BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

MARIE AZBILL, Claimant, vs. LINN-MAR COMMUNITY SCHOOL DISTRICT, Employer, and UNITED WISCONSIN INSURANCE COMPANY, Insurance Carrier, Defendants.	FILED FEB 14 2019 WORKERS COMPENSATION	File Nos. 5060942, 5060943 ARBITRATION DECISION Head Note Nos.: 1108.50, 1402.40, 1801 1803, 2501, 2502, 2601.10, 2907, 4000.2

STATEMENT OF THE CASE

Marie Azbill, claimant, filed a petition in arbitration seeking workers' compensation benefits from Linn-Mar Community School District, employer and United Wisconsin Insurance Company, insurance carrier, as defendants. Hearing was held on October 29, 2018 in Cedar Rapids, Iowa.

Marie Azbill and Cathy Gauger were the only witnesses to testify live at trial. The evidentiary record also includes Joint Exhibits JE1-JE13, Claimant's Exhibits 1-7, and Defendants' Exhibits A-F.

The parties filed a hearing report at the commencement of the arbitration hearing. On the hearing report, the parties entered into various stipulations. All of those stipulations were accepted and are hereby incorporated into this arbitration decision and no factual or legal issues relative to the parties' stipulations will be raised or discussed in this decision. The parties are now bound by their stipulations.

The parties submitted post-hearing briefs on November 30, 2018.

ISSUES

File No. 5060942 (Date of injury: July 5, 2016)

The parties submitted the following issues for resolution:

1. Whether claimant sustained permanent disability as a result of the stipulated July 5, 2016 work injury? If so, the extent of permanent disability claimant sustained to her upper extremity.

2. Whether penalty benefits are appropriate?

File No. 5060943 (Date of injury: November 10, 2017)

1. Whether claimant sustained temporary disability as a result of the stipulated November 10, 2017 work injury?

2. Whether claimant is entitled to a running award of healing period benefits?

3. If claimant is not entitled to a running award then, whether claimant sustained permanent disability as a result of the stipulated November 10, 2017 work injury? If so, the extent of permanent disability claimant sustained.

4. Whether claimant is entitled to reimbursement pursuant to Iowa 85.39 for an independent medical evaluation (IME)?

5. Whether claimant is entitled to alternate medical care?

6. Whether penalty benefits are appropriate?

FINDINGS OF FACT

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

File No. 5060942 (Date of injury: July 5, 2016)

Claimant, Marie Azbill, is employed by the Linn-Mar Community School District as a custodian. On July 5, 2016, Marie sustained a crush injury to her left hand when her hand was caught between a cement wall and a table. Marie received authorized treatment with Nicholas O. Bingham, M.D. Her treatment included physical therapy. On January 12, 2017, Dr. Bingham returned Marie to work full duty. The notes indicate she continued to have problems with her grip strength and sensation. She was instructed to continue her physical therapy for the three scheduled sessions. She was to follow-up as needed. Dr. Bingham stated she would be at maximum medical improvement (MMI)

after her last physical therapy session. Marie attended those final three session of therapy. There is no evidence in the record to indicate that defendants ever asked Dr. Bingham to provide his opinion regarding permanent impairment. (JE7; Testimony)

In October of 2016, Marie saw Peter D. Pardubsky, M.D. She was referred to him by Dr. Bingham. Dr. Pardubsky noted there was no objective evidence for surgical intervention. He referred Marie back to Dr. Bingham. (JE2)

At the request of the claimant, Farid Manshadi, M.D. performed an IME on July 5, 2018. Dr. Manshadi examined Marie's left hand, including measuring the grip strength in both hands. Dr. Manshadi assigned 20 percent permanent functional impairment to her left upper extremity. This is the only impairment rating in the file. Dr. Manshadi's opinion regarding permanent functional impairment to the left upper extremity is unrebutted. (Claimant's Exhibit 1)

At the time of hearing, Marie continued to experience weakness in her left hand. She also periodically dropped items that she was carrying in her left hand. She had not requested further medical treatment for her left hand. She also had not requested any accommodation from the school for the injury to her left arm. However, she did modify the way she performed some of her job duties. (Testimony; JE2, page 37)

I find Marie has demonstrated by a preponderance of the evidence that she sustained 20 percent permanent impairment to her left upper extremity as a result of the July 5, 2016 work injury. As such, she is entitled to 50 weeks of permanent partial disability benefits commencing on the stipulated date of July 5, 2016. These benefits shall be paid at the stipulated rate of four hundred seventy and 52/100 dollars ($470.52) per week.

Claimant alleges penalty benefits are appropriate for the defendants' unreasonable denial of permanency benefits to Marie. Defendants argue claimant was released from care without restrictions and this equated to a zero percent impairment rating. Defendants do not cite any legal authority for their position. I find that in January of 2017, the authorized treating physician, Dr. Bingham, indicated that Marie would be at MMI after her therapy ended. He noted objective evidence of loss of grip strength. The notes also reflect that Marie complained of diminishing sensation between her first and second metacarpals. Marie testified that she continued to have symptoms during this time period. Despite these facts, there is no evidence in the file to indicate that defendants ever sought an impairment rating form Dr. Bingham or any other medical expert. I find that despite objective evidence of loss of grip strength, defendants did not request an impairment rating from the treating physician. I further find defendants did not establish a reasonable investigation or reasonable basis for denial of permanent partial disability benefits. I find defendants unreasonably denied claimant payment of her permanent partial disability benefits in the amount of twenty-three thousand five hundred twenty-six and no/100 dollars ($23,526.00). I find a penalty in the amount of

six thousand six hundred dollars ($6,600.00) should be enough to deter such behavior from defendants in the future.

File No. 5060943 (Date of injury: November 10, 2017)

The parties have stipulated that Marie sustained an injury to her body as a whole which arose out of and in the course of her employment on November 10, 2017. Marie was working as a custodian and she was taking part in active shooter training. She was new to the school where the training was taking part and was not very familiar with the building's perimeter. During the training, Marie looked for an exit while the trainer was talking. She looked out a window and thought she saw mulch and grass. When it came time to exit the building, she cranked open a window and dove out the window. Unfortunately, she landed on river rock, not mulch and grass. As she was diving out the window her belt got hooked on the window causing her to hit the brick wall and then land on her left side and on her back. Marie reported the incident to her boss immediately. (Testimony)

Marie had welts and bruising on her shoulders and back. She took ibuprofen. She had difficulty sitting. She waited a couple of weeks before she sought medical treatment.

On November 22, 2017, Marie was seen by Dr. Bingham. His notes incorrectly state that Marie was Asian and a paraeducator. The doctor noted a substantial bruise to Marie's left posterior hip. The notes stated Marie did not have any radicular complaints, but then the notes also stated Marie reported pain radiating toward her left knee. The doctor noted that her gait was mildly antalgic. Marie had pain in her left lumbosacral area. She rated her pain as 8/10. She had been working full duty with minor modification since the work injury; Marie declined any work restrictions at that appointment. X-rays of the left hip and lumbosacral spine revealed no acute abnormalities. The doctor's assessment was lumbosacral back pain and left hip pain. She was instructed to take over-the-counter ibuprofen. Marie had also been taking a muscle relaxant that was prescribed by someone else for neck pain; the doctor said Marie could continue this if she desired. Dr. Bingham referred Marie for physical therapy for her back and left hip pain. She was to return in two weeks. (JE7, pp. 63-65)

Marie testified her condition became worse after she began physical therapy. After her second therapy appointment "everything went to the right side and down . . ." Tr. p. 78) Marie also testified that ever since the November 10, 2017 work injury she has had a constant limp.

In December of 2017, the employer's human resources representative wanted Marie taken off of work. However, Dr. Bingham did not take her off work. Instead, he provided her with restrictions. (Testimony)

Marie returned to see Dr. Bingham on December 14, 2017. She continued to have left hip pain. She reported that she had attended four or five sessions of physical therapy and that she felt the benefit of the therapy immediately after, but her pain raised again when she returned to work. The doctor noted her gait was grossly antalgic. The clinical note stated Marie complained of bilateral lower extremity numbness in a decidedly nondermatomal pattern. She was referred for an MRI of the lumbar spine and pelvis. She was to continue physical therapy. Marie was returned to work with restrictions. (JE7, pp. 66-71; Testimony)

On December 28, 2017, Marie had an MRI at the Steindler Clinic. The radiology report stated she had right hip pain and that a right hip MRI was performed. The radiologist identified a focal full-thickness anterior acetabular labral tear. (JE12, p. 107) Marie also had an MRI of her lumbar spine which revealed a focal disc protrusion at L4-L5 left far lateral region that contacted the extraforaminal portion of the left L4 nerve root. Otherwise the MRI was unremarkable. (JE13, p. 108)

Dr. Bingham saw Marie again on January 4, 2018 to go over the MRI. He noted that the radiology report incorrectly identified the MRI as the right hip. Marie reported lumbosacral pain and global bilateral lower extremity paresthesias described as pins and needles in a nondermatomal distribution. Dr. Bingham also noted that the lumbar MRI showed a single disc bulge that abutted the left L4 nerve root. However, there was no finding on the MRI to explain the right lower extremity paresthesias. Marie was referred to a pain clinic for evaluation for epidural steroid injection (ESI). She was to continue her physical therapy. She was allowed to return to work under restrictions. (JE7, pp. 72-74) There is no evidence in the record to show that defendants ever authorized the referral to the pain clinic; a referral that was made by Dr. Bingham, an authorized provider.

On January 16, 2018, Marie underwent an EMG. The testing revealed evidence of a sensory greater than motor peripheral neuropathy of bilateral lower extremities. There was no evidence to support subacute radiculopathy. (JE10, p. 96)

Around this same time, Marie and her manager reviewed which job duties Marie could and could not perform. She was not able to vacuum or sweep, clean bathrooms, remove lunchroom trash and recycling, lift tables, clean entryway windows or remove entryway trash. (Testimony; Cl. Ex. 2, p. 32)

The last time Dr. Bingham treated Marie was on February 6, 2018. Dr. Bingham noted that Marie, "rises with difficulty from the chair gait is grossly antalgic in the exam room, although when the patient was observed walking to her car gait was barely antalgic." (JE7, p. 76) He also noted that her lumbar range of motion was limited by pain. She reported that her back and bilateral hip pain were still 8/10. She had completed a total of 18 sessions of physical therapy without much progress; he placed the therapy on hold. Marie did not complain of radicular symptoms. She was referred to a back surgeon for an evaluation. She was allowed to return to work under

restrictions. With regard to Marie's right hip, the doctor stated, "MRI showed to be likely related to a degenerative condition. A review of the patient's physical therapy notes does not show any complaint of right hip pain until after the patient was informed of the results of the MRI." (JE7, pp. 75-76) However, Dr. Bingham's prior clinical notes stated Marie complained of bilateral lower extremity numbness and pain over her entire lumbar spine.

In an attempt to get better, Marie took unpaid Family and Medical Leave Act (FMLA) leave. Marie went to see her personal physician, Jasmin R. Morrison, M.D. On February 15, 2018, Dr. Morrison approved the leave. (Testimony; Ex. 2, p. 39, JE11, p. 101) On March 14, 2018, Dr. Morrison provided a letter for an extension of her FMLA leave. (JE11, pp. 100-105)

On February 6, 2018 Dr. Bingham, the authorized treating physician, recommended Marie be seen by a back doctor or neurosurgeon. It was not until after Marie filed a petition for alternate medical care on March 16, 2018 that defendants finally scheduled an appointment for Marie to see Cassie M. Igram, M.D. at the University of Iowa Hospitals and Clinics (UIHC). Defendants advised claimant of this appointment approximately one hour before the scheduled alternate care hearing on March 29, 2018. During the course of that proceeding defendants agreed to authorize any treatment recommended by Dr. Igram. (Alt. Care Dec. March 20, 2018).

On April 18, 2018, Dr. Igram saw Marie at the UIHC for purposes of a surgical consult. Marie reported bilateral low back pain with bilateral buttock and posterior thigh pain. She rated her pain as 8/10. She told Dr. Igram that since she had been off of work she did not have as much pain shooting down her leg. She did experience increased pain if she stood for a long period of time. Marie told Dr. Igram she felt worse after physical therapy. The examination portion of the notes stated Marie had a difficult time coming to a standing position and that her gait was antalgic. The range of motion of her back was limited by pain and stiffness. He noted that in the seated position no motor or sensory deficits were noted on objective examination. Dr. Igram felt the lumbar MRI was unimpressive for significant nerve root impingement. The EMG/NCV showed no evidence of lumbar radiculopathy. Dr. Igram's diagnosis related to the November 10, 2017 incident was back strain. He did not feel she required any type of back surgery. Dr. Igram indicated further treatment could include more physical therapy or over-the-counter nonsteroidal anti-inflammatory medications. He also noted she may possibly benefit from an evaluation by a physical medicine rehabilitation doctor. In the meantime, she was to continue her temporary restrictions. Dr. Igram stated Marie had not reached MMI. (JE8)

Stanley J. Mathew, M.D. saw Marie on June 8, 2018 at St. Luke's Physical Medicine and Rehabilitation Outpatient Clinic. Marie reported low back pain which radiated down her left leg since the time of the window incident. Marie reported that she had undergone physical therapy which caused her to have further excruciating pain.

She had an antalgic gait. Dr. Mathew ordered physical therapy and trigger point injections. He also referred her for a neurosurgical evaluation. (JE1, pp. 5-8)

The first time Marie treated with Dr. Mathew for the work injury was on June 8, 2018. However, Marie had previously treated with Dr. Mathew for a thyroid condition. He did not examine or treat Marie for any conditions she related to the work injury. (JE1, pp. 3-4)

On June 12, 2018, Dr. Jasmin Morrison issued a "To Whom it May Concern" letter. The letter indicated that since the time of the window incident Marie had chronic pain despite conservative therapies. Dr. Morrison felt that the earlier stated restrictions should remain in place because Marie continued to have pain. She also noted that Marie was working with pain management. (JE11, p. 106)

Dr. Igram issued a letter dated June 22, 2018 to the defendants. He opined that Marie's right hip changes were degenerative in nature and not likely to be related to the work injury. Dr. Igram had an opportunity to review the surveillance videos of Marie. Dr. Igram stated there was nothing in the video that showed her performing activities beyond her reported capabilities. He stated he would defer to a physical medicine and rehabilitation specialist for a determination of the MMI date. He deferred to her treating physician regarding restrictions. (JE8; Defendants' Ex. E)

Marie continued to treat with Dr. Mathew. On July 2, 2018, she underwent an electromyography study of her lower extremities. The EMG was felt to show S1 radiculopathy. The August 14, 2018 clinical note stated she was scheduled to have an epidural, but it was denied by her insurance. At the time of the August appointment she was participating in physical and aqua therapy. She continued to have severe pain to her mid back and bilateral hips. She was willing to try a higher dose of Topamax for pain management. Marie requested trigger point injections. Marie's gait was antalgic and her balance and coordination were fair. (JE1; Testimony)

On July 5, 2018, claimant filed a second petition for alternate medical care. The petition sought to have defendants follow the recommendations Dr. Igram made at the April appointment, as they had promised to do in the prior alternate care proceeding. Specifically, Marie wanted defendants to authorize a physical medicine and rehabilitation doctor, Dr. Mathew. Defendants eventually did authorize Dr. Mathew to treat Marie.

On August 3, 2018, Marie saw Joseph J. Chen, M.D. at the UIHC. Dr. Chen indicated she was being seen at the request of the defendants who had questions about causation and treatment recommendations for a chief complaint of low back and bilateral buttock and leg pain after a November 2017 work injury. She rated her pain as 8/10. Moving increased her pain. Her pain was aching in the low back midline and burning pain over the buttock with radiating and sharp pain from her buttock to posterior thighs with pins and needles into both feet. She had good days and bad days. Marie

denied any consistent radiating left leg pain. She told Dr. Chen that she wanted to see Dr. Mathew. Dr. Chen recommended up to 6 visits with Dr. Mathew and trigger point injections for 3-6 session. He also encouraged active flexibility, strengthening, and endurance exercises. Dr. Chen felt Marie would be at MMI within 2 months. Dr. Chen offered to have Marie return to see the UIHC Spine Rehab Team, but Marie declined the offer. Dr. Chen told Marie that the treatment he could provide included education and changing the way she thought about chronic pain. He advised her that avoidance of simple day to day physical activities or more rest would lead to even more muscle stiffness and pain. Dr. Chen's diagnosis was chronic bilateral low back pain without sciatica. Dr. Chen recommended temporary work restrictions of lifting up to 40 pounds on an occasional basis. He restricted her from repetitive pushing/pulling as in vacuuming, squatting, kneeling, bending, twisting, or crawling. She was instructed to return in one month. (JE9, pp. 86-90)

Marie returned to Dr. Mathew's office and saw Wendy R. Waterbury, ARNP on August 27, 2018. She reported that since the window incident she had low back pain radiating down her left leg which was associated with weakness, numbness, and tingling. Marie continued to have severe pain in her mid-back and bilateral hips. Marie requested trigger point injections. The clinical notes indicate that aqua therapy was denied by the insurance company. Marie also reported severe pain in her lower back and buttocks area. Marie was noted to have an antalgic gait and limited passive range of motion. They were awaiting authorization for physical and aqua therapy. (JE1, pp. 16-18)

On August 30, 2018, Dr. Mathew indicated that he felt Dr. Morrison's suggestion that Marie take time off work was reasonable. He also recommended continued treatment in the form of injection therapy and aqua therapy. (JE1, pp. 19-20)

Marie returned to Dr. Mathew's office where she saw Nurse Practitioner Waterbury on September 5, 2018. The notes state that aqua therapy and the lumbar epidural were denied by insurance. Marie was to continue her medications and follow-up in 4-6 weeks. (JE1, pp. 21-23)

On September 19, 2018, Marie again returned to see Nurse Practitioner Waterbury. Marie continued to take Topamax 50 mg twice daily and methocarbamol at bedtime. She continued to have severe pain to her mid back and bilateral hips as well as in her lower back and buttocks area. (JE1, pp. 24-26)

Dr. Chen saw Marie again on September 21, 2018, for follow-up. Marie had been to Dr. Mathew for trigger point injections every 7-10 days and this helped temporarily. Marie reported her pain as 6-7/10. Any physical activity increased her pain. Marie described her pain as stabbing and aching in the low back midline and burning pain over the buttock with radiating and sharp pain from buttock to posterior thighs with pins and needles into both feet. Dr. Chen offered to provide her with the previously described treatment. He felt her ongoing pain was due to hypersensitivity of

her nervous system and her inflexibility and weakness in her gluteal and back muscles. Dr. Chen again explained that her December 28, 2017 MRI that showed a far lateral disc protrusion at L4-L5 did not compress her left L4 nerve root because her left patellar reflex was normal and present. Marie felt that a lumbar fusion would fix her pain. Dr. Chen explained that given her physical findings he did not think that was very likely. Dr. Chen encouraged her to work on her overall flexibility, strength, and endurance. He also noted that she continued to smoke. Dr. Chen placed her at MMI. He agreed with Dr. Bingham in that he did not have any further recommendations for her care as related to the work injury. Dr. Chen did not feel any permanent work restrictions were necessary as a result of the work injury. He also stated that Marie did not have any ratable impairment as a result of the work injury. (JE9, pp. 91-95)

On October 2, 2018, Dr. Mathew authored a letter to Marie's attorney. Dr. Mathew stated that Marie had an MRI in December of 2017, but that she had not received any other medical care for her low back. He specifically stated that Marie never received physical therapy, aqua therapy, or injection therapy. A review of the treatment records demonstrates that this is simply incorrect. Additionally, Dr. Mathew recommended that Marie have an evaluation by neurosurgery. However, Dr. Igram had already seen Marie for such an evaluation. Dr. Mathew felt it was unfortunate that Marie had not received any care until recently. He recommended aqua therapy and trigger point injection therapy. He also recommended an evaluation by an interventional pain anesthesiologist for possible lumbar epidural. (JE1 p. 29-31)

On October 9, 2018, Marie saw Nurse Practitioner Waterbury. Marie reported that she was to have an epidural, but it was denied by her insurance. She was still taking Topamax 50 mg twice daily and methocarbamol at bedtime or when she is at work due to increased pain. Marie continued to have severe pain in her mid-back and bilateral hips. Ms. Waterbury made another referral for a lumbar epidural. Her notes also indicate they were awaiting authorization for physical therapy focusing on aqua therapy. Marie was to follow up with Dr. Mathew in two weeks. (JE1, pp. 32-34)

On October 31, 2018, Dr. Chen issued a report to the defendants. In the letter Dr. Chen points out what he believes to be flaws in Dr. Mathew's October 2, 2018 letter. Dr. Chen also opined that Marie did not have a left S1 radiculopathy as a cause of her back pain. Thus, he felt targeting the left S1 nerve root would be ineffective in improving her pain. Dr. Chen stated medical treatment under Dr. Mathew was no longer medically necessary as a result of the window incident. He felt there had been more than enough time to heal from any soft tissue injury. (Ex. F, pp. 2-3)

As previously noted, at the request of her attorney, Marie underwent an IME with Dr. Manshadi on July 5, 2018. Marie rated her back pain as 6-7 out of 10. Her pain went from her left low back to her left leg, but not below her knee. She also reported numbness and tingling in both feet, but it was better. At that time, she was working with restrictions of no bending, pushing, pulling, twisting, kneeling, or climbing, and no lifting over 20 pounds. Dr. Manshadi opined Marie sustained injures to her back and left hip

area, specifically the sacroilliac joint region as a result of the window incident. He also felt she had evidence of lumbar disc disease with radiculopathy, probably at S1. Dr. Manshadi stated it was reasonable for Dr. Morrison to recommend Marie take leave from work from February 21, 2018 through May 21, 2018. He also believed the lumbar radiculopathy and sacroiliac (SI) joint dysfunction on the left side was related to her work injury of November 10, 2017. He felt that her hip pain was caused by the window incident. Dr. Manshadi did not believe she had reached MMI. He also recommended her temporary restrictions continue. He recommended additional treatment for her left hip and low back injury. The treatment could include injections to the sacroiliac joint and or epidural steroid injections and physical therapy after injections. (Cl. Ex. 1, pp. 1-10)

On October 9, 2018, Dr. Manshadi wrote a letter to Marie's attorney. He had reviewed additional information from Dr. Chen and Dr. Mathew. Dr. Manshadi stood by his prior opinions. Dr. Manshadi disagreed with Dr. Chen's opinion that he was unable to assign any ratable impairment. Dr. Chen opined that Marie did show some evidence of reduced sensation along the S1 on the left side. He pointed out that Dr. Kim's EMG report did show evidence of sensory neuropathy, but no radiculopathy. Dr. Manshadi also noted that Marie demonstrated clinical evidence of sacroiliac joint dysfunction which he felt was not formally examined by Dr. Chen. Dr. Manshadi opined this was the result of the window incident. Dr. Manshadi indicated that Dr. Mathew had taken good care of Marie and that Marie should continue receiving his care. Dr. Manshadi stated it was appropriate that Dr. Mathew, not Dr. Chen, should determine how long Marie should treat with Dr. Mathew. (Cl. Ex. 1, pp. 13-14)

It is difficult to assess Marie's current condition because defendants have repeatedly delayed and/or denied treatment recommendations. There are several treatment recommendations from authorized providers that have not been provided to Marie. For example, Dr. Bingham referred Marie to a pain clinic for an ESI, but this was never authorized by defendants. Marie had to file two petitions for alternate medical care to get defendants to authorize care. Defendants failed to provide any treatment to Marie from February 6, 2018 through May 22, 2018. (Alt. Care Dec. May 30, 2018 & July 17, 2018). Defendants have also failed to provide the treatment recommended by Dr. Mathew.

The only physician in this case to place Marie at MMI is Dr. Chen. He placed Marie at MMI approximately 30 days before the hearing. Dr. Mathew and Dr. Manshadi both disagree with Dr. Chen. In June of 2018, Dr. Igram declined to place Marie at MMI. At that time, Dr. Igram noted that recommendations had been made for Marie for occupational health and/or physical medicine and rehabilitation. Dr. Mathew, an authorized treating physician, recommends additional trigger point injections. He also recommends Marie have an evaluation with an interventional pain anesthesiologist for a possible lumbar epidural, a neurosurgical evaluation, and an evaluation by a physical therapist. I find that the preponderance of the evidence demonstrates that Marie is not at MMI for the work injury. I further find that the extent of disability cannot be

determined at this time. I find that Marie is not at MMI and that the issue of permanency is not ripe for determination.

I further find that the evidence demonstrates Marie is entitled to the additional treatment as recommended by Dr. Mathew. Defendants argue Dr. Mathew's opinions should not be relied upon because it appears he may have an incomplete copy of her medical records. I do not find the argument to be persuasive. Defendants trusted Dr. Mathew enough to authorize him to treat Marie. If defendants felt he required any additional records or information, then they should have provided that information to the doctor. The defendants cannot fail to provide information to an authorized doctor and then when they disagree with the doctor's opinions try to discredit that doctor based on an incomplete history. Furthermore, Dr. Mathew has seen Marie on numerous occasions and is familiar with Marie and her conditions. I find Dr. Mathew's opinions to be persuasive. Defendants shall promptly authorize the treatment recommended by Dr. Mathew.

Marie is seeking an award of temporary total disability/healing period benefits from February 15, 2018 through May 22, 2018. After that time, Marie's FMLA leave ran out and she returned to work so she did not lose her job. Defendants argue claimant is not entitled to any such benefits because neither Dr. Bingham nor Dr. Chen took her off work during this time and defendants had light duty work available for her. I do not find this argument to be persuasive. Defendants did not offer any treatment from February 6, 2018 through May 22, 2018. During this period of time Marie took FMLA unpaid leave from work due to her ongoing symptoms. In January of 2018 there were several job duties that Marie could not perform. (Cl. Ex. 2; Testimony) Marie testified that her supervisor wanted her taken off of work. Dr. Morrison felt extending Marie's FMLA was reasonable in light of her restrictions, pain, and because she had not seen a neurosurgeon. (JE11, p. 101) In April, Dr. Igram noted that Marie did not have as much pain since she had been off work since February 15. (JE8, p. 77) Dr. Manshadi opined it was reasonable for Dr. Morrison to take Marie off work. (Cl. Ex. 1, p. 9) Dr. Mathew also found it reasonable that Marie was taken off of work. (JE1, p. 19) I find that Marie has demonstrated by a preponderance of the evidence that she is entitled to temporary weekly benefits from February 15, 2018 through May 22, 2018. Because there has not yet been a determination as to whether Marie sustained any permanent impairment as a result of the work injury, these benefits will be classified as temporary total disability (TTD) benefits for now.

I find that Marie's entitlement to temporary benefits ended when she returned to work on May 23, 2018. At this time, she has not demonstrated entitlement to a running award. Since Marie returned to work after her FMLA expired she has continued to perform some of her custodial job duties. She has not been able to complete all of her job duties. However, she has been working full time at her regular rate of pay. In May of 2018, Marie met with her employer to see how things were going. Marie reported that after she stood for a couple of hours her back gave out and then she needed to sit down. The employer suggested that she could perform some duties from a wheelchair.

Marie thought she could do that. Marie continues to experience numbness and pain in her lower extremities. She has difficulty walking and walks with a limp. Marie is taking muscle relaxers and routinely uses ice. (Testimony, Ex. D, pp. 3-4) If anything changes Marie may qualify for additional temporary total disability or healing period benefits.

Next, claimant alleges that penalty benefits are appropriate for defendants' refusal to pay TTD benefits from February 15, 2018 through May 22, 2018. I do not find claimant's argument to be persuasive. There was at least one physician, Dr. Bingham, who did not remove Marie from work completely. Further, there is evidence in the record which indicates defendants had light duty work available for Marie that was within the restrictions set forth by Dr. Bingham. (Testimony of Ms. Gauger; Def. Ex. A) I find defendants had a reasonable basis for denying TTD benefits during this period of time.

Claimant is seeking reimbursement for the IME with Dr. Manshadi in the amount of one-thousand six hundred and no/100 dollars ($1,600.00). I find that claimant had her IME with Dr. Manshadi prior to the date defendants obtained a rating from Dr. Chen. Thus, I find the prerequisites of section 85.39 were not met. Defendants are not responsible for reimbursing claimant the cost of the IME.

Finally, claimant is seeking an assessment of costs. (Cl. Ex. 6) I find that Marie was generally successful in her claim and therefore, I exercise my discretion and find that an assessment of costs against the defendants is appropriate. Claimant is seeking the $100.00 filing fee; I find this is an appropriate cost under 876 IAC 4.33(7). Claimant is also seeking costs for obtaining medical records. Claimant is also seeking costs in the amount of $237.65 for a telephone conference and medical records from St. Luke's. I find that these are not appropriate costs under 876 IAC 4.33. Thus, defendants are assessed costs in the amount of one hundred and no/100 dollars ($100.00).

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 6.14(6).

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

The question of causal connection is essentially within the domain of expert testimony. The expert medical evidence must be considered with all other evidence

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

Under the Iowa Workers' Compensation Act, permanent partial disability is compensated either for a loss or loss of use of a scheduled member under Iowa Code section 85.34(2)(a)-(t) or for loss of earning capacity under section 85.34(2)(u). 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). The fact finder must consider both medical and lay evidence relating to the extent of the functional loss in determining permanent disability resulting from an injury to a scheduled member. Terwilliger v. Snap-On Tools Corp., 529 N.W.2d 267, 272-273 (Iowa 1995); Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417, 420 (Iowa 1994).

Based on the above findings of fact, I conclude Marie demonstrated by a preponderance of the evidence that she sustained 20 percent permanent impairment to her left upper extremity as a result of the July 5, 2016 work injury. She is entitled to 50 weeks of permanent partial disability benefits commencing on the stipulated date of July 5, 2016. These benefits shall be paid at the stipulated rate of four hundred seventy and 52/100 dollars ($470.52) per week.

We now turn to the penalty claim in the July 5, 2016 injury. Claimant asserts that defendants unreasonably denied payment of her permanent partial disability benefits in this case and urges assessment of penalty benefits against defendants as well.

Iowa Code section 86.13(4) provides:

> 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 in benefits.

(2) The employer has failed to prove a reasonable or probable cause or excuse for the denial, delay in payment, or termination of benefits.

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

> Based on the plain language of section 86.13, we hold an employee is entitled to penalty benefits if there has been a delay in payment unless the employer proves a reasonable cause or excuse. A reasonable cause or excuse exists if either (1) the delay was necessary for the insurer to investigate the claim or (2) the employer had a reasonable basis to contest the employee's entitlement to benefits. A "reasonable basis" for denial of the claim exists if the claim is "fairly debatable."

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

The supreme court has stated:

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

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

(3) Reasonable causes or excuses include (a) a delay for the employer to investigate the claim, Christensen, 554 N.W.2d at 260; Kiesecker v. Webster City Meats, Inc., 528 N.W.2d at 109, 111 (Iowa 1995); or (b) the employer had a reasonable basis to contest the

claim—the "fairly debatable" basis for delay. See Christensen, 554 N.W.2d at 260 (holding two-month delay to obtain employer's own medical report reasonable under the circumstances).

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

> If we were to construe [section 86.13] to permit the avoidance of penalty if any amount of compensation benefits are paid, the purpose of the penalty statute would be frustrated. For these reasons, we conclude section 86.13 is applicable when payment of compensation is not timely . . . or when the full amount of compensation is not paid.

Id.

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

(6) In determining the amount of penalty, the commissioner is to consider factors such as the length of the delay, the number of delays, the information available to the employer regarding the employee's injury and wages, and the employer's past record of penalties. Robbennolt, 555 N.W.2d at 238.

(7) An employer's bare assertion that a claim is "fairly debatable" does not make it so. A fair reading of Christensen and Robbennolt, makes it clear that the employer must assert facts upon which the commissioner could reasonably find that the claim was "fairly debatable." See Christensen, 554 N.W.2d at 260.

Meyers v. Holiday Express Corp., 557 N.W.2d 502 (Iowa 1996).

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

Penalty is not imposed for delayed interest payments. Davidson v. Bruce, 593 N.W.2d 833, 840 (Iowa App. 1999). Schadendorf v. Snap-On Tools Corp., 757 N.W.2d 330, 338 (Iowa 2008).

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

Defendants were under an obligation, in the course of their ongoing duty to investigate claimant's claim, to inquire into her permanent impairment following the end of her healing. See Davidson v. Bruce, 594 N.W.2d 833 (Iowa App. 1999).

In this case, I found that claimant clearly established denial of weekly benefits. The parties stipulated that no weekly benefits were paid to claimant. (Hearing Report) I found that defendants did not establish a reasonable investigation or reasonable basis for denial of benefits. Therefore, I conclude that an award of penalty benefits in some amount is appropriate.

The purpose of Iowa Code section 86.13 is both punishment for unreasonable conduct but also deterrence for future cases. Id. at 237. In this regard, the Commission is given discretion to determine the amount of the penalty imposed with a maximum penalty of 50 percent of the amount of the delayed, or denied, benefits. Christensen v. Snap-On Tools Corp., 554 N.W.2d 254, 261 (Iowa 1996).

In exercising its discretion, the agency must consider factors such as the length of the delays, the number of delays, the information available to the employer regarding the employee's injury and wages, and the employer's past record of penalties. Meyers v. Holiday Express Corp., 557 N.W.2d 502, 505 (Iowa 1996). The denial of benefits in this case certainly occurred and was not reasonable. However, this is certainly not the most egregious situation where the maximum penalty is required to serve the purposes of the statute.

Having considered the relevant factors and the purposes of the penalty statute, I conclude that a section 86.13 penalty in the amount of six thousand six hundred and no/100 dollars ($6,600.00) is appropriate in this case. Such an amount is appropriate to punish the defendants for denial in payment of benefits under these facts and should serve as a deterrent against future conduct. However, the facts of this case are not of such an egregious nature that an additional penalty is warranted.

We now turn to the November 10, 2017 work injury.

Based on the above findings of fact, I conclude that the issue of permanency is not ripe for determination. I conclude the opinion of Dr. Chen that Marie had reached MMI did not carry as much weight as the opinions of the other doctors who opined Marie was not at MMI. As such, the issue of permanency cannot be determined at this time and is bifurcated for a later date.

Claimant is seeking additional treatment for the November 10, 2017 work injury. The employer shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance, and hospital services and supplies for all conditions compensable under the workers' compensation law. The employer shall also allow reasonable and necessary transportation expenses incurred for those services. The employer has the right to choose the provider of care, except where the employer has denied liability for the injury. Section 85.27. Holbert v. Townsend Engineering Co., Thirty-second Biennial Report of the Industrial Commissioner 78 (Review-Reopening October 1975).

Based on the above findings of fact, I concluded Marie is entitled to the additional treatment as recommended by Dr. Mathew. Defendants shall promptly authorize the treatment recommended by Dr. Mathew. Defendants shall promptly furnish all reasonable and necessary medical treatment to Marie for the November 10, 2017 work injury.

When an injured worker has been unable to work during a period of recuperation from an injury that did not produce permanent disability, the worker is entitled to temporary total disability benefits during the time the worker is disabled by the injury. Those benefits are payable until the employee has returned to work, or is medically capable of returning to work substantially similar to the work performed at the time of injury. Section 85.33(1). Based on the above findings of fact, I concluded claimant demonstrated entitlement to temporary total disability benefits from February 15, 2018 through May 22, 2018. These benefits shall be paid at the stipulated rate of five hundred thirty-one and 63/100 dollars ($531.63), plus interest.

Claimant is also seeking an award of penalty benefits from the November 10, 2017 injury. However, based on the previously stated case law and on the above findings of fact, I conclude defendants had a reasonable basis to deny temporary total disability benefits to the claimant. As such, I conclude penalty benefits are not appropriate in this claim.

Claimant is seeking reimbursement for the IME of Dr. Manshadi. Section 85.39 permits an employee to be reimbursed for subsequent examination by a physician of the employee's choice where an employer-retained physician has previously evaluated “permanent disability” and the employee believes that the initial evaluation is too low. However, I found that the prerequisites of section 85.39 were not met. As such, I conclude claimant failed to show entitlement to reimbursement for the IME.

Finally, claimant is seeking an assessment of costs. Based on the above findings of fact, I conclude defendants are assessed costs in the amount of one hundred and no/100 dollars ($100.00).

ORDER

THEREFORE, IT IS ORDERED:

File No. 5060942 (Date of injury: July 5, 2016)

All weekly benefits shall be paid at the stipulated rate of four hundred seventy and 52/100 dollars ($470.52).

Defendants shall pay fifty (50) weeks of permanent partial disability benefits commencing on the stipulated commencement date of July 5, 2016.

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

Defendants shall pay penalty benefits in the amount of six thousand six hundred and no/100 dollars ($6,600.00).

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

File No. 5060943 (Date of injury: November 10, 2017)

The issue of permanency is not ripe and is hereby bifurcated.

Defendants shall provide medical treatment to the claimant as set forth above pursuant to Iowa Code section 85.27.

All weekly benefits shall be paid at the stipulated rate of five hundred thirty-one and 63/100 dollars ($531.63).

Defendants shall pay temporary total disability benefits from February 15, 2018 through May 22, 2018.

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

Defendants shall reimburse claimant costs in the amount of one hundred and no/100 dollars ($100.00).

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

Signed and filed this 14th day of February, 2019.

ERIN Q. PALS
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

Copies To:

Nathan Willems
Attorney at Law
PO Box 637
Cedar Rapids, IA 52406
nate@rushnicholson.com

Laura Ostrander
Attorney at Law
PO Box 40785
Lansing, MI 48901-7985
laura.ostrander@accidentfund.com

EQP/srs

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 in writing and received by the commissioner's office 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 a legal holiday. The notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 1000 E. Grand Avenue, Des Moines, Iowa 50319-0209.