BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

LEANN BRODERSON, Claimant, vs. REM IOWA, Employer, and NEW HAMPSHIRE INS. CO., Insurance Carrier, Defendants.	:	File No. 5055853.01 ARBITRATION DECISION Head Note Nos.: 1108.50, 1402.40, 1802, 2501, 2602, 2907, 4000.2, 4100

STATEMENT OF THE CASE

LeAnn Broderson, claimant, filed a petition in arbitration seeking workers' compensation benefits from REM Iowa, employer and New Hampshire Insurance Company, insurance carrier, as defendants. Hearing was held on August 30, 2021. This case was scheduled to be an in-person hearing occurring in Davenport, Iowa. However, due to the declaration of a pandemic in Iowa, the Iowa Workers' Compensation Commissioner ordered all hearings to occur via video means, using CourtCall. Accordingly, this case proceeded to a live video hearing via CourtCall with all parties and the court reporter appearing remotely.

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.

Leann Broderson, Rebecca Ray, Donald Ray, Jr. and Angie Thomsen all testified live at trial. The evidentiary record also includes joint exhibits JE1-JE9, claimant's exhibits 1-19, and defendant's exhibits A-L. Prior to the hearing, claimant filed an objection to defendants' exhibit E, pages 8-15, a late supplemental report from a vocational counselor. The objection was sustained and defendants' exhibit E, pages 8-15 were excluded from evidence. All other exhibits were received without objection. At the outset of the hearing, defendants amended a portion of the hearing report related to

the date claimant reached maximum medical improvement. Claimant objected to the timing of the amendment. The undersigned allowed the amendment. The evidentiary record was left open for seven days so claimant could submit any additional evidence in response to the amendment. Claimant did not submit any additional evidence.

ISSUES

The parties submitted the following issues for resolution:

1. Whether claimant sustained permanent disability to her lower back.
2. Whether claimant has reached the end of her healing period or if she is entitled to a running award of benefits.
3. If claimant has reached the end of her healing period, the extent of permanent disability she sustained as the result of the work injury. Including whether claimant is permanently and totally disabled and/or the odd-lot doctrine applies.
4. Whether defendants are responsible for the payment of past medical expenses.
5. Whether penalty benefits are appropriate in this case.
6. Assessment of costs.

FINDINGS OF FACT

The undersigned, having considered all of the evidence and testimony in the record, finds:

Claimant, Leann Broderson, alleges injury to her neck and back as the result of the stipulated May 5, 2014 work injury at REM Iowa ("REM").

At the time of hearing Ms. Broderson was 37 years old. When she was 18 years old, she was involved in a motor vehicle accident in 2002. As the result of the accident, she sustained injuries to her thoracic spine and whiplash. She received treatment for approximately one year with Timothy Miller, M.D., a pain specialist. She testified that she recovered 100 percent from that accident. She did not have any permanent restrictions as the result of those injuries, and she was able to perform all of her regular duties. (Tr. pp. 63-64)

Ms. Broderson began working full-time at REM in March 2013 as a Direct Support Professional (DSP). She was paid $12.00 per hour and worked approximately 40 hours per week. This is the job she was performing on the date of the May 5, 2014, work injury. Essentially her duties were to provide safety and supervision for the clients. She ensures that the clients follow their goals and their plan of care. Additionally, she helped prepare meals, take them grocery shopping, shovel their walks, mow their grass. Ms. Broderson described her job as very physically demanding. She was expected to go to work and get beat up every day because some of the clients had physical aggression issues. (Tr. pp. 23-24)

When she arrived to work on the date of the injury, her client was very agitated. An altercation occurred between the client and another REM employee. When Ms. Broderson tried to help diffuse the situation, the two people collided into Ms. Broderson which caused her to fall backwards on a heavy wood glider chair. The two other people landed on top of Ms. Broderson, pinning her to the chair. The back of her neck hit the chair bottom; the chair broke. The chair had three levels of brackets that her lower back hit. She experienced very sharp pain in her right hip and buttocks region, pain from her tailbone that wrapped around her hip. Her neck had a bad burning pain. She felt pain in her cervical region, right arm, middle and low back, right hip, and legs. Ms. Broderson called the REM on-call service and reported the injury. She was instructed to finish her work shift. Ms. Broderson testified that she had to wait for the defendants to authorize medical treatment for her. She was able to work in the meantime, but it was difficult for her. Ms. Broderson was not able to receive medical treatment until May 20, 2014, when she was authorized to go to the emergency room at Trinity Medical Center. (Tr. pp. 25-28)

On May 20, 2014, Ms. Broderson went to the emergency room. She presented with lower back pain for approximately the past three weeks since an incident at work. Her pain radiates around to her right side. She is able to walk, but has a limp due to her pain. The clinical impression was lumbar strain and right shoulder strain. (JE1)

Ms. Broderson began treating at Concentra Medical Centers on May 29, 2014. She reported pain right side arm, shoulder, and low back. Her gait was normal. The assessment included: back strain, lumbosacral strain, cervical strain, right arm pain, right trapezius pain, and hip pain. Naomi C. Chelli, M.D., recommended conservative treatment including physical therapy. (JE2, pp. 4-6)

On June 3, 2014, Ms. Broderson returned to Dr. Chelli. She reported more pain in her lower right back. She also had pressure causing pain in her right hip. Ms. Broderson was given a trigger point injection in the trapezius muscle. On June 16, 2014, Dr. Chelli noted her gait was normal. She made an orthopedic referral. (JE2, pp. 7-11)

Ms. Broderson began physical therapy on June 9, 2014. She was noted to ambulate with a very antalgic gait and was unable to fully put weight onto her right foot. The notes state the examination was consistent with lumbar and cervical strain. (JE3, pp. 15-17)

On June 11, 2014, Ms. Broderson underwent an MRI of the lumbar spine. The impression on the report is broad-based disk bulge at L4-5 with abnormal annulus and midline disk herniation at L4-5 without tight central stenosis. (JE4, p. 18)

Ms. Broderson returned to Dr. Chelli on June 26, 2014. The doctor noted that the lumbar MRI showed a L4-5 small disc herniation with annular involvement. Her gait was normal. Ms. Broderson underwent a trigger point injection in the trapezius muscle. Again, Dr. Chelli recommended an orthopedic referral. (JE2, pp. 12-14)

On July 24, 2014, Ms. Broderson saw Myles J. Luszczyk, D.O., at ORA Orthopedics. The doctor noted she had a positive straight leg exam. She was visibly uncomfortable if she sat. She also guarded her right buttock region and as a result walked with an antalgic gait. She also had decreased range of motion of the lumbar spine. The assessment was multiple disk herniations as a result of an injury sustained at work with the L4-L5 level being most significantly affected. Dr. Luszczyk explained to Ms. Broderson that this is a difficult type of disk herniation to try and alleviate. He noted it was more centrally based and sometimes surgery itself is often worse than the symptoms she has without surgery. He recommended injections and trying pain management before surgical intervention. Ms. Broderson agreed. He recommended continued work restrictions. (JE5, pp. 27-29)

On August 14, 2014, Ms. Broderson saw Sanjay Sundar, M.D., for an initial evaluation of her now chronic low back pain. Her pain is located in the right lumbosacral area and is mostly a burning shooting sensation. The pain radiates into the buttock and down the hamstring occasionally over the lateral thigh. Dr. Sundar noted that the June 11, 2014 MRI demonstrated multiple disc bulges in the lower lumbar spine worse at L4-5 where there is a central herniation and possible annular disruption. His assessment included lumbar stenosis and lumbar HNP with myelopathy. A L5-S1 interlaminar epidural injection was performed. (JE6, pp. 49-51)

Ms. Broderson returned to Dr. Sundar's office on August 25, 2014. She reported 10 percent relief but she noticed a little less pressure when she walks now. The provider felt Ms. Broderson was suffering from lumbar stenosis at L4-5 level. She reported minimal relief from this recent lumbar epidural injection and is agreeable to having the second in the series. (JE6, pp. 52-53)

Ms. Broderson underwent another epidural steroid injection at the L4-5 level on September 9, 2014. (JE6, p. 54)

Dr. Sundar saw Ms. Broderson on September 23, 2014. She reported little relief with the series of lumbar epidurals. She did not start on the Effexor that was prescribed for her because it was not approved by workers' compensation. Dr. Sundar felt Ms. Broderson seemed to be suffering from lumbar stenosis at the L4-5 level. He noted that her MRI did not demonstrate critical stenosis, she was exhibiting S1 type symptoms. He noted that she has failed other modalities of conservative care and a trial of epidural steroid injections. Her goal was to put off surgery for as long as possible. Dr. Sundar recommended she avoid narcotics; he prescribed gabapentin. (JE6, pp. 55-56)

Ms. Broderson returned to Dr. Sundar on October 21, 2014. She was not able to start the gabapentin because it was denied by her insurance. He started her on Percocet and they agreed it would only be temporary. (JE6, pp. 57-58)

Ms. Broderson continued to follow-up with Dr. Sundar. He performed a lumbar medial branch block on December 30, 2014. (JE6, p. 59-62)

On February 17, 2015, Dr. Sundar performed a lumbar radiofrequency ablation (RFA). (JE6, p. 63) Ms. Broderson returned to Dr. Sundar's office on March 3, 2015. She reported a sunburn type feeling over the area of the procedure that was consistent with post procedure neuritis. She is experiencing spasming and tight sensation to the right trapezius area since May 2014. This causes pain to the neck and head and she has limited range of motion in her neck. She also has intermittent numbness to her thumb and first finger along with pain that runs down her arm from the shoulder to those two fingers. Her pain is primarily over the right sided lumbar facet joints. She no longer reports radicular symptoms, numbness, tingling, or weakness in her legs. Ms. Broderson benefited from RFA in the past for over three months. However, as expected the medial branch nerves that were ablated regenerated and started causing pain once again. Dr. Sundar recommended repeat RFA and trigger point injection to the upper trapezius. The trigger point injection was performed on March 25, 2015. (JE6, pp. 64-67)

During the summer of 2015, Ms. Broderson continued to receive conservative treatment from Dr. Sundar's office. The treatment included a cervical epidural injection in July. (JE6, pp. 68-76)

On August 24, 2015, Ms. Broderson underwent an MRI of the cervical spine. The impression was disk abnormalities at C5-C6 and C6-C7, worse at C5-6 where there was moderate central canal narrowing and moderately severe right foraminal narrowing. (JE4, pp. 19-20)

Ms. Broderson returned to see Dr. Luszczyk at ORA on September 28, 2015. The doctor noted he had seen her in 2014 and she returned today for a new complaint. She has radicular symptoms down her right arm which is associated with some neck pain and shooting pains down her arm consistent with more of a C6 and C7 nerve root distribution. An epidural provided her with no significant lasting relief. The physical therapy, particularly the traction, gave her good relief of symptoms, but she feels she cannot rely on the traction all the time. Dr. Luszczyk reviewed the 2015 MRI. His assessment was that she had radicular symptoms associated with cervical stenosis C5-C6, C6-C7, failed conservative treatment. He explained to Ms. Broderson that surgery would not reliably improve the numbness that she currently experiences. The goal of the surgery would be to relieve the arm pain. He anticipated that she would still have neck pain because surgery does not improve neck pain. He does feel that surgery is an option for her; she would like to go home and think about it. (JE5, pp. 30-31)

Ms. Broderson returned to ORA on November 12, 2015. The risks and benefits of surgery were once again discussed. The notes indicate that greater than an hour was spent with Ms. Broderson and her father. She wanted to go home and consider her options. (JE5, pp. 32-34)

On March 15, 2016, Ms. Broderson returned to Dr. Sundar's office to discuss a repeat lumbar RFA and additional physical therapy for her back and neck. The RFA was performed on May 27, 2016. (JE6, pp. 77-80)

On May 13, 2016, Robert Foster, M.D., performed an IME at the request of the defendants; he issued his report on May 16, 2016. In addition to evaluating Ms. Broderson he also reviewed the records provided to him by the defendants' attorney. Since the work injury Ms. Broderson has persistent right-sided complaints, especially right shoulder, right upper extremity pain, numbness, and tingling in the right buttock and thigh, and leg complaints. Her right upper extremity complaint is worse; she rates it as an 8 out of 10. Her back pain and buttock pain bother her, but she has no radicular complaints. Dr. Foster's impression was right C6 nerve root compression secondary to right C5-6 disc herniation. He noted Ms. Broderson presented with complaints of right upper extremity numbness and shoulder complaints that are related to the right C5-6 disc herniation. He opined that this was related to her on-the-job injury. He felt that Ms. Broderson's options were to live with this or consider surgery. Surgical intervention would involve a cervical disc replacement at C5-6 versus an anterior cervical fusion at C5-6. Postoperatively, Ms. Broderson would be released to full duty without restrictions at a period of 2-3 months. Otherwise, he considered her to be at MMI. (Def. Ex. C, pp. 1-5)

On July 13, 2016, Ms. Broderson reported increased back pain, without an inciting event. It was noted that she suffers from lumbar facet mediated pain and cervical stenosis with radicular symptoms. Ms. Broderson anticipates a ACDF at C5-6 with Dr. Luszczyk. She was doing well after the LRFA until a few days ago. A short course of prednisone. (JE6, pp. 81-83)

Ms. Broderson returned to Dr. Luszczyk on July 19, 2016 to continue their discussion regarding surgical intervention to the cervical spine. She felt she is worsening with respect to her right arm pain. The doctor still believed surgery was an option for Ms. Broderson. However, surgery would only be designed at improving her arm pain. If she was going to proceed with surgery, the doctor wanted an updated MRI. (JE5, p. 35)

Ms. Broderson underwent another cervical MRI on August 11, 2016; it was compared to the August 24, 2015 MRI. There was persistent disk and endplate abnormalities at the C5-6 level similar to August 2015. There were no signal changes within the spinal cord or any new areas of disk abnormality as compared to the prior study. (JE4, pp. 21-22)

On September 1, 2016, Dr. Foster issued a follow-up to his IME. At the time of the IME, Ms. Broderson presented without an MRI and he was now asked to comment on the MRI. Dr. Foster noted the MRI showed scattered degenerative changes particularly at L3-4, L4-5, and L5-S1 without any nerve root compression. There were no findings of acute changes. Dr. Foster felt Ms. Broderson did have low back complaints but that was related to her lumbar degenerative disk disease. He found nothing that would relate to her on-the-job injury to explain her back complaints. (Def. Ex. C, pp. 6-7)

On September 15, 2016, Ms. Broderson went to the emergency room with severe back pain that began that morning while getting ready for work. She was reaching for a shirt, coughed and heard a "pop" and immediately fell to the ground with severe back pain. She reported a herniated disc from motor vehicle collision two years ago. Her pain radiates to the right lower extremity. An MRI of the lumbosacral spine revealed lower lumbar multilevel disk degeneration without evidence of critical neural encroachment. (JE8, pp. 136-139)

On September 20, 2016, Ms. Broderson returned to Dr. Luszczyk. He reviewed the August 11, 2016 MRI. Again, he saw evidence of persistent abnormalities at the C5-C6 and C6-C7 levels. He noted this created foraminal stenosis as a result of the osteophyte formation and disk degeneration. He felt this is contributing to her radicular symptoms. Ms. Broderson reported that over the past week she was leaning over to grab a structure when she immediately felt a popping sensation and shooting pains into her right groin. She reports that she essentially was incapacitated by the pain. Dr. Luszczyk's assessment was ongoing radicular symptoms in the cervical spine with new onset low back pain with radiation into her groin. He explained to Ms. Broderson that it was difficult to say whether this was an exacerbation of previously existing disk herniations versus new ones. The doctor noted that discussion regarding cervical intervention would need to take a backseat until he could break some of the spasm in her lumbar spine. (JE5, pp. 36-38)

Throughout the second half of 2016 Ms. Broderson continued to receive treatment for her pain from Dr. Sundar's office. (JE6, pp. 84-102)

On January 17, 2017, Ms. Broderson returned to Dr. Sundar's office. She reported her cervical surgery was on hold due to a severe exacerbation of her low back pain. Her low back pain is improved so she will be contacting Dr. Luszczyk to get back on track for cervical surgery. She continued to treat at his office throughout 2017 and through April of 2018. (JE6, pp. 103-132)

On December 4, 2017, Ms. Broderson returned to Dr. Luszczyk for a recheck of her cervical spine. Ms. Broderson reported that an SI joint injection flared up some of her low back pain and now developed some atrophy to the underlying skin. At that time, he felt she had fibromyalgia/chronic pain syndrome. He cautioned her that there have been cases where he operated, everything went well, but patients were far worse after surgery. Dr. Luszczyk felt that surgery was an option for her cervical spine; she wanted to go home and think about her options. (JE5, p. 39)

On July 26, 2018, Ms. Broderson went to the emergency room with worsening acute on chronic lumbar back pain with an acute onset of bowel incontinence, which she reported caused her to fall to the ground. She also has right calf numbness. A MRI of the lumbar spine was remarkable for L3-L4, L4-L5 herniated disc with annular tear. There was no evidence of cord compression. She was encouraged to follow-up with Dr. Luszczyk. (JE8, pp. 140-144)

Ms. Broderson returned to ORA on May 1, 2018, for a recheck of her lumbar spine. She reported worsening radicular symptoms down her right lower extremity to the point where she has really struggled to walk. The doctor noted she looked significantly more deconditioned since her last visit and he was concerned she was developing further issues with an L5 radiculopathy. He recommended an urgent MRI, but there was an issue with workers' compensation. He wanted to see her back after the MRI. (JE5, pp. 40-41)

Ms. Broderson underwent a third cervical MRI on August 16, 2018. The report noted unchanged disc abnormalities at C5-6 and C6-7, with moderate central canal narrowing and moderately severe right foraminal narrowing at C5-6. (JE4, pp. 23-24)

Ms. Broderson returned to ORA on August 28, 2018, to review the results of her MRIs of the lumbar spine and cervical spine. At this point, Ms. Broderson wanted to proceed with surgical intervention to the cervical spine. The doctor noted they would begin scheduling for the anterior cervical discectomy and fusion, C5-C6, C6-C7. She reported that she did have an episode of incontinence so she went to the emergency room. The doctor went over the risks and benefits of surgical intervention. They also discussed that in the future she may benefit from a spinal cord stimulator in the lower thoracic region to help deal with radicular symptoms in her lower extremities. (JE5, pp. 42)

Dr. Luszczyk saw Ms. Broderson on June 20, 2019. The doctor stated:

> We have had multiple discussions with Leann and multiple visits as a result of her cervical radicular symptoms. She has MRI imaging that does show evidence of degeneration at 5-6 and 6-7 with severe foraminal stenosis. This has been contributing to right-sided symptoms down the arm as well as a component of some neck pain. We have discussed in the past and in multiple visits surgical intervention, but we have been waiting on approval from her worker's comp insurer.

(JE5, p. 43)

Dr. Luszczyk felt she would benefit from surgical intervention to the cervical spine in the form of a cervical fusion C5-7. He recommended a new MRI once the surgery is approved. Ms. Broderson agreed with the plan. (JE5, pp. 43-45)

Ms. Broderson underwent a fourth cervical MRI on July 18, 2019. The report noted degenerative disc disease with broad-based disc bulging at C5-6 and C6-7 causing central canal and bilateral neural foraminal narrowing, most severe at C5-6 similar to the prior exam. (JE4, pp. 25-26)

Dr. Luszczyk and Ms. Broderson reviewed the July 18, 2019 MRI on October 8, 2019. It showed evidence of severe foraminal stenosis at the 5-6 level and 6-7 segments, which the doctor believed accounted for her radicular symptoms. Ms.

Broderson wanted to proceed with surgical intervention. She recently had a bowel resection and is still recovering and requires blood transfusions. Dr. Luszczyk recommended waiting to perform the cervical surgery until she was recovered from the bowel surgery. He estimated they could consider surgery at the beginning of 2020, which would be one year after the bowel surgery. (JE5, p. 46)

Ms. Broderson had a baby in November 2019. She testified that she was very sick and required blood transfusions. (Tr. p. 98)

Ms. Broderson testified that Dr. Luszczyk scheduled her cervical surgery for February 28, 2020. However, she missed some preop clearance visits and the surgery was cancelled. There is conflicting information regarding why Ms. Broderson missed the appointments. She has indicated it was because she was extremely sick at that time. Ms. Broderson also said that she missed her preop visits because she felt she was being forced to go the surgery when she was not ready. (Tr. pp. 98-99) Ms. Broderson also indicated that there was a time in between the end of 2019 and the beginning of 2020 that she did not receive any phone calls so she did not know about the appointments. (Def. Ex. L, p. 12)

On April 6, 2020, Dr. Luszczyk authored a missive to Ms. Broderson. He advised her that as of May 6, 2020, he would no longer be able to treat her due to a pattern of repeated and frequent missed appointments without any communication from her, despite multiple attempts from his staff to contact her. He advised her to establish a relationship with another orthopedic physician as soon as possible. (JE5, p. 48)

On October 19, 2020, Ms. Broderson was seen at the neurosurgery department at the University of Iowa Health Care. Since a work injury in May 2014, she has continued to have neck pain more on the right side with numbness in her right hand. She has not been to physical therapy for three years. She has been unable to work for the last two years. The assessment was right-sided neck pain. Ms. Broderson reported that she is not particularly interested in surgical intervention at this time. There was a discussion about continued conservative management with physical therapy and the pain clinic. If the pain does not respond to conservative management and she is contemplating surgical intervention, then further evaluation with a cervical MRI, x-rays and right upper extremity EMG/NCV testing were recommended. (JE9, pp. 145-148)

On January 25, 2021, Dr. Luszczyk authored a missive to defense counsel. He noted that Ms. Broderson had been dealing with cervical radiculopathy. He had been following her for some time and they had discussed moving forward with surgical intervention. However, Ms. Broderson did not follow up with his office in a consistent manner so they discharged her from his care. Dr. Luszczyk reviewed Dr. Hitchon's notes and saw that Ms. Broderson is not interested in pursuing surgery. From Dr. Luszczyk's perspective he felt she had reached MMI as of her October 19, 2020 appointment with Dr. Hitchon. (Def. Ex. A. p. 3)

At the request of the defendants, Rick Garrels, M.D., performed an IME on February 24, 2021. In addition to evaluating Ms. Broderson he also reviewed the records provided to him by the defendants' attorney. Dr. Garrels felt that Ms. Broderson did sustain permanent impairment related to the work injury. Under Table 15-5, page 392 of the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, he assigned 18 percent whole person impairment which he noted was consistent with DRE cervical category III impairment. He believed that permanent restrictions due to the work injury were appropriate. He felt an FCE would be appropriate. For the cervical condition he recommended the following restrictions: rare twisting/bending of neck, limit right arm use to rare, limit lifting with right arm to 2 pounds rarely, no sustained twisting/bending of her neck, limit 2-handed lifting to 10 pounds rarely, and limit work to bench level only. He felt she required no further medical treatment for the cervical spine injury. (Def. Ex. B)

At the request of her attorney, Ms. Broderson underwent an IME with Richard L. Kreiter, M.D., on May 5, 2021. (Cl. Ex. 4) In addition to evaluating Ms. Broderson he also reviewed the records provided to him by her attorney. His diagnoses included degenerative C5 narrowed cervical disc with moderate to severe foraminal stenosis, greater on the right with radiculopathy and degenerative changes lumbar spine with primarily L4-5 disc narrowing, facet hypertrophy with foraminal stenosis and right-sided sciatica with mild neurological changes and chronic pain. Dr. Kreiter opined that these conditions were aggravated and accelerated by the May 5, 2014 work injury. He noted that the pre-existing issues were either minimally symptomatic or asymptomatic and did not cause significant problems. He noted that Ms. Broderson had been able to work without any significant problem until the May 2014 work injury. She seemed to develop significant symptoms after the fall at work. The doctor stated he would place her at MMI after she completes the physical therapy that was ordered by Patrick Hitchon, M.D. He noted Ms. Broderson had not seen any medical providers since her appointment at the University of Iowa. Dr. Kreiter recommended additional treatment for the work injury. He felt the use of a cane in her left hand could stabilize her gait. He noted anti-inflammatory medications and mild analgesics should be monitored by a family physician. He also felt she would benefit from a water exercise program. Dr. Kreiter assigned permanent impairment as the result of the work injury. He cited page 384, table 15-3 of the Fifth Edition of the Guides and assigned 8 percent whole person impairment for the lumbar spine. For the cervical spine, he agreed with Dr. Garrels' rating of 18 percent whole person impairment. He combined the two ratings for a total rating of 26 percent of the whole person. Dr. Kreiter assigned work restrictions of alternating walking, standing and sitting as tolerated. He also felt she should avoid being in a chronic forward flexed position. Lifting should be done two-handed with arms close to the side of her body, no more than 30-35 pounds occasionally, from floor to bench. Push/pull of 20-30 pounds occasionally. No jumping or walking over rough, uneven ground. No operating vehicles with a rough ride. He recommended consideration be given to vocational rehabilitation. (Cl Ex. 4)

It should be noted that the undersigned did review the surveillance video and report. Ms. Broderson was seen walking and texting, sitting, bending, and working under the hood of a car. (Def. Ex. J)

The first issue to be addressed is whether Ms. Broderson's work injury caused permanent disability to Ms. Broderson's back. Defendants contend that Ms. Broderson did not sustain any permanent disability to her low back as the result of the work injury. To support their position, defendants rely on the opinion of Dr. Foster who evaluated Ms. Broderson at the defendants' request in May 2016. Dr. Foster issued a supplemental report on September 1, 2016, wherein he opined that her low back complaints are related to her lumbar degenerative disc disease. He felt there was nothing that would relate to her on-the-job injury to explain her back complaints. (Def. Ex. C, pp. 6-7) It is unclear which MRI Dr. Foster reviewed to render his opinion. Additionally, his interpretation of the MRI differs from that of the other physicians in this case.

Ms. Broderson contends that she sustained permanent disability to her low back as the result of the work injury. There are several doctors who have opined that her low back pain is related to the work injury. When Dr. Luszczyk saw Ms. Broderson on July 24, 2014, he noted she had "multiple disk herniations as a result of an injury sustained at work with the L4-L5 level being most significantly affected." (JE5, p. 28) The notes from Dr. Luszczyk's office indicate that Ms. Broderson's lumbar and cervical pain are the result of a work injury. (JE6, pp. 116, 120, 123,130) Dr. Kreiter opined that Ms. Broderson's degenerative changes of her lumbar spine with primarily L4-5 disc narrowing, facet hypertrophy with foraminal stenosis and right-sided sciatica with mild neurological changes and chronic pain were aggravated and accelerated by the work injury. (Cl. Ex. 4, p. 42)

At hearing Ms. Broderson testified that prior to the work injury, she was able to perform her regular work activities and duties. During her fall at work, the three levels of the glider brackets and feet of the chair smashed her lower lumbar spine and tailbone. She felt immediate pain. (Testimony) I find the opinions of Dr. Luszczyk and Dr. Kreiter are more consistent with the record as a whole than that of Dr. Foster. I find the work injury caused permanent disability to Ms. Broderson's lower back.

The next issue is whether Ms. Broderson has reached the end of her healing period and if so, what the appropriate MMI date should be. Claimant contends her healing period has not ended because she now wants to pursue conservative treatment as recommended by Dr. Hitchon on October 19, 2020 and if that does not improve her condition she wants to proceed with cervical surgery. (Testimony)

Defendants contend Ms. Broderson reached MMI on either May 16, 2016 or on October 19, 2020. The first date, May 16, 2016, is when orthopedic surgeon Dr. Foster examined Ms. Broderson. At that time he stated, "the choices for the patient are to live with this or consider [cervical] surgery." (Def. Ex. C, p. 5) If she did not undergo surgery then he felt she had reached MMI. (Def. Ex. C, p. 7) The second date, October

19, 2020, is the last date Ms. Broderson saw Dr. Hitchon at the UIHC. Dr. Hitchon noted that Ms. Broderson was not particularly interested in surgical intervention at that time. There is no evidence that she has made any attempt to return to see Dr. Hitchon since October 2020. On January 25, 2021, Dr. Luszczyk authored a missive wherein he opined that Ms. Broderson reached MMI no later than October 19, 2020.

At hearing Ms. Broderson testified that she now wants to pursue additional conservative treatment, and if that does not improve her condition she wants to undergo cervical surgery. I do not find her testimony on this issue to be persuasive. The work injury occurred in 2014 and throughout the course of her treatment surgery has been discussed on numerous occasions. Throughout these discussions Ms. Broderson expressed a continued desire to think about her options. The cervical surgery was eventually scheduled for February 28, 2020. However, Ms. Broderson failed to attend the preoperative appointments and the surgery was cancelled. Ms. Broderson gave conflicting reasons for why she failed to attend those appointments. As the result of her failure to attend appointments, she was discharged from Dr. Luszczyk's care in May 2020. While I recognize that there was a time when she had some personal medical issues that affected her ability to undergo the surgery, there has been opportunity for her to seek additional treatment and undergo the surgery if so desired. The last time Ms. Broderson sought treatment was on October 19, 2020 with Dr. Hitchon at the UIHC. Despite the fact that Dr. Hitchon offered some conservative treatment options, it was not until shortly before this hearing that she once again voiced a desire for any additional treatment.

I found Ms. Broderson sustained injury to her neck and lower back as the result of the work injury. I find the opinion of Dr. Luszczyk to be persuasive. Thus, I find that her healing was complete and the extent of her permanent disability to her neck and lower back could be determined as of October 19, 2020. I find she reached MMI as of October 19, 2020.

We now turn to the extent of industrial disability that Ms. Broderson has sustained as the result of the work injury.

Ms. Broderson continued to work for REM following the injury. When Ms. Broderson saw Dr. Chelli on May 29, 2014, the doctor limited her activity to: no lifting over 5 pounds, no bending more than 2 times per hour, no prolonged standing, walking longer than tolerated to 50 percent, and no pushing/pulling over 10 pounds of force. (JE2, p. 6) Dr. Luszczyk and Dr. Sundar continued similar light duty restrictions until May 1, 2018, when Dr. Luszczyk took Ms. Broderson off work until further notice. (JE5, p. 41) REM accommodated her work restrictions by having her perform office work in the main office. She audited documentation that the employer was required to send to the state and performed what she described as menial jobs in the office. (Testimony)

On December 16, 2014, REM moved Ms. Broderson to the position of Client Financial Specialist (CFS). She was paid $11.50 per hour in this position. In 2015 she worked 34 to 40 hours per week. Her duties were to maintain all of the bills, accounting

records, receipts, and bank statements for every client. She had to make financial reconciliations each month for each client. (Testimony; Cl. Ex. 8)

In the first half of 2015, Ms. Broderson struggled to perform her job as CFS. Ms. Broderson contends that part of the reason she struggled was because she did not have any prior work experience in accounting or business. The job description for a CFS states REM prefers an Associate's Degree in accounting or business and one year accounting experience or Bachelor's Degree is preferred. However, when Ms. Broderson applied for the CFS position she pointed out that she maintained the finances for an elderly woman for eleven years. She ensured her checkbook and all three of her accounts were balanced. She also pointed out her experience in meticulously performing documentation audits for multiple aliases. (Def. Ex. F, p. 9)

Ms. Broderson testified she also began to struggle with the CFS position due to her work injury. She testified that her injury slowed down her pace of work. Initially, there was a co-worker, Katy, who split the work with Ms. Broderson. Katy left at the end of 2014 or beginning of 2015 and her spot was left open for approximately one year. After Katy left, Ms. Broderson struggled to keep up with the workload. At times Ms. Broderson had to lie down on the floor while trying to work. In June 2015, a physical therapist wrote a letter with some ergonomic suggestions for Ms. Broderson's workspace. (Testimony; JE7, p. 134)

Angie Thomsen, area director for the REM Davenport location, testified at the hearing. Previously Ms. Thomsen was the program director in the Clinton office; for a time she was in charge of the Davenport and Clinton offices. She was Ms. Broderson's direct supervisor for a time period. She described the CFS position as an office job. Most of a CFS's time was spent at a desk, paying bills and doing paperwork. A CFS would have the opportunity to sit up and sit back down and move around during the workday. Ms. Broderson's position was eliminated when the company made the decision to eliminate the CFS position across the entire state. (Testimony; Def. Ex. F, pp. 14-18)

Prior to the CFS position being eliminated statewide, REM documented some occasions when Ms. Broderson struggled to perform her duties. There is documentation of consumer rent not being paid in a timely manner and consumer loans not being paid consistently. Ms. Broderson's personnel file also contained Corrective Action Plans because she would fail to show up for required training and work and Ms. Broderson failed to notify a supervisor of her absences. There is also documentation that she failed to communicate necessary information to coworkers or supervisors in her absence, she also failed to turn in paperwork in a timely manner. The last time Ms. Broderson physically worked at the REM office was the week of April 25, 2018. Dr. Luszczyk took Ms. Broderson off work until further notice on May 1, 2018. Ms. Broderson's employment was terminated effective March 29, 2019. At the time of this arbitration hearing she was not employed. (Testimony; Def. Ex. F; Def. Ex. H, pp. 1-17; JE5, p. 41)

Ms. Broderson's injury occurred on May 5, 2014. At the time of the injury she was working as a Direct Support Professional (DSP). She was paid $12.00 per hour and worked approximately 40 hours per week. She continued to be a full-time employee of REM for several years after the injury. Following the work injury she worked as a Direct Support Professional and was scheduled to work 24 to 33 hours per week.

In early December 2014, she applied for and was given the position of Client Financial Specialist; a sedentary office-type job. Ms. Thomsen testified that in this position Ms. Broderson was able to sit, stand, change positions, and move around as needed throughout her day. The last time she physically worked at REM was the week of April 25, 2018. Her personnel information shows that Ms. Broderson worked from May 2014 through April 2018, sometimes in excess of 40 hours per week. Since the injury, she has not applied for any jobs. (Testimony; Def. Ex. I)

Ms. Broderson lives in an apartment by herself, she does her own shopping, cleaning, meal preparation, and laundry. She has a valid driver's license and is able to drive her own car. She does not use a cane or a crutch and does not take pain medications. She has not applied for Social Security Disability benefits. (Testimony)

Ms. Broderson testified that she has ongoing symptoms that she attributes to the work injury. She reports severe, burning pain in her neck that goes down her left arm into her fingers. She also experiences numbness in her legs and walks with a limp due to pain and numbness. She testified that she is not numb on the skin of her lumbar, but the inside is very raw. She described the pain as going around her hips, like it always did. She testified that part of her leg is completely numb. Ms. Broderson wears a neck brace for around three hours per day. She described her days as just surviving, rather than living. Her average pain is 8 out of 10, but can surpass 10 out of 10. (Testimony)

Ms. Broderson testified that because of her work injury she is no longer able to ride her bicycle, hike, roller blade, write or draw for moderate to long periods of time, travel for moderate to long distances in a car, carry items of moderate to heavy weight up and down stairs. She has difficulty walking long distances, cooking large meals, lifting and carrying a bag of groceries or garbage, lifting and carrying a laundry basket, vacuuming or cleaning her residence. If she does these activities, she pays for it afterwards. She also testified that she has difficulty focusing. She sometimes gets help from friends with tasks like laundry, carrying groceries, or moving furniture. (Testimony)

There are a couple of physicians who have offered their opinions on impairment ratings and permanent restrictions. In January 2021, Dr. Luszczyk declined to provide his opinion regarding any permanent impairment to her cervical spine because he had not seen Ms. Broderson in quite some time and she was no longer under his care. (Def. Ex. A, p. 3)

Dr. Garrels assigned 18 percent whole person impairment due to the injury to her cervical spine. He utilized Table 15-5, on page 392 of the Guides and placed her in the

DRE Cervical Category III for impairment. For Ms. Broderson's cervical condition, Dr. Garrels assigned the following restrictions: rare twisting/bending of neck, limit right arm use to rare, limit lifting with right arm to 2 pounds rarely, limit lifting with right arm to 2 pounds rarely, no sustained twisting/bending of her neck, limit 2-handed lifting to 10 pounds rarely, and limit work to bench level only. (Def. Ex. B, pp. 4-5)

Dr. Kreiter assigned 8 percent whole person impairment for her lumbar spine. He utilized table 15-3 on page 384. He agreed with Dr. Garrels and assigned 18 percent whole person impairment of her cervical spine. Dr. Kreiter assigned a total combined impairment of 26 percent whole person. Dr. Kreiter assigned permanent restrictions as follows: alternating walking, standing and sitting as tolerated; avoid being in an chronic forward flexed position; lifting should be done two-handed with arms close to the side of the body, no more than 30-35 pounds occasionally, from floor to bench; push/pull of 20-30 pounds occasionally; no jumping or walking over uneven ground; and no operating vehicles with a rough ride. (Cl. Ex. 4, p. 43)

With regard to the impairment rating and permanent restrictions in this case, I find the opinions of Dr. Kreiter to be most persuasive. Dr. Kreiter addressed permanent impairment and restrictions for both the cervical and lumbar spine as the result of the work injury. Thus, I find that Ms. Broderson sustained 26 percent functional impairment of the whole person. I further find that as a result of the work injury she has permanent restrictions as set forth by Dr. Kreiter. I find that these restrictions would prevent Ms. Broderson from returning to REM in the Direct Support Professional (DSP) position she was performing at the time of her injury.

Ms. Broderson graduated from West High School in Davenport, Iowa in 2002. She took one year of early education classes at a community college, but she did not earn a degree. After graduating from high school, Ms. Broderson's first full-time job was at Good Samaritan as a dietary aide. She was hired in 2002. She was paid $8.00 to $9.00 per hour and worked 40 hours per week. After a few months she left this job to work at Wal-Mart. She worked as a cashier and sales associate. She was paid $7.40 per hour and worked 40 hours per week. She left this job at the beginning of 2003. She then went to work for Jim Koberg as a caregiver for his mother. Ms. Broderson brought her food daily, cleaned her house, and kept her company. She was paid $10.00 per hour and worked approximately 40 hours per week. That job ended when Mr. Koberg's mother passed away in June 2012. Her next job was at REM Iowa. (Testimony)

At the request of the claimant, Barbara Laughlin, M.A., performed an Employability Assessment. Ms. Laughlin issued a report on June 11, 2021. Ms. Laughlin reviewed the documents provided to her by Ms. Broderson's attorney and she met with Ms. Broderson. She noted that as a 37-year-old, Ms. Broderson is considered a younger worker. Ms. Laughlin conducted a transferable skills analysis. In writing her report Ms. Laughlin relied on the restrictions set forth by Dr. Kreiter because she did not have Dr. Garrell's report. Ms. Laughlin felt that Ms. Broderson's need to change positions cannot be accommodated with a sit/stand workstation and her need to change positions was work preclusive. Ms. Laughlin noted that she was not tasked with

obtaining employment for Ms. Broderson. Although Ms. Laughlin was not asked to help Ms. Broderson find employment, she noted that her restrictions were so limiting and her need for accommodation so high, she felt Ms. Broderson was unemployable. Ms. Laughlin did not complete a Labor Market Research. (Cl. Ex. 1, pp. 1-13)

At the request of the defendants Lana Sellner, MS, CRC, conducted an employability analysis of Ms. Broderson. She reviewed the records provided to her by defendants, including the deposition of Ms. Broderson. Considering the restrictions of Dr. Garrels, Ms. Sellner felt Ms. Broderson was capable of working in selective sedentary to light work category. She felt due to postural needs of the cervical area, it could be light work with negligible weights and sedentary work due to material handling limitations. Considering the restrictions of Dr. Kreiter, Ms. Sellner felt Ms. Broderson was capable of working in material handling category of medium work category with positional changes. Ms. Sellner conducted a transferable skills analysis and labor market research to identify jobs within Ms. Broderson's geographic area. She then identified a snapshot of available jobs within the recommendations outlined by the doctors. Ms. Sellner identified positions including: customer service representatives, selective medical secretaries and administrative assistants, information and record clerks and receptionists and information clerks. The median hourly wages ranged from $13.72 to $16.26. Ms. Sellner's research also supported work from home positions which would allow Ms. Broderson to keep within her restrictions. She also noted that the option to have a sit/stand position with a headset is readily available in today's work environment and is not considered an accommodation. Ms. Sellner set forth her critiques of Ms. Laughlin's report. Ultimately, Ms. Sellner opined that Ms. Broderson is employable in a full-time position. (Def. Ex. E, pp. 1-7)

Ms. Laughlin issued a second report on July 12, 2021, after she had the chance to review the report of Lana Sellner, the IME of Dr. Garrels, and a job description of the CFS position at REM. Ms. Laughlin set forth her critiques of Ms. Sellner's report and the reasons she believed Ms. Broderson could not perform the potential jobs identified by Ms. Sellner. Ultimately, Ms. Laughlin opines that Ms. Broderson has a 100 percent occupational loss. (Cl. Ex. 1, pp. 14-31)

While I appreciate the criticisms Ms. Laughlin set forth regarding Ms. Sellner's report, I still find Ms. Sellner's opinions and recommendations to be reasonable and appropriate in this situation. Some of the positions identified by Ms. Sellner may not be appropriate and others may require accommodations. However, claimant has not shown motivation to seek alternate employment. I find Ms. Sellner's opinions to be credible. I find Ms. Broderson remains employable within the competitive labor market and she could pursue alternate employment options, if she was motivated to do so. I find that Ms. Broderson has the capability to perform specific jobs within the labor market both in her locality and within reasonable travel distances. I also find that she has the capacity to seek retraining and expend her employment opportunities.

I find Ms. Broderson has failed to prove that there are not sufficient employment opportunities that remain in identifiable branches of the labor market. Further, I find that

the remaining employment opportunities available to Ms. Broderson are not so limited in quality, dependability, or quantity to establish that a reasonable stable market for those positions does not exist. I find that there remain significant employment opportunities within the labor market that Ms. Broderson can perform.

Likewise, I find that Ms. Broderson has not proven she is permanently and totally disabled. Ms. Broderson is a younger work. She has demonstrated no motivation to find any work or retraining. Yet, Ms. Broderson is well-spoken and has sufficient educational background to permit retraining. She has a work history with varied employment and skills, including computer and office skills, that should enable her to pursue alternate employment.

At the time of the injury Ms. Broderson was paid $12.00 per hour; this is the highest hourly rate she was ever paid. Although she cannot return to the DSP job she was performing at the time of the injury, no medical provider has opined that she cannot work. Ms. Sellner has identified several potential categories of work that she could perform. I find Ms. Broderson's restrictions preclude her from a significant number of jobs. However, I find that the preponderance of the evidence does not show that she is permanently and totally disabled. I find she has demonstrated that she has a work history with a variety of skills that would enable her to pursue alternate employment if she were so motivated. Since the last date she worked for REM, Ms. Broderson has not applied for a single job. She has made no effort to seek out or attempt retraining. Unfortunately, she has demonstrated very little motivation to find alternate work or retraining.

I also find that Ms. Broderson has sustained a significant loss of future earning capacity as a result of the work injury. Unfortunately, she has now been out of the labor market for several years and she has significant restrictions. She has lost access to a significant portion of her pre-injury employment opportunities. However, she should be able to expand her employment opportunities with a willingness to work and retraining. Considering Ms. Broderson's age, educational background, employment history, ability to retrain, lack of motivation, length of healing period, permanent impairment and permanent restrictions and the other industrial disability factors identified by the Iowa Supreme Court, I find that she has proven that she sustained a 55 percent loss of future earning capacity as a result of her work injury with REM.

Ms. Broderson is seeking payment of medical expenses. (Cl. Ex. 13, p. 71) First, claimant is seeking payment for a visit to the emergency room at UnityPoint Trinity Medical Center on May 20, 2014. Ms. Broderson testified that her employer sent her for this treatment. Ms. Broderson sought treatment for lower back pain which was found to be related to the work injury. I find that Ms. Broderson has demonstrated that the treatment was authorized by her employer and related to the work injury. Thus, I find defendants are responsible for these medical expenses in the amount of $1,145.50. (Testimony; JE1, p. 1; Cl. Ex. 13, p. 71)

Next, claimant is seeking payment for an expense incurred at Radiology Group on March 4, 2015 in the amount of $60.00. Unfortunately, the exhibit merely states the name of the provider and the date of the service. It is not known what body part or service this charge was incurred for. There is no corresponding radiology report to demonstrate why this charge was incurred. I find claimant has failed to demonstrate that this expense was reasonable and necessary due to the work injury. Thus, I find defendants are not responsible for this medical expense.

Claimant seeks payment for services incurred for treatment of her lower back on September 15, 2016 at Radiology Group and Genesis Medical Center in the amount of $5,150.95. Defendants argue that the treatment was not authorized and rely on the opinion of Dr. Foster to deny payment of these expenses. However, I found that the opinion of Dr. Foster was not persuasive with regard to Ms. Broderson's lower back. Because defendants denied Ms. Broderson's claim for her lower back, authorization is not a defense. I find Ms. Broderson has demonstrated that the treatment was reasonable, necessary, and related to the work injury. Thus, I find defendants are responsible for these medical expenses in the amount of $5,150.95.

Finally, claimant seeks recovery of past medical expenses incurred for her lower back on July 26, 2018 at Genesis Medical Center in the amount of $4,456.35. Defendants argue that the treatment was not authorized and rely on the opinion of Dr. Foster to deny payment of these expenses. However, I found that the opinion of Dr. Foster was not persuasive with regard to Ms. Broderson's lower back. Because defendants denied Ms. Broderson's claim for her lower back, authorization is not a defense. I find Ms. Broderson has demonstrated that the treatment was reasonable, necessary, and related to the work injury. Thus, I find defendants are responsible for these medical expenses in the amount of $4,456.35.

Thus, I find defendants are responsible for the medical expenses as set forth above. Defendants shall pay these medical providers, reimburse claimant, reimburse all third-party payers, or otherwise satisfy and hold claimant harmless for medical expenses.

There is an issue with regard to the weekly rate of compensation. The parties have stipulated that the weekly workers' compensation rate is two hundred seventy-eight and 21/100 dollars ($278.21). (Hearing Report) Prior to the hearing, the defendants paid 219 weeks of benefits at the incorrect rate of $252.82. (Cl. Ex. 15; Cl. Ex. 16) I find that defendants underpaid the weekly benefits by $25.39 per week. Defendants shall pay the underpayment, plus statutory interest.

Claimant is seeking penalty benefits for the alleged late payment of 33 weeks of temporary weekly benefits. The claimant's post-hearing brief makes a blanket assertion that defendants were late in paying 33 weeks of temporary benefits from September 16, 2016 to May 9, 2021. Claimant contends defendants were late in mailing the weekly checks to claimant anywhere from 5 to 66 days. In support of her position, claimant offered 6 pages of what appears to be a payment log in very small font. Claimant

makes no effort to point out which weeks during the four plus year time period were allegedly made late. Additionally, the record contains no explanation of the pay codes listed on the payment log; therefore, the undersigned would be forced to speculate as to the types of payment were listed for the various weeks and amounts. I find claimant has failed to prove by a preponderance of the evidence that defendants made any late payments.

Finally, claimant is seeking an assessment of costs. Costs are to be assessed at the discretion of the Iowa Workers' Compensation Commissioner or at the discretion of the deputy hearing the case. I find that claimant was generally successful in her claim. I exercise my discretion and find that an assessment of costs against the defendants is appropriate. Claimant is seeking an assessment of costs as set forth in her exhibit 17, pages 82 through 86. I find that claimant was generally successful in her claim and therefore, I exercise my discretion and find that an assessment of costs is appropriate.

First, claimant seeks an assessment of costs in the amount of one hundred and no/100 dollars ($100.00) for the filing fee. I find this is an allowable cost under 876 IAC 4.33(7). Defendants are assessed this cost.

Second, claimant seeks an assessment of costs in the amount of eighty-seven and 55/100 dollars ($87.55) for the deposition of claimant. I find this is an allowable cost under 876 IAC 4.33(2). Defendants are assessed that cost.

Third, claimant is seeking the costs of two vocational reports from Barbara Laughlin in the amounts of $1,080.00 and $1,044.00. The cost of two practitioner reports up to $150.00 each is allowed as costs pursuant to our rule 876 IAC 4.33. It has been determined that reports from vocational counselors are considered practitioner reports as defined in our rule 876 IAC 4.17. Defendants are assessed costs for the vocational reports in the amount of three hundred and no/100 dollars ($300.00).

Defendants are assessed costs totaling four hundred eighty-seven and 55/100 dollars ($487.55).

CONCLUSIONS OF LAW

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

The question of causal connection is essentially within the domain of expert testimony. The expert medical evidence must be considered with all other evidence introduced bearing on the causal connection between the injury and the disability.

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

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

Based on the above findings of fact, I conclude Ms. Broderson sustained permanent disability to her low back as the result of the work injury. I found the opinions of Dr. Luszczyk and Dr. Kreiter to carry greater weight than that of Dr. Foster. I conclude the work injury caused permanent disability to Ms. Broderson's lower back.

There is a dispute in this case as to whether Ms. Broderson's healing period has ended. Healing period compensation describes temporary workers' compensation weekly benefits that precede an allowance of permanent partial disability benefits. Ellingson v. Fleetguard, Inc., 599 N.W.2d 440 (Iowa 1999). Section 85.34(1) provides that healing period benefits are payable to an injured worker who has suffered permanent partial disability until the first to occur of three events. These are: (1) the worker has returned to work; (2) the worker medically is capable of returning to substantially similar employment; or (3) the worker has achieved maximum medical recovery. Maximum medical recovery is achieved when healing is complete and the extent of permanent disability can be determined. Armstrong Tire & Rubber Co. v. Kubli, Iowa App., 312 N.W.2d 60 (Iowa 1981). Neither maintenance medical care nor an employee's continuing to have pain or other symptoms necessarily prolongs the healing period.

Based on the above findings of fact, I conclude Ms. Broderson has achieved maximum medical recovery. I found Ms. Broderson sustained injury to her neck and lower back as the result of the work injury. On this issue, I found the opinion of Dr. Luszczyk to be persuasive. I conclude that her healing was complete and the extent of her permanent disability could be determined as of October 19, 2020. Thus, I conclude she reached MMI as of October 19, 2020.

Ms. Broderson alleges she is permanently and totally disabled as a result of the May 5, 2014 work injury. She asserts this claim under both the traditional industrial disability analysis and claims that she is an odd-lot employee. The odd-lot doctrine includes a burden shifting analysis and therefore will be analyzed first.

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.

In this case, Ms. Broderson failed to establish that she is unemployable in the competitive labor market. However, even if a reviewing body concluded that she had met her burden of proof on this issue, I conclude that defendants produced sufficient evidence to establish suitable employment opportunities exist within the labor market to force claimant to establish by a preponderance of the evidence that there are not sufficient employment opportunities that remain in identifiable branches of the labor market to establish the odd-lot claim.

In the alternative, claimant asserts that she is permanently and totally disabled under the traditional industrial disability analysis. The parties stipulated that the injury involves an injury to the body as a whole and should be compensated with industrial disability. (Hearing Report)

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).

The focus of an industrial disability analysis is on the ability of the worker to be gainfully employed and rests on comparison of what the injured worker could earn before the injury with what the same person can earn after the injury. Second Injury Fund of Iowa v. Nelson, 544 N.W.2d 258, 266 (Iowa 1995), Anthes v. Anthes, 258 Iowa 260, 270; 139 N.W.2d 201, 208 (1965). Changes in actual earnings are a factor to be considered, but actual earnings are not synonymous with earning capacity. Bergquist v. MacKay Engines, Inc., 538 N.W.2d 655, 659 (Iowa App. 1995), Holmquist v. Volkswagen of America, Inc., 261 N.W.2d 516, 525 (Iowa App. 1977), 4-81 Larson's Workers' Compensation Law, sections 81.01(1) and 81.03. The loss of earning capacity is not measured in a vacuum. Loss of future earning capacity is measured by the employee's own ability to compete in the labor market.

Total disability does not mean a state of absolute helplessness. Permanent total disability occurs where the injury wholly disables the employee from performing work that the employee's experience, training, education, intelligence, and physical capacities would otherwise permit the employee to perform. See McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Diederich v. Tri-City R. Co., 219 Iowa 587, 258 N.W. 899 (1935).

A finding that claimant could perform some work despite claimant's physical and educational limitations does not foreclose a finding of permanent total disability, however. See Chamberlin v. Ralston Purina, File No. 661698 (App. October 1987); Eastman v. Westway Trading Corp., II Iowa Industrial Commissioner Report 134 (App. May 1982).

Based on the above findings of fact, I conclude claimant did not prove by a preponderance of the evidence that she is permanently and totally disabled at the present time. Nonetheless, I conclude that she has proven a significant loss of future earing capacity. I conclude Ms. Broderson demonstrated that she sustained a 55 percent loss of future earning capacity.

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. Based on the above findings of fact, I conclude Ms. Broderson's healing period ended on October 18, 2020. Having found claimant sustained a 55 percent loss of earning capacity, claimant is entitled to 275 weeks of industrial disability or permanent partial disability benefits. All weekly benefits shall be paid at the stipulated weekly rate of $278.21, and the permanent partial disability benefits shall commence on October 19, 2020.

Claimant is seeking payment of past medical expenses as set forth in claimant's exhibit 13, page 71. 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).

Based on the above findings of facts, I conclude defendants are responsible for the medical expenses as set forth above. Defendants shall pay these medical providers, reimburse claimant, reimburse all third-party payers, or otherwise satisfy and hold claimant harmless for medical expenses

Claimant is seeking penalty benefits due to the late payment of 33 weeks of benefits.

If weekly compensation benefits are not fully paid when due, section 86.13 requires that additional benefits be awarded unless the employer shows reasonable cause or excuse for the delay or denial. Robbennolt v. Snap-on Tools Corp., 555 N.W.2d 229 (Iowa 1996). Weekly compensation payments are due at the end of the compensation week. Robbennolt, 555 N.W.2d 229, 235.

Based on the above findings of facts, I conclude that claimant has failed to prove by a preponderance of the evidence that any weekly payments of temporary disability benefits were made by the defendants were late. Thus, claimant has failed to show entitlement to penalty benefits under Iowa Code section 86.13.

ORDER

THEREFORE, IT IS ORDERED:

All weekly benefits shall be paid at the stipulated rate of two hundred seventy – eight and 21/100 dollars ($278.21).

Defendants shall pay two hundred seventy-five (275) weeks of permanent partial disability benefits commencing on the stipulated commencement date of October 19, 2020.

Defendants shall be entitled to credit for all weekly benefits paid to date.

Defendants shall pay accrued weekly benefits in a lump sum together with interest at the rate of ten percent for all weekly benefits payable and not paid when due which accrued before July 1, 2017, and all interest on past due weekly compensation benefits accruing on or after July 1, 2017, shall be payable at an annual rate equal to the one-year treasury constant maturity published by the federal reserve in the most recent H15 report settled as of the date of injury, plus two percent. See Deciga Sanchez v. Tyson Fresh Meats, Inc., File No. 5052008 (App. Apr. 23, 2018) (Ruling on Defendants' Motion to Enlarge, Reconsider or Amend Appeal Decision re: Interest Rate Issue).

Defendants shall pay all medical providers, reimburse claimant, reimburse all third-party payers, or otherwise satisfy and hold claimant harmless for medical expenses as set forth above.

Defendants shall reimburse claimant costs as set forth above.

Defendants shall file subsequent reports of injury (SROI) as required by this agency pursuant to rules 876 IAC 3.1 (2) and 876 IAC 11.7.

Signed and filed this 3rd day of February, 2022.

ERIN Q. PALS
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Matthew Leddin (via WCES)

Edward Rose (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.