BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

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| LISA KRUSER,<br><br>Claimant,<br><br>vs.<br><br>AREA RESIDENTIAL CARE,<br><br>Employer,<br><br>and<br><br>WEST BEND MUTUAL INS. CO.,<br><br>Insurance Carrier,<br>Defendants. | : | File No. 5061914.02<br><br>ARBITRATION DECISION<br><br>Head Notes: 1108; 1801; 2701; 4000.2 |

## STATEMENT OF THE CASE

Claimant, Lisa Kruser, filed a petition in arbitration seeking workers' compensation benefits from Area Residential Care (ARC), employer, and West Bend Mutual Insurance Company, insurer, both as defendants. This matter was heard on August 10, 2021, with a final submission date of September 14, 2021.

The record in this case consists of Joint Exhibits 1 through 19, Claimant's Exhibits 1 through 6, Defendants' Exhibits A through E, and the testimony of claimant.

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.

## ISSUES

1. Whether claimant sustained a sequela injury that arose out of and in the course of employment.

2. The extent of claimant's entitlement to temporary benefits.

3. Whether there is a causal connection between the injury and the claimed medical expenses.

4. Whether claimant is entitled to alternate medical care under Iowa Code section 85.27.

5. Whether defendants are liable for a penalty under Iowa Code section 86.13.

Costs were identified as an issue in dispute at hearing. Based on claimant's post-hearing brief, defendants agreed to pay costs. As a result, costs will not be discussed as an issue in this decision. (Claimant's Post-Hearing Brief, p. 35)

Although the parties stipulated, on the hearing report, that claimant had an injury on May 23, 2016, that arose out of and in the course of employment, the parties dispute whether claimant sustained sequela injuries from the May 23, 2016, work injury. Permanent impairment ratings were given by Robin Sassman, M.D., through an independent medical evaluation (IME) report. However, as indicated in the hearing report and at hearing, both parties stipulated that claimant is not at maximum medical improvement (MMI). For that reason, permanent impairment is not an issue in dispute in this matter. (Transcript p. 4)

## FINDINGS OF FACT

Claimant was 55 years old at the time of hearing. Claimant graduated from high school. (Tr. pp. 9-10) Claimant worked at Rayovac battery factory from 1984 through 2001 as a machine operator. Claimant also worked part-time at PAMIDA and Kwik-Trip. (Tr., pp. 11-15)

Claimant testified she began working at ARC in approximately 2004. Claimant worked part-time and worked approximately 21-25 hours per week. (Tr., pp. 16-17) ARC is a residential facility for physically and mentally challenged individuals. (Tr., p, 17)

Claimant testified that between 2009 and 2011 she had a shoulder surgery that resulted in nerve damage. Claimant said this left her with no use of the left arm for approximately two years. Claimant applied for and was granted Social Security Disability benefits in approximately 2013, retroactive to 2011. (Tr., p. 12)

Claimant said that she left Rayovac in 2011, and then began to work approximately 21 hours per week at ARC. (Tr., p. 18)

Claimant said her job at ARC included making beds, bathing clients, toileting and helping clients with ADLs. (Tr., p. 18)

Claimant's previous medical history is relevant. Claimant had chiropractic treatment beginning in 2008 for back, neck and shoulder pain. (Joint Exhibit 1, pp. 6-7) Claimant had left shoulder surgery in 2009. (Tr., p. 23)

Claimant testified she had lower back issues beginning in 2004. (Tr., p. 23)

In 2012, claimant had an injection in her left rhomboid for pain. (JE 2, p. 18) At approximately the same time, claimant had a cervical injection for complex regional pain syndrome (CRPS). (JE 2, p. 17)

From 2013 through 2015 claimant had numerous chiropractic treatments for back, neck and left shoulder pain. (JE 3, pp. 20-22; JE 1, pp. 9-13)

In 2015, claimant had bilateral nerve root injections at the S1 level. (JE 4, p. 24)

In January of 2016, February of 2016, April of 2016, and May 9, 2016, claimant had six chiropractic treatments for her lower back, shoulders and neck. (JE 3, pp. 22-23)

On May 23, 2016, claimant was working with a resident in the work center when the resident punched claimant in the face. Claimant said she felt pain in her nose and the back of her head. Claimant was taken to the emergency room. (Tr., pp. 27-29)

Claimant was treated at Mercy Hospital Emergency Room after being punched. Claimant had nose, neck and head pain. Claimant was assessed as having a nasal fracture and head injury. (JE 5, pp. 28-34)

On May 25, 2016, and June 1, 2016, claimant was evaluated by Julie Muenster, ARNP. Claimant had pain in the forehead, neck, shoulders and back of the head. Claimant was assessed as having neck pain and a nasal fracture. Nurse Practitioner Muenster recommended claimant be allowed to treat with a chiropractor. (JE 6, pp. 42-45)

On June 2, 2016, claimant was evaluated by Peter Alt, M.D. Claimant was assessed as having a deviated septum and fracture of the nasal bone. Surgery was recommended. (JE 8, pp. 56-57)

On June 16, 2016, claimant underwent surgery with Dr. Alt consisting of an open septorhinoplasty and a turbinate reduction. (JE 10, pp. 84-85)

Claimant returned to Nurse Practitioner Muenster on June 29, 2016. Claimant had neck and nose pain. Claimant was kept off work. (JE 6, p. 46)

Claimant indicated treatment with Dr. Alt and chiropractic care did not significantly alleviate her symptoms. Claimant said she was sent to the University of Wisconsin Hospital for a second opinion. (Tr., p. 31)

On September 8, 2016, claimant was evaluated at the University of Wisconsin Hospitals and Clinics (UWHC) by Benjamin Marcus, M.D. Exam showed nasal

compromise and nasal obstruction. Surgery was recommended as a treatment option. (JE 12, p. 86)

Claimant returned to Nurse Practitioner Muenster on September 19, 2016. Claimant indicated she no longer needed chiropractic care regarding her neck and head injury. Claimant had neck pain, but believed she had returned to her pre-injury state. Claimant was found to be at MMI for head and neck pain, but was not at MMI for her nasal fracture. Claimant was returned to work without restrictions. (JE 6, p. 51)

On November 1, 2016, claimant underwent a second nasal surgery consisting of an open revision septorhinoplasty. Surgery was performed by Dr. Marcus. (JE 12, pp. 87-89)

On November 21, 2016, claimant called the UWHC indicating infection in her nose and breast where grafts were taken. Infection became severe, and claimant was hospitalized from December 1, 2016, through December 5, 2016, at the UWHC. (JE 12, pp. 91, 98-111)

Claimant returned to ARC at the end of December 2016 without restrictions. (Tr. p. 63)

Claimant saw Dr. Marcus on January 31, 2017. Claimant had scarring due to her infection, which limited airways. Dr. Marcus recommended another surgery. (JE 12, p. 113)

On February 10, 2017, claimant underwent a third nasal surgery consisting of a revision of the nasal septum, a partial removal of the right lateral crural graft, and a closure of the nasal fistula. Surgery was performed by Dr. Marcus. (JE 13, p. 124)

Claimant returned to Dr. Marcus in follow-up on April 19, 2017. Dr. Marcus noted improvement in valve areas, but saw problems with the skin envelope. Laser therapy was recommended. (JE 12, p. 116) Claimant underwent laser therapy beginning in mid-2017 until September 2017. (Ex. 3, p. 37)

On June 19, 2017, claimant resigned from ARC. Claimant's last day worked at ARC was July 3, 2017. The reason claimant gave for leaving was other employment. (Def. Ex. 4)

Claimant testified she found a job at Little Saints Daycare prior to leaving ARC. Claimant took the job at Little Saints, in part, because the daycare was close to her home. Claimant testified she left Little Saints and then went to Maple Street Daycare. Claimant left Maple Street Daycare due to lower back problems. (Tr. pp. 65-66)

Records indicate laser surgery was not successful treatment for opening her airways. As a result, claimant underwent a fourth nasal surgery on January 5, 2018.

Surgery was performed by Dr. Marcus consisting of excision of bilateral internal valve scar tissue. (JE 13, p. 176)

Claimant returned to Dr. Marcus on February 19, 2018. Records indicate claimant was doing "very well." An unhealing lesion had also developed on claimant's nose. A dermatology exam was recommended. (JE 12, p. 120)

In April of 2018 claimant contacted a healthcare practitioner. Claimant complained of posttraumatic stress disorder (PTSD) and nightmares due to her nose and surgeries. A referral was recommended. (JE 16, p. 136)

On May 7, 2018, claimant saw Dr. Marcus in follow-up. Dr. Marcus noted claimant had done well in recovery. Claimant's left nostril was working well. Claimant's right nostril had a small area of scar tissue. Debridement of the scar tissue was recommended. (JE 12, p. 121)

On May 24, 2018, claimant was evaluated by John Brooke, Ph.D., for a psychological evaluation. Dr. Brooke found that claimant was mildly depressed, in part due to her work-related injury and subsequent treatment. Dr. Brooke noted claimant had pre-existing chronic depression and anxiety. He noted claimant's injury and surgery aggravated her mental health condition. He recommended claimant have bi-weekly psychotherapy for one year to help deal with recovery. He found claimant had no psychological impairment. (JE 15)

On June 18, 2018, in response to a letter written by defendants' counsel, Nurse Practitioner Muenster indicated claimant had only had a temporary aggravation of a pre-existing problem of the cervical spine. Nurse Practitioner Muenster indicated claimant had no permanent impairment or permanent restrictions related to her cervical spine in regard to her May of 2016 work injury. (JE 6, p. 53)

On July 6, 2018, claimant underwent her fifth nasal surgery consisting of excision and splinting of the right nose. The surgery was performed by Dr. Marcus. (JE 13, p. 128)

Claimant returned to Dr. Marcus on August 29, 2018. Claimant had progress in the stenosis of her right nasal valve, but was not breathing better. Dr. Marcus recommended a sixth surgery, but also advised claimant that she could get a second opinion if desired. (JE 12, p. 122)

Claimant saw Timothy McCulloch, M.D., on April 10, 2019, for a second opinion. Dr. McCulloch recommended further surgery consisting of a flap procedure and another skin graft. (JE 12, p. 123)

Claimant requested a third opinion regarding surgery, and was sent to the University of Iowa Hospitals and Clinics (UIHC) on November 12, 2019. Claimant was

evaluated by Scott Owen, M.D. Claimant was recommended to have a revision rhinoplasty and potential reconstruction. (JE 18, pp. 142-144)

On May 11, 2020, claimant underwent a sixth nasal surgery consisting of scar revision, vestibular stenosis repair with a graft. Surgery was performed by Dr. Owen. (JE 18, pp. 151-152)

Claimant returned to Dr. Owen on July 14, 2020. Claimant had improvement, but needed sinus cones. (JE 18, p. 155) Claimant saw Dr. Owen on October 13, 2020, with complaints of a lesion on her nose. A biopsy was performed, which showed a basal cell carcinoma. Dr. Owen recommended a Mohs procedure for the cancerous cells. (JE 18, pp. 156-158)

In a November 19, 2020, letter by defendants' counsel, Dr. Owen indicated that basal cell carcinoma was a common skin cancer. He indicated the two most significant risk factors for development of basal cell carcinoma are age and sun exposure. He indicated that scarring generally does not cause basal cell carcinoma. Dr. Owen opined that he could not relate claimant's basal cell carcinoma on her nose to her nose injury of May 23, 2016, and subsequent treatments. (JE 18, pp. 159-160)

On February 12, 2021, claimant underwent a Mohs procedure. Surgery was performed by Brittany Buhalog, M.D. (JE 19)

On April 22, 2021, claimant saw Joni Downs, Ph.D., for psychological assessment. Claimant had nightmares of someone hitting her in the nose and dreams of cancer and having her nose removed. Dr. Downs suggested verbal abuse by her mother could also be impacting claimant. (JE 9, pp. 69-74) Claimant testified she wanted to continue counseling with Dr. Downs. (Tr., p. 41)

In a July 9, 2021 report, Robin Sassman, M.D., gave her opinions of claimant's condition following an IME. Claimant had loss of taste and smell. Claimant had pain on the bridge of her nose and on the sides into her cheeks. Claimant had numbness in her right breast due to grafting. Claimant had neck pain. Claimant had GI problems. Claimant complained of heightened anxiety. (Ex. 3, pp. 42-43)

Claimant was assessed as having a nasal fracture, right breast numbness due to grafting, GI disturbances caused by prolonged antibiotic treatment, cervical pain, and basal cell carcinoma. (Ex. 3, p. 47) Dr. Sassman opined claimant's right nasal fracture, cervical pain, and basal cell carcinoma were all caused by the May 23, 2016 injury. (Ex. 3, p. 48) Dr. Sassman could not offer causation opinions regarding claimant's mental health or GI tract disturbances. Id.

Dr. Sassman recommended a cervical MRI, a follow-up appointment with Dr. Owen regarding continued breathing issues and a follow-up with a dermatologist for monitoring development of future skin conditions. (Ex. 3, p. 49)

Dr. Sassman found claimant had a 15 percent permanent impairment to the body as a whole for the cervical spine, a 15 percent permanent impairment to the body as a whole for facial disfigurement, a 9 percent permanent impairment to the body as a whole for basal cell carcinoma, a 5 percent permanent impairment to the body as a whole for nasal air passage defect, a 2 percent permanent impairment to the body as a whole for loss of sensation in the breast, and a 2 percent permanent impairment for the loss of taste and smell. The combined values resulted in a 39 percent permanent impairment to the body as a whole. (Ex. 3, p. 50)

Dr. Sassman recommended against claimant working where she might have a head or nose injury. (Ex. 3, p. 50)

Claimant testified her right nostril is almost entirely closed, which causes difficulty with breathing. (Tr., p. 42) She also said she had facial numbness. (Tr., p. 45) Claimant said she had neck pain every day. Claimant said she had limited range of motion in her neck. (Tr., pp. 44, 47)

Claimant testified she has decreased smell and taste since her injury. (Tr., p. 46) She said she has headaches 4-6 times per month. (Tr., p. 46)

Claimant said she has daily anxiety and depression. She said she has routine nightmares related to her surgery. She believes she has "flashbacks" due to the injury. (Tr., pp. 49-52)

Claimant testified she voluntarily left Maple Street Daycare and has not looked for work since the summer of 2018. Claimant testified she does not intend to look for work. (Tr., pp. 66-67; Ex. A, depo p. 30; Ex. B, depo p. 12)

Claimant testified Dr. Marcus released her to return to work without restrictions. She said that the only work restriction she has is from Dr. Sassman pursuant to the July 9, 2021, IME report. (Tr., p. 68)

## CONCLUSION OF LAW

The first issue to be determined is did claimant sustain sequela injuries causally connected to the May 23, 2016, nasal injury.

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. 6.904(3).

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" refer 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 Elec. 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).

An employer may be liable for a sequela of an original work injury if the employee sustained a compensable injury and later sustained further disability that is a proximate result of the original injury. Mallory v. Mercy Medical Center, File No. 5029834 (Appeal February 15, 2012).

The Iowa Supreme Court noted "where an accident occurs to an employee in the usual course of his employment, the employer is liable for all consequences that naturally and proximately flow from the accident." Oldham v. Schofield & Welch, 266 N.W. 480, 482 (1936). The Court explained:

> If an employee suffers a compensable injury and thereafter suffers further disability which is the proximate result of the original injury, such further disability is compensable. Where an employee suffers a compensable injury and thereafter returns to work and, as a result thereof, his first injury is aggravated and accelerated so that he is greater disabled than before, the entire disability may be compensated for." Id. at 481.

A sequela can be an after effect or secondary effect of an injury. Lewis v. Dee Zee Manufacturing, File No. 797154, (Arb. September 11, 1989). A sequela can take the form of a secondary effect on the claimant's body stemming from the original injury. For example, where a leg injury causing shortening of the leg in turn alters the claimant's gait, causing mechanical back pain, the back condition can be found to be a sequela of the leg injury. Fridlington v. 3M, File No. 788758, (Arb. November 15, 1991).

A sequela can also take the form of a later injury that is caused by the original injury. For example, where a leg injury leads to the claimant's knee giving out in a grocery store, the resulting fall is compensable as a sequela of the leg injury. Taylor v. Oscar Mayer & Co., 3 Iowa Ind. Comm. Rep. 257, 258 (1982).

As noted, the parties stipulated claimant received a work-related injury to her nose on May 23, 2016. Defendants dispute that claimant had a cervical injury, a mental injury, skin cancer, a GI tract injury and an injury to her breast as a sequela to the May 23, 2016, nose injury.

Regarding the cervical spine, the record indicates claimant had a long history of neck problems dating back to at least 2008. (JE 1, pp. 6-16; JE 2, p. 17; JE 3, pp. 20-23) Nurse Practitioner Muenster found that claimant had neck pain and a nasal fracture on May 25, 2016. Nurse Practitioner Muenster also recommended claimant be allowed to treat for her neck pain with a chiropractor. (JE 6, pp. 42-45) Dr. Sassman also found that claimant had a neck condition from her May 23, 2016 injury. (Ex. 3, p. 48) There is little evidence to suggest that claimant did not have at least a temporary aggravation of her chronic cervical condition. Given this record, claimant has carried her burden of proof she had a sequela injury from her nasal fracture consisting of aggravation of her chronic cervical condition.

Claimant later saw Nurse Practitioner Muenster on November 19, 2016. At that visit, claimant indicated she no longer needed chiropractic care for her neck injury. Claimant had neck pain, but believed her pain had returned to her pre-injury levels. Based on this, Nurse Practitioner Muenster found claimant to be at MMI for her cervical condition. (JE 6, p. 51)

Dr. Sassman opined claimant had a permanent impairment to her cervical spine due to the May 23, 2016, neck injury. However, Dr. Sassman failed to adequately address why claimant had permanent impairment in 2021, yet was found to return to baseline in November 2016. Given this discrepancy, it is found that Dr. Sassman's opinion regarding permanent impairment to the cervical spine is found not convincing.

I recognize claimant testified her neck condition worsened following her May 23, 2016, punching incident. Claimant also testified at hearing that she did not dispute facts and findings made by Nurse Practitioner Muenster in the September 19, 2016, record. (Tr., p. 69) Given Nurse Practitioner Muenster's records, I am not able to find in claimant's favor regarding permanent impairment of the cervical spine. I also recognize

that the parties stipulated claimant had not yet reached MMI regarding her stipulated work injury. However, the cervical spine is not a stipulated work injury in this case. It is also necessary to make a finding of fact regarding the permanent impairment of the cervical injury as this impacts the issues regarding alternate medical care and payment of medical bills for this decision.

Nurse Practitioner Muenster found that claimant had a neck condition on May 25, 2016, related to her work injury. Based on claimant's information, she also found claimant's neck condition returned to baseline levels as of September 16, 2016. (JE 6, pp. 42-45, 51) Based on this record, it is found that claimant had a temporary aggravation of a pre-existing cervical condition beginning May 23, 2016, and resolving on September 16, 2016.

Regarding the allegations of skin cancer, claimant treated with Dr. Owen. Dr. Owen specializes in plastic and reconstructive surgery. Dr. Owen opined claimant's skin cancer was basal cell carcinoma. He opined basal cell carcinoma is more frequently associated with age and sun exposure. He said that squamous cell carcinoma is more closely associated with scarring or trauma. (Ex. E)

Dr. Sassman opined claimant's basal cell carcinoma is causally connected to the nasal injury and subsequent treatment. (Ex. 3, p. 48) However, Dr. Sassman does not address the issues raised in Dr. Owen's opinion that the basal cell carcinoma is more likely caused by age and sun exposure and not trauma and scarring. Because Dr. Sassman's opinion does not offer a counter against Dr. Owen's opinion, and because Dr. Owen specializes in plastic and reconstructive surgery, it is found that Dr. Owen's opinion regarding causation regarding the basal cell carcinoma is more convincing. Given this, claimant has failed to carry her burden of proof her basal cell carcinoma is causally connected to her nasal fracture and surgical treatment.

Regarding the GI problems, claimant contends she has a GI tract issue due to use of antibiotics. There is little evidence in the exhibits that claimant has a GI disorder. There is no evidence in the medical records that claimant's alleged GI condition was caused by antibiotics. Claimant testified in deposition that healthcare providers have no opinion regarding her GI tract problems. (Ex. A, depo p. 17) Given this record, claimant has failed to carry her burden of proof her GI problems are causally connected to the May 23, 2016 work injury.

Regarding claimant's mental health condition, as detailed, claimant has a prior history of depression and anxiety. Defendants authorized claimant to be evaluated by Dr. Brooke. Dr. Brooke opined that claimant's injury and surgeries aggravated her mental health condition. He recommended bi-weekly psychotherapy for one year. He also opined that claimant did not have a permanent impairment regarding her mental health condition. (JE 15)

Claimant was referred to Hillcrest Family Services for counseling. (Tr., p. 36; Ex. 17) Claimant went to one session, but did not continue services. (JE 17, p. 140)

Claimant was not satisfied with counseling at Hillcrest. (Tr., pp. 36-37) Claimant stopped going to therapy sessions in early 2019 and began seeing Dr. Downs in 2021. Claimant testified that part of the problem with getting counseling was due to the pandemic. (Tr., pp. 73-74)

Defendants' authorized provider found that claimant's injury and surgery aggravated a pre-existing mental health condition. There is no evidence in the record disputing this opinion. Given that record, claimant has carried her burden of proof the aggravation of her mental health condition is a sequela to her work-related injury of May 23, 2016.

Regarding the condition of her breast, claimant did have skin graft harvesting for her nose in the area of her right breast. Claimant testified she has some numbness in this area. There are no medical records in evidence regarding claimant being treated for numbness on her right breast area. There is no opinion claimant's skin graft harvesting caused claimant's alleged breast issues. Claimant's own expert does not give an opinion regarding causation of this alleged condition. (Ex. 3, p. 48) Given this record, it is found that claimant has failed to carry her burden of proof her alleged breast condition is causally connected to the May 23, 2016 work injury.

The next issue to be determined is the extent of claimant's entitlement to temporary benefits.

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

The parties agreed at hearing that claimant had not reached MMI, and therefore the issue of permanency was not yet ripe for adjudication. (Tr., p. 4) Claimant contends she is due temporary total disability benefits from November 1, 2016, through November 9, 2016, and a running award of temporary total disability benefits commencing on January 5, 2018. (Claimant's Post-Hearing Brief, pp. 27-28)

Claimant underwent surgery with Dr. Marcus on November 1, 2016. Claimant later had an infection. Claimant did not return to work until December 26, 2016. (JE 12, pp. 87-89, 111; Tr., p. 32) Claimant contends she did not receive temporary total disability benefits from November 1, 2016, through November 9, 2016. (Tr., p. 59) There is no documentation from either party to support or refute this contention. Defendants, in their post-hearing brief, failed to address their obligation to pay temporary total disability benefits during this period of time. Given this record, defendants are ordered to pay temporary total disability benefits from November 1, 2016, through November 9, 2016.

Claimant also contends she is due a running award of temporary total disability benefits commencing on January 5, 2018. Claimant indicates that January 5, 2018, is the commencement date for a running award of temporary total disability benefits as claimant has not worked since her surgery on January 5, 2018.

Dr. Marcus released claimant to return to work without restrictions on December 26, 2016. (JE 12, pp. 95-111) Claimant returned to work at ARC. (Tr., p. 64) Claimant voluntarily resigned from her job at ARC. (Ex. D, p. 2) At the time she resigned, claimant had no work restrictions. At the time she resigned, no expert opined claimant was unable to work. (Tr., p. 65) At the time she resigned, claimant indicated the rationale for leaving ARC was because she had other employment. Claimant testified she left ARC due to fear of re-injury. (Tr., p.64) Claimant resigned from ARC indicating she had found another job. (Ex. D, p. 2)

After leaving ARC, claimant went to work for Little Saints Daycare, which was closer to her home. (Tr., p. 65) Claimant voluntarily left Little Saints to work at Maple Street Daycare. (Tr., pp. 65-66) Claimant left Maple Street Daycare due to lower back pain. Claimant is not making a claim for a lower back injury in this case. (Tr., p. 66)

Claimant testified she has not looked for work since the summer of 2018. (Tr., p. 66; Ex. A, depo p. 30; Ex. B, depo p. 12) Claimant testified she does not intend to look for work. (Tr., p. 66) Claimant had no restrictions from the time she was released to work by Dr. Marcus in December 2016 until she received restrictions from her expert in an IME opinion dated July 9, 2021. (Ex. 3)

No expert has opined claimant could not return to work.

Given this record, claimant has failed to carry her burden of proof she is due a running award of temporary total disability benefits commencing on January 5, 2018.

The next issue to be determined is whether there is a causal connection between the injury and the claimed medical expenses.

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

Claimant seeks payment and medical benefits for her cervical condition, mental health condition, and the Mohs surgery for the skin cancer on the nose. (Claimant's Post-Hearing Brief, p. 34; Ex. 2)

Claimant's skin cancer has been found not causally connected to the May of 2016 nasal injury. As a result, defendants are not liable for medical bills related to the skin cancer.

As detailed above, it is found that claimant had a temporary aggravation of her cervical condition that resolved by September 19, 2016. (JE 6, p. 51) As a result, defendants are only liable for payment of medical bills for claimant's cervical condition between May 23, 2016, up to September 19, 2016.

As detailed, it is found that claimant has a chronic mental health condition aggravated by her May 23, 2016, work injury. Defendants offered claimant counseling with Hillcrest Family Services. Claimant attended one session and did not return as claimant was unhappy with counseling at Hillcrest. Claimant began counseling services with Dr. Downs in 2021.

Under Iowa Code section 85.27, the employer has the right to choose medical care as long as it offered promptly and is reasonably suited to treat the injury without undue inconvenience to the employee. The employer is not responsible for the costs of medical care not authorized by section 85.27. A claimant can seek payment of unauthorized medical care by a preponderance of the evidence that the care was reasonable and beneficial. Bell Brothers Heating & Air Conditioning v. Gwinn, 779 N.W.2d 193, 206 (Iowa 2010) To be beneficial, the medical care must provide a more favorable medical outcome than would be likely had been achieved by the care authorized by the employer. Id. at 206. The claimant has the significant burden to prove the care is reasonable and beneficial. Id. at 206.

Claimant did testify she believes she had good results with Dr. Downs. However, claimant left Hillcrest after one session. There is little evidence counseling provided by Ms. Downs gave a more favorable outcome than that which was initially provided at Hillcrest.

There is little evidence that claimant gave notice of her desire or need to seek counseling other than that offered at Hillcrest. There is little evidence that even if that request was made, defendants denied that request. Given this record, claimant has not carried her burden of proof under Bell Brothers defendants are liable for unauthorized care with Dr. Downs. Defendants are not liable for bills associated with Dr. Downs' counseling. However, as noted above, defendants still have an obligation to authorize counseling services for claimant as detailed by Dr. Brooke. (JE 15)

The next issue to be determined is whether claimant carried her burden of proof she is entitled to alternate medical care under Iowa Code section 85.27.

Iowa Code section 85.27(4) provides, in relevant part:

> For purposes of this section, the employer is obliged to furnish reasonable services and supplies to treat an injured employee, and has

> the right to choose the care. . . . The treatment must be offered promptly and be reasonably suited to treat the injury without undue inconvenience to the employee. If the employee has reason to be dissatisfied with the care offered, the employee should communicate the basis of such dissatisfaction to the employer, in writing if requested, following which the employer and the employee may agree to alternate care reasonably suited to treat the injury. If the employer and employee cannot agree on such alternate care, the commissioner may, upon application and reasonable proofs of the necessity therefor, allow and order other care.

An application for alternate medical care is not automatically sustained because claimant is dissatisfied with the care he has been receiving. Mere dissatisfaction with the medical care is not ample grounds for granting an application for alternate medical care. Rather, the claimant must show that the care was not offered promptly, was not reasonably suited to treat the injury, or that the care was unduly inconvenient for the claimant. Long v. Roberts Dairy Co., 528 N.W.2d 122 (Iowa 1995).

Claimant seeks alternate medical care consisting of a cervical MRI, a referral for her GI complaints, and authorization for continued care with Dr. Downs.

As noted, claimant's cervical injury is found to be a temporary aggravation of a pre-existing condition, which resolved itself as of September 19, 2016. Given this record, claimant has failed to carry her burden of proof she is entitled to alternate medical care consisting of a cervical MRI.

Regarding the GI complaints, as detailed above, it is found that claimant has failed to carry her burden of proof her GI complaints were causally connected to her May 23, 2016, injury. As a result, claimant has failed to carry her burden of proof she is entitled to alternate medical care consisting of referral to a GI specialist.

Regarding continued counseling with Dr. Downs, as noted above, defendants offered claimant counseling with Hillcrest Services. Claimant left Hillcrest after one session. There is little evidence that counseling with Ms. Downs resulted in a more favorable outcome. There is little evidence claimant gave notice of her dissatisfaction of the care with Hillcrest to defendants. Given this record, claimant has failed to carry her burden of proof she is entitled to alternate medical care consisting of continued counseling with Ms. Downs. As noted above, defendants are obligated to provide counseling services as detailed by Dr. Brooke. (JE 15)

The next issue to be determined is whether claimant is entitled for a penalty under Iowa Code section 86.13.

In Christensen v. Snap-on Tools Corp., 554 N.W.2d 254 (Iowa 1996), and Robbennolt v. Snap-on Tools Corp., 555 N.W.2d 229 (Iowa 1996), the supreme court said:

Based on the plain language of section 86.13, we hold an employee is entitled to penalty benefits if there has been a delay in payment unless the employer proves a reasonable cause or excuse. A reasonable cause or excuse 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."

Christensen, 554 N.W.2d at 260.

The supreme court has stated:

(1) If the employer has a reason for the delay and conveys that reason to the employee contemporaneously with the beginning of the delay, no penalty will be imposed if the reason is of such character that a reasonable fact-finder could conclude that it is a "reasonable or probable cause or excuse" under Iowa Code section 86.13. In that case, we will defer to the decision of the commissioner. See Christensen, 554 N.W.2d at 260 (substantial evidence found to support commissioner's finding of legitimate reason for delay pending receipt of medical report); Robbennolt, 555 N.W.2d at 236.

(2) If no reason is given for the delay or if the "reason" is not one that a reasonable fact-finder could accept, we will hold that no such cause or excuse exists and remand to the commissioner for the sole purpose of assessing penalties under section 86.13. See Christensen, 554 N.W.2d at 261.

(3) Reasonable causes or excuses include (a) a delay for the employer to investigate the claim, Christensen, 554 N.W.2d at 260; Kiesecker v. Webster City Custom Meats, Inc., 528 N.W.2d at 109, 111 (Iowa 1995); or (b) the employer had a reasonable basis to contest the claim—the "fairly debatable" basis for delay. See Christensen, 554 N.W.2d at 260 (holding two-month delay to obtain employer's own medical report reasonable under the circumstances).

(4) For the purpose of applying section 86.13, the benefits that are underpaid as well as late-paid benefits are subject to penalties, unless the employer establishes reasonable and probable cause or excuse. Robbennolt, 555 N.W.2d at 237 (underpayment resulting from application of wrong wage base; in absence of excuse, commissioner required to apply penalty).

> If we were to construe [section 86.13] to permit the avoidance of penalty if any amount of compensation benefits are paid, the purpose of the penalty statute would be frustrated. For these reasons, we conclude section 86.13 is

> applicable when payment of compensation is not timely . . . or when the full amount of compensation is not paid.
>
> Id.
>
> (5) For purposes of determining whether there has been a delay, payments are "made" when (a) the check addressed to a claimant is mailed (Robbennolt, 555 N.W.2d at 236; Kiesecker, 528 N.W.2d at 112), or (b) the check is delivered personally to the claimant by the employer or its workers' compensation insurer. Robbennolt, 555 N.W.2d at 235.
>
> (6) In determining the amount of penalty, the commissioner is to consider factors such as the length of the delay, the number of delays, the information available to the employer regarding the employee's injury and wages, and the employer's past record of penalties. Robbennolt, 555 N.W.2d at 238.
>
> (7) An employer's bare assertion that a claim is "fairly debatable" does not make it so. A fair reading of Christensen and Robbennolt, makes it clear that the employer must assert facts upon which the commissioner could reasonably find that the claim was "fairly debatable." See Christensen, 554 N.W.2d at 260.
>
> Meyers v. Holiday Express Corp., 557 N.W.2d 502 (Iowa 1996).

Weekly compensation payments are due at the end of the compensation week. Robbennolt, 555 N.W.2d 229, 235.

Penalty is not imposed for delayed interest payments. Davidson v. Bruce, 594 N.W.2d 833, 840 (Iowa App. 1999). Schadendorf v. Snap-On Tools Corp., 757 N.W.2d 330, 338 (Iowa 2008).

When an employee's claim for benefits is fairly debatable based on a good faith dispute over the employee's factual or legal entitlement to benefits, an award of penalty benefits is not appropriate under the statute. Whether the issue was fairly debatable turns on whether there was a disputed factual dispute that, if resolved in favor of the employer, would have supported the employer's denial of compensability. Gilbert v. USF Holland, Inc., 637 N.W.2d 194 (Iowa 2001).

Claimant testified at hearing she did not receive temporary total disability benefits from November 1, 2016, through November 9, 2016. Other than claimant's minimal testimony on this issue, there is no documentation of any kind indicating defendants did or did not pay claimant temporary total disability benefits from November 1, 2016, through November 9, 2016. Given this lack of a record of any kind on this issue, it is found that claimant has failed to carry her burden of proof a penalty is appropriate for this alleged nonpayment of temporary total disability benefits from November 1, 2016, though November 9, 2016. Defendants are liable for payment of temporary total

disability benefits for this period. It is respectfully requested the parties reach a resolution in this matter regarding payment of temporary total disability benefits for this period of time.

A penalty is not appropriate for defendants' failure to pay a running award of temporary total disability benefits commencing on January 5, 2018, as claimant failed to carry her burden of proof she is due a running award of temporary total disability benefits beginning at that time.

**ORDER**

Therefore it is ordered:

That claimant and defendants shall resolve the issue of the alleged issue of unpaid temporary total disability benefits from November 1, 2016, through November 9, 2016, including interest.

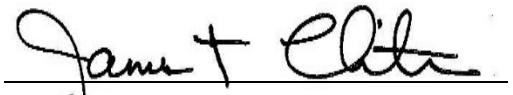
That defendants shall pay claimant's medical costs as detailed above.

That defendants shall authorize counseling as detailed by Dr. Brooke's report (JE 15).

That defendants shall pay costs.

That defendants shall file subsequent reports of injury as required by this agency under rule 876 IAC 3.1(2).

Signed and filed this 14th day of December, 2021.



JAMES F. CHRISTENSON
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Zeke McCartney (via WCES)

Adam Bates (via WCES)

**Right to Appeal:** This decision shall become final unless you or another interested party appeals within 20 days from the date above, pursuant to rule 876-4.27 (17A, 86) of the Iowa Administrative Code. The notice of appeal must be filed via Workers' Compensation Electronic System (WCES) unless the filing party has been granted permission by the Division of Workers' Compensation to file documents in paper form. If such permission has been granted, the notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 150 Des Moines Street, Des Moines, Iowa 50309-1836. The notice of appeal must be received by the Division of Workers' Compensation within 20 days from the date of the decision. The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or legal holiday.