

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

PENNY WILLIAMS,

Claimant,

vs.

COMMUNITY ACTION OF
SOUTHEAST IOWA,

Employer,

and

WEST BEND MUTUAL INS.,

Insurance Carrier,
Defendants.

File No. 19002053.01

ARBITRATION DECISION

Head Notes: 1402.40; 1803; 1803.1;
2505

STATEMENT OF THE CASE

Claimant Penny Williams filed a petition in arbitration seeking workers' compensation benefits against Community Action of SE Iowa, employer, and West Bend Mutual Insurance Company, insurer, for an accepted work injury date of November 12, 2018. The case came before the undersigned for an arbitration hearing on November 15, 2021. This case was scheduled to be an in-person hearing occurring in Des Moines. However, due to the outbreak of a pandemic in Iowa, the Iowa Workers' Compensation Commissioner ordered all hearings to occur via video means, using CourtCall. Accordingly, this case proceeded to a live video hearing via CourtCall with all parties and the court reporter appearing remotely. The hearing proceeded without significant difficulties.

The parties filed a hearing report prior to the commencement of the hearing. On the hearing report, the parties entered into numerous stipulations. Those stipulations were accepted and no factual or legal issues relative to the parties' stipulations will be made or discussed. The parties are now bound by their stipulations.

The evidentiary record includes Joint Exhibits 1 through 7, Claimant's Exhibits 1 through 9, and Defendants' Exhibits A through G.

Claimant testified on her own behalf. The evidentiary record closed at the conclusion of the evidentiary hearing on November 15, 2021. The parties submitted

post-hearing briefs on January 6, 2022, and the case was considered fully submitted on that date.

ISSUES

1. Whether the stipulated work injury is the cause of permanent disability;
2. If so, the nature and extent of permanent disability;
3. Payment of certain medical expenses;
4. Payment of claimant's independent medical examination under Iowa Code section 85.39; and
5. Taxation of costs.

FINDINGS OF FACT

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

Claimant's testimony was consistent as compared to the evidentiary record, and her demeanor at the time of hearing gave the undersigned no reason to doubt her veracity. Claimant is found credible.

At the time of hearing, claimant was a 59-year-old person. (Hearing Transcript, p. 10) She is married and has two adult children, and lives in Keokuk, Iowa. (Tr., pp. 10-11) Claimant did not graduate from high school, but did obtain her general education diploma (GED). (Tr., p. 13) Claimant then obtained an associate's degree, and then a bachelor's degree in law enforcement administration and sociology, and psychology. (Tr., p. 14) In 1997, claimant returned to school, and eventually graduated from Western Illinois University with a master's degree in elementary education. (Tr., pp. 14-15)

Claimant's job history includes early positions working as a restaurant server, and in retail sales positions. (Tr., pp. 18-19) In the early 1990s, claimant started working for an agency called Living and Aging Concerns Enterprises (LACE), where she did in-home family counseling for families at risk of having children removed by the department of human services (DHS). (Tr., pp. 19-20) After a couple of years there, claimant went to work at Hancock County Mental Health Center in Carthage, Illinois, as an alcohol and substance abuse prevention education specialist. (Tr., p. 20) She worked there for five years, at which time she returned to school for her master's degree. Claimant did not finish her master's degree until 2002, but was able to become licensed as a teacher before graduating and spent some time teaching in Illinois. (Tr., pp. 21-22)

In 2004, claimant started with Community Action of SE Iowa (hereinafter "Community Action"), in a temporary position. (Tr., p. 22) The following year, in 2005, she became a permanent employee, and worked as the lead teacher for Head Start. (Tr., p. 23) Head Start is a federally funded preschool program for underserved children. The children are accepted into the program based on a variety of factors, including family income, special needs, or other such factors. (Tr., pp. 23-24) Claimant's students were between the ages of three and five years old. (Tr., p. 24) When claimant first started her position as lead teacher, it was a part-time position, and claimant essentially created her own curriculum. In approximately 2011 or 2012, it became a full-time position. (Tr., pp. 24-25) Most of claimant's overall job duties remained the same, but she worked more hours and at times had more children in her classroom. (Tr., p. 25)

Claimant described her job duties as a preschool lead teacher as involving a lot of standing, sitting, squatting, kneeling, and getting up and down off the floor. Claimant indicated that she is a "firm believer" that a person cannot teach preschool without being on the floor and being at their eye level. (Tr., p. 26) Claimant also had to teach basic skills, such as jumping and hopping on one leg, and had to sit on small chairs with the children that are only about seven to twelve inches off the floor. She also noted that she was usually assigned children with behavioral concerns, which meant she would have to be prepared to run after them should they attempt to run away from the classroom.

Claimant has preexisting, chronic low back pain. (Tr., p. 15) She testified that for about the past ten years, she has had problems with her low back. She believes it to be sciatica caused by a bulging disk with arthritis. It mainly affects her in the evenings or when she stops moving. (Tr., p. 16) She has pain in her lower back that radiates down the back of her legs, right worse than left. She has received injections in the past that provided temporary relief, sought chiropractic treatment, and has seen a neurosurgeon, who said her condition was not yet bad enough for surgery. (Tr., p. 17) She takes arthritis medication, and most nights she takes one hydrocodone to help her sleep. Claimant testified that her chronic back pain has never affected her ability to work or limited what jobs she could do or what jobs she would seek out, and never affected her ability to perform her job duties at Community Action. (Tr., pp. 17-18)

Claimant testified that from the time she started at Community Action until the time of her work injury in 2018, she did not have any problem performing the physical duties of her job. (Tr., p. 26) While she may have had back pain at times, she was still able to play with the children and teach, and even taught the PE class. (Tr., pp. 26-27) She found the work very rewarding, and formed bonds with the children and parents of the children in her classes. (Tr., pp. 27-29) She thinks she did a good job as lead teacher, and testified that she had "more parents involved in everything than anybody else." (Tr., p. 29)

Claimant's work injury occurred on November 12, 2018. (Tr., p. 31) Claimant explained that at Head Start, versus public school, if a teacher needs to be gone, they are responsible for securing their own substitute teacher. (Tr., pp. 31-32) On the date of injury, which was a Monday, claimant's associate's husband called her in the early

evening to let her know that the associate had lost her voice and would not be able to work the following day. (Tr., p. 32) Since she had lost her voice, she also could not call for a substitute, so claimant agreed to call for her. However, the Friday prior to the injury claimant had been given an updated list of substitute teachers, which she had forgotten in the building when she left for the evening. As such, claimant returned to the building to retrieve the list. (Tr., pp. 32-33)

At the time claimant returned to the building, it was drizzling outside and had been misty most of the day. (Tr., p. 33) By then it was also dark outside. As claimant entered the building, she was cautious, as she felt it was getting slippery. On the way back out of the building, claimant testified that despite trying to be cautious, when she reached for the hand railing at the steps leading down from the front door, she slipped and fell. She was able to make it home, and called or texted her supervisor immediately to report the fall. She was told to complete an incident report the next day at work, which she did. (Tr., p. 33)

The incident report notes that claimant came to the building to get an updated sub list, and there was a thin coating of ice at the top of the stairs that she could not see. (Joint Exhibit 2, p. 6) When she fell, she reported hurting her back, both wrists, and jarring her neck and head. Claimant was sent to Great River Business Health on November 14, 2018, where she saw Terry O'Neal-Cox, M.D. (Jt. Ex. 3, p. 8) Claimant reported slipping and falling on ice and landing "firmly on her buttocks." She reported pain in her neck, back, and left upper extremity at that point. She advised that she had a history of left forearm pain from golfing, and a history of low back pain with sciatica. She reported discomfort down the right buttock and posterior right thigh, but not as bad as she has had in the past. After physical examination, she was diagnosed with musculoskeletal strain, and directed to start physical therapy. (Jt. Ex. 3, pp. 9-10) She was allowed to return to work with no restrictions.

Claimant returned to Dr. O'Neal-Cox on December 4, 2018, after completing some physical therapy. (Jt. Ex. 3, p. 12) She reported that her neck was a bit better, but her right hip area was much worse. She reported the right hip pain began after a few sessions of physical therapy and was getting worse. She had pain with range of motion, difficulty crossing her right leg over the left, and pain if laying on her right side. She still had some pain in her low back as well, but her hip was now her main concern.

On physical exam, she showed pain with range of motion and pain with applied pressure over the proximal femur. (Jt. Ex. 3, pp. 12-13) She also had discomfort with squatting, but was able to bear weight and walk with no difficulty. (Tr., p. 13) X-ray of the lumbar spine and right hip were normal, but in light of her examination and complaints, claimant was referred to orthopedics. She was to continue working regular duty and continue with physical therapy in the meantime.

Claimant returned to Great River Business Health on January 9, 2019, and saw Sarah Wingate, ARNP. (Jt. Ex. 3, p. 14) Her right hip pain was not improving, but at the time it was manageable. She reported that physical therapy was not helping, and

actually increasing her pain. She also reported having an MRI done, which showed a partial thickness tear of the right gluteus medius tendon. Claimant was advised to continue physical therapy and working regular duty. (Jt. Ex. 3, p. 15) She next saw ARNP Wingate on February 5, 2019, and reported that her hip pain had become much worse. (Jt. Ex. 3, p. 16) She described the pain as constant, made worse by walking, going up and down stairs, and standing on her right leg. She also noted that walking caused pain and that her knee had begun to hurt due to an altered gait. Her pain was also affecting her job, as she often had to kneel when working with students. After physical examination, ARNP Wingate referred claimant to orthopedics, and placed her on work restrictions. (Jt. Ex. 3, p. 17)

Claimant saw Derek Breder, M.D., in orthopedics on February 13, 2019. (Jt. Ex. 4, p. 18) He reviewed her history, and noted her current work restrictions were no/limited stairs, 10-pound lift limit, and decrease squatting. She continued to complain of right hip pain, along with some radiating pain to the right knee due to walking "funny" all day. On physical examination, Dr. Breder noted tenderness to palpation over the greater trochanter, and pain with range of motion. (Jt. Ex. 4, p. 20) He reviewed the prior x-ray and noted minimal degenerative changes. Finally, he stated that the MRI showed a partial tear of the gluteus medius at its insertion on the greater trochanter. (Jt. Ex. 4, pp. 20-21)

Dr. Breder diagnosed tendinopathy of the right gluteus medius and trochanteric bursitis of the right hip. (Jt. Ex. 4, p. 21) He stated that while she had some pain and weakness of her abductors, she seemed to have more pain over the lateral aspect of the greater trochanter and tenderness down the IT band, consistent with trochanteric bursitis. As such, he recommended a trial of a right hip trochanteric bursal corticosteroid injection, with a six-week course of physical therapy focused on generalized hip strengthening and IT band stretching. He performed the injection without complication, and allowed claimant to return to work with no restrictions. (Jt. Ex. 4, p. 21)

Claimant followed up with Dr. Breder on March 25, 2019. (Jt. Ex. 4, p. 23) She reported some relief from the injection, but said her hip still hurt. Her leg felt stronger from physical therapy, but she had complaints of lower back pain on the right side. Dr. Breder recommended she continue with physical therapy for another four to six weeks. (Jt. Ex. 4, p. 25) At her next follow up on May 6, 2019, claimant reported that she had been having difficulty with her full work duties due to pain. (Jt. Ex. 4, p. 27) She stated that any time she would get to 8,000 steps on her Fitbit, she would have increased pain. Dr. Breder noted that overall, she continued to have severe pain with any significant physical activity, and her condition had not changed much with physical therapy over the past months. (Jt. Ex. 4, p. 29) As such, he recommended referral to the University of Iowa for further evaluation and potential surgical repair of the abductor tendon.

Claimant saw Robert Westermann, M.D., at the University of Iowa Hospitals and Clinics on June 10, 2019. (Jt. Ex. 5, p. 31) He ordered plain radiographs, which showed mild to moderate osteoarthritis. (Jt. Ex. 5, p. 32) He reviewed the MRI of claimant's hip and noted an anterior-superior labral tear with degenerative changes in the articular

cartilage and underlying bone, and gluteus medius tear. After physical examination, Dr. Westermann discussed treatment options, and it was decided to proceed to surgery. (Jt. Ex. 5, p. 34)

Claimant had right hip arthroscopic surgery with gluteus medius repair, IT band release, and trochanteric bursectomy on August 21, 2019. (Jt. Ex. 5, pp. 39-41) His operative note indicates that an arthroscopic bursectomy was performed, and there was extensive scarring in the greater trochanteric bursa. (Jt. Ex. 5, p. 41) He further recorded using a chondral pick in the footprint of the gluteus medius in a microfracture style fashion, in order to stimulate healing. (Jt. Ex. 5, p. 41) At her first post-operative follow-up, claimant reported right hip and buttock pain with stabbing right lateral knee pain. (Jt. Ex. 5, p. 42) She had been using crutches and a hip brace, as her workers' compensation carrier did not approve a walker. She was cleared to start physical therapy, and kept on restrictions including toe-touch weight bearing on the right leg while using a walker or crutches for six weeks, no driving, change positions as needed, no squatting, kneeling, or ladders, must have an adult-sized chair, and should not be around children who might bump into her leg or crutches/walker. (Jt. Ex. 5, p. 45)

At her next follow up on October 7, 2019, claimant had progressed her weightbearing and had been occasionally bearing her full weight for the past week. (Jt. Ex. 5, p. 46) However, claimant was experiencing increased pain in the hip with full weightbearing. She had improved her gait and strength in physical therapy. Dr. Westermann felt that overall claimant was doing well. (Jt. Ex. 5, p. 49) He advised claimant to weight-bear as tolerated and wean off one crutch, continue physical therapy, and allowed her to return to work part-time if she could be accommodated with one crutch and an adult-sized chair.

On November 12, 2019, claimant returned to Dr. Westermann and reported doing very well. (Jt. Ex. 5, pp. 50-51) She had been working with physical therapy on "sport specific" strengthening and gait training, and was anxious to get back to her bowling league. (Jt. Ex. 5, p. 51) She was ambulating without pain and without a limp, and was overall very happy with the outcome of her surgery thus far. On physical examination, Dr. Westermann agreed that she ambulated with a normal gait, and noted minimal pain with range of motion, and 5 of 5 strength on hip abduction. (Jt. Ex. 5, p. 53) She was to continue physical therapy, and was allowed to return to work full-time with a 20-pound lifting restriction.

At her next follow up with Dr. Westermann on January 6, 2020, claimant reported achiness in her right hip with cold or damp weather, sitting for a long time, or if she sleeps on her right side. (Jt. Ex. 5, p. 54) However, she thought she was back at full strength and did not have pain with a two-mile walk. On physical examination, she had minimal pain with range of motion and minimal tenderness at the IT band. (Jt. Ex. 5, p. 55) She had 5 of 5 strength, and ambulated with a normal gait and no assistive devices. Dr. Westermann advised that her achiness would likely improve up to one year post-surgery. (Jt. Ex. 5, p. 56) He placed claimant at maximum medical improvement (MMI), and released her from care with no restrictions. He also provided an impairment rating,

using the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition. Using chapter 17, he noted range of motion and strength within normal limits, no neurologic dysfunction, no joint space narrowing, and no diagnosis-based reason to assign impairment for her gluteus medius injury. As such, he assigned zero percent permanent impairment. (Jt. Ex. 5, p. 56)

Claimant testified that she continued to have problems after Dr. Westermann's release, so she returned to see him within a few months. (Tr., p. 39) She was referred for a diagnostic ultrasound with injection with Ryan Kruse, M.D., which took place on March 2, 2020. (Jt. Ex. 5, p. 57) Dr. Kruse's summary findings were: 1) no evidence of recurrent gluteus medius tendon tear, and 2) greater trochanteric bursitis. (Jt. Ex. 5, p. 58) He then provided a sonographically-guided right greater trochanteric bursa corticosteroid injection.

Claimant returned to Dr. Westermann via telehealth visit on April 23, 2020. (Jt. Ex. 5, p. 60) Despite the injection, claimant continued to have pain. She reported increasing soreness of the hip when walking any distance over a mile, and a pulling sensation in the hip when twisting. Dr. Westermann noted that claimant had known mild to moderate hip arthritis, so he recommended an MRI in order to assess if her pain was coming from the arthritis or the gluteus medius repair.

Claimant returned to Dr. Westermann on May 14, 2020, following the MRI. (Jt. Ex. 5, p. 63) She reported that she felt Dr. Kruse's injection had actually made her pain worse, and at that point her pain was about to the level it was prior to hip surgery. (Jt. Ex. 5, p. 64) Dr. Westermann reviewed the MRI, which showed postsurgical changes of the gluteus medius tendon, and no discrete tears. (Jt. Ex. 5, p. 68) He noted that the tendon had healed, and he did not believe any further surgical treatment would be reasonable. He recommended TENEX treatment "in order to debride microscopically her pathological area which would stimulate some healing and relieve some of her pain." (Jt. Ex. 5, p. 68) He noted that he would discuss with workers' compensation for approval, and added that it "appears to be a continuation of her prior work comp injury will have her assessed for tenex procedure on the repaired tendon." (Jt. Ex. 5, p. 69)

Claimant testified that after that appointment, she received a letter from the workers' compensation insurer indicating that Dr. Westermann said it was just arthritis and "they're done with me." (Tr., p. 40) Dr. Westermann did author a letter to Amy Schrang of West Bend Insurance on May 29, 2020. (Defendants' Exhibit C, p. 7) His letter notes it is in response to an email request dated May 12, 2020, in which he was asked to answer two questions. The first question was: "Care regarding the acute injury of 11/12/18 has been effectively treated and resolved leaving the [employee] at her baseline pre-existing arthritic status?" Dr. Westermann answered "Yes." The second question read: "There was no permanent exacerbation or aggravation of her arthritis and she should resume regular care for her arthritic condition(s) with her personal provider?" Dr. Westermann again answered "Yes." (Def. Ex. C, p. 7) It appears this letter was the basis on which the defendants denied any further care for claimant's hip injury.

On June 26, 2020, Dr. Westermann replied to a “check-box” letter authored by Kimberly Westfall of West Bend Insurance. (Def. Ex. C, pp. 9-10) The letter indicates that Dr. Westermann was provided with preexisting medical records dating back to 2006, and requested his opinions regarding additional questions. (Def. Ex. C, p. 9) First, Ms. Westfall wrote that claimant “has extensive preexisting arthritic condition(s),” which were temporarily exacerbated by her work injury, but “outside of the surgical tendon repair” the work injury did not materially change those conditions in any way. Dr. Westermann marked that he agreed with that statement. The next statement indicated that as of Dr. Westermann’s last visit with claimant on May 14, 2020, the repaired tendon had healed, and “the underlying arthritic condition and tendinopathy were causing continued pain complaints.” The work injury was only a temporary aggravation of the underlying arthritic condition, and no longer a substantial factor in causing claimant’s continued problems. Dr. Westermann again indicated agreement with that statement. The next statement indicated that going forward, any future care claimant needs, “including the TENEX procedure recommended 5/14/20 prior to your review of her prior medical records,” should be attributed to claimant’s preexisting arthritic condition, and the work injury would not be a substantial factor in causing the need for any future treatment. (Def. Ex. C, p. 10) Dr. Westermann agreed. Finally, the last statement indicated that Dr. Westermann’s prior declaration of MMI with a zero percent impairment rating and no restrictions remains accurate, with which he again agreed.

After the denial of additional treatment for her work-related injury, claimant sought a second opinion on her own, at Steindler Orthopedic Clinic. (Tr., p. 41) On September 17, 2020, she saw Taylor Dennison, M.D. In reviewing claimant’s history, he noted that after surgery claimant’s strength recovered well and she had initial improvement in pain, but it never completely resolved and eventually worsened. (Jt. Ex. 6, p. 70) He also noted the repeat MRI claimant had in May of 2020 showed healing of the tendon and “only mild arthritic change.” On physical examination, Dr. Dennison noted marked trochanteric tenderness to palpation. (Jt. Ex. 6, p. 71) Range of motion of the hip was painless, and claimant had 5 of 5 strength in all muscle groups, and a non-antalgic gait. Hip x-rays taken that day showed well-preserved joint space without dysplastic features or significant FAI. Dr. Dennison’s diagnosis was trochanteric bursitis, right hip, and persistent right hip soft tissue pain. He noted that there is strong evidence clinically and radiographically that claimant’s tendon healed following surgery, she continued to experience significant pain in the area likely related to bursitis and/or tendinitis. He specifically noted that he did not think that arthritis was a significant factor in her pain. He noted that she had “minimal radiographic arthritis and negative provocative hip maneuvers.” (Jt. Ex. 6, pp. 71-72) He thought needle tenotomy would be one possible treatment consideration, and referred claimant to another physician at Steindler for discussion. (Jt. Ex. 6, p. 72)

On Dr. Dennison’s recommendation, claimant saw Daniel Jones, M.D., on October 13, 2020. (Jt. Ex. 6, p. 73) His physical examination was very similar to Dr. Dennison’s. (Jt. Ex. 6, p. 74) On review of the MRI from May 6, 2020, he noted “mild femoral acetabular [degenerative joint disease]. Mild bilateral hamstring origin

tendinopathy.” He reviewed x-rays from her prior appointment with Dr. Dennison and noted “mild bilateral femoral acetabular degenerative changes right-greater-than-left,” and “moderate enthesophyte formation around the greater trochanter on the right greater than left.” (Jt. Ex. 6, p. 74) Under “impression,” Dr. Jones wrote that after claimant’s gluteal tendon repair and IT band release she had improved function but persistent lateral hip pain with hypersensitivity, and suspected it represents some residual gluteal tendinopathy. He could not rule out possible nerve hypersensitivity related to her surgery or initial injury. His suspected diagnosis was gluteal tendinopathy leading to recurrent or persistent episodes of bursitis. Potential treatment options included short-term and long-term options, including platelet rich plasma (PRP) injections or percutaneous needle tenotomy (PNT). The record indicates claimant decided to try PNT, with the understanding that there was no guarantee it would fix her problem. (Jt. Ex. 6, p. 75)

At claimant’s next appointment on October 29, 2020, she presented for right gluteal PRP injection. (Jt. Ex. 6, p. 77) It is unclear whether the prior record indicating she wanted to try the PNT was simply an error, or if the decision changed. In any event, prior to the procedure the area was evaluated with ultrasound, which showed some evidence of “acute tendon inflammation and chronic tendon thickening of the distal gluteal tendons near the greater trochanter.” (Jt. Ex. 6, p. 77) Following the injection, she was instructed on a gradual increase in exercise/strengthening, and instructed to begin a course of physical therapy. (Jt. Ex. 6, pp. 77-78) Claimant testified that she paid \$800.00 out-of-pocket for the injection. (Tr., p. 42)

When claimant returned for follow up on November 23, 2020, she reported no significant changes in her symptoms following the PRP injection and physical therapy. (Jt. Ex. 6, p. 79) While she noted limited improvement, she continued to have pain. (Jt. Ex. 6, p. 80) Dr. Jones stated that some people have a more delayed symptomatic improvement and there was still a chance she would get some benefit. He encouraged her to stay consistent with her therapy exercises and continue to work on gluteal strengthening, core, and functional mechanics.

There is a note from Dr. Jones dated December 9, 2020, indicating he spoke to an attorney who had been working on claimant’s workers’ compensation case. (Jt. Ex. 6, p. 82) He recorded that they discussed his suspicion that claimant’s current lateral hip pain is still related to her prior injury and previous surgery, particularly with the hypersensitivity in the area. They discussed that there could still be some chance for improvement, although it is less likely as more time passes. Finally, he notes that he left it with claimant that she could call back if she would like to consider further treatment options, which could include PNT or amnion fix type injection to the area, although the success of those options is somewhat unknown as they are not commonly done in a patient with a history of the prior surgery claimant had. (Jt. Ex. 6, p. 82)

Following the phone conversation, Dr. Jones signed a “Statement of Dr. Daniel Jones” on December 11, 2020. (Claimant’s Exhibit 1, p. 1) The statement indicates that claimant continues to suffer from pain and discomfort in her right hip more than two

years since the original injury. In Dr. Jones' opinion, her current pain and discomfort in her right hip and need for treatment are a result of the original 2018 work injury and related care. He further stated that his treatment has been an attempt to relieve her pain and discomfort, and they were considering additional options to provide her with relief. Dr. Jones also opined that since claimant had been suffering with the condition for more than two years, it is likely that she is left with some level of permanency. However, he declined to provide an impairment rating at that time as she had not completed all treatment he may provide. Finally, he stated that he does not believe her pain is a result of any preexisting arthritis, as her MRI "looks good and she has minimal arthritis in her hip." Rather, he opined that her pain and discomfort is more likely than not associated with the original injury and surgery. (Cl. Ex. 1, p. 1)

At defendants' request, claimant attended an independent medical evaluation (IME) with Wesley Smidt, M.D., at Des Moines Orthopaedic Surgeons (DMOS). The IME took place on May 20, 2021. (Def. Ex. B, p. 2) Dr. Smidt reviewed claimant's treatment history. Claimant advised that while she had a history of low back pain, she did not have any prior injuries to the right hip. At the time of the IME, claimant's complaints were pain and sensitivity over the lateral aspect of the right hip. (Def. Ex. B, p. 3) She also complained of pain that radiates down the outside part of her leg, sometimes past her knee. She noted pain with "power walking" or extended walking throughout the day, especially with over 10,000 steps in one day. She continued to bowl and golf, but reported discomfort with those activities and additional pain if the area is bumped. She advised that the pain was essentially the same as prior to surgery.

On physical examination, Dr. Smidt noted tenderness over the lateral aspect of the hip over a fairly wide area. Claimant had no pain with range of motion, and normal strength. She moved about the exam room without guarding or discomfort. Dr. Smidt took x-rays, which showed changes that can be seen with trochanteric bursitis, with irregularity of the bone over the greater trochanter and lateral aspect of the proximal femur. He noted more boney formation and irregularity at the surface of the right hip than the left, and increased bone formation in the area of the greater trochanter at the insertion of the gluteus medius and minimus tendons. Finally, he noted mild narrowing of the joint space, particularly medially of the right hip joint. He noted that the left hip joint was normal. (Def. Ex. B, p. 3)

Dr. Smidt provided responses to several questions posed by defendants. His diagnosis for the November 12, 2018 work injury was "right hip greater trochanteric bursitis with partial tear of the gluteus medius insertion." (Def. Ex. B, p. 4) He opined that the work injury was the substantial factor in the need for the surgery Dr. Westermann performed. He further opined that the diagnosis for the treatment claimant received at the Steindler Clinic is that of persistent greater trochanteric bursitis, with healed gluteus medius tendon, and that diagnosis was the substantial factor is causing the need for her treatment at Steindler. Dr. Smidt opined that no further treatment was warranted for claimant's persistent greater trochanteric bursitis, given that the gluteus medius tear had healed, and she had multiple series of physical therapy and injections, including PRP injection, without benefit. As such, he would consider claimant to have

reached MMI on November 23, 2020, after her follow up with Dr. Jones following the PRP injection. Dr. Smidt was not asked about the need for permanent restrictions.

Finally, Dr. Smidt provided an impairment rating using the AMA Guides. Using Table 17-33, he assigned a 2 percent whole body impairment rating for chronic trochanteric bursitis, noting that she does not have an abnormal gait, which would be a 3 percent rating. (Def. Ex. B, pp. 4-5) She does have a limited gait and pain with gait, especially with longer distance or duration. However, Dr. Smidt opined that a 2 percent rating was more appropriate.

Claimant later had an IME at her attorney's request with Sunil Bansal, M.D. That IME took place on July 30, 2021, and Dr. Bansal's report is dated September 6, 2021. (Cl. Ex. 2) Dr. Bansal reviewed medical records, including records pre-dating the work injury that discuss claimant's degenerative changes in her lumbar spine. (Cl. Ex. 2, pp. 3-7) He noted her subjective symptoms at that time included lower back and right hip pain, and that going up stairs was difficult for her hip. (Cl. Ex. 2, p. 15) She does not have difficulty putting on her shoes or socks. Certain activities such as power walking aggravate her pain. She continues to golf, but must use a cart rather than walking the course. She also complained that her neck was still stiff at times.

On physical examination, Dr. Bansal noted some tenderness in her neck and lower back. (Cl. Ex. 2, pp. 15-16) With respect to her right hip, he noted tenderness to palpation over the greater trochanter and trochanteric bursitis. (Cl. Ex. 2, p. 16) He also noted an accentuation of pain with internal and external rotation of the hip, but full range of motion. Finally, he noted an antalgic gait. His diagnosis of the injuries sustained in the incident on November 12, 2018 was right gluteus medius partial tearing and greater trochanteric pain syndrome (GTPS). (Cl. Ex. 2, p. 17) He opined that the fall at work was the cause of the GTPS, and noted that the condition can be mistaken for common causes of hip pain, including osteoarthritis of the hip, lumbar spine referred pain, and pelvic pathology. (Cl. Ex. 2, pp. 17-18) However, he noted that the ability to put on her socks and shoes is a useful question in differentiating GTPS from hip osteoarthritis, because patients with GTPS will not have difficulty with that task. (Cl. Ex. 2, p. 18)

With respect to impairment, Dr. Bansal provided a 3 percent whole person impairment rating related to the trochanteric bursitis, using table 17-33 of the AMA Guides. (Cl. Ex. 2, p. 18) For maintenance, he recommended intermittent trochanteric bursal steroid injections. He further noted that a TENEX procedure was recommended, and explained that that procedure is "essentially an ultrasound-guided percutaneous needle tenotomy. It is indicated for tendinopathy, such as gluteal tendinopathy, and therefore wholly applicable to her injury-related condition." (Cl. Ex. 2, p. 18) Finally, Dr. Bansal recommended restrictions of avoiding multiple stairs and climbing, rare kneeling or squatting, and no prolonged walking greater than 30 minutes at a time. (Cl. Ex. 2, p. 19)

The parties disagree whether claimant sustained a permanent injury to her hip as a result of the November 12, 2018 injury. Defendants argue that based on Dr.

Westermann's opinion, the work injury caused no permanent impairment, and claimant's ongoing hip symptoms are related to pre-existing arthritis.

Claimant testified that at her last appointment with Dr. Westermann on May 14, 2020, he did not tell her anything about her arthritis causing her ongoing symptoms. (Tr., pp. 40-41) Claimant has never treated for hip arthritis prior to the work injury, only arthritis in her lower back. (Tr., p. 41; Jt. Ex. 1, pp. 1-5) All prior records related to claimant's hip injury reference mild to moderate arthritis, including the MRI results. Additionally, Dr. Westermann's statement after claimant's appointment on May 14, 2020, was that her condition appeared to be "a continuation of her prior work comp injury will have her assessed for tenex procedure on the repaired tendon." (Jt. Ex. 5, p. 69) All treatment recommendations were aimed at claimant's repaired tendon, not an arthritic condition. In fact, as Dr. Bansal explained, a TENEX procedure is "essentially an ultrasound-guided percutaneous needle tenotomy. It is indicated for tendinopathy, such as gluteal tendinopathy, and is therefore wholly applicable to [claimant's] injury-related condition." (Cl. Ex. 2, p. 18) It does not make sense for Dr. Westermann to recommend a procedure to treat claimant's tendon injury if he truly believed her symptoms were due to arthritis. Additionally, it is unclear what medical records Dr. Westermann reviewed prior to responding to the June 26, 2020 letter, but none of the medical records in evidence indicate claimant ever had hip complaints prior to the work injury, or a preexisting arthritic condition in her hip that was only "temporarily" aggravated by the work injury.

The only medical records in evidence that pre-date the work injury indicate claimant had preexisting arthritis causing low back pain and sciatica, which is pain radiating down the back of her right leg. (Jt. Ex. 1, pp. 1-5) There are no records indicating claimant had preexisting hip pain or pain radiating down the side of her right leg, over the IT band, as was true after the work injury. The records support claimant's testimony, that prior to the work injury she never had right hip pain. (Tr., p. 37) To the contrary, Dr. Westermann's opinions as expressed in the June 26, 2020 letter are not supported by the remainder of the evidence.

In addition, Dr. Jones, Dr. Smidt, and Dr. Bansal all agree that the work injury on November 12, 2018 and related treatment is the cause of claimant's ongoing hip condition. Each doctor has indicated that claimant's pain is the result of tendinopathy and bursitis due to the torn gluteus medius tendon and related surgery. None of these three physicians found claimant to have any significant arthritic condition in her right hip that would be the source of her ongoing symptoms. Given the evidence as a whole, I find that the November 12, 2018 injury resulted in a permanent injury to claimant's right hip. All treatment claimant has received for her right hip since the date of injury has been causally related to the work injury.

Claimant returned to Dr. Jones on September 27, 2021. (Jt. Ex. 6, p. 83) She continued to report right hip pain, and indicated she did not feel that she got significant relief with the PRP injection, as it "never really kicked in." On physical examination, she continued to have full range of motion and strength, with tenderness to palpation over

the region of the greater trochanter. (Jt. Ex. 6, p. 84) Dr. Jones recommended claimant try some home exercises over the next couple of months, and provided a trial of some topical patches and gel to try.

Claimant testified that the PRP injection did help for a little while. (Tr., p. 43) She also testified that it is her understanding that additional, similar procedures may provide her with long-term relief in the future. (Tr., pp. 74-75) With respect to her current condition, claimant testified that she is often in pain. (Tr., p. 56) It hurts to sit certain ways; for instance, if she crosses her legs she feels a pulling sensation. At times she feels like something is pinched, and other times she feels like someone is ripping her skin. She has a constant ache, which can get worse depending on how she moves or how long she has been sitting. The undersigned personally observed claimant to be shifting in her seat and appearing visibly uncomfortable after about one hour of testimony. Claimant also testified that she cannot walk for extended periods of time and has difficulty getting up and down off the ground. (Tr., p. 57) She rated her pain at a 3 or 4 most of the time, although if her hip is bumped or pushed the pain increases. Claimant also sleeps with a CPAP machine, which is on the right side of her bed, and as such she is used to sleeping on her right side. (Tr., p. 58) However, she often cannot sleep on her right side anymore due to her hip, which makes sleeping difficult as she cannot get comfortable. Claimant testified that the hydrocodone she takes to help with her back pain helps her hip somewhat, but it does not help the feeling of pressure when she lays on her hip. (Tr., pp. 58-59)

With respect to her right leg pain, claimant testified that prior to the hip injury, she only had pain down the back of her leg. (Tr., p. 59) However since the hip injury, she has had pain down the side of her leg, and the pain is more from moving or touching it or from something bumping it.

Claimant testified that after the work injury, she did continue to work as a preschool teacher for Community Action, but often would have some difficulties. (Tr., p. 59) Usually by the end of the day she would be in a lot of pain from being up and down with the children, and she was very cautious of anything being on her right side, which would cause her to distance herself from the children at times. (Tr., pp. 59-60) Prior to surgery, claimant did not miss work due to her injury, but she frequently left work as early as she could due to pain. (Tr., p. 60) When she returned to work after the surgery, she still went home early once or twice per week, but not as frequently as she did prior to surgery.

Claimant's employment at Community Action was terminated by the employer on November 13, 2020. (Def. Ex. G, pp. 26-27) In the termination letter, it is indicated that claimant was terminated for a number of reasons, including "egregious violation of Head Start Policy, CACFP rules, and USDA regulations." (Def. Ex. G, p. 28) Specifically, claimant served the children pizza produced by an outside company for lunch on October 21, 2020, which is a violation of federal rules and Head Start policy. The letter also indicates claimant was insubordinate to her immediate supervisor on October 28, 2020, when she replied to an email request to complete a required newsletter with

“Sorry, no time.” (Def. Ex. G, pp. 28, 33-34) The letter also cites to three separate reprimands in 2019, and concerns raised in her annual evaluations in 2018, 2019, and 2020. (Def. Ex. G, p. 28) At the time of claimant’s termination, she was working full time and earning \$19.54 per hour. (Def. Ex. G, pp. 30-31)

Since her termination from Community Action, claimant has worked as a substitute teacher for the Keokuk School District, and has worked as a part-time occasional minister for Bethany UCC Church in Tioga, Illinois. (Tr., pp. 52-53) She is paid \$220.00 by the church each time she fills in as minister, and over the summer of 2021 she did it three times. (Tr., p. 53) She is also a volunteer at her personal church, where she is an elder and is also on the governing board, and used to serve as a trustee. She and her husband also volunteer with Meals on Wheels and serve meals every Friday. (Tr., p. 56)

With respect to her substitute teaching, at the time of hearing she was subbing two or three days per week. (Tr., p. 54) Claimant testified that she applied for two permanent positions with the school district in the spring of 2021, but was not interviewed for either. Claimant explained that she believes the reason she was not interviewed is twofold. First, she had to change her teaching license to a substitute license when she went to work for Head Start, because it is not a state-accredited school so she was not able to maintain a teaching license while working there. (Tr., pp. 54-55) She is able to change it back to a full teaching license with a letter of intent from a principal, but believes this is part of why she was not interviewed. (Tr., p. 55) Second, she testified that since almost all of her experience is in preschool, and specifically at Head Start, she does not have as much experience with technology or teaching upper classroom levels. While she is learning now through subbing, she is not as familiar with some of the technology used in classrooms today, which impacts her ability to secure a full-time teaching job above the preschool level. (Tr., p. 56)

With respect to claimant’s ability to work, she testified that she has had to “rethink” what she is able to do since her injury, as she cannot do all the things she could before. (Tr., p. 61) For example, she does not believe she can return to teaching preschool, as it is too difficult to get on the floor and play with the children. She does not feel that she can teach preschool the “right” way without the ability to physically be on the floor with them. (Tr., pp. 61-62) She testified that there was a preschool opening that she would have been offered, but she declined even the offer to substitute as she did not believe she was physically capable of doing the job properly. (Tr., p. 61) Claimant believes that if she was still able to teach preschool, she would have more job opportunities, since that is where most of her experience lies. (Tr., p. 62) That being said, claimant admits she does not have any doctor-imposed work or activity restrictions related to her hip injury, other than Dr. Bansal’s recommendations. (Tr., pp. 71-72) Additionally, claimant is still able to golf and bowl regularly, and also plays pickleball. (Tr., p. 73) She testified that she does limit herself in terms of climbing, kneeling, stairs, squatting, and prolonged walking, consistent with Dr. Bansal’s recommendations. (Tr., pp. 75-76)

Claimant's job description from Community Action for her role as Head Start lead teacher is included in evidence. (Cl. Ex. 3, pp. 20-21) Under essential duties is it required that teachers eat with children at a child-sized table. (Cl. Ex. 3, p. 20) Additionally, the physical demands of the job include sitting on the floor and in low chairs; stooping, kneeling, crouching, bending, and crawling; the ability to stand, walk, run, and climb or balance; and regularly lifting/moving up to 50 pounds and occasionally 100 pounds. (Cl. Ex. 3, p. 21) Based on claimant's testimony regarding the difficulties she had when she returned to work following her injury, as well as her current abilities and limitations, I find it is unlikely that she can return to working as a preschool teacher. While claimant initially returned to work making the same or greater salary, she was subsequently terminated from employment, and at the time of hearing was earning less than she was at the time of injury. Claimant's permanent hip injury has decreased her earning capacity in that she is no longer able to teach preschool. Claimant is motivated to return to work, as demonstrated by her work substitute teaching and her attempts to secure a full-time teaching job. As claimant gains additional experience with technology and teaching at higher grade levels, it is possible she will find full-time work in the future. However, based on her situation at the time of hearing, I find claimant has sustained a 40 percent loss of earning capacity as a result of the work-related injury.

CONCLUSIONS OF LAW

The party who would suffer loss if an issue were not established ordinarily has the burden of proving that issue by a preponderance of the evidence. Iowa R. App. P. 6.904(3)(e). 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).

The first issue to determine is whether claimant's November 12, 2018 work injury resulted in permanent disability. Defendants argue that based on Dr. Westermann's opinion, the injury caused no permanent impairment, and claimant's ongoing hip symptoms are related to pre-existing arthritis. Claimant contends that the work injury did leave her with permanent disability, based on her testimony and the remainder of the evidence. The preponderance of the evidence supports claimant's argument. Dr. Westermann is the only physician who opined that claimant's current, ongoing complaints are related to arthritis. Further, he has only expressed that opinion in providing essentially "yes or no" answers to questions posed by the defendants. His change in opinion is not credible, especially considering the treatment he recommended, a TENEX procedure, is designed to treat claimant's repaired tendon, not an arthritic condition. None of the medical records in evidence support the conclusion that claimant had a significant arthritic condition or pain in her right hip prior to the work injury. Claimant has met her burden to prove her work injury resulted in permanent disability.

Since the injury resulted in permanent disability, the next issue to determine is the nature and extent of disability claimant has sustained. An injury to the hip is an unscheduled injury and thus considered an injury to the body as a whole. Defendants argue that claimant's recovery is limited to the impairment rating pursuant to Iowa Code section 85.34(2)(v). Claimant argues that she is entitled to industrial disability.

In 2017, the Iowa legislature amended the Iowa Workers' Compensation Act. See 2017 Iowa Acts, ch. 23. The 2017 amendments apply to cases in which the date of an alleged injury is on or after July 1, 2017. *Id.* at § 24(1); see also Iowa Code § 3.7(1). Because the injury at issue in this case occurred after July 1, 2017, the Iowa Workers' Compensation Act, as amended in 2017, applies. Smidt v. JKB Restaurants, LC, File No. 5067766 (App. Dec. 11, 2020).

Before 2017, permanent partial disability to an unscheduled body part caused by a work injury was "compensated by the industrial disability method which takes into account the loss of earning capacity." Gilleland v. Armstrong Rubber Co., 524 N.W.2d 404, 407 (Iowa 1994) (citing Mortimer, 502 N.W.2d at 14-15). With the 2017 amendments, the legislature carved out an exception to this general rule and created a mandatory bifurcated litigation process on the issue of permanent disability under certain circumstances. See 2017 Iowa Acts ch. 23, § 8 (now codified at Iowa Code § 85.34(2)(v)). The statute now articulates an exception and the circumstances triggering the bifurcated litigation process as follows:

If an employee who is eligible for compensation under this paragraph returns to work or is offered work for which the employee receives or would receive the same or greater salary, wages, or earnings than the employee received at the time of the injury, the employee shall be compensated based only upon the employee's functional impairment resulting from the injury, and not in relation to the employee's earning capacity. Notwithstanding section 85.26, subsection 2, if an employee who is eligible for compensation under this paragraph returns to work with the

same employer and is compensated based only upon the employee's functional impairment resulting from the injury as provided in this paragraph and is terminated from employment by that employer, the award or agreement for settlement for benefits under this chapter shall be reviewed upon commencement of reopening proceedings by the employee for a determination of any reduction in the employee's earning capacity caused by the employee's permanent partial disability.

Iowa Code § 85.34(2)(v).

Thus, the 2017 amendments changed the statute so that its text expressly incorporates the agency's review-reopening process to create a mandatory bifurcated litigation process when certain criteria are met. See, e.g., Garcia v. Smithfield Foods, File No. 1657969.01 (Arb. February 16, 2022). Under Iowa Code section 86.14(2), review-reopening is a process by which a determination of compensation is revisited due to a change in the claimant's condition. Kohlhaas v. Hog Slat, Inc., 777 N.W.2d 387, 391–95 (Iowa 2009). The bifurcated litigation process created in section 85.34(2)(v) allows a claimant to seek a new agency determination of permanent disability using an industrial disability analysis when the defendant-employer terminates the claimant's employment after the initial agency award or approval of the parties' agreement for settlement. Presumably, this is because the defendant-employer's discharge of the claimant after the award or agreement for settlement creates a potential change in the claimant's condition that could trigger reopening the determination of permanent disability. See id.

Defendants argue that because claimant returned to work with Community Action at the same or greater earnings following the work injury, her permanency benefits, if any, are limited to the functional impairment ratings pursuant to section 85.34(2)(v). Defendants state that had claimant not violated Head Start policy, resulting in her termination, she would have continued to earn those wages at the time of hearing. Additionally, defendants argue that claimant is not entitled to industrial disability based on termination of employment because there is no existing award or agreement for settlement in this case. Defendants argue that the proper interpretation of the statute requires an award or agreement for settlement to occur prior to the termination of employment, which then triggers the claimant's right to review reopening under section 85.34(2)(v).

Defendants' arguments are not convincing. The Commissioner considered the amendments to section 85.34 in Martinez v. Pavlich, Inc., File No. 5063900 (App. July 30, 2020). In Martinez, the claimant voluntarily quit employment with the defendant-employer and accepted a position with a different employer at higher pay. Id. While the nature of the employment separation differs from the one in this case, Martinez is nonetheless guiding. Id. The Commissioner considered how the provisions at issue in this case should be construed and found:

When the two new provisions . . . are read together, as they are set forth in the statute, it appears the legislature intended to address *only the*

scenario in which a claimant initially returns to work with the defendant-employer or is offered work by the defendant-employer at the same or greater earnings but is later terminated by the defendant-employer.

Id. (emphasis added). In other words, if an injured worker returns to work for the same employer and earns the same or greater wages than he or she did on the date of injury, the injured worker's entitlement to permanent disability benefits is limited to the functional loss unless or until the injured workers' employment relationship is terminated by either the injured worker or the employer. *Id.* Since the Martinez decision, a number of arbitration decisions have concluded similarly. See, e.g., Raley v. Securitas Security Services, File No. 5067169 (Arb., March 26, 2021); Turner v. NCI Building Systems, Inc., File No. 1652235.01 (Arb., Feb. 24, 2022); Ocampo v. New Fashion Pork, File No. 20012252.01 (Arb., March 4, 2022).

Defendants' argument that an award or agreement for settlement must occur prior to the termination of employment in order to trigger the right to review reopening actually supports the Commissioner's interpretation of the statute. In order for the bifurcated litigation process to apply, there must first be an award or agreement for settlement, so there is something to reopen in the review reopening procedure. In cases such as this, where the employee is terminated or voluntarily leaves employment prior to an award or agreement, there would never be a scenario in which industrial disability would be appropriate. This could lead to unfair and illogical results in many cases.

Additionally, the fact that claimant initially earned the same or greater wages when she initially returned to work is not convincing. The Commissioner has determined that logic and fairness dictate that the post-injury "snapshot" of claimant's salary, wages or earnings should occur at the time of the hearing, just as industrial disability is measured as the evidence stands at the time of the hearing. Vogt v. XPO Logistics Freight, File No. 5064694.01 (App., June 11, 2021) Performing the comparison based on a claimant's initial return to work could also lead to unfair and illogical results. *Id.*

In this case, the defendant employer terminated its employment relationship with claimant on November 13, 2020. At the time of hearing, claimant was not receiving the same or greater salary, wages, or earnings as she received at the time of the injury. As such, claimant is entitled to an industrial disability evaluation.

Functional impairment is an element to be considered in determining industrial disability which is the reduction of earning capacity, but consideration must also be given to the injured employee's age, education, qualifications, experience, motivation, loss of earnings, severity and situs of the injury, work restrictions, inability to engage in employment for which the employee is fitted and the employer's offer of work or failure to so offer. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963); Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961).

Based on claimant's testimony regarding her current abilities and limitations, I found it is unlikely that she can return to working as a preschool teacher. While she did

continue to work as a preschool teacher for some time after the injury, it was not without difficulty. She credibly testified that after the injury, she was often in pain by the end of the day and would frequently leave work as early as possible. Additionally, she testified that currently, she does limit herself in terms of climbing, kneeling, stairs, squatting, and prolonged walking, consistent with Dr. Bansal's recommendations. She does not believe she is physically capable of teaching preschool any longer, as she cannot do the job properly with those limitations. Because her past experience is primarily limited to teaching in a preschool setting, claimant had not been able to secure permanent work at the time of hearing. Claimant is motivated to return to work, as demonstrated by her work substitute teaching and her attempts to secure a full-time teaching job. As claimant gains additional experience with technology and teaching at higher grade levels, it is possible she will find full-time work in the future. However, based on her situation at the time of hearing, I found claimant has sustained a 40 percent loss of earning capacity as a result of the work-related injury. This is equal to 200 weeks of permanent partial disability benefits.

The final issues to determine involve payment of medical expenses and claimant's IME. Claimant seeks medical expenses from her treatment at Steindler Orthopedic Clinic following defendants' denial of ongoing treatment for her work injury. Defendants argue that claimant is not entitled to the expenses for the unauthorized care, as she has not shown the care was beneficial in improving her condition. Bell Bros. Heating & Air Conditioning v. Gwinn, 779 N.W.2d 193 (Iowa 2010). However, under Iowa law, once defendants denied compensability for ongoing medical treatment, they lost the right to choose the medical providers for that care during the period of denial. "[T]he employer has no right to choose the medical care when compensability is contested." Bell Bros., 779 N.W.2d at 204. Further, when compensability is contested, "the employer cannot assert an authorization defense in response to a subsequent claim by the employee for the expenses of the alternate medical care." R. R. Donnelly, 670 N.W.2d at 197-198.

Ultimately, therefore, defendants are precluded from asserting an authorization defense as to any treatment during the period of denial, and defendants lost the right to control the medical care claimant sought during the period of denial. Brewer-Strong, 913 N.W.2d at 247; Bell Bros., 779 N.W.2d at 204. As such, claimant is entitled to reimbursement for the treatment she received at Steindler during the period of the denial, as reflected in claimant's exhibit 5.

Finally, claimant seeks reimbursement for her IME with Dr. Bansal, pursuant to Iowa Code section 85.39. The Iowa Workers' Compensation Commissioner has noted that the Iowa Supreme Court adopted a strict and literal interpretation of Iowa Code section 85.39 in Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839 (Iowa 2015) (hereinafter "DART"). See Cortez v. Tyson Fresh Meats, Inc., File No. 5044716 (Appeal December 2015). If an injured worker wants to be reimbursed for the expenses associated with a disability evaluation by a physician selected by the worker, the process established by the legislature must be followed. This process permits the employer, who must pay the benefits, to make the initial arrangements for the

evaluation and only allows the employee to obtain an independent evaluation at the employer's expense if dissatisfied with the evaluation arranged by the employer. DART, 867 N.W.2d at 847 (citing Iowa Code § 85.39).

In this case, the employer sought an impairment rating from Dr. Westermann on January 6, 2020, and a second rating from Dr. Smidt on May 20, 2021. Claimant's IME with Dr. Bansal took place on July 30, 2021, and his report was issued on September 6, 2021. Defendants did not provide any argument to suggest claimant is not entitled to reimbursement or that Dr. Bansal's fees were unreasonable. Because Dr. Bansal's IME took place subsequent to the defendants' ratings, claimant is entitled to reimbursement of his full IME fee in the amount of \$3,637.00, pursuant to Iowa Code section 85.39. (Cl. Ex. 6, 26)

ORDER

THEREFORE, IT IS ORDERED:

Defendants shall pay claimant two hundred (200) weeks of permanent partial disability benefits, commencing on the stipulated date of January 6, 2020, at the stipulated rate of four hundred ninety-five and 34/100 dollars (\$495.34).

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

Defendants are responsible for all reasonable and causally related medical care with respect to claimant's right hip/right lower extremity injury, including but not limited to treatment claimant received at Steindler Orthopedic Clinic.

Defendants shall reimburse claimant in the amount of three thousand six hundred thirty-seven and 00/100 dollars (\$3,637.00) for payment of Dr. Bansal's IME report, pursuant to Iowa Code §85.39.

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 28th day of March, 2022.



JESSICA L. CLEEREMAN
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Nicholas Pothitakis (via WCES)

Charles Blades (via WCES)

Right to Appeal: This decision shall become final unless you or another interested party appeals within 20 days from the date above, pursuant to rule 876-4.27 (17A, 86) of the Iowa Administrative Code. The notice of appeal must be filed via Workers' Compensation Electronic System (WCES) unless the filing party has been granted permission by the Division of Workers' Compensation to file documents in paper form. If such permission has been granted, the notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 150 Des Moines Street, Des Moines, Iowa 50309-1836. The notice of appeal must be received by the Division of Workers' Compensation within 20 days from the date of the decision. The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or legal holiday.