

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

KARI ETHERINGTON,

Claimant,

vs.

SPENCER MUNICIPAL HOSPITAL,

Employer,

and

FARM BUREAU PROPERTY &
CASUALTY INSURANCE COMPANY,

Insurance Carrier,
Defendants.

File No. 5047488

ARBITRATION

DECISION

Head Notes: 1801.1, 1803

STATEMENT OF THE CASE

Kari Etherington filed a petition in arbitration on August 28, 2017, seeking workers' compensation benefits from the defendants, Spencer Municipal Hospital (Spencer Hospital) and Farm Bureau Property and Casualty (Farm Bureau). Deputy Workers' Compensation Commissioner Erica Fitch presided over the hearing in this case on August 1, 2018, in Sioux City, Iowa.

Under Iowa Code section 17A.15(2), the Iowa Workers' Compensation Commissioner delegated the decision in this case to the undersigned in an order dated September 6, 2019. The undersigned contacted counsel for the parties by email. In separate reply emails the counsel for Etherington and counsel for the defendants waived the right to have the undersigned rehear any parts of the hearing that relate to witness credibility under Iowa Code section 17A.15(2).

ISSUES

Under rule 876 IAC 4.149(3)(f), the parties jointly submitted a hearing report defining the claims, defenses, and issues submitted to the presiding deputy commissioner. The hearing report was approved and entered into the record via an order. The parties identified the following disputed issues in the hearing report:

- 1) What is the commencement date of permanent disability benefits?

- 2) Has Etherington reached maximum medical improvement? If so, when?
- 3) What is the nature and extent of Etherington's permanent disability relating to the stipulated injury?
- 4) Is Etherington entitled to healing period or temporary disability benefits from May 15, 2013 through September 2, 2014?
- 5) Is Etherington entitled to a running award of temporary disability or healing period benefits beginning on September 20, 2016?
- 6) Is Etherington entitled to recover the cost of an independent medical examination (IME) under Iowa Code section 85.39?
- 7) Are the defendants entitled to a credit of 216 weeks of compensation at the rate of \$933.55 per week?
- 8) Is Etherington entitled to penalty benefits under Iowa Code section 86.13(4)(a)?
- 9) Are costs taxed against the defendants under Iowa Code section 86.40?

STIPULATIONS

In the hearing report, the parties entered into the following stipulations:

- 1) Etherington sustained an injury on March 23, 2009, which arose out of and in the course of her employment with Spencer Hospital.
- 2) An employer-employee relationship existed between Etherington and Spencer Hospital at the time of the stipulated work injury.
- 3) The stipulated injury is a cause of temporary disability during a period of recovery.
- 4) The stipulated injury is a cause of industrial disability.
- 5) At the time of the stipulated injury, Etherington:
 - a. Had gross earnings of \$1,514.40 per week.
 - b. Was married.
 - c. Was entitled to five exemptions.

The parties' stipulations in the hearing report are accepted and incorporated into this arbitration decision. This decision contains no discussion of any factual or legal issues relative to the parties' stipulations. The parties are bound by their stipulations.

FINDINGS OF FACT

The evidentiary record in this case consists of the following:

- Joint Exhibits 1 through 11;
- Claimant's Exhibits 1 through 11;
- Defendants' Exhibits A through G; and
- Testimony at hearing by Etherington; Joe Etherington, her husband; and Michael Schauer, the human resources director at Spencer Hospital.

After careful consideration of the evidence in the record and the parties' briefs, the undersigned makes the following findings of fact.

1. Injury, Care, Physical Limitations, and Impairment.

Part of Etherington's job duties as a physical therapist at Spencer Hospital included working with students at schools under a contract the hospital had with the Area Education Association (AEA). (Hearing Transcript pages 32–33, 53–54) On October 20, 2008, Etherington was driving for work on a gravel road when she was involved in a car crash. (Hrg. Tr. p. 19; Claimant's Exhibit 1, p. 2; Cl. Ex. 10, p. 2) An oncoming car failed to slow down or stop; instead, it hit the front end of her vehicle, spun around, and hit the back end of her vehicle. (Hrg. Tr. p. 19) The force propelled Etherington's vehicle airborne and it landed in the flat area of a ditch. (Hrg. Tr. p. 19)

After the crash, Etherington experienced neck pain due to the crash. (Cl. Ex. 1, p. 2; Cl. Ex. 10, p. 2) She participated in physical therapy for three or four months. (Hrg. Tr. p. 19; Cl. Ex. 1, p. 2; Cl. Ex. 10, p. 2) Etherington did not miss work at Spencer Hospital because of the first car crash. (Hrg. Tr. p. 19) Her physical condition was close to back to normal after physical therapy and she did not experience any lingering effects from the crash. (Hrg. Tr. p. 19; Joint Ex. 10, p. 159)

On the stipulated injury date of March 23, 2009, Etherington was involved in a second car crash while driving for work. (Hrg. Tr. p. 20) The driver of an oncoming vehicle fell asleep at the wheel. (Hrg. Tr. p. 20) The oncoming vehicle crossed the centerline and struck the back corner panel of Etherington's vehicle. (Hrg. Tr. p. 20) The collision spun her vehicle sideways and knocked it into the ditch. (Hrg. Tr. p. 20)

As a result of the crash, Etherington experienced neck pain, spasms, and whiplash. (Hrg. Tr. p. 21; Defendants' Ex. A, p. 17; Cl. Ex. 1, p. 2) She initially received care at Spencer Hospital. (Cl. Ex. 1, p. 2) Because Etherington's physical therapy was not providing results, Dr. Feldman referred her to Rick Wilkerson, D.O. (Hrg. Tr. p. 20) After magnetic resonance imaging (MRI), Dr. Wilkerson referred her to Ralph Reeder, M.D., a neurosurgeon. (Hrg. Tr. p. 21; Jt. Ex. 10, p. 159)

Dr. Reeder prescribed Etherington medication that provided some relief. (Hrg. Tr. p. 21) He ordered x-rays and an MRI of her thoracic spine. (Jt. Ex. 10, pp. 159–160) Dr. Reeder diagnosed Etherington with cervicalgia, a soft tissue injury, and a loss of disc height C5–6. (Jt. Ex. 10, p. 161)

Dr. Reeder and Etherington discussed her care, including the possibility of surgery. (Jt. Ex. 10, p. 161) Dr. Reeder was hesitant to perform surgery because of her lack of radicular symptoms. (Jt. Ex. 10, p. 162) He prescribed continued conservative care, including Tramadol, which produced a mild benefit. (Hrg. Tr. p. 21; Jt. Ex. 10, pp. 161–62)

Etherington continued to experience symptoms, including pain, reduced range of motion, and functional limitations at work when attempting to lift patients. (Jt. Ex. 10, p. 162) The defendants authorized Etherington to get a second opinion from Grant Shumaker, M.D. (Hrg. Tr. p. 22) While Dr. Shumaker understood Dr. Reeder's hesitation to perform surgery due to Etherington's lack of radicular symptoms, he felt surgery was appropriate because she had experienced pain for more than six months and had significant limitations in her ability to perform work. (Jt. Ex. 10, p. 163)

Dr. Shumaker performed a C5–6 anterior cervical discectomy and fusion on October 30, 2009. (Jt. Ex. 10, p. 167) Two weeks after surgery, Sandra Shumaker, A.R.N.P., prescribed physical therapy and work restrictions of four-hour days with a lifting restriction of ten pounds. (Jt. Ex. 10, p. 169) The plan was for Etherington to slowly progress into full-time work duties. (Jt. Ex. 10, pp. 169–70)

On December 11, 2009, Nurse Practitioner Shumaker prescribed continued physical therapy with a strengthening program and a work schedule of alternating between six-to-eight-hour days and four-hour days. (Jt. Ex. 10, pp. 172–73) Etherington returned to see Nurse Shumaker on January 15, 2010, and was prescribed work restrictions of no lifting greater than 15 pounds and continuing to work her current schedule of about 30 hours per week in staggered fashion. (Jt. Ex. 10, pp. 175–76) On February 19, 2010, Dr. Shumaker released Etherington to work full-time hours with the work restriction of occasional lifting over 30 pounds. (Jt. Ex. 10, pp. 177–78)

Dr. Shumaker found that Etherington reached MMI on May 21, 2010, and prescribed a permanent lifting restriction of no more than 35 pounds. (Jt. Ex. 10, pp. 180–81) In response to a letter from Mary Sullivan, R.N., a nurse case manager (NCM) with Case Management Services, Inc., Dr. Shumaker assessed Etherington's permanent impairment to be 25 percent to the body as a whole. (Jt. Ex. 10, p. 182)

Etherington returned to Dr. Shumaker on October 15, 2010, because of increasing neck and left arm pain without specific inciting trauma. (Jt. Ex. 10, p. 183–84) Dr. Shumaker ordered an MRI scan of the cervical spine and electromyography (EMG)/nerve conduction of the left arm. (Jt. Ex. 10, p. 184) The EMG/nerve conduction showed no evidence of radiculopathy. (Jt. Ex. 10, p. 189) The MRI showed central disc herniation C6–7, which Dr. Shumaker found directly attributable to the prior C5–6 surgery. (Jt. Ex. 10, p. 189)

Dr. Shumaker recommended discography of the C4–5 and C6–7 levels, which Frederick Fisher, M.D., performed. (Jt. Ex. 10, p. 189–90) After discussion, Dr. Shumaker and Etherington decided to proceed with an anterior cervical discectomy and fusion at the C4–5 level. (Jt. Ex. 10, pp. 191, 193) Dr. Shumaker performed the surgery on January 12, 2011. (Jt. Ex. 10, p. 192)

On January 21, 2011, Etherington had a checkup, which NCM Sullivan attended. (Jt. Ex. 10, p. 193) Etherington was using between six and eight tabs of Percocet daily, with Tramadol, and half of a tablet of Flexeril at night for nerve pain. (Jt. Ex. 10, p. 193) She complained of some posterior neck discomfort and occasional mild aching in her left triceps, but denied any specific weakness in her arms. (Jt. Ex. 10, p. 193) Patrick J. Honner, P.A., opined that Etherington was doing relatively well ten days after surgery. (Jt. Ex. 10, p. 193)

Dr. Shumaker saw Etherington for a follow-up exam on March 18, 2011. (Jt. Ex. 10, p. 195) He released her to return to light-duty work. (Jt. Ex. 10, p. 196) Dr. Shumaker assigned Etherington the work restriction of four-hour days for one month with an increase to six hours thereafter. (Jt. Ex. 10, p. 196)

Etherington's next appointment was on May 20, 2011. (Jt. Ex. 10, p. 197) She noted occasional difficulty on the job depending on her work load. (Jt. Ex. 10, p. 197) Nurse Shumaker recommended a trial of Lyrica based on her continued trapezius discomfort. (Jt. Ex. 10, p. 198) She also advised that if Etherington did not see improvement due to Lyrica, they would proceed with trigger point injections in the trapezius region, and if that did not work, BOTOX injections in that area. (Jt. Ex. 10, p. 198)

On May 27, 2011, Etherington returned for a follow-up exam. (Jt. Ex. 10, p. 199) She continued to experience trapezius spasms that were occasionally severe and limited her physical activities. (Jt. Ex. 10, p. 200) In consultation with Dr. Shumaker, Nurse Shumaker recommended trigger point injections in the trapezius region. (Jt. Ex. 10, p. 200)

Etherington next saw Dr. Shumaker on August 12, 2011, regarding possible cervical dystonia. (Jt. Ex. 10, p. 201) Dr. Shumaker noted that throughout Etherington's treatment, she had chronic severe neck pain and that she has developed altered head posture. (Jt. Ex. 10, p. 201) Etherington had responded only briefly to myofascial trigger point injections. (Jt. Ex. 10, p. 201) Her physical therapy had plateaued, with no apparent continued benefit. (Jt. Ex. 10, p. 201) Dr. Shumaker found altered neck postures including right laterocollis, anterocollis, and right shoulder elevation consistent with secondary cervical dystonia. (Jt. Ex. 10, p. 202)

Dr. Shumaker prescribed BOTOX injections to address the altered head posture and pain. (Jt. Ex. 10, p. 202) Jon M. Grudem, M.D., performed the injections. (Jt. Ex. 10, p. 204) Etherington reported an improvement of approximately 50 percent in her symptoms after the injections. (Jt. Ex. 10, p. 204) Dr. Shumaker altered Etherington's work restrictions to light duty for eight hours per day. (Jt. Ex. 10, p. 207)

CMS referred Etherington to John Kruzich, MS, OTR/L, for a functional capacity evaluation (FCE) on October 31, 2011. (Jt. Ex. 6, p. 139) Kruzich found that Etherington had decreased left upper extremity strength and stamina for functional activities as well as increased objective signs of neck pain while increasing her workload and prolonged extension. (Jt. Ex. 6, p. 140) Based on the functional limitations Kruzich found, he recommended work within the light or medium physical demand level, under U.S. Department of Labor standards, and within the following restrictions:

- Lifting up to 30 pounds occasionally from waist to floor;
- Lifting up to 25 pounds occasionally from waist to crown;
- Lifting up to 30 pounds occasionally when performing front carrying;
- Lifting up 20 pounds occasionally when performing left carrying;
- Elevated work on an occasional basis; and
- No lifting waist to crown on a frequent or continuous basis secondary to the limitations on elevated work. (Jt. Ex. 6, p. 141)

On November 11, 2011, Etherington returned to Dr. Shumaker after the functional capacity evaluation (FCE). (Jt. Ex. 10, p. 209) He found her to have reached maximum medical improvement (MMI). (Jt. Ex. 10, pp. 209–10) Dr. Shumaker prescribed Etherington the permanent work restrictions in Kruzich's FCE report. (Jt. Ex. 10, p. 210)

With respect to future care, Dr. Shumaker opined that Etherington "likely may require intervention with a 10 visit course of physical therapy for a flare up over the next year." (Jt. Ex. 10, p. 209) He authorized three additional visits with Dr. Grudem for any needed BOTOX injections. (Jt. Ex. 10, p. 209) Dr. Shumaker deferred to Etherington's primary care physician, Jason Huisenga, D.O., to make a referral for long-term pain management. (Jt. Ex. 10, p. 209)

Etherington saw Dr. Grudem for additional BOTOX injections on November 15, 2011. (Jt. Ex. 10, p. 212) Dr. Grudem included a note of clarification in the records from this appointment after speaking with Etherington's NCM. (Jt. Ex. 10, p. 212) He opined that he did not think Etherington would receive sustained short-term benefit from BOTOX injections, nor did he think the injections would be an ongoing long-term treatment. (Jt. Ex. 10, p. 212)

NCM Sullivan wrote Dr. Shumaker a letter dated December 13, 2011, asking whether Etherington's permanent partial impairment rating had changed after the second surgery. (Jt. Ex. 10, p. 216) Dr. Shumaker opined that her permanent partial disability to the body as a whole had gone up two percentage points, from 25 to 27 percent. (Jt. Ex. 10, p. 216) He signed and dated his opinion December 20, 2011. (Jt. Ex. 10, p. 216)

Etherington continued experiencing symptoms in her neck and left arm. (Jt. Ex. 10, pp. 217–21) Dr. Shumaker examined her on February 11, 2013, and performed a complete updated review of symptoms. (Jt. Ex. 10, pp. 221–22) He opined that Etherington should maintain her work restrictions from the FCE. (Jt. Ex. 10, p. 222)

Dr. Shumaker recommended diagnostic medial branch blocks at C6–7. (Jt. Ex. 10, p. 222) After the blocks, Dr. Shumaker performed a bilateral C5–6, C6–7 facet rhizotomy on March 23, 2013. (Jt. Ex. 10, p. 223) The procedure did not provide Etherington significant benefit. (Jt. Ex. 10, p. 231) After a follow-up examination, Dr. Shumaker continued Etherington’s work restrictions from the FCE. (Jt. Ex. 10, pp. 224, 227)

On May 17, 2013, Etherington saw Jerry Blow, M.D., with NCM Sullivan present. (Jt. Ex. 1, pp. 1) Dr. Blow reviewed Etherington’s history of care and symptoms and issued a report with recommendations. (Jt. Ex. 1, pp. 1–22) Dr. Blow noted Etherington’s “primary problem is neck pain at the base of her neck on the right side and left side of her neck and right suboccipital area as well as elevated muscle tone in her left upper trapezius.” (Jt. Ex. 1, p. 2) She rated her pain in these areas, on a scale from zero (no pain) to ten (the worst pain imaginable), at four when resting and seven with activity. (Jt. Ex. 1, p. 2)

Etherington also had an appointment with Dr. Shumaker on May 17, 2013. (Jt. Ex. 10, p. 228) She reported continued suboccipital neck pain as well as some posterior discomfort that radiates into the left and right trapezius area. (Jt. Ex. 10, p. 228) Dr. Shumaker ordered a bone scan and computed tomography (CT) scan of Etherington’s cervical spine. (Jt. Ex. 10, pp. 228–29) Based on the CT findings, bone scan findings, previous MRI, and treatment history, Dr. Shumaker recommended surgical intervention in the form of C4 to C7 posterolateral mass fusion with separate incision for bone marrow aspirate. (Jt. Ex. 10, p. 229)

The medical records for this appointment indicate a plan for Etherington to “continue to work 3 days per week with 20 pound weight restrictions.” (Jt. Ex. 10, p. 229) However, the evidence demonstrates Etherington was working four and one-half days or 36 hours per week, with occasional and varying paid time-off, beginning on January 29, 2012, until March 22, 2014. (Def. Ex. E, pp. 47–48; Def. Ex. F) The evidence does not support the conclusion that the work restrictions referenced in the medical records were in place at this time.

The defendants did not authorize the surgery Dr. Shumaker recommended; instead, they sent Etherington to Eric Phillips, M.D., for a second opinion. (Hrg. Tr. p. 24; Jt. Ex. 3, p. 42) Dr. Phillips saw Etherington for a comprehensive medical review on June 24, 2013. (Jt. Ex. 3, p. 42) He noted Etherington complained of neck and bilateral upper extremity pain. (Jt. Ex. 3, p. 42)

Dr. Phillips opined that further operations for axial neck pain at the time would be ill advised. (Jt. Ex. 3, p. 47) Dr. Phillips also stated that if Etherington underwent another surgery, it should be an anterior cervical discectomy and fusion at the C6-7 level. (Jt.

Ex. 3, p. 47) He agreed with the work restrictions Dr. Shumaker prescribed on June 10, 2013, and opined that Etherington was not yet at MMI. (Jt. Ex. 3, p. 47)

Dr. Blow referred Etherington to Scott Lockwood, M.D., for injections. (Jt. Ex. 2, p. 38) Dr. Lockwood noted Etherington's symptoms included left-sided neck pain and upper back pain stemming from the car crashes she was involved in while working for Spencer Hospital. (Jt. Ex. 2, p. 38) Dr. Lockwood performed five trigger point injections on September 5, 2013, for left-sided neck pain and upper back pain. (Jt. Ex. 2, p. 38)

Etherington saw Dr. Blow on October 3, 2013. (Jt. Ex. 1, p. 23) She complained of symptoms including "nerve pain in her tricep that is the same" and "pain in the C5-6 and C6-7 area that is the same." (Jt. Ex. 1, p. 23) Etherington rated her pain as five to six at rest and seven to nine with activity. (Jt. Ex. 1, p. 23) Among Dr. Blow's diagnoses are neck pain, pain with work and leisure activities, and pain with muscle spasm. (Jt. Ex. 1, p. 26)

On October 21, 2013, Etherington saw Dr. Blow again. (Jt. Ex. 1, p. 28) He noted that her primary issues were headaches and nerve pain. (Jt. Ex. 1, p. 28) Dr. Blow's diagnoses included neck pain, pain with work and leisure activities, and muscle spasms. (Jt. Ex. 1, p. 29)

On October 31, 2013, Dr. Lockwood saw Etherington again. (Jt. Ex. 2, p. 39) She complained to him of pain in the lower neck which radiated into the left arm, and pain that started in her upper cervical spine and caused occipital pain and several headaches. (Jt. Ex. 2, p. 39) Dr. Lockwood performed bilateral occipital nerve injections on Etherington. (Jt. Ex. 2, p. 39)

Etherington presented to Dr. Lockwood on December 18, 2013, with symptoms of neck pain, right occipital pain, and pain into mostly her left arm down her left hand and occasionally into the right hand. (Jt. Ex. 2, p. 40) He categorized her symptoms as "the same" as she reported previously. (Jt. Ex. 2, p. 40) Dr. Lockwood performed cervical epidural injections to help manage the symptoms. (Jt. Ex. 2, p. 40)

On December 18, 2013, Etherington saw Dr. Blow again. (Jt. Ex. 1, p. 30) Etherington reported her pain was variable, but in general was a five or six at rest and seven or eight with activity. (Jt. Ex. 1, p. 30) She was taking more Hydrocodone and Lyrica to keep her pain more tolerable. (Jt. Ex. 1, p. 30) Dr. Blow's diagnoses include neck pain and pain with spasm. (Jt. Ex. 1, p. 32) Dr. Blow also diagnosed her with a history of pain with work and leisure activities. (Jt. Ex. 1, p. 32)

Etherington returned to Dr. Lockwood on March 4, 2014. (Jt. Ex. 2, p. 41) He noted that she presented "with her usual pain which is severe neck pain with pain and numbness radiating to the left arm." (Jt. Ex. 2, p. 41) Dr. Lockwood administered a cervical epidural injection to address her symptoms. (Jt. Ex. 2, p. 41)

Dr. Blow last examined Etherington on April 2, 2014. (Jt. Ex. 1, p. 34) He noted her pain had diminished and she was taking less pain medication. (Jt. Ex. 1, p. 34)

Nonetheless, Etherington shared that, on a good day, her pain was at a five and, on a bad day, it was at a nine. (Jt. Ex. 1, p. 34)

Dr. Blow found Etherington had reached MMI. (Jt. Ex. 1, pp. 35, 37) Dr. Blow prescribed work restrictions consisting of lifting no more than 20 pounds and working no more than 27 hours per week. (Jt. Ex. 1, pp. 35, 37; Hrg. Tr. p. 31) He also recommended that Etherington follow-up with Dr. Lockwood for any questions about any additional injections three times per year for the next two years. (Jt. Ex. 1, p. 35) Spencer Hospital reduced Etherington's work hours so her schedule was consistent with Dr. Blow's restrictions. (Def. Ex. E, p. 48; Def. Ex. F, p. 49)

On May 6, 2014, Etherington returned to see Dr. Shumaker. (Jt. Ex. 10, p. 231) He diagnosed her with chronic cervicothoracic junction pain without clear etiology. (Jt. Ex. 10, p. 232) Because of Etherington's ongoing symptomology and treatment history, Dr. Shumaker prescribed a trial of a cervical spinal stimulator to see if it provides significant benefit. (Jt. Ex. 10, p. 232) If Etherington received such a benefit, they would consider a spinal cord stimulation implant; if not, they would consider cervical discography at the C6-7 level. (Jt. Ex. 10, p. 232)

Frederick Fisher, M.D., inserted a trial spinal cord stimulator on August 4, 2014. (Jt. Ex. 5, p. 70) Etherington reported greater than 80 percent pain relief during the five-day trial period to Dr. Shumaker. (Jt. Ex. 10, p. 234) On August 22, 2014, Dr. Shumaker implanted an epidural cervical spinal cord stimulator electrode via C2 and C3 laminotomy and a spinal cord stimulator generator in her left buttock. (Jt. Ex. 10, p. 236) Dr. Shumaker released Etherington to return to work with the work restrictions detailed in the FCE and for 32 hours per week on September 12, 2014. (Jt. Ex. 10, p. 239; Hrg. Tr. pp. 31-32)

The first spinal cord stimulator reduced the pain Etherington felt on her left side. (Jt. Ex. 5, p. 74) Doing so revealed pain on the right side of her neck. (Jt. Ex. 5, p. 74; Jt. Ex. 10, p. 240) Drs. Fisher and Shumaker decided to implant another stimulator to address Etherington's right-neck pain. (Jt. Ex. 10, pp. 241-44)

Etherington experienced greater than a 50 percent reduction in right-neck pain as well as the ability to discontinue hydrocodone and the ability to perform more activities of daily living during the trial period. (Jt. Ex. 10, p. 241) On January 14, 2015, Dr. Shumaker implanted a second permanent spinal cord stimulator and generator to address Etherington's right trapezius region. (Jt. Ex. 10, p. 244) At a follow-up appointment on March 13, 2015, Dr. Shumaker and Nurse Practitioner Shumaker continued work restrictions of no more than 24 hours per week of light duty with a 20-pound lifting limit. (Jt. Ex. 10, pp. 246, 248; Hrg. Tr. p. 31)

Dr. Shumaker and Nurse Practitioner Shumaker saw Etherington on May 15, 2015. (Jt. Ex. 10, p. 249) The spinal cord stimulator had allowed Etherington to reduce her hydrocodone medication to five tablets daily on average with some variation based on the amount of physical activity in a given day. (Jt. Ex. 10, p. 249) However, her attempts to wean off Lyrica therapy had been less successful, with increased pain as

the result. (Jt. Ex. 10, p. 249) Etherington's overall reduction in symptoms had allowed her to increase to working 32 hours per week while continuing the 20-pound lifting restriction. (Jt. Ex. 10, p. 249) Dr. Shumaker and Nurse Practitioner Shumaker consequently altered Etherington's work restrictions to 32-hour work weeks while maintaining the 20-pound lifting restriction. (Jt. Ex. 10, p. 250)

Etherington returned to see Dr. Shumaker and Nurse Practitioner Shumaker on August 21, 2015. (Jt. Ex. 10, p. 251) She shared overall reduction in pain with aggravation after driving or performing activities that involve cervical flexion. (Jt. Ex. 10, p. 251) Dr. Shumaker and Nurse Practitioner Shumaker recommended changing Etherington's work restrictions to five days per week of four to eight hours per day as tolerated with a 15-pound lifting restriction. (Jt. Ex. 10, p. 252)

On June 23, 2016, Etherington saw Dr. Shumaker. (Jt. Ex. 10, p. 253) She was experiencing partial pullback of the right subcutaneous lead and multiple electrode failure in the cervical epidural lead. (Jt. Ex. 10, p. 253) After discussion with Dr. Shumaker, Etherington decided to proceed with revision of the cervical epidural electrode and repositioning of the right subcutaneous electrode. (Jt. Ex. 10, p. 254) Dr. Shumaker performed the revision surgery on July 20, 2016. (Jt. Ex. 10, p. 255)

Etherington returned to Dr. Shumaker for a follow-up appointment on October 14, 2016. (Jt. Ex. 10, p. 256) She told him that she was doing well with easily manageable chronic neck pain with mild radiation to her left arm. (Jt. Ex. 10, p. 256) Dr. Shumaker released her from care, but stated she could follow up with him as needed. (Jt. Ex. 10, p. 257) He released Etherington to return to work within the FCE restrictions. (Jt. Ex. 10, p. 257) Even though Dr. Shumaker released Etherington from his care, Dr. Fisher continues to see her for ongoing pain management. (Jt. Ex. 5, p. 138)

John Kuhnlein, D.O., performed an independent medical examination (IME) of Etherington. (Cl. Ex. 1, p. 1) Dr. Kuhnlein's IME included an in-person physical examination on May 30, 2018, and review of medical records. (Cl. Ex. 1, pp. 1-14, 18) He issued a report dated June 13, 2018. (Cl. Ex. 1, p. 1) Dr. Kuhnlein diagnosed Etherington with muscle contraction cephalgia and chronic myofascial neck pain with intermittent radiculitis with multiple surgeries. (Cl. Ex. 1, p. 14)

Dr. Kuhnlein suggested Etherington go to the University of Nebraska Medical Center (UNMC) for ongoing care needs. (Cl. Ex. 1, p. 15) He opined that Etherington should see Dr. Kenneth Follett at UNMC because she had multiple complications with the spinal cord stimulator placement, with multiple trials and multiple superficial leads. (Jt. Ex. 1, p. 15) He felt her stimulator should be assessed to see if further intervention and movement of the leads would be appropriate so that the system can be simplified and internalized to make it more protected. (Cl. Ex. 1, p. 15) Dr. Kuhnlein also recommended Etherington be evaluated for participation in the multidisciplinary chronic pain program at UNMC to assist her in learning coping skills to address her new normal so that the injections become unnecessary and she is able to cope with her pain more effectively. (Cl. Ex. 1, p. 16)

Dr. Kuhnlein opined that if no further care was needed, Etherington had reached MMI on October 20, 2016. (Cl. Ex. 1, p. 16) Using the American Medical Association Guides to the Evaluation of Permanent Impairment, Fifth Edition, (AMA Guides) he assigned the following permanent impairment rating:

The DRE method is indicated according to page 379 – 380. Turning to Table 15-5, page 392, I would place Ms. Etherington into DRE Cervical Category room 4 and assign 28% whole person impairment. In this particular instance, I believe the chapter 18 applies, and I would assign an additional 3% whole person impairment.

Turning to the Combined Values Chart on Page 604, when these values are combined[,] this is a 30% whole person impairment.

(Cl. Ex. 1, p. 16)

Dr. Kuhnlein also prescribed Etherington the following work restrictions:

- Stoop, squat, bend, crawl, and kneel occasionally;
- No climbing ladders;
- Work at or above shoulder height occasionally;
- Lifting floor to waist up to 20 pounds;
- Lifting waist to shoulder up to 25 pounds; and
- Lifting over the shoulder up to 20 pounds occasionally. (Cl. Ex. 1, p. 16)

Further, Dr. Kuhnlein stated that Etherington should sit, stand, and walk as needed for comfort. (Jt. Ex. 1, p. 16) He also advised Etherington to make ergonomic changes as needed while working as a teacher. (Cl. Ex. 1, p. 16)

On June 20, 2018, Etherington participated in an FCE performed by Daryl Short, D.P.T. (Cl. Ex. 2, p. 3) Short found that Etherington provided valid effort during the FCE. (Cl. Ex. 2, p. 3) He recommended Etherington:

- Work in the sedentary category of physical demand with lifting up to five pounds on occasion at the waist level;
- Change positions as needed between sitting, standing, and walking; and
- Limit reaching forward up to chest level up to 25 percent of the workday with non-material activities and above chest level rarely with material and non-material activities. (Cl. Ex. 2, pp. 2–3)

In a letter dated June 28, 2018, Dr. Shumaker attributed Etherington's ongoing symptoms to the work injuries she sustained in the car crash on March 23, 2009. (Jt.

Ex. 10, p. 258) Further, he opined that due to the stipulated work injuries, she will “be more likely to need additional spinal fusion surgery in the future.” (Jt. Ex. 10, p. 258) Dr. Shumaker also opined that the stipulated work injury caused Etherington’s permanent work restriction of not lifting more than 20 pounds. (Jt. Ex. 10, p. 258)

Dean Wampler, M.D., performed an IME of Etherington on July 3, 2018. (Cl. Ex. 10, p. 1) Dr. Wampler’s IME included an in-person physical examination and interview as well as a review of medical records. (Cl. Ex. 1, pp. 1–8) He categorized the question of whether Etherington had reached MMI “challenging” because treating physicians had found her to have reached MMI on multiple prior occasions only for her to require additional care. (Cl. Ex. 10, p. 8) He opined that Dr. Shumaker’s MMI assignment on May 21, 2010 appeared medically appropriate at the time because Etherington reported sustained benefit from radiofrequency ablations at C5-C6 and C6-C7. (Cl. Ex. 10, p. 9) Because Etherington’s symptoms were constant even though her treatment was minimal, he opined that the MMI findings from before June 13, 2018, were medically inappropriate at the time. (Cl. Ex. 10, p. 9)

Dr. Wampler concluded it was “safe” to opine Etherington reached MMI on June 13, 2018, the date of Dr. Kuhnlein’s IME report. (Cl. Ex. 10, p. 9) Using the AMA Guides, Fifth Edition, Dr. Wampler agreed with Dr. Kuhnlein’s reasoning and assigned a 30 percent whole person impairment. (Cl. Ex. 10, p. 10) He prescribed the following permanent work restrictions:

- Occasional lifting up to 30 pounds to chest height;
- No overhead lifting; and
- Avoid sustained (longer than 10 minutes) head-down or head-up postures. (Cl. Ex. 10, p. 9)

As a physical therapist by training and occupation until her termination by Spencer Hospital, Etherington is familiar with injuries and the functional limitations they cause. She testified at hearing that she felt the permanent work restrictions contained in the 2018 FCE report most accurately reflect her functional limitations due to the stipulated injury. (Hrg. Tr. 41) Etherington credibly testified that the ten-pound lifting restriction most accurately reflected what she was physically capable of doing because of the nature of the testing and her experience. (Hrg. Tr. p. 41) She credibly testified that lifting 20 pounds from floor to waist, with substitutions, is unsafe and increases her spasms and pain. (Hrg. Tr. 41) She further shared that she functions much better if she infrequently carries 10 pounds or less. (Hrg. Tr. 41) Etherington does not lift more than 10 pounds with any frequency while performing her teaching duties. (Hrg. Tr. 42) The thoroughness of the FCE performed by Short, combined with Etherington’s informed and credible testimony, make the work restrictions in the FCE most persuasive with respect to her functional limitations.

Etherington continues to treat with Dr. Fisher at the Siouxland Pain Clinic for pain management, including injections and prescription medication. (Hrg. Tr. p. 25) At the

time of hearing, Etherington was taking the medications Lyrica, tramadol, Celebrex, and tizanidine daily. (Hrg. Tr. p. 27) She also was taking hydrocodone as needed; or, about three to five times per week. (Hrg. Tr. p. 27) Her pain level was at six on a one-to-ten scale, which was higher than usual. (Hrg. Tr. p. 12) Etherington experienced the following symptoms:

- Muscle spasms in the lower part of her neck;
- Headaches; and
- Pain and tingling down her arm and in the area of her shoulder blade. (Hrg. Tr. p. 26)

In addition, Etherington experiences flare-ups if she uses her arms. (Hrg. Tr. p. 26) For example, if she reaches out and holds something or scrubs a counter with a washcloth, she may suffer increased spasms. (Hrg. Tr. p. 26) If Etherington lifts her left arm up, it causes tingling down the arm and the back of her shoulders. (Hrg. Tr. p. 27)

2. Education, Physical Activity, Employment, and Earnings.

After graduating from high school, Etherington went to South Dakota State and got her undergraduate degree in athletic training. (Hrg. Tr. p. 11) Etherington then received a master's degree in physical therapy at the University of Iowa. (Hrg. Tr. p. 11) After obtaining her master's degree, Etherington gained employment with Sports Rehab & PT. (Cl. Ex. 3, p. 3; Hrg. Tr. p. 12) She worked there from 1994 to 1996, earning about \$36,000 annually. (Cl. Ex. 3, p. 3; Hrg. Tr. p. 12)

In 1996, Etherington left employment with Sports Rehab & PT to take a physical therapist job with Spencer Hospital. (Cl. Ex. 3, p. 3; Hrg. Tr. p. 12) The job duties of a physical therapist at Spencer Hospital included, among other tasks, heavy lifting of weights over 45 pounds and heavy carrying of weights over 45 pounds. (Cl. Ex. 5, p. 4; Hrg. Tr. pp. 14–15) In Etherington's experience working in the position, the employees at Spencer Hospital helped one another when lifting weight greater than about 40 to 50 pounds. (Hrg. Tr. pp. 13, 15)

Spencer Hospital documented Etherington's pay rate on an hourly basis. (Def. Ex. F) At the time of the stipulated injury, Etherington's annual earnings working at Spencer Hospital were about \$78,000. (Hrg. Tr. p. 59) Spencer Hospital increased her pay multiple times after the stipulated work injury. (Hrg. Tr. pp. 70–74; Def. Ex. F)

In January 2012, Etherington was still experiencing symptoms. (Hrg. Tr. p. 32) Etherington believed that reducing her hours worked would help reduce the amount of pain she experienced. (Hrg. Tr. p. 32) At Etherington's request, Spencer Hospital agreed to let her reduce her work schedule from 40 hours per week to 36 hours as part of the accommodations it provided to Etherington due to the work injury. (Hrg. Tr. pp. 32, 70, 79; Def. Exs. F, G.) After Spencer Hospital agreed to reduce Etherington's work

hours, she spent the majority of her time on the job working with students under the AEA contract. (Hrg. Tr. pp. 32–33, 53–54)

From May 10, 2013, through December 14, 2013, Etherington's work week was four hours shorter than it would have been had she not sustained the stipulated work injury. She experienced an actual loss of gross pay equal to \$ 1,514.40, her earnings at the time of the stipulated injury, minus her weekly gross weekly pay of \$1,484.36 per week (\$2,968.72, \$2,968.73, or \$2,968.74 per biweekly pay period). Etherington's weekly reduction in earnings was \$30.04 from May 10, 2013, through December 14, 2013.

Etherington worked 54 hours and received pay for 27 hours of paid time-off from December 15, 2013, through December 28, 2013. (Def. Ex. E, p. 48) It is unclear whether this includes holiday pay. Her hours worked plus her hours of paid time-off equal 81 hours. Thus, Etherington did not experience an actual reduction in gross pay during these two weeks.

Because Etherington's work week was four hours shorter than it would have been had she not sustained the stipulated work injury, her weekly gross pay was reduced from December 29, 2013 to March 22, 2014. She experienced an actual loss of gross pay equal to \$ 1,514.40, her earnings at the time of the stipulated injury, minus her gross weekly pay. During this time period, she worked 36 hours per week (54 hours per pay period) earning \$1,476.37 per week (\$2,952.72 or \$2,972.73 per pay period). During these weeks, Etherington's weekly reduction in pay was \$38.04 during this time period.

After Dr. Blow gave Etherington work restrictions that included working 27 hours per week, Spencer Hospital further reduced her hours effective March 23, 2014. (Def. Ex. E, p. 48; Def. Ex. F) From then through June 13, 2014, her last day of work at Spencer Hospital, Etherington worked 27 hours per week (54 per pay period) and earned \$1,107.27 per week (\$2,214.54 or \$2,214.55 per pay period). She experienced an actual loss of gross pay equal to \$ 1,514.40, her earnings at the time of the stipulated injury, minus her gross weekly pay. Her actual reduction in earnings from March 23, 2014, through June 13, 2014, was \$407.13 per week.

On June 13, 2014, Spencer Hospital fired Etherington because it lost its contract with the AEA and no longer had employment for her that was within her work restrictions. (Cl. Ex. 4; Hrg. Tr. pp. 32, 79–80) Etherington committed no misconduct, so misconduct played no part in Spencer Hospital's decision to terminate her employment. (Cl. Ex. 4; Hrg. Tr. pp. 79–81) At hearing, Michael Schauer, the director of human resources, testified that Etherington was a good employee and a hard worker who Spencer Hospital would have liked to keep on staff. (Hrg. Tr. pp. 79–80) He further stated that Spencer Hospital would not have terminated Etherington if it had not lost its contract with the AEA. (Hrg. Tr. pp. 80) Schauer testified he absolutely would give Etherington a good reference if a prospective employer called him and asked about her. (Hrg. Tr. pp. 80–81)

Etherington had intended to stay in her job with Spencer Hospital as a physical therapist. (Hrg. Tr. pp. 15, 16) Etherington looked for work as a physical therapist in the area around her home, but could not find a new job. (Hrg. Tr. p. 34) Sports Rehab & PT interviewed her but did not want to hire her because of her work restrictions. (Hrg. Tr. p. 34) Etherington applied at Cherokee Hospital, but it was not hiring. (Hrg. Tr. p. 34) She also applied at the hospital in Storm Lake, but did not hear back from it. (Hrg. Tr. p. 34) Etherington contacted Northwest Iowa Bone and Joint, but it was not hiring. (Hrg. Tr. p. 34) Etherington experienced a total loss of earnings from the week of June 15, 2014, through September 2, 2014. (Def. Ex. E, p. 48)

Spencer Hospital terminating Etherington's employment, combined with her work restrictions from the stipulated work injury, effectively ended her career as a physical therapist. She and her husband discussed other career paths and whether she could physically perform the work they entailed. (Hrg. Tr. p. 35) One aspect of her job she missed was working with school children. (Hrg. Tr. p. 35) Etherington decided to work as a substitute teacher to see if she could physically perform the job of a teacher and to determine if she liked the work enough to pursue teaching as a new career. (Hrg. Tr. pp. 35–36) Because Etherington liked the work, she decided to pursue a teaching degree. (Hrg. Tr. p. 36) Farm Bureau voluntarily paid for her classes even though the defendants are not responsible for such expenses under the Iowa Workers' Compensation Act. (Hrg. Tr. pp. 36, 55–56)

Etherington obtained her degree in education. (Hrg. Tr. p. 36) She completed student-teaching in February of 2016. (Hrg. Tr. p. 36) Storm Lake Community School District ultimately hired her as a seventh-grade science teacher. (Hrg. Tr. p. 36) (Hrg. Tr. p. 37) She started working there on August 15, 2016. (Hrg. Tr. p. 56; Cl. Ex. 9, p. 3) From September 21, 2016, through October 19, 2016, Etherington experienced a partial loss of income equal to \$774.50 after subtracting \$739.90, her weekly earnings as a teacher, from \$1,514.40, her weekly earnings at the time of the injury. (Cl. Ex. 9, p. 6)

Etherington experiences difficulty performing some of the teacher job duties physically, but coworkers and students help her with lifting. (Hrg. Tr. pp. 36–37, 56–57) She was working as a teacher in Storm Lake at the time of hearing and intended to continue in her new career. (Hrg. Tr. p. 57) She earned between \$44,000 and \$45,000 for the 2017 school year. (Hrg. Tr. p. 37) For the 2018 school year, Etherington earned about \$46,000. (Hrg. Tr. p. 57) In addition to working as a teacher, Etherington had two part-time jobs at the time of hearing.

At the time of hearing, Etherington was working a part-time job at Trinity United Methodist Church as the worship leader/pastor. (Hrg. Tr. p. 37) She works five to six hours per week and earns between \$10,000 and \$12,000 per year. (Hrg. Tr. p. 38) The only thing she carries while working this job is her laptop. (Hrg. Tr. p. 43)

Etherington also worked for the Iowa State University Extension in the summers of 2017 and 2018, leading Science, Technology, Engineering, and Math (STEM) camps. (Hrg. Tr. p. 37–38) She earned about \$2,000 in the summer of 2017 in that job, but less in the summer of 2018 because she did not work as many hours. (Hrg. Tr. p. 38) In the

years prior to 2018, the STEM camp job consisted of between 36 and 40 hours per week. (Hrg. Tr. p. 58) But in 2018, she worked about 60 hours for the summer. (Hrg. Tr. p. 58) Etherington receives help carrying things while working at the STEM camps. (Hrg. Tr. p. 42)

Etherington did not work part-time or seasonal jobs when working for Spencer Hospital. (Hrg. Tr. p. 38) While working there, she was the primary breadwinner for her family. (Hrg. Tr. p. 38) Etherington seeks and works part-time jobs in order to make money to help pay bills. (Hrg. Tr. p. 38)

For this case, Schauer performed an analysis of what Etherington would have earned as a physical therapist at Spencer Hospital had it not terminated her employment. (Hrg. Tr. p. 75–77; Def. Ex. B) Schauer calculated that Etherington would have earned if she worked 36 or 40 hours per week as a physical therapist in 2018. (Hrg. Tr. p. 77–78; Def. Ex. B) She would have earned a little less than \$93,000 for the year if she worked 36 hours per week and a little bit more if she worked 40 hours. (Hrg. Tr. p. 77–78; Def. Ex. B)

In 2017, Etherington worked three jobs and earned about \$56,000 in combined income. (Cl. Ex. 6, p. 3; Hrg. Tr. 60) In 2018, Etherington earned about the same working at her church, less working at the STEM camp, and was set to earn slightly more beginning with the new school year in the fall. Thus, it appears that Etherington's actual annual earnings in employment have decreased by about \$35,000, from the amount she would have earned as a physical therapist at Spencer Hospital to what she earned at the three jobs.

Before the stipulated work injury, Etherington was physically active during her free time. She ran three to five times per week and did Pilates one to three times each week as well. (Hrg. Tr. p. 16) She would play catch outside with her children and attend their sporting events. (Hrg. Tr. p. 17)

Etherington liked to scrapbook and perform activities with her family. (Hrg. Tr. p. 16) Around the house, Etherington cleaned, vacuumed, dusted, swept floors, mopped floors, carried laundry up and down steps, folded laundry, cooked all of family meals, and would help with mowing, carrying groceries into the house, and hauling softener salt downstairs. (Hrg. Tr. p. 16)

At the time of hearing, Etherington was 48 years old. (Hrg. Tr. p. 10) She was less physically active during her free time than she was before her injury and surgeries. She no longer attempts to lift anything over ten or fifteen pounds. (Hrg. Tr. p. 42) She tries not to carry groceries into the house; family members perform that task. (Hrg. Tr. p. 42) Etherington no longer runs for exercise. (Hrg. Tr. p. 43) Nowadays she works out on an elliptical machine at a slow pace two days per week or three if it is a good week for her physically. (Hrg. Tr. p. 43)

Etherington attempted Pilates after her injury. (Hrg. Tr. p. 45) She attempted to show a child what a plank is, but she could not even begin to perform the maneuver

because her neck tightened up. (Hrg. Tr. p. 45) Consequently, Etherington no longer does Pilates due to her injury. (Hrg. Tr. p. 44-45)

Etherington no longer scrapbooks because it puts too much of a strain on her neck when attempting to hold her head in one position, looking down. (Hrg. Tr. p. 44) She also cannot cut out shapes of paper and adhere them to pages. (Hrg. Tr. p. 44) Her work injury has made it so she can no longer enjoy the hobby of scrapbooking.

Etherington no longer performs as many chores around the house. (Hrg. Tr. p. 45) She does not sweep, mop, or vacuum. (Hrg. Tr. p. 45) Family members carry laundry up and down stairs for her. (Hrg. Tr. p. 45) They also typically fold towels for Etherington because doing so hurts her neck and upper trapezius. (Hrg. Tr. p. 45) She cannot carry a bag of salt for the water softener. (Hrg. Tr. p. 45) Etherington cannot help shovel snow anymore. (Hrg. Tr. p. 45)

Her leisure activities are likewise limited. Etherington cannot throw a baseball, softball, or beanbag. (Hrg. Tr. p. 46) She and her husband no longer go on motorcycle rides. (Hrg. Tr. p. 46) Such activities aggravate Etherington's neck symptoms. (Hrg. Tr. p. 46)

3. Payment of Benefits.

a. Permanent Partial Disability (PPD) Benefits.

The defendants paid Etherington weekly PPD benefits, but no temporary or healing period benefits, from June 11, 2014, through September 2, 2014, at the rate of \$933.55. (Def. Ex. D) Based on the parties' stipulations with respect to the factors used to calculate rate, they believe this is the correct rate. In total, the defendants paid Etherington 214.86 weeks of PPD benefits as of the date of hearing. (Def. Ex. D)

b. Healing Period Benefits.

The defendants paid Etherington what they categorized at the time as temporary total disability (TTD) benefits. As the parties stipulated and is discussed below, Etherington sustained a permanent industrial disability because of the stipulated work injury. Therefore, these benefits are properly categorized at present as healing period benefits.

The defendants paid Etherington healing period benefits during each week in the following time periods:

- September 3, 2014, through March 10, 2015;
- June 24, 2015, through June 30, 2015;
- October 21, 2015, through December 8, 2015;
- January 4, 2016, through February 21, 2016;

- May 21, 2016, through June 16, 2016; and
- July 15, 2016, through August 14, 2016. (Def. Ex. D)

For weeks including May 23, 2016, through May 27, 2016, and May 30, 2016, through June 3, 2016, Etherington had no income. (Cl. Ex. 9, p. 1) Etherington's attorney emailed Farm Bureau on June 13, 2016, because the defendants had not paid her any workers' compensation for these weeks. (Cl. Ex. 9, p. 2) On June 14, 2016, Farm Bureau replied that it would mail two healing period benefits checks, each in the amount of \$1,883.02, on June 15, 2016. (Cl. Ex. 9, p. 2; Def. Ex. D, p. 45) After two days for delivery by U.S. Mail, Etherington received the two checks on or about June 17, 2016.

Etherington earned no pay during the weeks including July 18, 2016, through July 22, 2016, and July 24, 2016, through July 28, 2016. (Cl. Ex. 9, p. 3) The defendants did not pay Etherington any benefits for these two weeks until after her attorney emailed on August 1, 2016, inquiring about payment. (Cl. Ex. 9, p. 3) On August 3, 2016, Farm Bureau replied by email stating the requested benefits checks would be mailed to Etherington on August 4, 2016. (Cl. Ex. 9, p. 4) After two days for delivery by U.S. Mail, Etherington received the two checks on or about August 6, 2016.

The evidence establishes Etherington received late payment of healing period benefits as detailed in the following table.

Week of	Amount	Date Due	Date Paid	Days Late
5/22/16	\$ 933.55	5/28/16	6/17/16	18
5/29/16	\$ 933.55	6/4/16	6/17/16	11
7/17/16	\$ 933.55	7/23/16	8/6/16	14
7/24/16	\$ 933.55	7/30/16	8/6/16	7

In their post-hearing brief, the defendants contend they waited to pay TPD benefits until after Etherington provided information regarding her earnings. (Def. Brief, p. 16) This explanation for late payment of benefits could apply to the healing period benefits in question, since Etherington would qualify for either healing period or TPD benefits based on whether she had earnings from work in a given week. However, there is an insufficient basis in the evidence from which to conclude that was the reason for the delay or the defendants provided Etherington with contemporaneous written notice of the reason for the delay in healing period benefits during the weeks shown in the table in which they did not timely issue payment.

c. Temporary Partial Disability (TPD) Benefits.

The defendants paid Etherington TPD benefits for each week in the following time periods:

- March 11, 2015, through June 23, 2015;

- July 1, 2015, through October 20, 2015;
- December 9, 2015, through January 3, 2016;
- February 22, 2016, through May 20, 2016;
- June 17, 2016, through July 14, 2016; and
- August 15, 2016, through September 20, 2016. (Def. Ex. D)

On October 10, 2016, Etherington's attorney emailed Farm Bureau about unpaid TPD benefits from the time period beginning on August 15, 2016, her first day on the job as a science teacher, and ending on September 20, 2016. (Cl. Ex. 9, p. 6) On October 25, 2016, Farm Bureau replied with calculation regarding the TPD benefits owed, asking if Etherington's attorney agreed so the insurance carrier could issue a check. (Cl. Ex. 9, p. 6) The defendants paid Etherington \$516.33 per week in TPD benefits during this time period. (Cl. Ex. 9, p. 6; Def. Ex. D, p. 45) Allowing two days for delivery by mail, Etherington received the late benefits check on or about October 27, 2016. The evidence establishes the defendants were late in their payment of TPD benefits as shown in the following table.

Week of	Amount	Date Due	Date Paid	Days Late
8/14/16	\$ 516.33	8/20/16	10/27/16	68
8/21/16	\$ 516.33	8/27/18	10/27/16	61
8/28/16	\$ 516.33	9/4/16	10/27/16	54
9/5/16	\$ 516.33	9/11/16	10/27/16	47
9/12/16	\$ 516.33	9/18/16	10/27/16	40

In the defendants' post-hearing brief, they claim the reason for the delay was waiting for Etherington to provide information about her income during this time period. (Def. Brief, p. 16) The defendants contend they timely paid TPD benefits after receiving the amount of Etherington's earnings. (Def. Brief, p. 16) There is an insufficient basis in the evidence from which to conclude why the defendants did not timely pay TPD benefits from August 15, 2016, through September 20, 2016. There is also insufficient evidence from which to find the defendants contemporaneously communicated to Etherington the reason for a delay in payment during this time period.

CONCLUSIONS OF LAW

In 2017, the Iowa legislature amended provisions of the Iowa Workers' Compensation Act. See 2017 Iowa Acts, ch. 23. The 2017 amendments apply to cases in which the alleged date of injury is on or after July 1, 2017. See id. at § 24(1); see also Iowa Code § 3.7(1). The stipulated date of injury in this case is March 23, 2009. (Hrg. Rpt. & Order, p. 1) Therefore, the 2017 amendments do not apply in this case, except for the provisions governing interest under the Commissioner's decision in Gamble v. AG Leader Technology, File No. 5054686 (App. Apr. 24, 2018).

1. Commencement Date of Permanent Partial Disability (PPD) Benefits.

Iowa Code section 85.34 governs payment of permanent disability, including the interplay between temporary or healing period benefits and permanent benefits. Iowa Code section 85.34(1) provides “alternative markers of the end of the healing period.” Waldinger Corp. v. Mettler, 817 N.W.2d 1, 9 (Iowa 2012); see also Evenson v. Winnebago Indus., 881 N.W.2d 360, 372 (Iowa 2012). The alternative markers are when the injured employee:

- 1) Returns to work;
- 2) Reaches maximum medical improvement (MMI) for the injury; or
- 3) Is medically capable of returning to employment substantially similar to that which the employee was engaged at the time of injury. Iowa Code § 85.34(1); Evenson, 881 N.W.2d at 372.

The first of the alternative markers to occur ends a healing period. Id.; Evenson, 881 N.W.2d at 372 (Iowa 2012); Crabtree v. Tri-City Elec. Co., File No. 5059572 (App. Mar. 20, 2020). PPD benefits “shall begin at the termination of the healing period.” Id. at § 85.34(2); Evenson, 881 N.W.2d at 372.

The stipulated date of injury in this case is March 23, 2009. Etherington was able to work after the date of injury and before her first back surgery. The defendants began paying Young what they categorized as TTD benefits on the date of her first surgery. However, TTD and healing period benefits cover the same condition and are categorized as one or the other based on whether the injured employee sustains a permanent disability from the work injury. See Bell Bros. Heating & Air Conditioning v. Gwinn, 779 N.W.2d 193, 200 (Iowa 2010) (citing Clark v. Vicorp Rests., Inc., 696 N.W.2d 596, 604–05 (Iowa 2005)). Because Etherington’s injury resulted in permanent disability, the benefits are therefore properly categorized as healing period benefits.

Etherington’s recovery from surgery caused her to miss work for recovery through November 26, 2009. She returned to work with restrictions on November 27, 2009. Thus, the first alternative marker to end the healing period under Iowa Code section 85.34(1) occurred on that date.

Under Iowa Code section 85.34(2), the end of the healing period triggers the beginning of PPD benefits if it is the first alternative marker to occur. And the end of an injured employee’s first healing period triggers the commencement of PPD benefits even if the employee experiences multiple subsequent healing periods over the course of treatment for the work injury. See Evenson, 881 N.W.2d at 372; see also Crabtree v. Tri-City Elec. Co., File No. 5059572 (App. Mar. 20, 2020).

Thus, the commencement date for Etherington’s PPD benefits is November 27, 2009, the date on which she first returned to work following a period of convalescence even though there were subsequent healing periods and dates of MMI.

2. Maximum Medical Improvement (MMI).

The parties dispute whether Etherington has reached MMI for the stipulated injury. The Iowa Supreme Court has explained the concept of MMI thusly:

“MMI” is a term of art commonly used by the commissioner, attorneys practicing in the field of workers' compensation law, and medical providers expressing opinions affecting claimants' entitlement to healing period benefits and permanent partial disability benefits under Iowa Code section 85.34. The term is used as an alternative means of expressing the point at which “it is medically indicated that significant improvement from the injury is not anticipated.” Iowa Code § 85.34(1). A treatise on Iowa workers' compensation law uses “maximum recuperation” as an alternative moniker for the MMI concept. See 15 James R. Lawyer, Iowa Practice Series: Workers' Compensation, § 13:3, at 135 (2011).

Mettler, 817 N.W.2d 1, 6 n. 2 (Iowa 2012); see also AMA Guides, § 2.4, p. 19 (“a date from which further recovery or deterioration is not anticipated, although over time there may be some expected change”).

An injured employee may have more than one healing period relating to a work injury. Id. at 7–10. Subsequent healing periods may occur after the employee reaches MMI. Id. at 8. For example, if an injured employee achieves MMI and is later rendered temporarily disabled and cannot work after surgery necessitated by the work injury, a new healing period begins under Iowa Code section 85.34(1). Id. at 8. Thus, “section 85.34(1) leaves room for the possibility that continuing medical treatment provided by the employer under section 85.27 can result in a series of intermittent invasive treatments, periods of temporary disability from work and convalescence, serial MMI dates, and revised permanent disability ratings following a single work-related injury.” Id. at 9.

It is possible for the agency to determine if an injured employee has sustained a permanent disability before the employee reaches MMI. Gwinn, 779 N.W.2d at 201. However, “a claim for permanent disability benefits is not ripe until [MMI] has been achieved.” Id. (citing 4 Larson § 80.03D[3] n. 10, at D80–43 to D80–48.2). “Any disability that remains after stabilization of the condition gives rise to ‘either a permanent partial or a permanent total award.’ In other words, maximum physical recovery marks the end of the temporary disability benefits, and at that point, any permanent disability benefits can be considered.” Id. at 200 (quoting 4 Larson § 80.03D[3] n. 10, at D80–43 to D80–48.2).

In the current case, Etherington’s continuing medical treatment resulted in a series of surgeries, subsequent periods of temporary disability from work and convalescence, serial MMI dates, and revised permanent disability ratings for the stipulated injury. The question is whether Etherington has achieved MMI following her most recent invasive surgery and period of recovery so that the disputed issue of her permanent disability may be decided.

The following doctors opined Etherington reached MMI on the following dates:

- Dr. Shumaker found Etherington at MMI effective May 21, 2010.
- After Etherington's second surgery, Dr. Shumaker opined she reached MMI effective November 11, 2011.
- Dr. Blow declared Etherington at MMI on April 2, 2014.
- Dr. Kuhnlein opined, barring additional care with Dr. Follett at UNMC for her spinal cord stimulator, Etherington attained MMI on October 20, 2016, three months after the last spinal cord stimulator revision performed by Dr. Shumaker
- Dr. Wampler opined it was safe to assign MMI at the time of Dr. Kuhnlein's IME on June 13, 2018.

Etherington contends Dr. Kuhnlein's recommendation that she seeks care with Dr. Follett at UNMC for her spinal cord stimulator means that she is not at MMI. But there is no indication that Dr. Kuhnlein anticipates or that Etherington would experience significant improvement in her condition from this care. Dr. Kuhnlein recommended Etherington see Dr. Follett to "assess the spinal cord stimulator" because "they may break again at some point in the future" due to "the superficial placement of the leads." (Cl. Ex. 1, p. 15) He further opined, "I believe this should be assessed to see if further intervention and movement of the leads would be appropriate and so that this system can be simplified and internalized to make it more protected." (Cl. Ex. 1, p. 15)

Thus, Dr. Kuhnlein's recommendation for Etherington to obtain care with Dr. Follett was to get an opinion on simplifying and internalizing Etherington's spinal cord stimulator. There is no indication whether Dr. Follett would be likely to recommend additional intervention. And if Dr. Follett made such a recommendation, there is an insufficient basis in the evidence from which to conclude such a course of treatment would result in significant improvement from Etherington's work injury. Moreover, such maintenance care relative to pain management is common in workers' compensation cases after the injured employee reaches MMI. Consequently, Dr. Kuhnlein's recommendation that Etherington see Dr. Follett does not preclude a finding of MMI.

Of the dates on which doctors have found Etherington at MMI, Dr. Kuhnlein's opinion that she attained stabilization on October 20, 2016, is most persuasive. Etherington required care that resulted in significant improvement subsequent to both of Dr. Shumaker's earlier findings of MMI, as well as Dr. Blow's. Lastly, it is unclear why Dr. Wampler decided the day of Dr. Kuhnlein's IME was the date on which Etherington reached MMI other than the conclusory observation that it was "safe." There is little basis in the evidence indicating Etherington experienced significant improvement or worsening in her symptoms between October 20, 2016, the date of MMI Dr. Kuhnlein assigned, and June 13, 2018, the date of MMI Dr. Wampler assigned.

Over the years, Etherington received significant care for her work injury. She underwent multiple surgeries and periods of recovery. Dr. Shumaker's final revision of the spinal cord stimulator was the last of them as of the date of hearing. It took Etherington time to recuperate. And while she has consistently stated the spinal cord stimulator has given her relief from symptoms, there is an insufficient basis in the record from which to conclude Etherington achieved significant improvement from her injury after recuperating from the final revision of her spinal cord stimulator in 2016. For the above reasons, the weight of the evidence establishes Etherington reached MMI for her work injury on October 20, 2016, as opined by Dr. Kuhnlein.

3. Industrial Disability.

Permanent disabilities are divided into scheduled and unscheduled losses. See Iowa Code § 85.34(2). The parties stipulated that Etherington has sustained an unscheduled loss, which means that the question of permanency in this case is one of industrial disability. Clark v. Vicorp Restaurants, Inc., 696 N.W.2d 596, 605 (Iowa 2005) (citing Sherman v. Pella Corp., 576 N.W.2d 312, 320–21 (Iowa 1998)); see also Diederich v. Tri-City R. Co., 219 Iowa 587, 258 N.W.2d 899 (1935)). The factors considered when determining industrial disability are “functional impairment, age, education, work experience, qualifications, ability to engage in similar employment, and adaptability to retraining to the extent that any factor affects the employee’s prospects for relocation in the job market.” Id. (citing Sherman, 576 N.W.2d at 321, and Luke’s Hosp. v. Gray, 604 N.W.2d 646, 653 (Iowa 2000)).

“Industrial disability measures an employee’s lost earning capacity.” Id. (citing Sherman, 576 N.W.2d at 321. “The focus is not solely on what the worker can or cannot do; industrial disability rests on the ability of the worker to be gainfully employed.” Id. (quoting Myers v. F.C.A. Servs., Inc., 592 N.W.2d 354, 356 (Iowa 1999)). “Showing that the employee’s actual earnings have decreased is not always necessary ‘to determine an injury-caused reduction in earning capacity.’” Id. (quoting Gray, 604 N.W.2d at 653). The inquiry focuses on what an injured employee could earn before the work injury compared to after. Second Injury Fund of Iowa v. Nelson, 544 N.W.2d 201, 208 (Iowa 1995).

Etherington was 48 years old at the time of hearing. Etherington sustained permanent functional limitations because of her injury. Her work restrictions are significant under Short’s FCE report. She is unable to lift more than ten pounds without aggravating her symptoms. Etherington’s functional limitations have substantially limited the number of jobs in the labor market for which she is physically able to perform the duties.

Etherington’s work experience prior to Spencer Hospital firing her was entirely as a physical therapist, a job she can no longer physically perform. The functional limitations caused by the stipulated work injury effectively ended her career as a physical therapist halfway through it and her ability to rely on all of her pre-injury work experience when seeking a new job. The early end of Etherington’s physical therapist career has resulted in a substantial reduction in her earning capacity.

Likewise, Etherington's education prior to termination was focused on physical therapy. The work injury ended her ability to be a physical therapist, which partially negated her ability to rely on her undergraduate degree in sports medicine and graduate degree in physical therapy. That being said, her age contributed to her ability to obtain a new degree in education and begin a new career as a teacher, albeit one in which she earns much less than she did as a physical therapist.

Etherington showed a strong desire to work and substantial adaptability by identifying a career of interest with work duties she felt were within her functional limitations. She improved her prospects for relocation in the job market by returning to school and obtaining her education degree, with the financial support of Farm Bureau. After doing so, she obtained gainful employment as a teacher.

Etherington now earns about \$46,000 per year as a teacher, which is significantly less than the approximately \$92,000 to \$93,000 annually she would have made had she not gotten injured on the job. Because of Etherington's loss of earning capacity, she has supplemented her teaching income by working two part-time jobs. One of the jobs is year-round; the other is summer work in between school years.

She earns in the range of \$10,000 to \$12,000 per year working part time at her church. Etherington has also earned additional money working at summer STEM camps, though the amount varied from 2017 to 2018, when it was less because she worked fewer hours. Based on the evidence, it is unclear how sustainable Etherington's patchwork approach to increasing her earnings by working multiple jobs will be moving forward.

Even while working two jobs to supplement her teaching earnings, Etherington's earnings are significantly lower than what she would have earned as a physical therapist. In 2017, Etherington's income was about \$56,000, approximately 61 percent of what she would have made at Spencer Hospital. Given the raise she received in her teaching salary and the reduced hours working at the STEM camp, her 2018 income was likely about the same, if not less, as in 2017. The evidence establishes Etherington's lost earning capacity has been relatively consistent from year to year despite the industriousness she has displayed by working three jobs.

Based on consideration of the evidence relating to all of the factors used to assess an injured worker's industrial disability, Etherington has sustained an industrial disability of 60 percent. Industrial disability is calculated as a percentage of 500 weeks under Iowa Code section 85.33(2)(u). Sixty percent of 500 is 300. Therefore, Etherington is entitled to 300 weeks of PPD benefits.

The parties stipulated that, at the time of the work injury, Etherington had gross earnings of \$1,514.40 per week; was married; and was entitled to five exemptions. Based on these stipulations, Etherington is entitled to a weekly PPD benefit rate of nine hundred thirty-three and 55/100 dollars (\$933.55).

4. Temporary Partial Disability (TPD) and Healing Periods.

Etherington's entitlement to PPD benefits does not preclude her from concurrent entitlement to TPD or healing period benefits under the law. Evenson, 881 N.W.2d at 372-73 (holding an injured employee may be entitled to PPD benefits and TPD benefits simultaneously under the Iowa Workers' Compensation Act); Crabtree v. Tri-City Elec. Co., File No. 5059572 (App. Mar. 20, 2020) (holding an injured employee may be entitled to simultaneously receive PPD and healing period benefits under the Iowa Supreme Court's holding in Evenson). Therefore, this section will analyze Etherington's entitlement to TPD benefits and healing period benefits after the commencement date of PPD benefits.

a. TPD Benefits From May 15, 2013, Through June 13, 2014, and September 21, 2016, Through October 19, 2016.

A TPD is "the condition of an employee for whom it is medically indicated that the employee is not capable of returning to employment substantially similar to the employment in which the employee was engaged at the time of injury, but is able to perform other work consistent with the employee's disability." Iowa Code § 85.33(2). TPD benefits are "payable, in lieu of temporary total disability and healing period benefits, to an employee because of the employee's temporary partial reduction in earning ability as a result of the employee's temporary partial disability." Id. TPD benefits "are for the purpose of compensating injured employees during weeks when they experience a temporary . . . partial loss of actual earnings (reduced or eliminated paychecks) caused by the injury." Evenson, 881 N.W.2d at 373.

Typically, "maximum physical recovery marks the end of the temporary disability benefits, and at that point, any permanent disability benefits can be considered." Gwinn, 779 N.W.2d at 200. However, it is possible for an injured employee to be eligible to receive PPD and TPD benefits simultaneously. Evenson, 881 N.W.2d at 373. "[T]he various categories of workers' compensation benefits have distinct purposes. Thus, because TPD and PPD benefits compensate for completely different categories of losses, an employee who receives TPD and PPD benefits following a single workplace injury is not paid twice for the same injury or loss." Id.

Thus, Etherington may collect TPD benefits during this time period even though the commencement date for PPD benefits preceded it if she was temporarily and partially disabled under the law. To establish entitlement to TPD benefits, Etherington must prove by a preponderance of the evidence:

1. Lost earnings during the weeks in question; and
2. A causal connection between the work injury and the claimed diminution of earnings. Mannes v. Fleetguard, Travelers Ins. Co., 770 N.W.2d 826, 830 (Iowa 2009); Larson Mfg. Co. v. Thorson, 763 N.W.2d 842, 860 (Iowa 2009);

Kelly v. Performance Contractors, File No. 5055951, p. 8 (App., May 13, 2019).

“Temporary benefits are ‘ordinarily established by direct evidence of actual wage loss.’” Mannes, 770 N.W.2d at 830 (citing 4 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law § 80.03[2], at 80–5 (2009)). Etherington has satisfied the first element by proving by a preponderance of the evidence that she sustained a partial loss in weekly earnings during the following time periods:

- May 5, 2013, through December 14, 2013;
- December 29, 2013, through June 13, 2014; and
- September 21, 2016, through October 19, 2016.

Etherington worked less hours during the time period from December 15, 2013, through December 29, 2013. However, her hours worked and on paid time-off equal 81 hours. Her weekly gross pay during this two-week period was therefore \$1,660.91. Etherington bears the burden of proving a temporary partial loss in earnings in order to establish entitlement to TPD benefits. There is insufficient evidence to conclude she sustained such a loss in pay during either of these two weeks.

Because Etherington has satisfied the first element for the time periods identified above, the analysis must consider whether Etherington’s reduction in pay is causally connected to the work injury. The Iowa Supreme Court has held that evidence the injured employee “worked under a physician-imposed light-duty restriction during the relevant weeks” and made complaints of chronic pain in the medical records throughout that time “is minimally sufficient to support a causal nexus between [the work] injury and the claimed diminution of her earnings for the relevant weeks.” Larson Mfg. Co., 763 N.W.2d at 861.

In the current case, the evidence establishes Dr. Shumaker imposed permanent light-duty restrictions under which Etherington worked from May 15, 2013, through March 22, 2014. Medical records from throughout this time period show Etherington consistently complained of chronic pain to Drs. Blow, Lockwood, and Shumaker. Further, Etherington and Spencer Hospital agreed to reduce her weekly hours worked by four as an accommodation in the hopes it would help alleviate the symptoms caused by her work injury, including pain.

The evidence therefore establishes it is more likely than not that Etherington’s reduced hours and pay were causally connected to the symptoms she was experiencing because of the stipulated work injury in this case. Etherington has met her burden of proof. She is entitled to TPD benefits for the weeks from May 10, 2013 (the first day in the week in which May 15 falls), through December 15, 2013, and December 29, 2013, through March 22, 2014.

Further, Dr. Blow prescribed a 27-hour work week as a restriction due to the work injury, which reduced her work week by 13 hours from March 23, 2014, through June

14, 2014, her last day of work at Spencer Hospital. This plainly establishes causation between the work injury and Etherington's reduced pay during this time period. Etherington has therefore established her entitlement to TPD benefits from March 23, 2014, through June 14, 2014.

Etherington began her job as a teacher on August 15, 2016. The defendants paid Etherington weekly TPD benefits from August 15, 2016, through September 20, 2016, because she sustained a partial loss of earnings in her job as a teacher when compared to what she was earning as a physical therapist. The evidence shows it is more likely than not that the functional limitations caused by Etherington's work injury resulted in her changing jobs from physical therapist to teacher, it is more likely than not her reduced earnings from September 21, 2016, through October 19, 2016, the day before she reached MMI, are causally connected to the injury.

Because the evidence establishes Etherington is entitled to TPD benefits as described above, the decision must address the amount. In Area Education Agency 7 v. Bauch, the Iowa Supreme Court "rejected an overly formulistic approach to the calculation of an employee's weekly earnings under sections 85.36 and 85.61." Burton v. Hilltop Care Ctr., 813 N.W.2d 250, 262 (Iowa 2012) (discussing Area Education Agency 7 v. Bauch, 646 N.W.2d 398 (Iowa 2002)). The agency is "required . . . to look beyond the numbers appearing on an employee's paycheck when determining the employee's weekly gross earnings under sections 85.36 and 85.61(3)." Id. "Instead of allowing the commissioner to simply cut and paste the amount shown on an employee's paycheck into the formula contained in the appropriate subsection of section 85.36, Bauch requires the commissioner to determine what an employee actually earns *for employment* each pay period and use that number to calculate weekly earnings." Id. at 262 (citing Bauch, 646 N.W.2d at 402 (italicized emphasis in original)).

An injured employee's benefit rate is calculated based on the employee's weekly earnings at the time of the work injury under Iowa Code section 85.36, which the parties stipulated was \$1,514.40. Iowa Code § 85.33(4). Weekly TPD benefits equal "sixty-six and two-thirds percent of the difference between the employee's weekly earnings at the time of injury . . . and the employee's actual gross weekly income from employment during the period of TPD." Id.

Weekly earnings means gross salary, wages, or earnings of an employee to which such employee would have been entitled had the employee worked the customary hours for the full pay period in which the employee was injured, as regularly required by the employee's employer for the work or employment for which the employee was employed, computed or determined as follows and then rounded to the nearest dollar.

Id. Under Iowa Code section 85.61(3), "gross earnings" are "recurring payments by the employer to the employee for employment, before any authorized or lawfully required deduction or withholding of funds by the employer, excluding irregular bonuses, retroactive pay, overtime, penalty pay, reimbursement of expenses, expenses allowances, and the employer's contribution for welfare benefits."

The following table details Etherington's reduction in hours and gross pay by time period and the TPD benefits to which she is entitled as a result with the columns respectively showing:

- **Start Date:** The first day of the time period.
- **End Date:** The final day of the time period.
- **Weeks:** Number of weeks in the time period commencing on the Start Date and concluding on the End Date.
- **Weekly Pay at Time of Injury:** Etherington's average weekly wage at the time of the work injury as stipulated by the parties.
- **Reduced Weekly Pay:** Etherington's gross earnings during the time period commencing on the Start Date and concluding on the End Date.
- **Weekly Pay Reduction:** The reduction in Etherington's weekly gross pay, which is derived by subtracting her Reduced Weekly Pay from her Weekly Pay at Time of Injury during the time period commencing on the Start Date and concluding on the End Date.
- **Weekly TPD Rate:** The amount of TPD benefits to which Etherington is entitled, which equals sixty-six and two-thirds percent of Etherington's Weekly Gross Pay Reduction in each week during the time period commencing on the Start Date and concluding on the End Date.

Start Date	End Date	Weeks	Weekly Pay at Time of Injury	Reduced Weekly Pay	Weekly Pay Reduction	Weekly TPD Rate
5/15/13	12/14/13	31	\$ 1,514.40	\$ 1,484.36	\$ 30.04	\$ 20.03
12/29/13	3/22/14	12	\$ 1,514.40	\$ 1,476.36	\$ 38.04	\$ 25.36
3/23/14	6/14/14	12	\$ 1,514.40	\$ 1,107.27	\$ 407.13	\$ 271.43
9/21/16	10/19/16	4	\$ 1,514.40	\$ 739.90	\$ 774.50	\$ 516.33

Etherington has proved by a preponderance of the evidence that she is entitled to TPD benefits for the weeks and at the rate shown for the corresponding time periods identified in the above table.

b. Healing Period Benefits From June 15, 2014, Through September 2, 2014.

Spencer Hospital terminated Etherington. Her last day of work was June 13, 2014. Etherington sought work as a physical therapist in her area of the state after her termination but was unsuccessful. After Etherington's termination and unsuccessful work search, she substitute-taught to see how she would like teaching and then went back to school to become a teacher. It is more likely than not that she did not substitute-teach during the summertime.

Thus, the evidence establishes it is more likely that Etherington sustained a total loss of pay during the weeks following her termination by Spencer Hospital from June 15, 2014, through September 2, 2014. Etherington's receipt of PPD benefits from the defendants during this time period does not disqualify her from receiving healing period benefits under the Commissioner's decision in Crabtree v. Tri-City Elec. Co., File No. 5059572 (App. Mar. 20, 2020). Etherington is entitled to healing period benefits in the amount of \$933.55 commencing on June 15, 2014, through September 2, 2014.

5. Credit.

The parties dispute whether the defendants are entitled to a credit for PPD benefits paid. Etherington contends that awarding a credit would be inappropriate because she had not reached MMI at the time of hearing. Because Etherington reached MMI on October 20, 2016, the rationale behind her disputing the defendants' entitlement to a credit is no longer viable. The defendants are entitled to a credit for PPD benefits paid.

With respect to the disputed credit, the hearing report provides it is for 216 weeks at the rate of \$933.55. The defendants offer a lesser amount in their post-hearing brief of 214.86 weeks at the same rates. Based on this revised calculation, the defendants are entitled to a credit for PPD benefits paid of 214.86 weeks at the rate of \$933.55 per week.

6. Penalty.

"Because penalty benefits are a creature of statute, our discussion begins with an examination of the statutory parameters for such benefits." Keystone Nursing Care Ctr. v. Craddock, 705 N.W.2d 299, 307 (Iowa 2005). Under Iowa Code section 86.13(4)(a)

If a denial, a delay in payment, or a termination of benefits occurs without reasonable or probable cause or excuse known to the employer or insurance carrier at the time of the denial, delay in payment, or termination of benefits, the workers' compensation commissioner shall award benefits in addition to those benefits payable under this chapter, or chapter 85, 85A, or 85B, up to fifty percent of the amount of benefits that were denied, delayed, or terminated without reasonable or probable cause or excuse.

This provision "codifies, in the workers' compensation insurance context, the common law rule that insurers with good faith disputes over the legal or factual validity of claims can challenge them, if their arguments for doing so present fairly debatable issues." Covia v. Robinson, 507 N.W.2d 411, 412 (Iowa 1993) (citing Dirks v. Farm Bureau Mut. Ins. Co., 465 N.W.2d 857, 861 (Iowa 1991) and Dolan v. Aid Ins. Co., 431 N.W.2d 790, 794 (Iowa 1988)). "The purpose or goal of the statute is both punishment and deterrence." Robbennolt v. Snap-On Tools Corp., 555 N.W.2d 229, 237 (Iowa 1996).

The legislature established in Iowa Code section 86.13(4)(b) a burden-shifting framework for determining whether penalty benefits must be awarded in a workers'

compensation case. See 2009 Iowa Acts ch. 179, § 110 (codified at Iowa Code § 86.13(4)(b)); see also Pettengill v. Am. Blue Ribbon Holdings, LLC, 875 N.W.2d 740, 746–47 (Iowa App. 2015) as amended (Feb. 16, 2016) (discussing the burden-shifting required by the two-factor statutory test). The employee bears the burden to establish a prima facie case for penalty benefits by establishing a denial, delay in payment, or termination of workers' compensation benefits. Iowa Code § 86.13(4)(b)(1). If the employee fails to prove a denial, delay, or termination, there can be no award of penalty benefits and the analysis stops. See id. at § 86.13(4)(b); see also Pettengill, 875 N.W.2d at 747. However, if the employee makes the requisite showing, the burden of proof shifts to the employer. See id. at § 86.13(4)(b); see also Pettengill, 875 N.W.2d at 747.

To avoid an award of penalty benefits, the employer must “prove a reasonable or probable cause or excuse for the denial, delay in payment, or termination of benefits.” Iowa Code § 86.13(4)(b)(2). An excuse must meet all of the following criteria to be “a reasonable or probable cause or excuse” under the statute:

- (1) The excuse was preceded by a reasonable investigation and evaluation by the employer or insurance carrier into whether benefits were owed to the employee.
- (2) The results of the reasonable investigation and evaluation were the actual basis upon which the employer or insurance carrier contemporaneously relied to deny, delay payment of, or terminate benefits.
- (3) The employer or insurance carrier contemporaneously conveyed the basis for the denial, delay in payment, or termination of benefits to the employee at the time of the denial, delay, or termination of benefits.

Id. § 86.13(4)(c).

This paragraph creates a mandatory timeline for the employer to follow in showing it had a “reasonable or probable cause or excuse” for the termination of benefits. Iowa Code § 86.13(4)(c)(1)-(3). First, the employer's excuse for the termination must have been *preceded* by an investigation. Id. § 86.13(4)(c)(1). Second, the results of the investigation were “*the actual basis ... contemporaneously*” relied on by the employer in terminating the benefits. Third, the employer “*contemporaneously* conveyed the basis for the ... termination of benefits to the employee *at the time of the ... termination.*” Id. § 86.13(4)(c)(3)

Pettengill, 875 N.W.2d at 747. “An employer cannot unilaterally decide to terminate an employee's benefits without adhering to Iowa Code section 86.13; to allow otherwise would contradict the language of that section.” Id.

“A ‘reasonable basis’ for denial of the claim exists if the claim is ‘fairly debatable.’” Keystone Nursing Care Ctr., 705 N.W.2d at 307 (quoting Christensen v.

Snap-On Tools Corp., 554 N.W.2d 254, 260 (Iowa 1996)). A claim may be fairly debatable because of a good faith legal or factual dispute. See Covia, 507 N.W.2d at 416 (finding a jurisdictional issue fairly debatable because there were “viable arguments in favor of either party”). “[T]he reasonableness of the employer’s denial or termination of benefits does not turn on whether the employer was right. The issue is whether there was a reasonable basis for the employer’s position that no benefits were owing.” Keystone Nursing Care Ctr., 705 N.W.2d at 307–08.

If the employer establishes a “reasonable or probable cause or excuse,” no penalty benefits are awarded. However, if the employer fails to meet its burden of proof, penalty benefits must be awarded. In the current case, the defendants have not marshaled enough evidence from which to conclude a reasonable or probable cause or excuse exists for their delayed payment of healing period benefits for the following weeks: May 23, 2016, through May 27, 2016; May 30, 2016, through June 3, 2016; July 18, 2016, through July 22, 2016; and July 24, 2016, through July 28, 2016. The same is true for the TPD benefits for the time period from August 15, 2016, through September 20, 2016.

The following factors are used in determining the amount of penalty benefits:

- The length of the delay;
- The number of the delays;
- The information available to the employer regarding the employee's injuries and wages; and
- The prior penalties imposed against the employer under Iowa Code section 86.13. Robbennolt v. Snap-On Tools Corp., 555 N.W.2d at 238.

Under the Iowa Workers’ Compensation Act, weekly benefits payments are due at the end of the compensation week. Id. at 235. Etherington has shown delays in the payments of healing period and TPD benefits. She also established the defendants’ denial of:

- Healing period benefits from June 18, 2014, through September 2, 2014; and
- TPD benefits from September 21, 2016, through October 19, 2016.

Because Etherington has established a prima facie case for penalty benefits, the burden shifts to the defendants. The defendants contend that they timely paid benefits after receiving information from Etherington about her earnings. Put otherwise, they say the delay is Etherington’s fault for not providing to them in a timely manner the information they needed to calculate benefits.

There is an insufficient basis in the evidence from which to conclude the defendants were late or denied paying Etherington’s weekly benefits during these time

periods. Moreover, contemporaneous notice to the injured employee of the reason for a delayed payment of benefits at the time of the delay is required under Iowa Code section 86.13(4)(c). In the current case, there is an insufficient basis in the evidence from which to conclude the defendants contemporaneously conveyed to Etherington the reason for the delay in paying benefits was her failure to provide earnings information for the weeks in question. Therefore, a penalty is appropriate under the law.

The defendants were late by up to just under ten weeks in the payment of TPD and healing benefits in certain weeks during the summer of 2016. Based on the Robbennolt factors, a penalty of \$500.00 is sufficient to deter the defendants from failing to timely identify an injured employee's earnings for a given week and pay appropriate temporary or healing period benefits based upon it.

The defendants also denied payment of healing period benefits to Etherington from June 18, 2014, through September 2, 2014, and of TPD benefits from September 21, 2016, through October 19, 2016. Their failure to pay these benefits is more egregious than the delayed payments discussed above. Based on the Robbennolt factors, the defendants will be deterred from failing to pay temporary or healing period benefits in the future by a penalty of \$2,000.00 for the denial of benefits.

7. Independent Medical Examination (IME) Reimbursement.

An employer has the right to obtain an opinion on what, if any, permanent impairment an injured employee has sustained due to a work injury. Iowa Code § 85.39(1). If the injured employee disagrees with the opinion of the employer-chosen doctor, the employee may obtain an IME with a doctor of the employee's choosing. Iowa Code § 85.39(2). The employer must reimburse the injured employee for the reasonable fee of the IME. Id.

The parties identified reimbursement of the cost of Dr. Kuhnlein's IME as a disputed issue in the Hearing Report. (Hrg. Rpt., p. 2) During the hearing, the defendants stated they would be reimbursing Etherington for the cost of the IME without identifying any issue regarding its amount. (Hrg. Tr., p. 6) The parties to a workers' compensation case may amend the hearing report during in-hearing colloquy. See Staff Mgmt. v. Jimenez, 839 N.W.2d 640, 656-57 (Iowa 2013). Likely due to the defendants' representation they would pay for the IME during the colloquy, Etherington did not address the issue in her post-hearing brief, which was filed concurrently with the defendants' brief and therefore in ignorance of the fact the defendants attempt to resurrect the issue.

In the defendants' post-hearing brief, they contend the cost of Dr. Kuhnlein's IME is unreasonable due to the expenses being higher than the expenses relating to Dr. Wampler's IME. By agreeing to reimburse the expenses relating to Dr. Kuhnlein's IME, the defendants agreed to amend the hearing report to remove reimbursement under Iowa Code section 85.39 as a disputed issue. The defendants are consequently

precluded from resurrecting the issue, unbeknownst to Etherington, via their post-hearing brief.

8. Costs.

Etherington seeks taxation of the costs in Claimant's Exhibit 11. (Hrg. Rpt., p. 2) The parties did not indicate on the Hearing Report whether it is disputed that the costs Etherington seeks have been paid. The defendants' post-hearing brief does not address taxation of costs.

Costs incurred in the hearing are taxed in the discretion of the presiding officer. See Iowa Code § 86.40. "Fee-shifting statutes using 'all costs' language have been construed 'to limit reimbursement for litigation expenses to those allowed as taxable court costs.'" Des Moines Area Reg'l Transit Auth. v. Young, 867 N.W.2d 839, 846 (Iowa 2015) (quoting Riverdale v. Diercks, 806 N.W.2d 643, 660 (Iowa 2011)). Statutes and administrative rules providing for recovery of costs are strictly construed. Id. (quoting Hughes v. Burlington N. R.R., 545 N.W.2d 318, 321 (Iowa 1996)).

a. Filing Fee.

Under agency rules, hearing costs shall include filing fees when appropriate, including convenience fees incurred by using the payment gateway on the Workers' Compensation Electronic System (WCES). 876 IAC 4.33. "The filing fee may be taxed as a cost to the losing party in the case. If the filing fee would impose an undue hardship or be unjust in the circumstances for the losing party, the filing fee may be taxed as costs to the winning party in the case." 876 IAC 4.8(2)(f), 4.33.

Etherington seeks taxation of the \$100.00 filing fee as a cost in this case. The record establishes Etherington paid the filing fee to the agency. (Cl. Ex. 11) She has largely prevailed in this case. Therefore, the filing fee is taxed against the defendants as a cost under agency rules.

b. FCE Report.

Agency rules do not expressly authorize taxation of the cost of an FCE report. See 876 IAC 4.33. Nonetheless, the cost of an FCE report is taxable if it was "required by a medical provider as necessary for the completion of a medical report." Sainz v. Tyson Fresh Meats, Inc., File No. 5053964, p. 3 (App. Sept. 28, 2018). If the attorney for the injured employee requested the FCE, it does not qualify as a taxable cost under agency rules. Id. (citing Pastor v. Farmland Foods, Inc., File No. 5050551 (App. Oct. 27, 2017)).

Etherington seeks reimbursement for the costs of the FCE report by Daryl Short, D.P.T. But there is no indication a medical provider requested the FCE as necessary for the completion of a medical report. Rather, it appears Etherington's attorney requested and paid for the report. (Cl. Ex. 11, p. 3) Therefore, the cost of the FCE report is not taxable under Rule 876 IAC 4.33.

c. Phone Conference With Dr. Shumaker.

Rule 876 IAC 4.33 allows the agency to tax “the costs of doctors’ and practitioners’ deposition testimony, provided that said costs do not exceed the amounts provided by Iowa Code sections 622.69 and 622.72.” Agency rules do not authorize taxation of the cost of a conference call with a treating physician. As an administrative rule that provides for recovery of costs, Rule 876 IAC 4.33 is strictly construed. Young, 867 N.W.2d at 846 (quoting Hughes v. Burlington N. R.R., 545 N.W.2d 318, 321 (Iowa 1996)).

Etherington’s attorney conducted a phone conference with Dr. Shumaker on June 12, 2018, that cost \$225.00. (Cl. Ex. 11, p. 1) There is no indication Etherington deposed Dr. Shumaker for this case. Therefore, the cost of the conference call between Dr. Shumaker and Etherington’s attorney may not be taxed as a cost of this case under the express language of Rule 876 IAC 4.33, which must be strictly construed.

CONCLUSION

It is therefore ordered:

- 1) The defendants shall pay to the claimant three hundred (300) weeks of PPD benefits at the rate of nine hundred thirty-three and 55/100 dollars (\$933.55) per week from the commencement date of November 27, 2009.
- 2) The defendants shall pay to the claimant fourteen (14) weeks of healing period benefits at the rate of nine hundred thirty-three and 55/100 dollars (\$933.55) per week.
- 3) The defendants shall pay to the claimant TPD benefits as follows:
 - a. Thirty-one (31) weeks at the rate of one hundred nine and 95/100 dollars (\$109.95) per week;
 - b. Seven (7) weeks at the rate of one hundred nine and 36/100 dollars (\$109.36) per week;
 - c. Six (6) weeks at the rate of three hundred fifty-five and 44/100 dollars (\$355.44) per week; and
 - d. Five (5) weeks at the rate of five hundred sixteen and 33/100 dollars (\$516.33) per week.
- 4) The defendants shall pay to the claimant penalty benefits in the amount of two thousand five hundred and 00/100 dollars (\$2,500.00).
- 5) The defendants shall pay accrued weekly benefits in a lump sum.

- 6) The defendants shall pay interest on unpaid weekly benefits awarded herein as set forth in Iowa Code section 85.30. 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 Gamble, File No. 5054686.
- 7) The defendants shall receive credit for PPD benefits previously paid.
- 8) The defendants shall pay Etherington the cost of Dr. Kuhnlein's IME in the amount of five thousand one hundred eighty-two and 50/100 dollars (\$5,182.50).
- 9) The defendants shall file subsequent reports of injury as required by Rule 876 IAC 3.1(2).
- 10) The defendants shall pay to the claimant one hundred and 00/100 dollars (\$100.00) for the filing fee as a taxed cost.

Signed and filed this 18th day of May, 2020.


BENJAMIN G. HUMPHREY
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Nick Platt (via WCES)

James Russell (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.