BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

SARAH PHILLIPS, Claimant, vs. REM IOWA, Employer, and NEW HAMPSHIRE INSURANCE CO., Insurance Carrier, Defendants.	FILED JUL 21 2016 WORKERS COMPENSATION	File Nos. 5044838 5044839 5084484 ARBITRATION DECISION Head Note Nos.: 1402.60, 1403.20, 1803, 2204, 2700

STATEMENT OF THE CASE

Claimant Sarah Phillips ("Phillips") filed three petitions in arbitration on October 2, 2013, alleging she sustained injuries to her head and neck affecting her cognitive and mental function when she was assaulted by residents while working for the defendant, REM Iowa ("REM"), on October 15, 2011, File Number 5044838, on January 21, 2012, File Number 5044838, and on October 17, 2012, File Number 5804484. REM and the defendant, New Hampshire Insurance Co., filed answers to the petitions on October 30, 2013, admitting work-related injuries occurred.

An arbitration hearing was held on March 28, 2016, at the Division of Workers' Compensation in Des Moines. Attorney Emily Anderson represented Phillips. Attorney Edward Rose represented REM and New Hampshire Insurance Co. Phillips appeared and testified. Exhibits 1 through 15, and A through Q were admitted into the record. The record was left open for the receipt of Exhibit 16, which was admitted into the record, and for the submission of post-hearing briefs. The case was fully submitted on May 6, 2016.

Before the hearing the parties completed a hearing report listing stipulations and issues to be decided. REM and New Hampshire Insurance Co. withdrew all affirmative defenses.

STIPULATIONS

1. An employer-employee relationship existed at the time of the alleged injuries.
2. Phillips sustained injuries on October 15, 2011, January 21, 2012, and October 17, 2012, which arose out of and in the course of her employment with REM.
3. Phillips's alleged injuries caused temporary disabilities during a period of recovery.
4. Phillips's alleged injuries caused a permanent disability.
5. The disability is an industrial disability.
6. At the time of the alleged injuries, Phillips's gross earnings were $303.49 per week, she was single and entitled to one exemption, and her weekly benefit rate is $206.98.
7. Phillips is entitled to reimbursement for one independent medical examination.
8. Although medical expenses are disputed, the fees or prices charged by providers are fair and reasonable, the treatment was reasonable and necessary, and the medical providers would testify as to the reasonableness of their fees and/or treatment set forth in the listed expenses, and REM and New Hampshire Insurance Co. are not offering any evidence to the contrary.
9. Prior to the hearing Phillips was not paid any weeks of permanent partial disability benefits.

ISSUES

1. What is the extent of Phillips's permanent disability?
2. If permanent disability benefits are awarded, is the commencement date for permanency August 3, 2013 or January 29, 2015?
3. Is Phillips entitled to reimbursement for her medical expenses?
4. Is Phillips entitled to penalty benefits?
5. Should costs be assessed against either party?

FINDINGS OF FACT

Phillips was born in Ann Arbor, Michigan, on May 16, 1983, and at the time of hearing she was 32. (Transcript, pages 12-13; Exhibit Q, page 2) Phillips does not smoke and is right-hand dominant. (Exs. 7a, p. 34; Q, p. 2) Phillips has a past history of anxiety, depression, panic attacks, gastroesophageal reflux disease, hypothyroidism, leukemia, and neck pain. (Tr., pp. 56-59, 62-63; Exs. 7b, p. 47; 7f, p. 198; J, p. 1; L, pp. 1, 3; M; N) Phillips was treated for anxiety, depression and panic attacks as an adolescent and as a young adult, but she was not taking medication for her psychological conditions at the time of her injuries in this case. (Tr., pp. 58-59) Phillips also reported experiencing neck pain following a car accident in November 2000 and after a fall on the ice in 2014, but she did not have any ongoing pain or symptoms following each incident. (Tr., pp. 56-57)

Phillips is a high school and college graduate. (Tr., pp. 13-14) Phillips received a bachelor's degree in recreational leadership and management in 2007, and is qualified to work as a camp director, park ranger, city parks worker, and community recreation worker. (Tr., pp. 14-15; Ex. 10)

After graduating from college, Phillips accepted a position with Camp Courageous, a camp for adults and children with disabilities. (Tr., pp. 13, 15) Phillips has also worked as a day care provider, a server and a hostess, a nanny, in direct sales, in a bookstore, in a movie theater, at a call center, and she has performed seasonal work at a Girl Scout camp. (Tr., pp. 68-72; Exs. 8, p. 252; P, pp. 2-3) For a period of time Phillips also worked for the Cliff House Holiday Park in the United Kingdom as a general assistant where she was responsible for scheduling all restaurant, kitchen, and shop staff, special event planning, customer service, food handling, housekeeping, and office work. (Ex. 10)

On April 26, 2011, REM hired Phillips as a direct support professional. (Tr., p. 21; Ex. 9) REM is part of a larger national company, Mentor Network, which has locations in Iowa and Michigan. (Tr., pp. 19-21)

As a direct support professional, Phillips provided personal care and supervision to persons with intellectual and physical disabilities over the age of 18 living in a group home residential setting. (Tr., pp. 20, 24; Ex. 9) Phillips was responsible for helping prepare food for the residents, assisting the residents with their behavioral and learning programs, transferring residents with mobility issues, and intervening when residents engaged in behavioral issues, including self-injury and aggression directed toward staff and other residents. (Tr., pp. 18-20, 25) REM required Phillips to physically restrain aggressive residents. (Tr., p. 24) The individuals Phillips worked with all weighed over 50 pounds. (Tr., p. 25)

Phillips's first position with REM was a part-time overnight position, where Phillips cleaned, performed bed checks, and supervised the residents while they were sleeping. (Tr., p. 21) Phillips moved into a full-time position as a weekend float, where she worked two 12-hour shifts and one eight-hour shift per week. (Tr., p. 22)

Based on her work with Camp Courageous and REM, Phillips decided to pursue a nursing degree. (Tr., p. 15) While working for REM, Phillips enrolled in a nursing program through Kirkwood Community College. (Tr., p. 15) Phillips continued to work full-time for REM until she started the clinical portion of her nursing program. (Tr., p. 22) REM did not have a full-time position that worked with her schedule, so she moved into a part-time position and picked up shifts from other employees. (Tr., p. 22) As a full-time employee, Phillips earned $11.65 per hour. (Ex. Q, p. 6) When Phillips reduced her hours to part-time, she earned $9.65 per hour. (Ex. Q, p. 6)

Phillips sustained three separate head injuries while working for REM on October 15, 2011, January 21, 2012, and on October 17, 2012. (Tr., pp. 28-31) On October 15, 2011, Phillips was trying to restrain a resident with a co-worker by placing the resident on the ground. (Tr., pp. 28-29) Another resident became agitated, walked up, and kicked Phillips in the right cheek, nose, and abdomen. (Tr., p. 29; Ex. 7a, p. 34) Phillips does not recall losing consciousness. (Tr., p. 29)

Phillips reported the injury to her employer by telephone and the individual she spoke with directed her to urgent care. (Tr., p. 29) Phillips stated her stomach was upset, and her cheek and nose were tender where she had been hit, but she denied losing consciousness, or having hearing or vision changes. (Ex. 7a, p. 34) Phillips was assessed as having a contusion to the cheek and abdomen. (Ex. 7a, pp. 35-37) Phillips took the day off work and she returned to work the next day. (Tr., p. 29) Phillips did not receive any additional medical care for the first injury. (Tr., p. 30)

On January 21, 2012, one of the REM staff members was passing medication to the residents, and another staff member was in the kitchen cooking. (Tr., p. 30) A resident grabbed the back of Phillips's shirt and pushed her against the wall and began hitting her. (Tr., p. 30) Phillips was against the wall and the resident hit her in the back of the head multiple times. (Tr., p. 30) Phillips called for help, but her co-workers could not hear her. (Tr., pp. 30-31) Another resident came out and started yelling, and the resident stopped hitting Phillips. (Tr., p. 31) That day Phillips returned to urgent care and reported she had a headache and neck pain. (Tr., p. 31) Phillips denied having nausea, hearing or vision changes, vomiting, or losing consciousness. (Ex. 7a, p. 38) Phillips was diagnosed with a headache and neck pain. (Ex. 7a, pp. 40-41) She was prescribed Flexeril. (Ex., p. 40; Tr., p. 31) Phillips's headache and neck pain resolved and she returned to work the next day. (Tr., p. 31) Phillips did not receive any additional medical care related to the second injury. (Tr., p. 31)

Phillips's third injury occurred on October 17, 2012, at approximately 8:00 p.m. (Ex. 7b, p. 43; Tr., p. 31) At the time of her third injury, Phillips was working part-time

and attending nursing school. (Tr., p. 22) Phillips was working the afternoon shift. (Tr., p. 32) REM staff members went to the vocational center to pick up the residents. (Tr., p. 32) One resident had a really rough day and had to be restrained at the vocational center by the staff. (Tr., p. 32) Because of his aggressive behavior, the staff requested an additional, fourth staff person. (Tr., p. 32) The resident's bedroom is across from the laundry room. (Tr., p. 32) The laundry room door shuts and locks automatically. (Tr., p. 32) One of Phillips's co-workers was in the laundry room with a resident and Phillips was in the dining room helping another resident. (Tr., p. 32) Phillips heard her co-worker scream in the laundry room for help. (Tr., p. 32) Phillips went down the hall and the laundry room door had latched. (Tr., p. 32) Phillips was able to open the door, the resident became startled, and the door shut behind Phillips. (Tr., pp. 32-33) The resident cornered Phillips by the door and started hitting her over and over on the right side of her head and neck. (Tr., p. 33) Phillip was able to get away from the door, into the corner and squatted down, hoping the resident would walk away. (Tr., p. 33) The other staff members came in and restrained the resident. (Tr., p. 33) The resident became agitated again and had to be restrained a second time. (Tr., p. 33)

Phillips's neck and head hurt after the incident. (Tr., p. 33) She filled out the paperwork regarding the restraint and left REM. (Tr., p. 34)

Later that day Phillips's roommate noted she was acting "weird" because she was talking to her like she was her sister, she was wearing a resident's clothing, and she was being mean and short with her. (Tr., pp. 36-37) Phillips went to the emergency room the next day, on October 18, 2012, complaining of a headache. (Ex. 7b, p. 43) Phillips was diagnosed with a head injury and released. (Ex. 7b, pp. 45-46; Tr., p. 36)

Phillips was referred to Ann McKinstry, M.D., with Work Well, on October 18, 2012. (Ex. 7b, p. 47) Phillips reported a resident hit her at least three times with his hands, impacting the right side of her head, above her ear and in the temple. (Ex. 7b, p. 47) Phillips relayed that when she woke up in the morning she had developed pain in the right side of her neck down into her trapezius muscle. (Ex. 7b, p. 47) Phillips reported she had an intense, pounding headache and that when she closed her eyes she felt like she was falling, and even with her eyes open she had some vertigo. (Ex. 7b, p. 47) Phillips stated she had been forgetful that day, when she reached for a television remote instead of her cellular telephone, when she took the wrong book to class, and when she showed up an hour early to class. (Ex. 7b, p. 47) Phillips denied having blurred vision. (Ex. 7b, p. 47) Dr. McKinstry diagnosed Phillips with a headache and contusion and ordered a computed tomography scan. (Ex. 7b, p. 48) The computed tomography scan was normal. (Ex. 7b, p. 50) Dr. McKinstry prescribed Tramadol and Aleve, and recommended Phillips rest and not return to work. (Ex. 7b, pp. 48, 51)

Phillips returned to the emergency room the next day because her behavioral issues persisted. (Tr., pp. 37; Ex. 7b, pp. 52-54) Phillips reported she continued to

have headaches and she was vomiting and disoriented. (Ex 7b, p. 52) Phillips was assessed with postconcussive syndrome and blunt head trauma. (Ex. 7b, p. 54)

Phillips attended a follow-up appointment with Dr. McKinstry on October 22, 2012. (Ex. 7b, p. 55) Phillips relayed she was forgetful and the day before and her roommate had to point out that she had forgotten to rinse the shampoo out of her hair. (Ex. 7b, p. 55) Phillips told Dr. McKinstry she was having difficulty concentrating on her studies because of her headache. (Ex. 7b, p. 55) Dr. McKinstry assessed Phillips with a concussion, headaches, and vertigo, and restricted Phillips from driving and working, and prescribed Zofran. (Ex. 7b, p. 55)

Phillips returned to Work Well on October 29, 2012, and continued to complain of severe headaches, nausea, and vertigo. (Ex. 7b, p. 57) Phillips complained of two types of headaches, a throbbing headache that was constant and more frontal and temporal, and an intermittent occipital headache with pain extending down the right side of her neck and into her right trapezius muscle. (Ex. 7b, p. 57)

Dr. McKinstry listed an impression of post-concussion syndrome, headaches, and a cervical strain and ordered Phillips to remain off work and noted she believed she "would benefit medically from a reduced course load." (Ex. 7b, p. 57) Dr. McKinstry recommended physical therapy. (Ex. 7b, p. 57)

During her appointment on November 8, 2012, Phillips reported she continued to experience significant headaches and cervical strain affecting her sleep, concentration, and ability to read. (Ex. 7b, p. 59) Phillips continued to have difficulty with her nursing coursework and rotations. (Ex. 7b, p. 59) Dr. McKinstry prescribed Skelaxin, a sleep aid, additional physical therapy, and continued to restrict Phillips from working. (Ex. 7b, p. 59)

Phillips returned to Dr. McKinstry two weeks later and reported she was experiencing severe, daily headaches and that she had vomited during physical therapy. (Ex. 7b, p. 62) Dr. McKinstry referred Phillips to Jill Miller, ARNP, for a neurological evaluation, and prescribed Imitrex as a sleep aid. (Ex. 7b, pp. 62, 64, 65; Tr., p. 39) Miller works in the same office as Andrew Peterson, M.D., a neurologist.

A week later, on November 26, 2012, Dr. McKinstry prescribed amitriptyline for nighttime migraine prevention. (Ex. 7b, p. 65) Dr. McKinstry restricted Phillips from working pending the results of her neurological evaluation. (Ex. 7b, p. 65) Phillips commenced vestibular therapy in December 2012. (Ex. 7b, pp. 67-68)

Phillips attended her first appointment with Miller on January 14, 2013, and reported she was experiencing migraines two days per week, and that she was struggling with concentration, attention, focus, depression, and anxiety. (Ex. 7c, pp. 82, 87) Miller adjusted Phillips's medication, continued to restrict her from working, ordered neuropsychological testing, and wrote a note for testing accommodations for Phillips's

nursing coursework. (Ex. 7c, pp. 87-91) Phillips required reasonable accommodations and supervision during her clinical rotations. (Ex. 7b, p. 57)

In February 2013, Stephen Peters, Psy.D., performed a neuropsychological evaluation of Phillips. (Ex. 5) Dr. Peters found Phillips "demonstrated small measurable deficits including slowed cognitive processing speed, difficulty maintaining and shifting cognitive set, mild attentional difficulties, and mild deficits in working memory." (Ex. 5, p. 27) Dr. Peters noted "cognitive difficulties are typical in the setting of mild head injury and are likely to resolve over time." (Ex. 5, p. 27)

On February 20, 2013, Miller released Phillips to work four-hour shifts, on a part-time basis, and no more than 20 hours per week. (Ex. 7c, p. 93) Miller restricted Phillips from working with combative individuals. (Ex. 7c, p. 93; Tr., p. 26)

Phillips returned to Miller on March 7, 2013, complaining of migraines. (Ex. 7c, p. 94) Miller's office administered a Sumavel injection. (Ex. 7c, p. 94)

On March 11, 2013, Miller referred Phillips for chiropractic care given that pharmaceutical treatment and physical therapy had not been effective in alleviating her migraines. (Ex. 7c, p. 95) Phillips received chiropractic treatment through Atlas Family Chiropractic from April 2013 through June 2014. (Exs. 7d; l) Phillips reported the chiropractic care helped her. (Tr., p. 44)

Dr. Peterson saw Phillips on March 25, 2013. (Ex. 7c, p. 96) Phillips reported she was not doing well at school, that she could not concentrate, and noted she never had problems with her grades or test anxiety in the past. (Ex. 7c, p. 96) Phillips was taking three-quarters of a normal caseload. (Ex. 7c, p. 96) Dr. Peterson diagnosed Phillips with postconcussive syndrome, classic migraines with aura, and attention-deficit hyperactivity disorder. (Ex. 7c, p. 99) Dr. Peterson issued a release clearing Phillips "to return to work with two 8 hours shifts and one four hour shift (max 20 hour [*sic*] per week). If she has a migraine HA then she needs to be permitted to skip her shift without penalty. NO EXPOSURE TO ANY COMBATIVE PATIENTS." (Ex. 7c, p. 103) (Emphasis in original.)

Phillips finished the fall semester of nursing school in 2012, but she had to withdraw in the spring of 2013 because she was struggling with focus problems during her clinical program. (Tr., p. 17) In May 2013, Phillips informed Miller she had withdrawn from school due to medical reasons, but noted she was planning on returning in the fall. (Ex. 7c, p. 104) Phillips's work restrictions were modified to allow her to work an additional four-hour shift, up to 24 hours per week. (Ex. 7c, p. 111)

During an appointment with Miller on August 2, 2013, Phillips reported her headaches had improved, but were still "hit and miss." (Ex. 7c, p. 112) Phillips reported her chiropractic treatment "helps with the tension headaches and neck pain." (Ex. 7c, p. 112) Phillips requested her work restrictions be removed because she had to pay her

bills. (Ex. 7c, p. 112) Phillips received an occipital block injection on August 6, 2013, and continued to take medication. (Ex. 7c, pp. 117-119)

While she was off work, Phillips received temporary disability benefits. (Tr., p. 41) Phillips returned to work in February 2013. (Tr., p. 99) She received her last check for temporary disability benefits on August 3, 2013. (Tr., p. 41)

Phillips reported that the residents she had been working with at the time of her last head injury were combative. (Tr., p. 27) As a result of her restriction, REM moved Phillips from the house where she had been working to a group home with more medically needy individuals who were older and did not display as much aggressive behavior. (Tr., p. 27) Phillips noted that she was able to perform her job duties at the new group home most of the time, but some individuals displayed aggressive behavior and other staff would have to restrain them. (Tr., p. 27) REM also accommodated Phillips by allowing her to go home or call in sick for the day. (Tr., pp. 28, 41-42)

When Phillips returned to nursing school she received accommodations. (Tr., pp. 17-18) Instead of shadowing a nurse on the floor, she shadowed the instructor, and she was not permitted to pass medication. (Tr., p. 18)

Phillips continued to receive treatment. In November 2013, Phillips received a greater and lesser occipital nerve block and a cervical occipital trigger point injection to attempt to resolve her postconcussive syndrome and migraine headaches. (Ex. 7b, pp. 73-75) In January 2014, Phillips received a Botox treatment. (Ex. 7c, pp. 123-125) During a March 2014 visit with Dr. Peterson Phillips reported the Botox treatment had helped, but Dr. Peterson believed a cervical epidural might be more effective stating, "[t]he meds are certainly not helping hugely." (Ex. 7c, p. 126)

On March 27, 2014, Phillips received a cervical epidural steroid injection. (Ex. 7b, pp. 77-78) Phillips continued to complain about her migraines to Miller. (Ex. 7c, p. 129) Miller ordered a Kaniecki cocktail, which was administered intravenously on April 24, 2014. (Ex. 7c, p. 129)

Linda Collins, Ph.D., performed a second neuropsychological evaluation of Phillips on June 3, 2014. (Exs. 6; D) Dr. Collins concluded the testing results "did not indicate any deficits in cognitive processing speed, maintaining and shifting cognitive set, or working memory," representing "significant cognitive gains in these areas," but Phillips continued to have "[d]eficits in visual-motor speed and sustained attention," mild depression, and mild to moderate anxiety. (Exs. 6, p. 32; D, p. 4) Dr. Collins also noted Phillips's "attention efficiency scores were impaired due to a strong speed/accuracy trade-off. In other words, she sacrificed performance speed to achieve maximum accuracy (which would be the preferred compensation strategy for her profession of nursing)." (Exs. 6, p. 32; D, p. 4) Dr. Collins found the results were "highly consistent with the diagnosis of post-concussion syndrome," exacerbated by her neck pain, headaches, anxiety, depression, and sleep disruption, and that her neck pain,

headaches, anxiety, depression and sleep disruption were contributing to her attention problems and difficulties with everyday functioning. (Exs. 6, p. 32; D, p. 4) Dr. Collins opined the results of the testing indicate Phillips should be able to be competitively employed in nursing, and "[i]t would be better for her to avoid jobs that involve frequently working with potentially combative patients" and to work in a job "where she can work at her own pace (rather than in a fast-paced setting such as the ER)." (Exs. 6, p. 33; D, p. 5)

During a follow-up appointment with Miller on June 9, 2014, Phillips reported she believed the Botox treatment she had received had helped with her tightness and neck pain, and that she had received injections through the pain clinic. (Ex. 7c, p. 131) Phillips stated that she was having tension headaches daily, but her migraines had decreased. (Ex. 7c, p. 131)

Phillips decided to move back near her family in Michigan in June 2014. (Tr., p. 28) Phillips had always planned to move back to Michigan after she finished nursing school. (Ex. Q, p. 6) She attended her last appointment with Dr. Peterson in June 2014. At that time her symptoms had not resolved. (Exs. 7c, pp. 131-35; E, pp. 3-6)

Counsel for Phillips provided Dr. Peterson with a form letter with a series of prepared questions. (Ex. 4) Dr. Peterson agreed Phillips was not at maximum medical improvement, and that in the foreseeable future she would need medication, possibly Botox, physical therapy, and massage therapy. (Ex. 4, pp. 23-24) Dr. Peterson concurred that Phillips's depression, postconcussive syndrome, headaches, neck pain, and attention deficit hyperactivity disorder were more likely than not caused by the concussion injuries she sustained at work, including the most recent injury on October 17, 2012. (Ex. 4, p. 23) Dr. Peterson agreed Phillips needs permanent restrictions, including not working in situations that will put her at risk for additional head injuries, including work where she would be exposed to combative patients, such as an emergency room or psychiatric ward. (Ex. 4, p. 24)

After moving back to Michigan, Phillips took and passed her nursing boards. (Tr., p. 18) Phillips is a registered nurse in Michigan. (Tr., p. 18)

Phillips continued to receive chiropractic care in Michigan, but she did not find it as helpful as the treatment she received in Iowa. (Tr., p. 45) Phillips relayed her chiropractor in Cedar Rapids used special tools, including an activator with adjustments. (Tr., p. 45) Phillips's chiropractor in Michigan did not use an activator and her adjustment technique was not as comfortable. (Tr., p. 45)

In November 2014, Phillips attended her first appointment with Mark Garwood, M.D., a neurologist with the University of Michigan. (Ex. 7f) Dr. Garwood assessed Phillips with chronic tension-type headaches, migraine headaches with aura, cervicalgia, insomnia, and depression. (Ex. 7f, p. 200) Dr. Garwood's initial treatment plan included physical therapy, medication adjustments, and a sleep study to exclude

obstructive sleep apnea as a cause of Phillips's headaches. (Ex. 7f, p. 200) Dr. Garwood suggested Phillips receive physical therapy. (Tr., p. 46) Phillips did not receive the physical therapy because it was not authorized. (Tr., p. 46)

During Phillips's next appointment with Dr. Garwood on January 29, 2015, Dr. Garwood discussed Phillips's return to work following her head injury. (Exs. 7f, p. 206; B, p. 6) Dr. Garwood documented,

> I don't feel she needs to refrain from working in any specific unit of nursing. I believe she was previously cautioned to avoid working in a psychiatry unit or ER due to a risk of further head injuries from violent patients; however as she could be at risk of a head injury in any unit of the hospital working as a nurse (and we reviewed despite her past troubles the risk of such would generally to me be thought low compared to many other occupations), I don't feel her past head injury should prevent her from pursuing the field of nursing that she is most interested in or where she feels best matches her skill set and she is most interested in psychiatry.

(Exs. 7f, p. 206; B, p. 6) Dr. Garwood reported he believed Phillips had reached maximum medical improvement, and opined:

> Based on all the treatments tried with her symptoms continuing to remain relatively unchanged, I believe this to likely be the case to a reasonable degree of medical certainty. It has now been per my records over two years since her head injury. While I feel she has reached maximal medical improvement from the symptoms that began after her head injury, I do feel it is possible some of her symptoms including her depression and insomnia could improve after there is closure to any ongoing legal proceedings which she and I are hopeful will soon be the case.

(Exs. 7f, p. 206; B, p. 6) REM and New Hampshire Insurance Co. requested Dr. Garwood provide a permanent impairment rating under the Guides to the Evaluation of Permanent Impairment, (AMA Press, 5th Ed. 2001) ("AMA Guides"), and he reported "I am not familiar with this definition but as above would feel she appears to have reached maximum medical improvement following her closed head injury." (Ex. 7f, p. 206; B, p. 6) Dr. Garwood listed Phillips's diagnosis as chronic tension-type headaches, migraine headaches with aura, cervicalgia, insomnia, and depression, attributed to post-concussion symptoms and post-concussive syndrome from a closed head injury. (Ex. 7f, p. 210) Dr. Garwood found Phillips could return to full duty without restrictions on January 30, 2015. (Exs. 7f, pp. 210, 213; B, p. 9)

Dr. Garwood requested a sleep study to rule out obstructive sleep apnea as a cause of Phillips's headaches. (Exs. 7f, p. 206; B, p. 6) Phillips participated in the sleep study in May 2015, which revealed mild obstructive sleep apnea. (Exs. 7f,

pp. 214, 216; C, p. 5) Dr. Garwood recommended CPAP titration to see if it would improve Phillips's sleep related symptoms and headaches. (Exs. 7f, p. 216; C, p. 5) Dr. Garwood opined it was difficult to say whether her head injury caused the obstructive sleep apnea, but noted "there is an increased incidence of [obstructive sleep apnea] after a head injury." (Exs. 7f, p. 219; C, p. 7) REM and New Hampshire Insurance Co. did not authorize the sleep study. (Tr., p. 46) Phillips testified the bill for the sleep study has gone to collections. (Tr., p. 47)

Following the results of the sleep study Phillips requested injections to treat her headaches at the headache clinic. (Ex. 7f, p. 220; C, p. 8) The last time Phillips saw Dr. Garwood was in January 2015. (Tr., p. 48)

In June 2015, Phillips secured employment at a daycare working with infants and preschool children. (Tr., p. 72) Phillips obtained the position through a friend of a family member. (Tr., p. 72) Phillips works three ten-hour shifts, and is paid $10.00 per hour. (Tr., p. 72)

In August 2015, Phillips was referred to Wade Cooper, D.O., and received bilateral occipital nerve block and trigger point injections. (Ex. 7f, pp. 227, 232-236) When she returned in September 2015, Phillips reported a slight improvement in her symptoms following the injections. (Ex. 7f, p. 237) Phillips reported that during the last 30 days, she experienced six days of severe headaches, 24 days of low to moderate headaches, and zero days of no headaches. (Ex. 7f, p. 237) Phillips noted she continued to experience dizziness and vertigo with some of her headaches. (Ex. 7f, p. 237)

On September 16, 2015, Phillips saw Pamela Summers, M.D., an interventional pain management specialist. (Ex. 7f, p. 241) Phillips was assessed as having cervicalgia, migraines, post-concussion syndrome, and depression. (Ex. 7f, p. 244) Phillips received additional injections in November 2015. (Ex. 7f, pp. 246-250)

On December 9, 2015, Phillips fractured her ankle. (Ex. C, p. 11) Phillips testified the fracture delayed her treatment. (Tr., p. 48) For a period of time she was on blood thinners, which precluded her from receiving medial branch blocks. (Tr., p. 49) Phillips resumed receiving injections in February 2016. (Ex. 16, pp. 302-303)

James Milani, M.D., performed an independent medical examination of Phillips for REM and New Hampshire Insurance Co. in December 2015. In preparing his report, Dr. Milani responded to questions posed by REM and New Hampshire Insurance Co. (Ex. A) Dr. Milani opined Phillips has reached maximum medical improvement. (Ex. A, p. 8) Using Chapters 15 and 18 of the AMA Guides, which address the spine and pain, Dr. Milani found Phillips sustained an 11 percent whole person impairment relating to the October 17, 2012 injury. (Ex. A, pp. 8-9)

Dr. Milani used the range of motion ("ROM") method to formulate his opinion with respect to Phillips's cervical spine, as follows:

> Therefore, turn to table 15-12 for cervical flexion and extension; 40 degrees of flexion is a 1% whole person impairment and 30 degrees of extension is 3% whole person impairment. Table 15-13 for lateral bending shows the 30 degrees left is 1% whole person and 30 degrees right is 1% whole person. Table 15-14 for rotation shows 60 degrees right rotation is 1% whole person and 60 degrees left rotation is a 1% whole person. The guide [*sic*] has instructed to add all of these and therefore equals [*sic*] an 8% whole person impairment. This would demonstrate the impairment she is showing today with the cervical spine.

(Ex. A, p. 8) Dr. Milani then noted,

> It does not rate the pain/headache symptoms that she has associated with postconcussion [*sic*]. I believe it is appropriate to turn to chapter 18 as the guides state that if there is an added burden of illness born by individuals then the pain category can be used. In further reviewing chapter 18, subchapter 18.3b, goes through questions on whether the pain-related impairment is rateable [*sic*]. I do believe that she has a known medical condition. I believe she presents with a typical presentation of the diagnoses given and the diagnoses are well defined. I also find that the patient is credible in past notes and in my visit today. I therefore continue to work through chapter 18 for pain. In table 18-3, in which she fits in the class II for moderate, she does not fit all the categories but she does fit one or more of these to get her into the moderate category. I then had her fill out the table 18-4 for rating determining impairment associated with pain. When going through the worksheet on table 18-6, she totals up to 34, that then on table 18-7 gives her a moderate impairment pertaining to her total pain. To get to the value of 34; she gets a 24 from the worksheet, a 0 from table 18-4, and a 10 on my clinical judgment of individual's credibility.
>
> Therefore, for an impairment rating, she has an 8% whole person for the cervical and I would increase this by 3% for her pain due to her having a rateable [*sic*] pain. This would total an 11% whole person impairment pertaining to her injury October 17, 2012.

(Ex. A, pp. 8-9) Dr. Milani agreed with Dr. Garwood that Phillips should be able to look for general employment in the nursing field. (Ex. A, p. 9)

Robin Sassman, M.D., performed an independent medical examination of Phillips on January 19, 2016. (Ex. 2, p. 5) Dr. Sassman placed Phillips at maximum medical

improvement as of her last visit with the headache specialist in Michigan on November 11, 2015. (Ex. 2, p. 14) Using the AMA Guides, Dr. Sassman opined:

> For the cervical symptoms, using Section 15.2, on page 379, the DRE method is the most appropriate method for assessment of the cervical spine. For the cervical spine using Table 15-5 on page 392, she will be placed into DRE Cervical Category II with 7% impairment of the whole person. The upper level of this category is chosen due to the effects on activities of daily living.
>
> For the head trauma and the post-concussive symptoms, I followed the instructions in Section 13.2 on page 308. There is no impairment in the level of consciousness or awareness. For the mental status and memory issues, there is no impairment. According to Table 13-7 on page 323, criteria for rating impairment due to aphasia or dysphasia, there is no impairment. According to Table 13-8 on page 325, she will be placed in a Class 1 with 7% impairment of the whole person due to mild limitation of activities of daily living and daily social and interpersonal functioning based on the changes she has noted in her lack of motivation for interpersonal functioning.
>
> I am then instructed on page 308 to identify the most severe cerebral impairment of those listed above and combine this most severe impairment with any other impairment noted in Table 13-1. Therefore, the criteria for rating impairment due to emotional behavior disorders will be chosen (7% whole person impairment), and combined with the value derived from Table 13-1. I will combine an additional 3% whole person impairment for the headaches. Turning to the Combined Values Chart on Page 604, this is combined for a total of 10% impairment of the whole person.
>
> Overall, using the Combined Values Chart on page 604, 10% whole person impairment is combined with 7% whole person impairment for a total of 16% impairment of the whole person.

(Ex. 2, pp. 14-15)

Dr. Sassman concluded Dr. Peterson's restrictions were appropriate and found Phillips should not work in situations that would put her at risk for additional head injuries, including work where she would be exposed to combative patients, such as in an emergency room or a psychiatric ward. (Ex. 2, p. 15) Dr. Sassman also recommended Phillips "limit lifting, pushing, pulling and carrying to 50 pounds occasionally from floor to waist and waist to shoulder height," that "[s]he should limit lifting, pushing, pulling, and carrying above shoulder height to 20 pounds rarely," and

"[s]he should not use vibratory or power tools as these would likely exacerbate her symptoms." (Ex. 2, p. 15)

Phillips testified that since her last head injury in October 2012, she has been diagnosed with postconcussive syndrome, attention deficit hyperactivity disorder, depression, migraines, tension headaches, and cervical pain. (Tr., pp. 35, 50) At the time of the hearing Phillips reported that she continues to have issues with migraines, tension headaches, neck pain, and depression. (Tr., pp. 23-35, 49) Phillips testified her neck always hurts, and that she has been diagnosed with spasmatic torticollis, which she described as a head tilt to the right side. (Tr., p. 55)

Phillips reported her tension headaches are worse on the right side and when she experiences a headache the whole base of her skull and her neck become tight and painful. (Tr., pp. 53-54) Phillips takes muscle relaxers for the pain at night almost daily, and approximately three times per week during the day. (Tr., p. 54) When she takes the muscle relaxers she does not feel comfortable driving or performing duties as a nurse. (Tr., p. 54) Phillips reported she often gets a tension headache and then a migraine. (Tr., p. 50) If Phillips is able to take medication when she first experiences symptoms, the migraine may last an hour or two, but if she does not take medication early on, the migraine may last the whole day, and at times, two or three days. (Tr., p. 50)

The migraines affect Phillips's right side, and make her nauseous, to the point where she vomits, with pounding, vertigo, and sensitivity to light. (Tr., p. 50) Phillips described the migraines as "unbearable" and reports that when she has a migraine she "can't even tell up from down." (Tr., p. 50) If Phillips feels a migraine developing at work and she takes her medication, goes to her car, and sleeps an hour or two and then drives herself home. (Tr., p. 51) Phillips testified she only has a migraine once or twice per month because she consistently takes her medication. (Tr., pp. 51-52) Before Phillips began consistently taking her medication she would have a migraine once or twice per week. (Tr., p. 52) Phillips reported that when she has a migraine she cannot work. (Tr., p. 52) Phillips testified she did not have migraines before her October 2012 head injury. (Tr., p. 53)

Phillips testified her focus issues have improved, but persist. (Tr., p. 43) Before her October 2012 head injury Phillips could read two novels per week, and since her injury she has not been able to sit and read a book, and instead listens to audiobooks. (Tr., p. 43) Before her October 2012 head injury Phillips was able to read textbooks and digest the information. (Tr., pp. 43-44) Now, she has to take notes and use flash cards to digest new information. (Tr., p. 44) While in nursing school Phillips had to take tests at the test center and use tutors, which she did not need before her head injury. (Tr., p. 44)

Phillips currently takes Effexor for depression, Topamax for neuropathic pain and to prevent migraines, Zofran for nausea, Aleve for tension headaches, and Flexeril and

Fioricet for tension headaches. (Tr., pp. 59-61) Phillips also uses Biofreeze for her neck and shoulder a few times per day. (Tr., pp. 61-62) Phillips testified the pain clinic at the University of Michigan has indicated she will be on the pain medication for the foreseeable future. (Tr., p. 62)

Phillips has held three jobs since she worked for REM. (Tr., p. 71) In 2014 Phillips worked seasonally, four of five weeks, for a Girl Scout camp and earned $8.10 per hour. (Tr., p. 71) Phillips was able to perform the physical tasks of the position and worked on arts and crafts projects, science projects, a talent show, hiking, swimming, and field trips. (Tr., p. 91) Phillips also sold products through 31 Bags for a period of time in 2014 and 2015. (Tr., pp. 71-72) Phillips reported the income she received was inconsistent, and she earned a total of approximately $3,000.00. (Tr., p. 72)

Phillips has been employed with a daycare center since June 2015 and earns $10.00 per hour working with children between the ages of six weeks to pre-kindergarten, 30 hours per week. (Tr., p. 72) Phillips has had to take some time off from work due to migraines and headaches, and her supervisor allows her to have a flexible schedule. (Tr., p. 73) Phillips reported she experiences pain when she has to carry toddlers or larger children. (Tr., p. 73)

When questioned about her past relevant work, Phillips responded she believes she would have difficulty working as a waitress because when she worked as a waitress she had to carry trays of plates with her right hand, which would aggravate her neck over time, and she would have difficulty unloading and lifting large boxes of ice and soda. (Tr., pp. 68-69) Phillips reported she would be hesitant to return to Camp Courageous because she would have to work with campers who might hit her in the head. (Tr., pp. 69-70) Phillips applied for a nursing position with Camp Courageous, interviewed for the position, and discussed her work injury with the employer. (Tr., p. 70) Phillips was not hired and reported Camp Courageous hired a person with more experience. (Tr., p. 70)

Phillips has also worked as a nanny, in a movie theater, and in a call center doing outbound calling and believes she could work in those capacities now. (Tr., pp. 70-71) Phillips earned minimum wage working at the movie theater. (Tr., pp. 70-71) Phillips does not wish to work in a call center again. (Tr., p. 71)

Phillips has tried to secure employment in nursing. (Tr., p. 73) Phillips reported the job market for nurses in the Ann Arbor area is "[e]xtremely competitive" because there are four nursing colleges within a 20 mile radius. (Tr., p. 75) When questioned about nursing positions, Phillips responded she believes she could do patient transfers with someone else, and perhaps now on her own. (Tr., p. 67) Phillips testified she is trying to avoid jobs in psychiatric units, memory care units, and jobs in emergency departments because Drs. Peterson and Collins advised her that those would not be the best options for employment. (Tr., p. 74)

Phillips has applied for some nursing home positions with non-memory care units. (Tr., p. 75) Phillips stated that her lack of experience has also impacted the jobs she can apply for because many of the postings state that new graduate nurses need not apply, and many of the jobs require a bachelor's degree in nursing, which she does not possess. (Tr., pp. 75-76) Phillips reported the University of Michigan will not hire a nurse unless the nurse has a bachelor's degree in nursing. (Tr., p. 76)

In 2014, Phillips took time off from her job search to care for her father after he was hospitalized. (Tr., p. 76) Phillips provided wound care and administered intravenous medications through his PICC line. (Tr., p. 95) Phillips reported that she was performing the duties of a home health nurse, which is a job that she could perform. (Tr., p. 95)

Phillips has returned to her job search and also volunteers at a free clinic where she administers shots and takes vital signs. (Tr., pp. 76-77) During the summer of 2015, she worked twice a week at the clinic, and in the fall she worked once or twice per month. (Tr., p. 76) During the winter she was not needed as often. (Tr., p. 76)

Phillips testified that her biggest hurdle to finding nursing work is "[b]eing a new nurse. Getting that first job is always the hardest, and it's really competitive in Ann Arbor. And then my limitations on the jobs that I can apply for because of the ones that might put me at risk for head injury." (Tr., p. 79) Phillips believes she could work in an orthopedic clinic, in family practice, and as telephonic nurse. (Tr., p. 87) She would also be able to work as a nurse case manager, if she obtains experience. (Tr., p. 87)

CONCLUSIONS OF LAW

I. Nature and Extent of the Injury

It is undisputed Phillips sustained three head injuries when she was assaulted by residents living in a group home while she was working for REM on October 15, 2011, January 21, 2012, and October 17, 2012. REM and New Hampshire Insurance Co. contend the injuries that occurred on October 15, 2011, and January 21, 2012 did not proximately cause Phillips's permanent disability and Phillips has failed to prove the October 17, 2012 work injury caused anything more than a minimal industrial disability. Phillips disagrees and argues that the October 17, 2012 work injury caused a significant industrial disability. Phillips seeks an award of permanent partial disability benefits.

A claimant bears the burden of proof by a preponderance of the evidence that his or her claimed injury is a proximate cause of the claimed disability. Schutjer v. Algona Manor Care Ctr., 780 N.W.2d 549, 560 (Iowa 2010) (citing Grundmeyer v. Weyerhaeuser Co., 649 N.W.2d 744, 752 (Iowa 2002)). For a cause to be proximate, it must be a "substantial factor." Ayers v. N & D Fence Co., Inc. 731 N.W.2d 11, 17 (Iowa 2007). The claimant must establish a probability of causation exists; a mere possibility

of causation is insufficient. Frye v. Smith-Doyle Contractors, 569 N.W.2d 154, 156 (Iowa Ct. App. 1997).

"Ordinarily, expert testimony is necessary to establish the causal connection between the injury and the disability for which benefits are claimed." Schutjer, 780 N.W.2d at 560. When evaluating expert testimony, the commissioner considers the testimony with all other evidence presented bearing on the causal connection between the injury and disability. Id. As the finder of fact, the commissioner determines the weight to afford expert testimony, and may accept or reject the expert's opinion in whole or in part. Id.; see also Sanchez v. Blue Bird Midwest, 554 N.W.2d 283, 285 (Iowa Ct. App. 1996) (finding "[e]xpert opinion testimony, even if uncontroverted, may be accepted or rejected in whole or in part by the trier of fact.")

A. October 15, 2011 and January 21, 2012 Head Injuries

Phillips did not present evidence at hearing that she received any ongoing treatment, or experienced any ongoing symptoms following the first two injuries. After each injury Phillips took off one day of work, but returned to work the following day without restriction. (Tr., pp. 29, 31) Phillips did not receive any medical care after her initial visits to urgent care. (Tr., p. 30-31) Phillips has not presented evidence supporting her October 15, 2011 and January 21, 2012 injuries caused a permanent disability. Phillips has not met her burden of proof with respect to the October 15, 2011 and January 21, 2012 injuries. Phillips shall take nothing with respect to File Numbers 5044838 and 5044839.

B. October 17, 2012 Head Injury

REM and New Hampshire Insurance Co. next aver Phillips has failed to establish that her October 17, 2012 work injury caused anything more than a minimal industrial disability. Phillips disagrees and contends she sustained a significant industrial disability.

"Industrial disability is determined by an evaluation of the employee's earning capacity." Cedar Rapids Cmty. Sch. Dist. v. Pease, 807 N.W.2d 839, 852 (Iowa 2011). In considering the employee's earning capacity, the deputy commissioner evaluates several factors, including "consideration of not only the claimant's functional disability, but also [his] age, education, qualifications, experience, and ability to engage in similar employment." Swiss Colony, Inc. v. Deutmeyer, 789 N.W.2d 129, 137-38 (Iowa 2010). The inquiry focuses on the injured employee's "ability to be gainfully employed." Id. at 138.

The determination of the extent of disability is a mixed issue of law and fact. Neal v. Annett Holdings, Inc., 814 N.W.2d 512, 525 (Iowa 2012). Compensation for permanent partial disability shall begin at the termination of the healing period. Iowa Code § 85.34(2). Compensation shall be paid in relation to 500 weeks as the disability

bears to the body as a whole. Id. § 85.34(2)(u). When considering the extent of disability, the deputy commissioner considers all evidence, both medical and nonmedical. Evenson v. Winnebago Indus., Inc., No. 14-2097, 2016 WL 3125846, at *9 (Iowa June 3, 2016).

Phillips's treating physicians, Drs. McKinstry, Peterson, Garwood, and Cooper, the examining neuropsychologists, Drs. Peters and Collins, and Miller all opined Phillips experienced a head injury when she was assaulted at work on October 17, 2012. (Exs. 5; 6; 7b, p. 57; 7c, p. 82; 7c, p. 99; 7f, pp. 197, 200, 227). Dr. McKinstry, Miller, and Dr. Peterson assessed Phillips with postconcussive syndrome, migraines, and headaches. (Exs. 7b, p. 57; 7c, pp. 82, 99) Dr. Garwood diagnosed her with chronic tension headaches, and migraine headaches with cervicalgia. (Ex. 7f, pp. 197, 200) Dr. Cooper diagnosed her with cervicalgia, migraines, and cervicogenic vertigo. (Ex. 7f, pp. 226-227)

Dr. Milani opined Phillips sustained an 11 percent permanent impairment to the body as whole, finding she sustained an eight percent whole person impairment with respect to her cervical spine using the ROM method, and an additional three percent whole person impairment due to her pain. (Ex. A, pp. 8-9) Dr. Sassman opined Phillips has sustained a combined impairment of 16 percent to the body as a whole, finding she sustained a seven percent impairment to the body as whole with respect to her cervical spine, using the diagnosis-related estimate ("DRE") method, a seven percent impairment to the body as whole related to her head trauma and postconcussive symptoms, and an additional three percent whole person impairment for her headaches. (Ex. 2, pp. 14-15)

I find Dr. Sassman's opinion more persuasive than Dr. Milani's opinion. Dr. Milani used the ROM method and Dr. Sassman used the DRE method in rating the permanent impairment to Phillips's cervical spine. While the AMA Guides at page 380 recognize both methods for evaluating permanent impairments to the spine, the DRE method is the principal methodology used when an individual has a distinct injury. Dr. Milani did not provide any explanation why he chose the ROM method in evaluating Phillips or explain why the DRE method is inapplicable in this case. Dr. Milani separately evaluated Phillips's pain, Dr. Sassman did not. The AMA Guides at page 10 provide "[i]mpairment ratings in the Guides already have accounted for commonly associated pain, including that which may be experienced in areas distant to the specific site of the pathology. For example, when a cervical spine disorder produces radiating pain down the arm, the arm pain, which is commonly seen, has been accounted for in the cervical spine impairment rating." And Dr. Milani did not use Chapter 13 of the AMA Guides, which relates to the central nervous system, in rating Phillips's postconcussive symptoms, or headaches.

Dr. Peterson, a neurologist, recommended a restriction of "NO EXPOSURE TO ANY COMBATIVE PATIENTS." (Ex. 7c, p. 103) (Emphasis in original.) Dr. Garwood, also a neurologist, disagreed, and opined Phillips should not be restricted from working

in any nursing setting. (Exs. 7f, p. 206; B, p. 6) Dr. Sassman agreed with Dr. Peterson's restriction, and Dr. Milani agreed with Dr. Garwood. (Exs. 2; A) Dr. Collins, a neuropsychologist, also agreed Phillips should avoid working with combative patients. (Exs. 6, p. 33; D, p. 5) I find the opinions of Drs. Peterson and Sassman more persuasive than the opinions of Drs. Garwood and Milani that Phillips should not work in situations that will put her at greater risk for additional head injuries.

Dr. Sassman also recommended permanent restrictions, as follows: "limit lifting, pushing, pulling and carrying to 50 pounds occasionally from floor to waist and waist to shoulder height," that "[s]he should limit lifting, pushing, pulling, and carrying above shoulder height to 20 pounds rarely," and "[s]he should not use vibratory or power tools as these would likely exacerbate her symptoms." (Ex. 2, p. 15) I do not find this portion of Dr. Sassman's opinion persuasive. No other physician or practitioner has imposed similar temporary or permanent restrictions. Drs. McKinstry, Peterson, Garwood, and Cooper and ARNP Miller provided treatment to Phillips over time and did not recommend any such restrictions.

Phillips's current hourly wage is slightly higher than her hourly wage in October 2012. Phillips is young. She received a bachelor's degree in recreational leadership and management in 2007, and worked in the recreation field following graduation. At the time of her injury in October 2012, Phillips was enrolled in nursing school and hoped to earn a higher hourly wage as nurse. After her October 2012 brain injury, Phillips required testing accommodations and accommodations within her clinical nursing program. (Tr., pp. 17-18) Before her injury Phillips did not require any accommodations at school. Since her injury Phillips has had problems with focus. (Tr., p. 43) She was an avid reader who read two books per week. (Tr., p. 43) Phillips cannot maintain her attention to read a book and now listens to audio books. (Tr., p. 43) Phillips does not retain new material when she reads it and has to use flash cards. (Tr., pp. 43-44)

After her October 2012 head injury, Phillips experienced migraine headaches once or twice per week. (Tr., pp. 51-52) Now, she experiences one or two migraines per month because she consistently takes her medication. (Tr., pp. 51-52) Before her head injury, Phillips did not have migraines and tension headaches. (Tr., p. 53) The migraines affect her right side and make her nauseous to the point where she vomits. (Tr., p. 50) Phillips described her migraines as pounding and "unbearable." (Tr., p. 50) Phillips testified her migraines cause her to experience vertigo and to be sensitive to light. (Tr., p. 50) If Phillips feels a migraine developing at work, she takes her medication, goes to her car, sleeps an hour or two, and then drives herself home. (Tr., p. 51) When Phillips has a migraine she cannot work. (Tr., p. 52) Phillips requires accommodations from her current employer for her migraine headaches and she will require future accommodations related to her headaches. Phillips's migraines have persisted for nearly four years.

To date Phillips has been unable to secure employment as a nurse, due, in part, to the labor market in Ann Arbor and her training. Phillips also has a permanent

restriction of not working with combative patients. Phillips is working as a daycare provider, working 30 hours per week. In considering the factors of industrial disability, I conclude Phillips has sustained a 40 percent industrial disability.

C. Commencement Date for Permanency

REM and New Hampshire Insurance Co. aver the commencement date for permanency is January 29, 2015. Phillips contends the commencement date for permanency is August 3, 2013, when she received her final temporary disability check, and around the time she returned to REM to employment substantially similar to that which she was engaged in at the time of the injury.

Iowa Code section 85.33 governs temporary disability benefits, and Iowa Code section 85.34 governs healing period and permanent disability benefits. Dunlap v. Action Warehouse, 824 N.W.2d 545, 556 (Iowa Ct. App. 2012). 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 benefit depends on whether or not the employee has a permanent disability. Dunlap, 824 N.W.2d at 556.

"Compensation for permanent partial disability shall begin at the termination of the healing period." Evenson, No. 14-2097, at *11 (quoting Iowa Code § 85.34(2)). Under the statute, healing period benefits continue:

> [U]ntil the employee has returned to work or it is medically indicated that significant improvement from the injury is not anticipated or until the employee is medically capable of returning to employment substantially similar to the employment in which the employee was engaged at the time of injury, whichever occurs first.

Iowa Code § 85.34(1). Under Iowa Code section 85.33(6), "'employment substantially similar to the employment in which the employee was engaged at the time of the injury' includes, for purposes of an individual who was injured in the course of performing as a professional athlete, any employment the individual has previously performed."

Before her injury, Phillips was working as a part-time direct support professional for REM. While she was off work, Phillips received temporary disability benefits. (Tr., p. 41) The last check she received was on August 3, 2013. (Tr., p. 41) At the time she received her last check, Phillips had returned to substantially similar work.

The parties did not produce Phillips's payroll records. Phillips returned to substantially similar work by August 3, 2013, when she received her last temporary disability check. At the time of her October 2012 injury, the residents Phillips had been

working with were combative. (Tr., p. 27) As a result of Dr. Peterson's restriction that she not work with combative patients, REM moved Phillips to a different group home with more medically needy individuals who were older and did not display as much aggressive behavior. (Tr., p. 27)

Phillips continued to work as a part-time direct support professional, at a different location for REM. The evidence in this case supports Phillips returned to employment substantially similar to the employment she was engaged in at the time of the injury on August 3, 2013.

II. Medical Expenses

Phillips seeks to recover the cost of bills covering treatment she received from the University of Michigan in February 2016, and for payment of Dr. Garwood's sleep study. In their post-hearing brief, REM and New Hampshire Insurance Co. agreed they are responsible for all bills from the University of Michigan, except for the sleep study. REM and New Hampshire Insurance Co. never authorized the sleep study and contend the sleep study had no tangible connection to the work injury.

"An employer is required to 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." Iowa Code § 85.27(1). The employer has the right to choose the provider of care, except when the employer has denied liability for the injury. Id.; Pirelli-Armstrong Tire Co. v. Reynolds, 562 N.W.2d 433, 436 (Iowa 1997). "If the employer chooses the care, the employer shall hold the employee harmless for the cost of care until the employer notifies the employee that the employer is no longer authorizing all or any part of the care and the reason for the change in authorization." Ramirez-Trujillo v. Quality Egg, L.L.C., 878 N.W.2d 759, 771 (Iowa 2016) (quoting Iowa Code § 85.27(4)). The Iowa Supreme Court has held that the plain language of the statute "limits employer liability for authorized care to expenses incurred seeking care related to the medical condition or conditions for which the employee sought care in the aftermath of a workplace injury and upon which the employee's claim for workers' compensation benefits is based." Id. at 775.

The record reflects Dr. Garwood ordered the sleep study to rule out whether Phillips's headaches and migraines were caused by obstructive sleep apnea. Defendants refused to authorize the sleep study and Phillips elected to proceed with the sleep study. Dr. Garwood never opined that Phillips's work injury caused Phillips to have obstructive sleep apnea. Phillips is not entitled to recover the cost of the sleep study.

III. Penalty

Phillips seeks penalty benefits because REM and New Hampshire Insurance Co. did not pay Phillips's permanent partial disability benefits until after Dr. Milani's examination. REM and New Hampshire Insurance Co. contend no penalty benefits should be awarded.

Under the statute's plain language, if there is a delay in payment absent "a reasonable or probable cause or excuse", the employee is entitled to penalty benefits, of up to 50 percent of the amount of benefits that were denied, delayed, or terminated without reasonable or probable cause or excuse. Iowa Code § 86.13(4); see also Christensen v. Snap-On Tools Corp., 554 N.W.2d 254, 260 (Iowa 1996) (citing an earlier version of the statute). "The application of the penalty provision does not turn on the length of the delay in making the correct compensation payment." Robbennolt v. Snap-On Tools Corp., 555 N.W.2d 229, 236 (Iowa 1996). If a delay occurs without a reasonable excuse, the commissioner is required to award penalty benefits in some amount to the employee. Id.

The statute requires the employer or insurance company to conduct a "reasonable investigation and evaluation" into whether benefits are owed to the employee, the results of the investigation and evaluation must be the "actual basis" relied on by the employer or insurance company to deny, delay, or terminate benefits, and the employer or insurance company must "contemporaneously convey the basis for the denial, delay, or termination of benefits to the employee at the time of the denial, delay, or termination of benefits. Iowa Code § 86.13(4)(a). An employer may establish a "reasonable cause or excuse" if "the delay was necessary for the insurer to investigate the claim," or if "the employer had a reasonable basis to contest the employee's entitlement to benefits." Christensen, 554 N.W.2d at 260. "A 'reasonable basis' for denial of the claim exists if the claim is 'fairly debatable.'" Burton v. Hilltop Care Ctr., 813 N.W.2d 250, 267 (Iowa 2012). "Whether a claim is 'fairly debatable' can generally be determined by the court as a matter of law." Id. The issue is whether the employer had a reasonable basis to believe no benefits were owing. Id. "If there was no reasonable basis for the employer to have denied the employee's benefits, then the court must 'determine if the defendant knew, or should have known, that the basis for denying the employee's claim was unreasonable.'" Id.

When considering an award of penalty benefits, the commissioner considers "the length of the delay, the number of delays, the information available to the employer regarding the employee's injuries and wages, and the prior penalties imposed against the employer under section 86.13." Schadendorf v. Snap-On Tools Corp., 757 N.W.2d 330, 336 (Iowa 2008). The purposes of the statute are to punish the employer and insurance company and to deter employers and insurance companies from delaying payments. Robbennolt, 555 N.W.2d at 237.

REM and New Hampshire Insurance Co. paid Phillips temporary disability benefits and issued a final check on August 3, 2013. There is no evidence they paid any late temporary benefits. On January 22, 2016, Dr. Milani issued an opinion finding Phillips had sustained an 11 percent impairment to the body as a whole. No physician had provided a permanent impairment rating prior to Dr. Milani's rating. After receiving his opinion, REM and New Hampshire Insurance Co. did not commence paying permanent partial disability benefits to Phillips, and had not paid any permanent partial disability benefits at the time of hearing. REM and New Hampshire Insurance Co. did not communicate the reason to Phillips why they did not commence payment of permanent partial disability benefits after receiving Dr. Milani's opinion. I conclude Phillips is entitled to $500.00 in penalty benefits.

IV. Costs

Phillips seeks to recover the $350.00 expert witness fee for Dr. Peterson, $581.02 for medical records charges, and the $100.00 filing fee, for a total of $1,031.02. The workers' compensation commissioner has discretion to tax costs. Iowa Code § 86.40; Christensen., 554 N.W.2d at 262. Rule 876 Iowa Administrative Code 4.33 provides the costs that can be taxed, as follows,

> Costs 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, (8) costs of persons reviewing health service disputes.

The administrative rule does not expressly provide that the cost of copies of medical records is recoverable. Phillips is awarded $450.00 in costs. The witness and filing fees are expressly recoverable.

ORDER

IT IS THEREFORE ORDERED, that:

Claimant shall take nothing with respect to File Numbers 5044838 and 5044839.

With respect to File Number 5804484, the defendants shall pay the claimant two hundred (200) weeks of permanent partial disability benefits, commencing on August 4, 2013, at the rate of two hundred six and 98/100 dollars ($206.98).

Defendants shall take credit for all benefits previously paid.

Defendants shall pay accrued benefits with interest in a lump sum.

Defendants shall pay the claimant a penalty of five hundred and 00/100 dollars ($500.00).

Costs in the amount of four hundred fifty and 00/100 dollars ($450.00) are taxed to the defendants pursuant to rule 876 IAC 4.33.

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

Signed and filed this 21st day of July, 2016.

HEATHER L. PALMER
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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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.