BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JANET MARSHALL,	:	
Claimant,	:	File No. 22700386.03
vs.	:	
TM, INC., d/b/a HODGE CO., INC.,	:	ARBITRATION DECISION
Employer,	:	
and	:	
EMPLOYERS ASSURANCE CO.,	:	
Insurance Carrier, Defendants.	:	Head Notes: 1802; 1803; 2200; 2500; 2700; 4000

STATEMENT OF THE CASE

The claimant, Janet Marshall, filed a petition for arbitration seeking workers' compensation benefits from employer TM, Inc., d/b/a Hodge Co., Inc. ("Hodge") and their insurer Employers Assurance Company. Makayla Augustine appeared on behalf of the claimant. Nathan McConkey appeared on behalf of the defendants.

The matter came on for hearing on July 25, 2023, before Deputy Workers' Compensation Commissioner Andrew M. Phillips. Pursuant to an order of the Iowa Workers' Compensation Commissioner, the hearing occurred electronically via Zoom. The hearing proceeded without significant difficulty.

The record in this case consists of Joint Exhibits 1-6, Claimant's Exhibits 1-9, and Defendants' Exhibits A-H. All of the exhibits were received into evidence without objection.

The claimant testified on her own behalf. Sean Quinn testified on behalf of the defendants. Kimberly Blink was appointed the official reporter and custodian of the notes of the proceeding. The evidentiary record closed at the close of the hearing, and the matter was considered fully submitted following briefing by the parties on September 6, 2023.

STIPULATIONS

Through the hearing report, as reviewed at the commencement of the hearing, the parties stipulated and/or established the following:

1. There was an employer-employee relationship at the time of the alleged injury.

2. That the claimant sustained an injury, which arose out of, and in the course of employment on February 14, 2022.

3. That the alleged injury was a cause of temporary disability during a period of recovery.

4. That, at the time of the work injury, the claimant's gross earnings were six hundred ninety-eight and 35/100 dollars ($698.35) per week, that the claimant was married, and entitled to two exemptions. The resulting stipulated weekly compensation rate was four hundred seventy-three and 67/100 dollars ($473.67).

5. That, prior to the hearing, the claimant was paid 2.2 weeks of compensation at the stipulated rate of compensation.

The defendants waived their affirmative defenses.

The parties are now bound by their stipulations.

ISSUES

The parties submitted the following issues for determination:

1. Whether the alleged injury is a cause of permanent disability.

2. Whether the claimant is entitled to temporary disability and/or healing period benefits from March 15, 2022, to June 1, 2023, and whether the claimant was off work during this period of time.

3. The extent of permanent partial disability benefits, should any be awarded.

4. Whether the disability is a scheduled member disability to the left upper extremity or the left thumb.

5. The proper commencement date for permanent partial disability benefits, should any be awarded.

6. Whether the claimant refused suitable work pursuant to Iowa Code section 85.33.

7. Whether the claimant is entitled to payment of certain medical expenses.

8. With regard to the disputed medical expenses:

a. Whether the fees or prices charged by providers were fair and reasonable.
b. Whether the treatment was reasonable and necessary.
c. Whether the medical providers would testify as to the reasonableness of their fees and/or treatment.
d. Whether the listed expenses were causally connected to the work injury.
e. Whether the listed expenses were at least causally connected to the medical conditions upon which the claim of injury is based.
f. Whether the requested expenses were authorized by defendants.

9. Whether the claimant is entitled to reimbursement for an independent medical evaluation ("IME") pursuant to Iowa Code section 85.39.

10. Whether an award of penalty benefits pursuant to Iowa Code section 86.13 is appropriate.

11. Whether apportionment is appropriate.

12. Whether the claimant is entitled to a specific taxation of costs, and the amount of those costs.

FINDINGS OF FACT

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

Janet Marshall, the claimant, was 67 years old at the time of the hearing. (Testimony). She was born in Chicago, Illinois, and attended high school in Des Plaines, Illinois. (Testimony). She graduated from high school in 1972. (Testimony). She then attended two years of college, taking medical courses. (Testimony). She eventually earned a certification as a Certified Nursing Assistant ("CNA"). (Testimony).

From 1972 to 2002, Ms. Marshall was primarily engaged in employment as a CNA. (Testimony). She also worked as an EMT, and then briefly went to school for respiratory therapy. (Testimony).

In 2002, Ms. Marshall moved from Chicago, Illinois, to Davenport, Iowa. (Testimony). She recounted the impetus for her move from Chicago as a violent robbery during which her jaw was broken in five places. (Testimony). Upon arriving in Iowa, she sought employment through a temporary employment agency known as Labor Ready. (Testimony). She then found employment through Express, QPS Staffing, and PeopleReady. (Testimony). She worked as a general laborer in in-home health for all of these temporary agencies. (Testimony).

Some previous medical records were included in the record, including a visit from October of 2013. (Joint Exhibit 1:1). Ms. Marshall had leg cramps due to diarrhea. (JE 1:1). She also had chronic diabetes. (JE 1:1).

In 2016, Ms. Marshall treated for low back pain and diabetes. (JE 1:2-3). Ms. Marshall had severe osteoarthritis and diabetes, and requested a form for her to take Davenport city transit. (JE 1:4).

Ms. Marshall recounted several prior surgeries, including ankle surgery, jaw surgery, shoulder surgery, right carpal tunnel surgery, two back surgeries, and a right trigger thumb. (Testimony). She also injured her left hip in 2019 after slipping on black ice while feeding the homeless through her work at King's Harvest. (Testimony).

Ms. Marshall had an IME with Robert Rondinelli, M.D., Ph.D., C.I.M.E., on June 25, 2020, relating to an October 29, 2019, work incident. (Defendants' Exhibit B:1-10). Dr. Rondinelli noted that Ms. Marshall fell onto her left side on October 29, 2019. (DE B:2). The result was left hip pain, facial pain, and mild neck pain. (DE B:2). Dr. Rondinelli issued certain opinions regarding the claimant's left hip issues. (DE B).

QPS placed Ms. Marshall at Hodge, where she worked for six to seven months before being hired on as an employee by Hodge in December of 2021. (Testimony; DE E:1). Her title was warehouse janitor. (DE E:1). At Hodge, she swept bathrooms, cleaned sinks, washed mirrors, cleaned toilets, cleaned the break room, removed garbage, dusted, swept hallways, and mopped, throughout the Hodge plant. (Testimony).

On February 14, 2022, Ms. Marshall was sitting on a wheeled bench. (Testimony). She arose from the bench to go to her morning meeting. (Testimony). Unbeknownst to her, one of her shoelaces became wrapped in the wheel. (Testimony). As she began to walk, she fell towards her left side. (Testimony). She tried to catch herself with her left hand. (Testimony). Her hand struck the wall, and she ended up falling onto her left side. (Testimony). Her hand struck the wall "a little past the wrist going up the thumb, the fatty part of [her] thumb and [her] wrist." (Testimony).

She attended the morning meeting, and noticed that she could not bend her left thumb. (Testimony). She also noted that her left hand began to swell from the top of her wrist towards her thumb. (Testimony). Specifically, she noted swelling to "that fatty part and the bone right there and the thumb part just below the nail." (Testimony). She told "Kaleb" after the meeting, and was sent to seek medical care. (Testimony).

Ms. Marshall visited Naomi Gunti-Chelli, M.D., at Concentra on February 14, 2022, following her work incident. (JE 2:8-13). Ms. Marshall complained of left hip and left hand injuries. (JE 2:8). Ms. Marshall reported to Dr. Gunti-Chelli that her foot became caught on a table leg when she was removing cups from the table. (JE 2:8). She caught herself on the table, and her hand hit the wall. (JE 2:8). Following the incident, she had pain and swelling in the left lateral hand that radiated to her left hand and left forearm. (JE 2:8-9). She also noted twisting her hip resulting in pain to the left lateral hip. (JE 2:8). Her hip pain caused a gait disturbance. (JE 2:9). Dr. Gunti-Chelli observed that the claimant had swelling and tenderness in the radial portal site. (JE 2:9). She had swelling and pain with movement of the thumb. (JE 2:9). She displayed limited and painful range of motion across the thumb, except with IP extension and MCP extension. (JE 2:9). The doctor found a decreased grip strength on the left. (JE 2:10). Ms. Marshall was diagnosed with a contusion of the left hip and thigh and of the

left hand. (JE 2:10). A thumb brace was ordered, along with injections for the hip. (JE 2:10). The doctor allowed the claimant to return to work on modified, sedentary work. (JE 2:11). She allowed the claimant to stand and walk occasionally. (JE 2:11). She also prohibited the claimant from using tools with the left upper extremity, along with wearing a splint or brace on her left upper extremity. (JE 2:11).

Following the restrictions provided by Dr. Gunti-Chelli, Ms. Marshall returned to work at Hodge working modified duty. (Testimony). Hodge had her sitting while sorting and counting certain parts. (Testimony). She then packed the parts. (Testimony). She could only use her right hand in performing this task. (Testimony). During this time, her left hand was purple and red in color with increased swelling. (Testimony).

Dr. Gunti-Chelli examined Ms. Marshall again on February 17, 2022, for her left hip and left hand injuries. (JE 2:14-17). Ms. Marshall complained of pain with popping in the left thumb that was aggravated by flexion. (JE 2:14). Pain radiated to her left arm. (JE 2:14). Her left hip pain was aggravated by walking. (JE 2:14). The doctor noted swelling to the left wrist, along with tenderness in the radial portal site. (JE 2:15). Ms. Marshall continued to display painful limited range of motion with her left thumb, along with decreased grip strength. (JE 2:15). Dr. Gunti-Chelli's diagnoses remained unchanged. (JE 2:16). She noted a consideration of physical therapy at future appointments, and educated the claimant on progressing activity with healing measures. (JE 2:16). Dr. Gunti-Chelli's restrictions remained unchanged. (JE 2:17).

Dr. Gunti-Chelli saw Ms. Marshall again on February 24, 2022. (JE 2:22-27). Ms. Marshall reported sharp shooting pain in her left hip, and reduced range of motion in the left wrist. (JE 2:23). She could not grasp or bend her hand, but was wearing the brace as recommended. (JE 2:23). She continued to display swelling and limited range of motion in the left wrist. (JE 2:24). Dr. Gunti-Chelli's diagnoses of, and restrictions for, Ms. Marshall remained unchanged. (JE 2:24-27). She ordered physical therapy for the claimant. (JE 2:25).

Ms. Marshall commenced physical therapy on February 24, 2022. (JE 2:18-21). She described her pain to the therapist. (JE 2:19-20). The therapist outlined certain goals and provided treatment in support of achieving those goals. (JE 2:21). Ms. Marshall was provided with a home exercise plan. (JE 2:21).

On February 25, 2022, Ms. Marshall had another physical therapy visit. (JE 2:28-31). Her overall progress had been slower than expected. (JE 2:28). She tolerated hand interventions during the visit. (JE 2:28). The claimant rated her pain in her left wrist 9 out of 10. (JE 2:29). Therapy was provided in an attempt to further certain treatment goals. (JE 2:29-31).

Ms. Marshall had an ultrasound of her lower extremity performed on February 25, 2022. (JE 3:44-45). The ultrasound was performed to rule out a deep venous thrombosis. (JE 3:44-45). It showed no deep venous thrombosis. (JE 3:44-45).

Ms. Marshall had continued physical therapy on February 28, 2022. (JE 2:32-34). Her progress continued to be slower than expected. (JE 2:32). She experienced

wrist pain only when she took her brace off. (JE 2:32). She tolerated therapy well. (JE 2:32).

Ms. Marshall recounted striking her left hand and wrist while working light duty on March 2, 2022. (Testimony). She tried to lift tangled parts and pulled too hard on stuck parts. (Testimony). Her hand came back and struck the side of the wooden box containing the parts. (Testimony). She noted that, prior to this date, she used her brace to reduce her swelling. (Testimony). Following this incident, her left hand worsened, including what she agreed was a substantial change to her condition. (Testimony).

Dr. Gunti-Chelli examined Ms. Marshall again on March 2, 2022. (JE 2:39-43). Ms. Marshall reported doing well until she hit her hand against "a cardboard" which caused her to be at "0 [percent] towards recovery." (JE 2:39). She described the pain as constant throbbing. (JE 2:39). She continued to wear her brace and use hot and cold compresses. (JE 2:39). Dr. Gunti-Chelli prescribed Naproxen to treat the left hand issue. (JE 2:41). Ms. Marshall was urged to resume activities that do not produce pain and continue therapy. (JE 2:41, 43). Dr. Gunti-Chelli reiterated her previous restrictions. (JE 2:41-43). When she visited with Dr. Gunti-Chelli on March 2, 2022, Ms. Marshall recalled having a throbbing pain in her left hand, along with an inability to bend her thumb. (Testimony).

She reported for therapy on the same day. (JE 2:35-38). The therapist recounted the claimant striking her hand at work, and noted that she had "regressed in progress." (JE 2:35). She was in more pain, and therapy was not performed for the left wrist. (JE 2:35). The therapist opined that Ms. Marshall had no desire to get better based upon her very poor effort and lack of work ethic. (JE 2:35). The therapist also noted in the record that Ms. Marshall was on her phone for "the majority of the session." (JE 2:35). Ms. Marshall told the therapist that she experienced difficulty sleeping and would like the session to be short. (JE 2:35).

Ms. Marshall recalled the above incident at physical therapy on March 2, 2022. (Testimony). The record indicates that she was inattentive and on her phone during the appointment. (Testimony). She disputed this characterization and indicated that she was sitting in a chair while the therapist dealt with another patient. (Testimony). During this time, she called "Kaleb" to come and get her from her appointment. (Testimony). She alleges that the therapist looked at her hand and told her that no therapy could be performed on that date. (Testimony).

Ms. Marshall testified that she called Hodge the next day and told them that she would like to take paid time off. (Testimony). She then called back the next day and indicated she wanted to take three days of paid time off. (Testimony). She alleges that her supervisor agreed. (Testimony). She testified that she told Hodge that she wanted to see her own personal physician, to which she was told that she could not see her physician "as long as [she] worked for Hodge." (Testimony). Two days after she submitted her time off request, Hodge called her and terminated her because she did not show up to work. (Testimony). According to Hodge witness Sean Quinn, Ms.

Marshall was terminated on March 7, 2022, and a letter was sent to her indicating the same. (Testimony).

Suleman Hussain, M.D., examined Ms. Marshall at ORA Orthopedics on April 18, 2022, for an evaluation of her left hip following a fall in February of 2022. (JE 4:46-47). She indicated that she had pain, weakness, swelling, and stiffness in her left lower extremity. (JE 4:46). She rated her pain 9 out of 10. (JE 4:46). Dr. Hussain also palpated the left thumb, and noted tenderness. (JE 4:46). X-rays of the left hip showed "tonis grade I changes." (JE 4:46). X-rays of the left thumb showed "advanced CMC joint osteoarthritis" with no fractures. (JE 4:46). Dr. Hussain recommended treatment for the left hip, and also recommended that she use a thumb spica brace along with a prescription for Diclofenac cream. (JE 4:47).

On April 26, 2022, Jonathan Winston, M.D., examined the claimant for "debilitating left thumb pain" following a fall. (JE 4:48). Upon examination, Dr. Winston found Ms. Marshall to be "exquisitely painful" over her left thumb CMC joint and thumb A1 pulley. (JE 4:48). Dr. Winston noted that Ms. Marshall had "some hallmarks of arthritis." (JE 4:48). Dr. Winston performed a cortisone injection into the claimant's joint. (JE 4:48). He diagnosed her with "CMC joint arthritis, moderate STT joint arthritis, and a left thumb trigger thumb versus pre trigger thumb." (JE 4:48).

A left hip MRI performed on April 27, 2022, at Genesis Health showed mild insertional tendinopathy of the left gluteus medius/minimus tendons with probable partial tearing. (JE 5:51).

Dr. Gunti-Chelli responded to a note from defendants' counsel dated May 20, 2022. (DE C:1-2). The doctor wrote that Ms. Marshall indicated that she did not fall on February 14, 2022. (DE C:2). Dr. Gunti-Chelli continued, "[w]e would not know about her catching herself on the table without her mentioning it." (DE C:2). The doctor concluded that the notes are taken and finalized while the patient, in this case, Ms. Marshall, was in the room. (DE C:2).

Dr. Hussain examined Ms. Marshall again following a left hip MRI on May 27, 2022. (JE 4:49). Dr. Hussain reviewed the MRI results and opined that there were no acute fractures, but did show mild trochanteric bursitis which was worse on the left than the right. (JE 4:49). Dr. Hussain recommended physical therapy and potentially injections into the hip. (JE 4:49).

On June 7, 2022, Ms. Marshall had a therapy evaluation. (JE 6:53-55). She complained of ongoing pain in her left hip. (JE 6:53). She recollected receiving a cortisone injection which provided minor, but brief relief. (JE 6:53). She requested another injection, but the therapist referred her back to Dr. Hussain. (JE 6:53). Physical therapy was performed in an effort to treat the left hip. (JE 6:53-55).

Ms. Marshall had a left hip corticosteroid injection on June 13, 2022. (JE 4:50).

On June 16, 2022, Chau Nguyen, M.D., issued a note excusing Ms. Marshall from work from June 16, 2022, to June 20, 2022. (JE 1:6). There is no diagnosis listed in the letter. (JE 1:6). Dr. Nguyen wrote another note following the June 16, 2022, visit,

indicating that Ms. Marshall needed work restrictions due to left hip pain. (JE 1:7). The doctor allowed Ms. Marshall to return to regular work or activity after three weeks. (JE 1:7). Ms. Marshall was also provided work restrictions including sedentary work activities, lifting 10 pounds at the most, and no frequent lifting or carrying objects. (JE 1:7).

Another therapy session was held on June 20, 2022. (JE 6:56-57). This was her second attended visit, with two canceled visits noted. (JE 6:56). She had minimal improvement following her second injection. (JE 6:56). She performed quite well in physical therapy "[d]espite high reported pain intensity." (JE 6:56).

On June 30, 2022, Ms. Marshall had another session of physical therapy. (JE 6:58-59). The therapy notes indicated that Ms. Marshall had canceled three visits and not shown up for another. (JE 6:58). She tolerated therapy for her left hip well. (JE 6:58).

Dr. Hussain wrote a letter to defendants' counsel dated July 2, 2022, containing some of his opinions with regard to Ms. Marshall's condition. (DE D:1-4). Dr. Hussain opined that Ms. Marshall had no permanent impairment to her left hip. (DE D:3).

Ms. Marshall had her fifth physical therapy visit on July 7, 2022. (JE 6:60-61). She previously canceled three visits and did not show up for two visits. (JE 6:60). She reported happiness with her progress, and that she had no pain in her hip "for quite some time." (JE 6:60). The range of motion in her left hip was within normal limits. (JE 6:60). She was discharged from physical therapy with a home exercise plan. (JE 6:60).

On July 25, 2022, Ms. Marshall had another therapy evaluation. (JE 6:62-63). She complained of pain in her left thumb along with triggering during range of motion. (JE 6:62). Ms. Marshall reported that pain significantly limited the functional use of her left thumb. (JE 6:62). The therapist opined that there appeared to be "some arthritic changes to the left thumb CMC joint." (JE 6:62). The therapist fabricated a hand based long spica splint in order to rest the CMC, MP and to "limit IP ROM." (JE 6:63). Ms. Marshall told the therapist that the splint was supportive and that she planned to wear it while she slept and intermittently during the day." (JE 6:63). The therapist examined the claimant's range of motion, and found it to be within normal limits with pain reported on full extension and flexion. (JE 6:63). Pain also impeded the claimant's grip and pinch strength. (JE 6:63).

Ms. Marshall had continued physical therapy on August 8, 2022. (JE 6:64). The therapist observed that she had "much improved" grip and pinch strength during this appointment. (JE 6:65).

On August 24, 2022, Ms. Marshall had her third physical therapy visit for her left thumb. (JE 6:66-67). She canceled two visits and did not show up for one visit. (JE 6:66). She told the therapist that her trigger thumb appeared better, but that she continued to have increased pain along the base of the thumb. (JE 6:66). Her pain was located along the CMC joint. (JE 6:67). The therapist recommended that Ms. Marshall return to her ORA provider to discuss her "basal joint pain." (JE 6:67).

The claimant noted that "Kaleb" attended all of her appointments with her. (Testimony).

Robert Rondinelli, M.D., Ph.D., C.I.M.E., F.A.A.P.M.&R., issued an IME report on June 1, 2023, outlining the findings of his IME performed on Ms. Marshall. (Claimant's Exhibit 7:20-30). The report opens with the doctor recounting the incident, and Ms. Marshall's subsequent medical care. (CE 7:21-23). Ms. Marshall complained to Dr. Rondinelli of "multiple issues that have been physically problematic and disabling for more than a decade…" (CE 7:23). Dr. Rondinelli told her that his evaluation was focused on her baseline prior to February 14, 2022, and her condition after that date. (CE 7:23). Ms. Marshall complained of left hand pain, which woke her at night. (CE 7:23). She also had swelling for several hours that reoccurred every few days. (CE 7:23). She located the pain and swelling to the base of her thumb, and she used a spica splint to immobilize her thumb. (CE 7:24). She also medicated with Tylenol, soaked her hand in cold water, and applied heat. (CE 7:24). Ms. Marshall told Dr. Rondinelli that she was not performing a home exercise program. (CE 7:24). Dr. Rondinelli performed an evaluation using the "QuickDASH" method and noted that the AMA Guides to the Evaluation of Permanent Impairment, Sixth Edition, used this tool to help evaluate permanent impairment. (CE 7:24). Based upon this evaluation, Dr. Rondinelli opined that Ms. Marshall had "severe" functional loss. (CE 7:24).

Dr. Rondinelli examined Ms. Marshall and found her to be "mildly histrionic," though still able to cooperate with an examination. (CE 7:24). She ambulated with a left compensated Trendelenburg gait. (CE 7:25). Dr. Rondinelli ruled out the possibility of complex regional pain syndrome. (CE 7:25). He found her to have intact cranial nerves. (CE 7:25). He also observed that she had give-way resistance to wrist flexion and extension. (CE 7:25). She showed "decidedly weaker" grip on the left than the right. (CE 7:25). The doctor measured grip and pinch strength using a dynamometer and pinch meter, respectively. (CE 7:25). He found her to have a left maximum grip of 35 pounds compared to 52 pounds on the right, while her left pinch was 8 pounds compared to 14 pounds on the right. (CE 7:25). Dr. Rondinelli used a goniometer to identify 3 cm of carpometacarpal opposition on the left, compared to 5 cm on the right. (CE 7:26). Dr. Rondinelli took additional measurements including 55 degrees of radial abduction on the right, and 35 degrees on the left, along with 100 percent radial adduction on the right and 50 percent reduction on the left. (CE 7:26). The exam revealed 70 degrees of thumb metacarpal phalangeal flexion on the right and 40 degrees on the left, and 70 degrees of interphalangeal thumb flexion on the right and 45 degrees on the left. (CE 7:25). Finally, "MCP extension" and "[m]aximum IP extension" were full bilaterally. (CE 7:25).

Dr. Rondinelli diagnosed the claimant with a resolved left trigger thumb and left carpometacarpal joint pain with active advanced osteoarthritis, prior trochanteric bursitis and left hip osteoarthritis, chronic low back pain with a history of a fusion, and morbid obesity. (CE 7:26). Dr. Rondinelli opined that the claimant's ongoing left thumb issues were related to the work incident at issue in this case. (CE 7:27). Specifically, Dr. Rondinelli opined that hitting her hand against a wall was "probably sufficient trauma to cause/accelerate or worsen any painful component of her arthritic joint," and trigger

swelling in her left hand. (CE 7:27). Dr. Rondinelli further opined that medical treatment provided to Ms. Marshall was reasonable and necessary considering the circumstances. (CE 7:27-28). He recommended additional cortisone injections to address any recurring triggering in the left thumb. (CE 7:28).

Dr. Rondinelli opined that Ms. Marshall achieved maximum medical improvement as of the date of his evaluation. (CE 7:28). Dr. Rondinelli used Table 16-9 of the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, to opine that her CMC opposition of the right thumb limited to 5/8 cm was "worth 5%" while the left side to 3/8 cm is "worth 13% TI, respectively." (CE 7:28). Dr. Rondinelli continued:

> According to Table 16-8A on page 459, her radial abduction right side to 55 degrees is worth 0% right TI; left side to 35 degrees is worth 3% left TI, respectively. According to table 16-8B on page 459, her radial adduction right side to 6 cm (lacks 2 cm) is worth 1% right TI; left side to 3 cm (lacks 5 cm) is worth 6% left TI, respectively. With respect to thumb MCP flexion and Figure 16-15 on page 457, right side to 70 degrees is worth 0% right TI; left side to 40 degrees is worth 2% left TI, respectively. MCP extension is full bilaterally and is worth 0% right TI and 0% left TI, respectively. With respect to Figure 16-12 on page 456, IP flexion right side to 70 degrees is worth 1% right TI; left side to 45 degrees is worth 2% left TI, respectively. IP extension is full bilaterally and is worth 0% right TI and 0% left TI respectively.

(CE 7:29). In summation, Dr. Rondinelli used the right unaffected side as a control with thumb impairment of 7 percent, in contrast to the 26 percent left "TI." (CE 7:29). Dr. Rondinelli subtracted the right thumb impairment from the left thumb impairment to arrive at a 19 percent left thumb impairment estimate. (CE 7:29). Dr. Rondinelli then converted this to an 8 percent hand impairment and a 7 percent upper extremity impairment. (CE 7:29).

Dr. Rondinelli also found impairment based upon the strength loss index, which takes into account grip strength and pinch strength. (CE 7:29). On the left side, Dr. Rondinelli opined that Ms. Marshall had a strength loss index of 15 percent, which, according to Table 16-34 of the Guides, resulted in a 10 percent left upper extremity impairment. (CE 7:29). For pinch strength testing, the result of Dr. Rondinelli's measurements was a 43 percent strength loss index. (CE 7:29). This resulted in a 20 percent impairment to the left upper extremity based upon Table 16-34. (CE 7:29). Dr. Rondinelli again references the "QuickDASH" index" and recommended combining the left upper extremity impairments "due to weakness and pain" with the left upper extremity impairments due to deficits in range of motion to arrive at a 25 percent left upper extremity impairment. (CE 7:29). There is no indication in Dr. Rondinelli's report as to what portion of the Guides allows him to combine these ratings, or why these impairments were to the left upper extremity as a whole rather than an impairment to the left thumb. (CE 7).

Dr. Rondinelli recommended that Ms. Marshall avoid use of her left hand for repetitive or forceful work-related activity, and limit left hand carrying to only 5 pounds

on an occasional basis. (CE 7:30). He also allowed Ms. Marshall to work in sedentary activity frequently, so long as she wears her thumb-spica splint while working with her left hand. (CE 7:30).

The claimant recalled seeing Dr. Rondinelli for about two and a half hours. (Testimony). Dr. Rondinelli indicated that he met with her for 90 minutes. (CE 7:20). She recalled that he performed tests on her, including "pinch[ing] a little thing to see the strength in [her] left hand." (Testimony). He also observed her walking back and forth. (Testimony).

On July 13, 2023, Dr. Winston issued a letter indicating that, based upon the AMA Guides to the Evaluation of Disease and Injury Causation, Second Edition, Ms. Marshall experienced a temporary aggravation of a pre-existing condition. (DE A:3). Since this was a temporary aggravation, Dr. Winston opined that the claimant had no permanent impairment, and "returned to her baseline by July 12, 2022." (DE A:3). Dr. Winston later revised this letter on July 19, 2023, to reference the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, to opine that Ms. Marshall did not have any permanent impairment stemming from her February 14, 2022, work incident. (DE A:4).

Ms. Marshall worked for the Friendly Thrift Store for a short time in early 2023. (Testimony). She put clothing on hangers and hung them in their proper locations. (Testimony). She would also check vouchers and ensure that the customer was taking the proper amount of clothing pursuant to their voucher. (Testimony). The job did not require her to use her left upper extremity. (Testimony).

At the time of the hearing, Ms. Marshall continued to have swelling in her left thumb. (Testimony). If she used her left thumb on a frequent basis, the swelling could become so severe that she could not bend her thumb until it dissipated. (Testimony). She wore a splint made for her by the physical therapist. (Testimony). She testified to wearing the splint three to four times per week, "or whenever [she] [felt] [her] hand stiffening and starting to swell…" (Testimony).

She testified that she tried not to use her left hand as much because of her ongoing swelling and stiffness. (Testimony). She also testified that her left thumb would cramp. (Testimony). She felt that her left upper extremity only functioned at 50 percent of her pre-injury capabilities. (Testimony). She indicated that she could no longer lift bags the way she used to, or mop or sweep, or vacuum. (Testimony). Finally, she concluded that she had no issues with her left thumb or wrist prior to her February 14, 2022, work incident. (Testimony).

Sean Quinn testified on behalf of Hodge. (Testimony). He has been a human resource manager for Hodge for 24 years. (Testimony). He testified that he is involved in recruiting, onboarding, handling employee complaints or concerns, and advised HR administrators on his team of how to handle certain human resource situations. (Testimony). Mr. Quinn recounted that Ms. Marshall returned to light duty employment with Hodge, but that the offer for her return was never put into writing. (Testimony). He indicated that he was unaware of Ms. Marshall requesting paid time off following her

March 2, 2022, incident, and that she was subsequently fired due to being considered a "no call/no show" for three consecutive days. (Testimony).

CONCLUSIONS OF LAW

The party who would suffer loss if an issue were not established has the burden of proving that issue by a preponderance of the evidence. Iowa Rule of Appellate Procedure 6.904(3).

Temporary Disability

The claimant clarified their position as to their alleged entitlement to temporary disability benefits in their post-hearing brief. Specifically, the claimant is seeking temporary disability benefits from March 2, 2022, to February 20, 2023, and then from March 24, 2023, to June 1, 2023.

As a general rule, "temporary total disability compensation benefits and healing-period compensation benefits refer to the same condition." Clark v. Vicorp Rest., Inc., 696 N.W.2d 596 604 (Iowa 2005). The purpose of temporary total disability benefits and healing period benefits is to "partially reimburse the employee for the loss of earnings" during a period of recovery from the condition. Id. The appropriate type of benefits depends on whether or not the employee has a permanent disability. Dunlap v. Action Warehouse, 824 N.W.2d 545, 556 (Iowa Ct. App. 2012).

When an injured worker has been unable to work during a period of recuperation from an injury that did not produce permanent disability, the worker is entitled to temporary total disability benefits during the time the worker is disabled by the injury.

Iowa Code 85.33(1) provides

> ...the employer shall pay to an employee for injury producing temporary total disability weekly compensation benefits, as provided in section 85.32, until the employee has returned to work or is medically capable of returning to employment substantially similar to the first employment in which the employee was engaged at the time of injury, whichever occurs first.

Temporary total disability benefits cease when the employee returns to work, or is medically capable of returning to substantially similar employment.

Iowa Code 85.34(1) provides that healing period benefits are payable to an injured worker who has suffered permanent partial disability until: (1) the worker has returned to work; (2) the worker is medically capable of returning to substantially similar employment; or, (3) the worker has achieved maximum medical recovery. The first of the three items to occur ends a healing period. See Waldinger Corp. v. Mettler, 817 N.W.2d 1 (Iowa 2012); Evenson v. Winnebago Indus., 881 N.W.2d 360 (Iowa 2016); Crabtree v. Tri-City Elec. Co., File No. 5059572 (App., Mar. 20, 2020). The healing period can be considered the period during which there is a reasonable expectation of improvement of the disabling condition. See Armstrong Tire & Rubber Co. v. Kubli, 312 N.W.2d 60 (Iowa App. 1981). Healing period benefits can be interrupted or intermittent.

Teel v. McCord, 394 N.W.2d 405 (Iowa 1986). Compensation for permanent partial disability shall begin at the termination of the healing period. Id.

An employee has a temporary partial disability when, because of the employee's medical condition, "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 the injury, but is able to perform other work consistent with the employee's disability." Iowa Code 85.33(2). Temporary partial disability benefits are payable in lieu of temporary total disability and healing period benefits, due to the reduction in earning ability as a result of the employee's temporary partial disability, and "shall not be considered benefits payable to an employee, upon termination of temporary partial or temporary total disability, the healing period, or permanent partial disability, because the employee is not able to secure work paying weekly earnings equal to the employee's weekly earnings at the time of the injury." Id.

Additionally, Iowa Code 85.33(3) provides in pertinent part:

> If an employee is temporarily, partially disabled and the employer for whom the employee was working at the time of the injury offers to the employee suitable work consistent with the employee's disability the employee shall accept the suitable work, and be compensated with temporary partial benefits. If the employee refuses to accept the suitable work with the same employer, the employee shall not be compensated with temporary partial, temporary total, or healing period benefits during the period of the refusal.

Iowa Code 85.33(3).

Our statute also requires an employer to communicate an offer of temporary work to the employee in writing. See Iowa Code section 85.33(3)(b). This communication shall include the details of any lodging, meals, or transportation. Id. It also should include the duties expected of the employee. Central Iowa Fencing, Ltd. v. Hays, 986 N.W.2d 880 (Iowa App. 2022). The Court of Appeals in Central Iowa Fencing determined that Iowa Code section 85.33(a) worked in concert with Iowa Code section 85.33(b) insofar as the statutory requirement of a written job offer along with a written refusal of a job offer by the employee guaranteed that evidence existed to hold either party accountable. Id.

The Iowa Supreme Court held that there is a two-part test to determine eligibility under Iowa Code 85.33(3): "(1) whether the employee was offered suitable work, (2) which the employee refused. If so, benefits cannot be awarded, as provided in section 85.33(3)." Schutjer v. Algona Manor Care Center, 780 N.W.2d 549, 559 (Iowa 2010). "If the employer fails to offer suitable work, the employee will not be disqualified from receiving benefits regardless of the employee's motive for refusing the unsuitable work." Neal v. Annett Holdings, Inc., 814 N.W.2d 512, 519 (Iowa 2012). If an employee refuses an offer of temporary work by claiming that the work is not suitable, the employee must communicate the refusal, and reasons for refusal, to the employer in writing when the offer of work is refused. Iowa Code section 85.33(3)(b). If an employee does not communicate the reason for a refusal in writing, the employee is

precluded from raising suitability of the work as the reason for refusal until the reason for the refusal is communicated in writing to the employer. Id.

This case presents a unique fact pattern. It is undisputed that Hodge failed to make Ms. Marshall a written offer of temporary work. Even Hodge's corporate representative testified that he could find no record of Hodge sending any sort of written documentation regarding the temporary part sorting position in which Ms. Marshall was placed. However, Ms. Marshall acknowledged that she returned to work for a time with Hodge in this part sorting position. It seems counterintuitive that Ms. Marshall would automatically qualify for temporary disability benefits pursuant to Iowa Code section 85.33 because Hodge did not present her with a written offer according to the terms of Iowa Code section 85.33(3)(b) when she admittedly returned to work at Hodge in a modified duty position. Ms. Marshall alleges that the conditions of the temporary position did not meet the restrictions provided by Dr. Gunti-Chelli. Part of the problem presented by the lack of a written offer from Hodge is that there is no documentation, besides Ms. Marshall's testimony on the record, of her job duties while she worked in a modified duty position.

Ms. Marshall testified that she had to use her hands in order to sort and count parts in a box. She was not very specific as to any other job duties, or whether she was allowed to sit or stand. She also was not specific as to whether or not she was required to use her left hand in carrying out this position. She indicated that she *did* use her left hand, but again, the record is unclear as to whether she was required to do so. Additionally, Ms. Marshall was a very poor historian during her testimony. She needed to be reminded of certain items on more than one occasion. This damaged her credibility, and provides doubt as to whether or not her testimony was accurate. Much like the Court of Appeals in Central Iowa Fencing, I conclude that having a written offer of temporary employment would have helped provide accountability to both the claimant and Hodge.

Likewise, Hodge alleges that Ms. Marshall voluntarily resigned her position, and thus improperly refused employment with Hodge. Accordingly, Hodge asserts that Ms. Marshall's benefits should cease as of her termination on March 7, 2022. The problem for Hodge is that the temporary work performed by Ms. Marshall was not properly offered. Hodge failed to provide an offer in writing outlining the terms of their temporary employment. Therefore, whether Ms. Marshall improperly refused work is moot.

Based upon the foregoing, I conclude that Ms. Marshall is entitled to temporary disability benefits. Ms. Marshall stopped working at Hodge on March 2, 2022. She was terminated effective March 7, 2022. Benefits should commence on March 2, 2022.

Ms. Marshall worked for a short time between February 20, 2023, and March 24, 2023. There is no indication as to Ms. Marshall's wages during this time, or any detailed description of her job duties. She testified that she hung clothing and helped monitor vouchers for those in need of clothing. However, as noted above, Ms. Marshall was not an accurate historian. Without any objective proof of her duties at this employer, I do not find that she provided evidence to meet her burden of proof of entitlement to temporary disability benefits during this time period.

The question becomes when one of the potential triggering events occurred that would cause temporary disability benefits to cease. As discussed in more detail below, Ms. Marshall would be entitled to healing period benefits, as her thumb injury caused her to suffer permanent impairment. Therefore, I must examine which occurred first: Ms. Marshall returned to work, Ms. Marshall was medically capable of returning to substantially similar employment, or Ms. Marshall achieved MMI.

Obviously, Ms. Marshall returned to work for a brief period of time at a thrift store. There is no indication in the record that she could not perform this employment adequately. She testified that she placed clothing on hangers and then hung the hanger. She also checked vouchers of customers to determine which clothing they may receive. The record does not provide an explanation as to why Ms. Marshall stopped working at the thrift store. Healing periods can be intermittent or interrupted as noted in Teel, 394 N.W.2d at 405.

Turning to the medical evidence, there are several opinions from various medical providers. On June 16, 2022, Dr. Nguyen examined Ms. Marshall for left hip pain. During this time, Ms. Marshall's treatment appeared to be exclusively to her left hip. She made no mention during this visit of left thumb pain. She also did not have left thumb treatment between April 26, 2022, and July 25, 2022. Dr. Nguyen concluded that Ms. Marshall should be off work from June 16, 2022, to June 20, 2022, for her left hip issues. He provided her with work restrictions, but noted that she could return to regular work or activities after three weeks. This would be July 12, 2022.

Ms. Marshall never saw Dr. Gunti-Chelli again following her visit with Dr. Nguyen. So, it does not appear that her thumb restrictions were ever re-addressed. They also were never lifted by any physician. Dr. Rondinelli performed an IME, and issued a report on June 1, 2023. He concluded that Ms. Marshall achieved MMI on June 1, 2023.

Treating physician Dr. Winston produced a letter on July 13, 2023, indicating that Ms. Marshall returned to her baseline by July 12, 2022. Dr. Winston issued another letter updating his opinions. Dr. Winston's letters are quite late in time, and appear to have been solicited by Hodge.

I find the opinions of Dr. Rondinelli to be most convincing on this issue. Dr. Rondinelli performed a thorough physical examination, lasting almost two hours. He opined that Ms. Marshall achieved MMI effective June 1, 2023. Dr. Nguyen's opinions appear to be centered on the left hip issue. He makes no mention in his letter as to any ongoing left thumb or hand issues. The letters issued by Dr. Winston are quite late in time in comparison to when Dr. Winston provided Ms. Marshall with treatment. They also lack considerable detail or discussion. There is no indication that Dr. Gunti-Chelli's restrictions were ever lifted. Certainly, no doctor from ORA made mention of any changes to restrictions or impairment until July of 2023.

Therefore, I find that the claimant is entitled to healing period benefits from March 2, 2022, to February 20, 2023, and then from March 24, 2023, to June 1, 2023.

Permanent Disability

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

The question of medical causation is "essentially within the domain of expert testimony." Cedar Rapids Cmty. Sch. Dist. v. Pease, 807 N.W.2d 839, 844-45 (Iowa 2011). The commissioner, as the trier of fact, must "weigh the evidence and measure the credibility of witnesses." Id. The trier of fact may accept or reject expert testimony, even if uncontroverted, in whole or in part. Frye, 569 N.W.2d at 156. When considering the weight of an expert opinion, the fact-finder may consider whether the examination occurred shortly after the claimant was injured, the compensation arrangement, the nature and extent of the examination, the expert's education, experience, training, and practice, and "all other factors which bear upon the weight and value" of the opinion. Rockwell Graphic Sys., Inc. v. Prince, 366 N.W.2d 187, 192 (Iowa 1985). Unrebutted expert medical testimony cannot be summarily rejected. Poula v. Siouxland Wall & Ceiling, Inc., 516 N.W.2d 910 (Iowa App. 1994). Supportive lay testimony may be used to buttress expert testimony, and therefore is also relevant and material to the causation question.

It is noted that the claimant had pre-existing osteoarthritis in her left thumb. This appears to be a condition that pre-existed the work incident. The defendants argue that this pre-existing issue should be apportioned out pursuant to Iowa Code section 85.34(7). However, there is limited evidence that the claimant's thumb was symptomatic prior to the work incident in February of 2022.

Iowa employers take an employee subject to any active or dormant health problems, and must exercise care to avoid injury to both the weak and infirm and the strong and healthy. Hanson v. Dickinson, 188 Iowa 728, 176 N.W. 823 (1920). While a claimant must show that the injury proximately caused the medical condition sought to be compensable, it is well established that a cause is "proximate" when it is a substantial factor, or even the primary or most substantial cause to be compensable under the Iowa workers' compensation system. Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417 (Iowa 1994); Blacksmith v. All-American, Inc., 290 N.W.2d 348 (Iowa 1980).

It is well established in workers' compensation that "if a claimant had a preexisting condition or disability, aggravated, accelerated, worsened, or 'lighted up' by an injury which arose out of and in the course of employment resulting in a disability found to exist," the claimant is entitled to compensation. Iowa Dep't of Transp., State of Iowa v. Van Cannon, 459 N.W.2d 900, 904 (Iowa 1990). The Iowa Supreme Court has held,

> [A] disease which under any rational work is likely to progress so as to finally disable an employee does not become a "personal injury" under our Workmen's Compensation Act merely because it reaches a point of disablement while work an employer is being pursued. It is only when there is direct causal connection between exertion of the employment and the injury that a compensation award can be made. The question is whether the diseased condition was the cause or whether the employment was a proximate contributing cause.

Musselman v. Ce. Tel. Co., 261 Iowa 352, 359-60, 154 N.W.2d 128, 132 (1967).

Based upon the evidence presented in this case, Ms. Marshall had osteoarthritis prior to her fall incident. The arthritis then became symptomatic following her February 14, 2022, fall. The claimant sustained injuries to her left hip and left thumb on February 14, 2022, when she tripped and fell. She sustained no permanent injuries to her left hip. After her fall, she visited Dr. Gunti-Chelli and complained of swelling and pain with movement of the thumb. The doctor examined her and noted that she had limited range of motion across the thumb, except with IP extension and MCP extension. She also displayed reduced grip strength. The doctor ordered a thumb brace for the claimant. Ms. Marshall continued to follow-up with Dr. Gunti-Chelli for pain in her left wrist and thumb. She eventually underwent physical therapy.

On March 2, 2022, Ms. Marshall was working light duty at Hodge. She lifted some parts that were tangled and stuck. Her hand then came back and struck the inside of the wooden box containing the vehicle parts. She then struck her hand on the inside of the wooden box. She testified that the result of this incident was a substantial worsening of her symptoms. However, in listening to Ms. Marshall's testimony, it was clear that she was a poor historian.

Ms. Marshall then saw Dr. Winston. Dr. Winston provided the claimant with a cortisone injection into the claimant's left thumb joint. He diagnosed her with CMC joint arthritis, moderate STT joint arthritis, and a left thumb trigger thumb. Ms. Marshall did not have much treatment following the cortisone injection until July of 2022. At that time, the therapist fabricated a joint spica in order to help limit range of motion in the thumb. Ms. Marshall then had several physical therapy visits, and by August 24, 2022, she continued to complain of increased pain along the base of her thumb. Namely, her pain was located along the CMC joint. The therapist recommended that Ms. Marshall return to ORA for her basal joint pain, but there are no records indicating that she ever returned to ORA.

Dr. Rondinelli then performed an IME and issued a report outlining his opinions on June 1, 2023. Dr. Rondinelli made mention of the "QuickDASH" method as employed by the AMA Guides to the Evaluation of Permanent Impairment, Sixth Edition. I would note that we use the Fifth Edition of the Guides to the Evaluation of Permanent Impairment. See 876 Iowa Administrative Code 2.4. However, Dr. Rondinelli's opinions are not based entirely on the Sixth Edition. Therefore, I decline to discount Dr. Rondinelli's opinions in their entirety.

Dr. Rondinelli opined that Ms. Marshall's injury on February 14, 2022, resulted in a permanent impairment. He provided opinions on permanent impairment to the thumb, hand, and left upper extremity. Dr. Rondinelli's opinions are based upon his review of medical records, his examination of Ms. Marshall, and his interview of Ms. Marshall. The evidence documented in his report is largely consistent with the testimony of Ms. Marshall.

Dr. Winston was a treating physician for Ms. Marshall. He issued two letters. The first was dated July 13, 2023. In that letter, Dr. Winston used the AMA Guides to the Evaluation of Disease and Injury Causation, Second Edition, to opine that Ms. Marshall had a temporary aggravation of her pre-existing condition. He further concluded that Ms. Marshall returned to her baseline condition by July 12, 2022. Dr. Winston issued a revised report on July 19, 2023. The only change is that his second letter referenced the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, to opine that Ms. Marshall did not have a permanent impairment as a result of her February 14, 2022, work injury.

The opinions of Dr. Rondinelli, along with Ms. Marshall's medical records and her testimony represent that she sustained a permanent impairment as a result of her February 14, 2022, work incident. It appears from the evidence that Ms. Marshall had arthritis in her thumb. Certainly, having reviewed the medical records, Dr. Rondinelli was aware of the claimant's pre-existing arthritis. Following her February 14, 2022, work incident, her symptoms became aggravated. As noted by Dr. Rondinelli, the result is a permanent impairment.

Under the Iowa Workers' Compensation Act, permanent partial disability is compensated either for a loss of use of a scheduled member under Iowa Code 85.34(2)(a)-(u) or for loss of earning capacity under Iowa Code 85.34(2)(v). The extent of scheduled member disability benefits to which an injured worker is entitled is determined by using the functional method. Functional disability is "limited to the loss of the physiological capacity of the body or body part." Mortimer v. Fruehauf Corp., 502 N.W.2d 12, 15 (Iowa 1993); Sherman v. Pella Corp., 576 N.W.2d 312 (Iowa 1998).

An injury to a scheduled member may, because of after effects or compensatory change, result in permanent impairment of the body as a whole. Such impairment may in turn be the basis for a rating of industrial disability. It is the anatomical situs of the permanent injury or impairment which determines whether the schedules in Iowa Code 85.34(a) – (u) are applied. Lauhoff Grain v. MacIntosh, 395 N.W.2d 834 (Iowa 1986); Blacksmith v. All-American, Inc., 290 N.W.1d 348 (Iowa 1980); Dailey v. Pooley Lumber Co., 233 Iowa 758, 10 N.W.2d 569 (1943); Soukup v. Shores Co., 222 Iowa 272, 268 N.W. 598 (1936).

Iowa Code 85.34(2)(v) provides:

> In all cases of permanent partial disability other than those hereinabove described or referred to in paragraphs 'a' through 't' hereof, the compensation shall be paid during the number of weeks in relation to five hundred weeks as the reduction in the employee's earning capacity caused by the disability bears in relation to the earning capacity that the employee

> possessed when the injury occurred. A determination of the reduction in the employee's earning capacity caused by the disability shall take into account the permanent partial disability of the employee and the number of years in the future it was reasonably anticipated that the employee would work at the time of the injury. If an employee who is eligible for compensation under this paragraph returns to work or is offered work for which the employee receives or would receive the same or greater salary, wages, or earnings than the employee received at the time of the injury, the employee shall be compensated based only upon the employee's function impairment resulting from the injury, and not in relation to the employee's earning capacity.

Where an injury is limited to a scheduled member, the loss is measured functionally, not industrially. Graves v. Eagle Iron Works, 331 N.W.2d 116 (Iowa 1983).

Iowa Courts have repeatedly stated that for those injuries limited to the schedules in Iowa Code 85.34(2)(a)-(u), this agency must only consider the functional loss of the particular scheduled member involved, and not the other factors which constitute an "industrial disability." Iowa Supreme Court decisions over the years have repeatedly cited favorably language in Soukup v. Shores Co., 222 Iowa 272, 277, 268 N.W. 598, 601 (1936), which states:

> The legislature has definitely fixed the amount of compensation that shall be paid for specific injuries … and that, regardless of the education or qualifications or nature of the particular individual, or of his inability … to engage in employment … the compensation payable … is limited to the amount therein fixed.

Our court has even specifically upheld the constitutionality of the scheduled member compensation scheme. Gilleland v. Armstrong Rubber Co., 524 N.W.2d 404 (Iowa 1994). Permanent partial disabilities are classified as either scheduled or unscheduled. A specific scheduled disability is evaluated by the functional method; the industrial method is used to evaluate an unscheduled disability. Graves, 331 N.W.2d 116; Simbro v. DeLong's Sportswear, 332 N.W.2d 886, 887 (Iowa 1983); Martin v. Skelly Oil Co., 252 Iowa 128, 133, 106 N.W.2d 95, 98 (1960).

When the result of an injury is loss to a scheduled member, the compensation payable is limited to that set forth in the appropriate subdivision of Iowa Code 85.34(2). Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961). "Loss of use of a member is equivalent to "loss" of the member. Moses v. National Union C.M. Co., 194 Iowa 819, 184 N.W. 746 (1921). Pursuant to Iowa Code 85.34(2)(w), the workers' compensation commissioner may equitably prorate compensation payable in those cases wherein the loss is something less than that provided for in the schedule. Blizek v. Eagle Signal Co., 164 N.W.2d 84 (Iowa 1969).

The right of a worker to receive compensation for injuries sustained which arose out of and in the course of employment is statutory. The statute conferring this right can also fix the amount of compensation to be paid for different specific injuries, and the

employee is not entitled to compensation except as provided by statute. Soukup, 222 Iowa 272, 268 N.W. 598.

The next issue for determination involves which body part is permanently impaired. The claimant argues that I should adopt Dr. Rondinelli's 25 percent permanent impairment rating to the left upper extremity. The defendants argue that the claimant has no permanent impairment. It is clear that the claimant did not suffer an impairment to her left upper extremity, as Iowa Code section 85.34(2)(m) provides for compensation based upon the "[t]he loss of two-thirds of that part of an arm between the shoulder joint and the elbow joint…" to be compensated as 250 weeks. Iowa Code section 85.34(2)(a) provides for compensation for the loss of a thumb as 60 weeks. Iowa Code section 85.34(2)(l) provides for compensation for a loss of the hand at 190 weeks.

The claimant did not suffer a permanent impairment to her left upper extremity. Dr. Rondinelli ended up providing a rating for the left upper extremity, but he also measured impairment based upon a number of other aspects, to be discussed herein. I would also note that the claimant did not suffer an impairment to her hand. The claimant indicated that her pain was at the base of her thumb. The therapist built a brace in order to relieve pain in her thumb. Range of motion was taken of her thumb, not other parts of her hand, or her wrist. While Dr. Rondinelli ends up providing an impairment rating based upon the left upper extremity, there is no indication that this was based upon anything other than impairment to the thumb. As noted above, the claimant testified that her pain was located at the base of her thumb and was relieved when she rested her thumb. The preponderance of the evidence indicates that the claimant's impairment is to her left thumb, and not her left hand, or left upper extremity.

Dr. Rondinelli provided a number of justifications for his various impairment ratings. The first measure of permanent impairment used by Dr. Rondinelli is various measurements of range of motion in the left thumb. Based upon these range of motion measurements, and their comparison to the right, unaffected, thumb, Dr. Rondinelli concluded that Ms. Marshall suffered a 19 percent permanent impairment to her left thumb. The Guides recommends using a comparison between "the relevant joint(s) in both extremities." See Guides, page 453.

Dr. Rondinelli then uses the strength loss index to justify certain impairment opinions. The Guides states that strength measurements are "influenced by subjective factors," and as such "further research is needed before loss of grip and pinch strength is given a larger role in impairment evaluation." See Guides, page 507. Further, Section 16.8a of the Guides provides that it is only in a rare case that a loss of strength represents an impairing factor. See Guides, page 508. Therefore, loss of strength should only be considered if impairment has not been considered adequately by other methods in the Guides. Id. Furthermore, strength should only be combined with other impairments if it is based upon unrelated etiologic or pathomechanical causes, "[o]therwise, the impairment ratings based on objective anatomic findings take precedence." Id. The Guides conclude that, "[d]ecreased strength *cannot* be rated in the presence of decreased motion … that prevent effective application of maximal force in the region being evaluated." Id. (emphasis in original).

Dr. Rondinelli does not provide justification in his report as to why he felt that decreased strength or pinch testing would be appropriately combined with range of motion testing. Further, he does not indicate why he tested and provided an impairment rating for decreased strength when there is evidence of decreased range of motion. Therefore, I find that the claimant's impairment to the left thumb should be considered only based upon the impairment to the range of motion as provided by Dr. Rondinelli. I would note that this is not imposing my own rating or guidance. I am using the rating provided by Dr. Rondinelli that conforms with the Guides. I am rejecting the impairment rating provided by Dr. Rondinelli that does not conform with the Guides. Therefore, the claimant is entitled to permanent disability benefits for 19 percent of the left thumb as rated by Dr. Rondinelli for diminished range of motion. The result is 11.4 weeks of benefits, commencing on June 1, 2023 (19 percent x 60 weeks = 11.4 weeks).

Payment of Medical Expenses

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

Pursuant to Iowa Code 85.27, claimant is entitled to payment of reasonable medical expenses incurred for treatment of a work injury. Claimant is entitled to an order of reimbursement if he/she has paid those expenses. Otherwise, claimant is entitled only to an order directing the responsible defendants to make such payments directly to the provider. See Krohn v. State, 420 N.W.2d 463 (Iowa 1988).

In cases where the employer's medical plan covers the medical expenses, claimant is entitled to an order of reimbursement only if he has paid treatment costs; otherwise, the defendants are ordered to make payments directly to the provider. See Krohn, 420 N.W.2d at 463. Where medical payments are made from a plan to which the employer did not contribute, the claimant is entitled to a direct payment. Midwest Ambulance Service v. Ruud, 754 N.W.2d 860, 867-68 (Iowa 2008) ("We therefore hold that the commissioner did not err in ordering direct payment to the claimant for past medical expenses paid through insurance coverage obtained by the claimant independent of any employer contribution."). See also Carl A. Nelson & Co. v. Sloan, 873 N.W.2d 552 (Iowa App. 2015)(Table) 2015 WL 7574232 15-0323.

The employee has the burden of proof to show medical charges are reasonable and necessary, and must produce evidence to that effect. Poindexter v. Grant's Carpet Service, I Iowa Industrial Commissioner Decisions, No. 1, at 195 (1984); McClellon v. Iowa S. Util., 91-92, IAWC, 266-272 (App. 1992).

The employee has the burden of proof in showing that treatment is related to the injury. Auxier v. Woodward State Hospital School, 266 N.W.2d 139 (Iowa 1978), Watson v. Hanes Border Company , No. 1 Industrial Comm'r report 356, 358 (1980)

(claimant failed to prove medical charges were related to the injury where medical records contained nothing related to that injury) See also Bass v. Veith Construction Corp., File No. 5044438 (App. May 27, 2016)(Claimant failed to prove causal connection between injury and claimed medical expenses); Becirevic v. Trinity Health, File No. 5063498 (Arb. December 28, 2018) (Claimant failed to recover on unsupported medical bills)

Nothing in Iowa Code section 85.27 prohibits an injured employee from selecting his or her own medical care at his or her own expense following an injury. Bell Bros. Heating and Air Conditioning v. Gwinn, 779 N.W.2d 193, 205 (Iowa 2010). In order to recover the reasonable expenses of the care, the employee must still prove by a preponderance of the evidence that unauthorized care was reasonable and beneficial. Id. The Court in Bell Bros. concluded that unauthorized medical care is beneficial if it provides a "more favorable medical outcome than would likely have been achieved by the care authorized by the employer." Id.

The claimant seeks reimbursement to the health insurer for one thousand five hundred seventy-three and 31/100 dollars ($1,573.31) in billing related to care with ORA and Genesis. I reviewed the records and the medical billing, and find it appropriate to order the defendants to reimburse the claimant's health insurer(s) for payments made to these providers for the requested billing in Claimant's Exhibit 8.

Penalty

Iowa Code 10A.315(4) provides the basis for awarding penalties against an employer. Iowa Code 10A.315(4) states:

> (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.
>
> (b) The workers' compensation commissioner shall award benefits under this subsection if the commissioner finds both of the following facts:
>
> (1) The employee has demonstrated a denial, delay in payment, or termination of benefits.
>
> (2) The employer has failed to provide a reasonable or probable cause or excuse for the denial, delay in payment, or termination of benefits.
>
> (c) In order to be considered a reasonable or probable cause or excuse under paragraph "b", an excuse shall satisfy all of the following criteria:

(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.

If weekly compensation benefits are not fully paid when due, Iowa Code 10A.315 requires that additional benefits be awarded unless the employer shows reasonable cause or excuse for the delay or denial. Robbennolt v. Snap-On Tools Corp., 555 N.W.2d 229 (Iowa 1996). Delay attributable to the time required to perform a reasonable investigation is not unreasonable. Kiesecker v. Webster City Custom Meats, Inc., 528 N.W.2d 109 (Iowa 1995).

It is also not unreasonable to deny a claim when a good faith issue of law or fact makes the employer's liability fairly debatable. An issue of law is fairly debatable if viable arguments exist in favor of each party. Covia v. Robinson, 507 N.W.2d 411 (Iowa 1993). An issue of fact is fairly debatable if substantial evidence exists which would support a finding favorable to the employer. Gilbert v. USF Holland, Inc., 637 N.W.2d 194 (Iowa 2001). An employer's bare assertion that a claim is fairly debatable is insufficient to avoid imposition of a penalty. The employer must assert facts upon which the commissioner could reasonably find that the claim was "fairly debatable." Meyers v. Holiday Express Corp., 557 N.W.2d 502 (Iowa 1996).

If an employer fails to show reasonable cause or excuse for the delay or denial, the commissioner shall impose a penalty in an amount up to 50-percent of the amount unreasonably delayed or denied. Christensen v. Snap-On Tools Corp., 554 N.W.2d 254 (Iowa 1996). The factors to be considered in determining the amount of the penalty include: the length of the delay, the number of delays, the information available to the employer, and the employer's past record of penalties. Robbennolt, 555 N.W.2d at 238.

For purposes of determining whether an employer has delayed in making payments, payments are considered "made" either (a) when the check addressed to a claimant is mailed, or (b) when the check is delivered personally to the claimant by the employer or its workers' compensation insurer. Robbennolt, 555 N.W.2d at 235-236; Kiesecker, 528 N.W.2d at 112).

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

The claimant argues that imposition of penalty benefits is appropriate, as the defendants did not begin issuing temporary disability benefits as soon as March 2, 2022, when the claimant's employment with Hodge ceased. The claimant further argues that Ms. Marshall was not offered light duty work consistent with Iowa Code section 85.33. The claimant continues by arguing that the defendants would have had no reasonable basis to terminate issuing temporary disability benefits until June 1, 2023. The claimant concludes that the defendants failed to convey any basis for their denial of temporary disability benefits, and therefore, she is entitled to penalty benefits.

The defendants argue that the claimant did not meet her burden to prove entitlement to temporary disability benefits. They also argue that they communicated their reasonable basis for non-payment of temporary disability benefits to claimant's attorney. Finally, the defendants argue that they had a reasonable basis to not pay permanent disability benefits considering the opinions of several doctors.

The first potential basis for awarding penalty benefits is the defendants' failure to pay temporary disability benefits. The claimant worked light duty for Hodge for some time prior to her leaving employment on March 2, 2022. There is no indication that she was working outside of the restrictions provided by Dr. Gunti-Chelli. Again, Ms. Marshall was a poor historian, and her credibility was damaged by this issue. The only indication that she was working outside of the restrictions provided by Dr. Gunti-Chelli is the testimony provided by Ms. Marshall. Granted, this is due to the fact that Hodge did not properly convey a written offer of light duty employment. However, this is still not enough to prove entitlement to penalty benefits.

The next potential basis is that the claimant left employment with Hodge effective March 2, 2022. Subsequent to this, on May 20, 2022, Hodge informed claimant's counsel that they were "looking into weekly benefits," as it appeared that Ms. Marshall was offered work within her restrictions which she refused. Defendants' counsel noted that they were "obtaining further information." There is no indication as to the defendants' next steps of their investigation. As noted above, Ms. Marshall was working for Hodge for a time, seemingly in a light duty capacity. While this was not properly offered, Ms. Marshall still worked for Hodge in this capacity. She then stopped working, and was considered a "no-call no-show" before her termination. It is reasonable that Hodge thought Ms. Marshall could continue to work in a light duty capacity and that she abandoned her position with Hodge. However, it is not reasonable for Hodge to consider Ms. Marshall's refusal to be enough to terminate benefits pursuant to Iowa Code section 85.33 when they admit that they have no proof of a written offer of temporary employment. It is therefore reasonable to award penalty benefits. In this case, I find it appropriate to impose a penalty of 30 percent of temporary disability benefits owed to Ms. Marshall.

Finally, the claimant argues that it would be reasonable to impose a penalty for the defendants' failure to pay the permanent impairment amount discussed by Dr. Rondinelli. Soon after the report of Dr. Rondinelli was issued, the defendants obtained an opinion by Dr. Winston indicating that Ms. Marshall sustained no permanent impairment. This represents a good faith issue of fact that provided the defendants with

a reasonable basis to deny the payment of permanent impairment benefits. Therefore, I decline to award penalty benefits for this issue.

IME Reimbursement Pursuant to Iowa Code section 85.39

The claimant seeks reimbursement for Dr. Rondinelli's IME expenses of four thousand four hundred and 00/100 dollars ($4,400.00).

Iowa Code 85.39(2) states:

> If an evaluation of permanent disability has been made by a physician retained by the employer and the employee believes this evaluation to be too low, the employee shall, upon application to the commissioner and upon delivery of a copy of the application to the employer and its insurance carrier, be reimbursed by the employer the reasonable fee for a subsequent examination by a physician of the employee's own choice, and reasonably necessary transportation expenses incurred for the examination.
>
> . . .
>
> An employer is only liable to reimburse an employee for the cost of an examination conducted pursuant to this subsection if the injury for which the employee is being examined is determined to be compensable under this chapter or chapter 85A or 85B. An employer is not liable for the cost of such an examination if the injury for which the employee is being examined is determined not to be a compensable injury. A determination of the reasonableness of a fee for an examination made pursuant to this subsection shall be based on the typical fee charged by a medical provider to perform an impairment rating in the local area where the examination is conducted.

Iowa Code section 85.39(2).

Defendants are responsible only for reasonable fees associated with claimant's independent medical examination. The claimant has the burden of proving the reasonableness of the expenses incurred for the examination. See Schintgen v. Economy Fire & Casualty Co., File No. 855298 (App. April 26, 1991). An opinion finding a lack of causation is tantamount to a zero percent impairment rating. Kern v. Fenchel, Doster & Buck, P.L.C., 2021 WL 3890603 (Iowa App. 2021).

There is no evidence in the record that the defendants obtained an impairment rating prior to the provision of Dr. Rondinelli's IME. There is also no evidence in the record that the defendants obtained any opinion finding a lack of causation. Therefore, the provisions of Iowa Code section 85.39 were not triggered, and I decline to award the costs of Dr. Rondinelli's IME pursuant to Iowa Code section 85.39.

Costs

Claimant seeks the award of costs as outlined in Claimant's Exhibit 9. Costs are to be assessed at the discretion of the deputy commissioner hearing the case. See 876

Iowa Administrative Code 4.33; Iowa Code 86.40. 876 Iowa Administrative Code 4.33(6) provides:

> [c]osts taxed by the workers' compensation commissioner or a deputy commissioner shall be (1) attendance of a certified shorthand reporter or presence of mechanical means at hearings and evidential depositions, (2) transcription costs when appropriate, (3) costs of service of the original notice and subpoenas, (4) witness fees and expenses as provided by Iowa Code sections 622.69 and 622.72, (5) 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, (6) the reasonable costs of obtaining no more than two doctors' or practitioners' reports, (7) filing fees when appropriate, including convenience fees incurred by using the WCES payment gateway, and (8) costs of persons reviewing health service disputes.

Pursuant to the holding in Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839 (Iowa 2015), only the report of an IME physician, and not the examination itself, can be taxed as a cost according to 876 IAC 4.33(6). The Iowa Supreme Court reasoned, "a physician's report becomes a cost incurred in a hearing because it is used as evidence in lieu of the doctor's testimony," while "[t]he underlying medical expenses associated with the examination do not become costs of a report needed for a hearing, just as they do not become costs of the testimony or deposition." Id. (Noting additionally that "[i]n the context of the assessment of costs, the expenses of the underlying medical treatment and examination are not part of the costs of the report or deposition.") The commissioner has found this rationale applicable to expenses incurred by vocational experts. See Kirkendall v. Cargill Meat Solutions Corp., File No. 5055494 (App. December 17, 2018); Voshell v. Compass Group, USA, Inc., File No. 5056857 (App. September 27, 2019).

The claimant seeks one hundred three and 00/100 dollars ($103.00) in costs for the filing fee and four thousand four hundred and 00/100 dollars ($4,400.00) for the costs of Dr. Rondinelli's IME. Dr. Rondinelli breaks down his costs in his invoice. It appears that six and one-quarter hours were devoted to preparing his report at the rate of five hundred fifty and 00/100 dollars ($550.00) per hour. The result is three thousand four hundred thirty-seven and 50/100 dollars ($3,437.50) in fees for Dr. Rondinelli.

Based upon my discretion, I award the claimant three thousand five hundred forty and 50/100 dollars ($3,540.50) in costs for the filing fee and the reasonable fees of Dr. Rondinelli's report.

ORDER

THEREFORE, IT IS ORDERED:

That the defendants shall pay the claimant healing period benefits from March 2, 2022, to February 20, 2023, and from March 24, 2023, to June 1, 2023, at the stipulated rate.

That the defendants shall pay the claimant 11.4 weeks of permanent partial disability benefits at the stipulated rate of four hundred seventy-three and 67/100 dollars ($473.67), commencing on June 1, 2023.

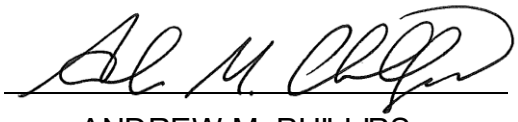
That the defendants shall pay the claimant a penalty equivalent to 30 percent of healing period benefits as awarded herein at the stipulated rate.

That the defendants shall reimburse the claimant three thousand five hundred forty and 50/100 dollars ($3,540.50) for costs incurred.

That the defendants shall pay accrued weekly benefits in a lump sum together with interest. All interest on past due weekly compensation benefits 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 v. AG Leader Technology, File No. 5054686 (App. Apr. 24, 2018).

That the defendant shall file subsequent reports of injury (SROI) as required by this agency pursuant to 876 Iowa Administrative Code 3.1(2) and 876 Iowa Administrative Code 11.7.

Signed and filed this ___8th___ day of November, 2023.



ANDREW M. PHILLIPS
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

MaKayla Augustine (via WCES)

Nathan McConkey (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.