penalty benefits was in error. This difference of opinion is a prime indicator the compensation rate was open to dispute. We accordingly affirm the district court on this issue.

C. Left Foot/Ankle Injury.

1. Functional impairment rating. The agency determined Burton had suffered a 4.9% functional impairment of her leg, which the parties agree converts to a 7% impairment of the foot. *See Mortimer v. Fruehauf Corp.*, 502 N.W.2d 12, 14 (Iowa 1993) (explaining compensation for scheduled injuries is based on functional impairment and is limited to the loss of the physiological capacity of the body or body part). Hilltop challenges this finding as excessive and unsupported by substantial evidence. We conclude otherwise.

Dr. Blankers, Burton's treating physician for her left foot injury, examined her in February 2007, more than a year after her injury occurred. He observed that Burton had continued problems with her ankle, including occasional parasthesias, swelling, and tenderness. Dr. Blankers opined that due to Burton's "ligamentous instability, mild in nature," along with her "clinical instability and

pain, a rating of between 3 and 7% of the foot is appropriate." No contrary impairment rating appears in the record. We accordingly conclude the agency's adoption of Dr. Blankers's rating was supported by substantial evidence. *See Asmus v. Waterloo Cmty. Sch. Dist.*, 722 N.W.2d 653, 657 (Iowa 2006) ("Evidence is substantial for purposes of reviewing the decision of an administrative agency when a reasonable person could accept it as adequate to reach the same finding.").

2. Apportionment. We also reject Hilltop's argument that the agency erred in failing to "apportion that amount of the functional impairment associated with Burton's pre-existing foot condition" under Iowa Code section 85.34(7). That statute provides an

> employer is fully liable for compensating all of an employee's disability that arises out of and in the course of the employee's employment with the employer. An employer is not liable for compensating an employee's preexisting disability that arose out of and in the course of employment with a different employer or from causes unrelated to employment.

Iowa Code § 85.34(7)(a). Our supreme court has limited the apportionment rule "to preexisting conditions or prior injuries that are disabling in the compensation sense," i.e. those that affected the employee's ability to earn wages. *Bearce v. FMC Corp.*, 465 N.W.2d 531, 536 (Iowa 1991); *see also Floyd v. Quaker Oats*, 646 N.W.2d 105, 110 (Iowa 2002) (stating for the apportionment rule to be applied "it must be shown that a particular percentage of permanent disability would have resulted from the prior event acting alone").

An x-ray of Burton's ankle after her accident at work showed "evidence of old injury involving the medial malleolus with several calcifications noted distally." In a letter to Hilltop's counsel, Dr. Blankers stated that

> based on the patient's previous history, it is my opinion that the patient had some preexisting laxity to her left ankle prior to her work injury of January 2006. However, *she was asymptomatic with respect to this condition* as she had not been receiving ongoing treatment for it.

(Emphasis added.) Dr. Blankers went on to write that in "a situation where an individual has a preexisting impairment that is aggravated by a specific injury, it has been my practice to *arbitrarily assign* 50% of the impairment to the preexisting condition and 50% to the aggravating event." (Emphasis added.)

The agency rejected this apportionment, stating the

> record shows that [Burton] was not limited by her prior ankle injury. While the medical records show that [she] had a prior injury, it did not affect her functionally until after her second injury. . . . [Dr. Blankers's] admitted "arbitrary" assignment of 50 percent to pre-existing condition is not appropriate in apportionment of disability. . . . Nor does Iowa Code section 85.34(7) require a changing of the arbitration decision. As pointed out in [Burton's] resistance [her] ankle was asymptomatic and was not an ascertainable pre-existing disability.

As the trier of fact, the agency determines the weight to be given to any expert testimony. *See Sherman v. Pella Corp.*, 576 N.W.2d 312, 321 (Iowa 1998). It may accept or reject an expert opinion in whole or in part. *Id.*; *see also Sanchez v. Blue Bird Midwest*, 554 N.W.2d 283, 285 (Iowa Ct. App. 1996) ("Expert opinion testimony, even if uncontroverted, may be accepted or rejected in whole or in part by the trier of fact."). We determine the evidence supports the agency's rejection of Dr. Blankers's arbitrary apportionment, as he also acknowledged Burton's prior ankle injury was asymptomatic before her January

2006 work injury. This brings us to the final claim in this case: whether the agency erred in concluding Burton's abdominal injuries were compensable and resulted in permanent partial disability.

D. Abdominal Injuries.

1. Notice. Hilltop begins by arguing the agency erred in concluding that Burton provided notice of her abdominal injuries within ninety days, as required by Iowa Code section 85.23. It asserts, "Burton was well aware of her condition and the need for surgery prior to the alleged May 24, 2006 injury date." However, as the agency recognized, the ninety-day notice period does not begin until Burton also became aware of the compensable nature of her injury. *See IBP, Inc.*, 779 N.W.2d at 219; *see also Herrera v. IBP, Inc.*, 633 N.W.2d 284, 288 (Iowa 2001) (discussing application of the discovery rule in a cumulative-injury case). Applying that rule, the agency concluded that while Burton may have been aware of her injury when she was examined by Dr. Ford in 2005, she "was not aware that her condition was caused by work until after her surgery in May 24, 2006." Substantial evidence supports this finding.

Burton testified that she did not know her incontinence and bleeding problems were related to the manual labor she performed at Hilltop until after her surgery on May 24, 2006, when Dr. Gaetze informed her about the hernias she discovered during the procedure. Until that time, Burton believed many of her symptoms were attributable to menopause, as reflected in her medical records from Dr. Ford. We accordingly affirm the agency on this issue and next address whether it was correct in concluding Burton's abdominal injuries arose out of and in the course of her employment with Hilltop.

2. Causation. A workers' compensation claimant must prove by a preponderance of the evidence the disability on which the claim is based is causally related to injuries arising out of and in the course of employment. *Sanchez*, 554 N.W.2d at 285. "The question of causal connection is essentially within the domain of expert testimony." *Id.* As stated earlier, the weight to be given the expert testimony is for the agency to determine as the trier of fact. *Id.*

Hilltop urges that we should rely on the reports of Dr. Larry Lindell and Dr. Ford, both of whom opined that Burton's abdominal injuries were not caused by her employment at Hilltop but instead by her multiple pregnancies and lifetime of manual labor. The agency rejected those opinions in favor of Dr. Gaetze's opinion that

> [a]ll of the hernia sacs, which included the urethra, the bladder, the rectum, and the colon, were made worse by continued heavy labor over the past several years. None of these hernia sacs would have been as problematic for her 2-3 years ago. This happens as an ongoing, slowly progressive problem related to heavy labor and an enlarged uterus.

The agency found Dr. Gaetze's opinion "to be more convincing than the reports of Dr. Ford and Dr. Lindell" because Dr. Gaetze performed Burton's surgery "and had the most knowledge of the claimant's medical condition." Dr. Lindell, on the other hand, based his opinion solely on a review of Burton's medical records; he did not physically examine or treat her. The agency also observed Burton was "asymptomatic of major bleeding and incontinence until she engaged in heavy labor for Hilltop."

We find substantial evidentiary support for the agency's conclusion that Burton's abdominal injuries arose out of and in the course of her employment. It

is within the province of the agency to choose among competing medical opinions. It is not the role of the district court on judicial review, or this court on appeal, to reassess this evidence. *See Arndt v. City of Le Claire*, 728 N.W.2d 389, 394 (Iowa 2007).

3. Industrial disability rating. In the case of unscheduled injuries such as this, permanent partial disability is determined by the employee's industrial disability. *Hill v. Fleetguard, Inc.*, 705 N.W.2d 665, 673 (Iowa 2005). "Industrial disability is based upon a loss in earning capacity, which 'rests on a comparison of what the injured worker could earn before the injury as compared to what the same person could earn after the injury.'" *Id.* (citation omitted). Factors that should be considered include the employee's functional disability, age, education, qualifications, experience, and the ability of the employee to engage in employment for which the employee is fitted. *Id*. Hilltop claims the agency erred in finding any industrial disability resulted from Burton's work-related abdominal injuries. We do not agree.

On this issue, the agency found Burton

> has a high school education. She does not have further post high school education but does have the ability to obtain other certification as evidenced by her recent attendance at the community college to learn how to dispense medication. [Burton] appears motivated to work but her age, limited education, and work experience limits the number of jobs in the labor market available to her. This is supported by the vocational report of Mr. Ostrander. I find [Burton] has suffered a 30 percent loss of earning capacity and therefore . . . has a 30 percent industrial disability.

The agency additionally considered the permanent lifting restriction of fifty pounds that Dr. Gaetze placed on Burton following her surgery.

Although there is some conflicting evidence in the record as to this issue, such as Dr. Lindell's opinion that no permanent lifting restrictions were necessary for Burton, the "fact that two inconsistent conclusions may be drawn from the same evidence does not prevent the agency's findings from being supported by substantial evidence." *Asmus*, 722 N.W.2d at 657. We must not "reassess the weight of the evidence because the weight of the evidence remains within the agency's exclusive domain." *Robbennolt*, 555 N.W.2d at 234. We accordingly affirm on this issue as well.

IV. Conclusion.

In summary, we conclude the district court erred in reversing and remanding on the compensation rate calculated by the agency. We believe the agency was correct in using the wages Burton was actually paid by Hilltop, including the regular annual bonus she received in December 2005, in computing her weekly benefit rate. We affirm the district court on all other issues, including its reversal of the agency's penalty benefit award and its affirmance of the agency's determination as to the compensability and extent of Burton's injuries.

AFFIRMED IN PART AND REVERSED IN PART.