BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

TERESA WALTON, Claimant, vs. COMPASS GROUP USA, INC., Employer, and NEW HAMPSHIRE INS. CO. Insurance Carrier, Defendants.	File No. 1663689.02 ARBITRATION DECISION Head Note Nos.: 1803, 1803.1, 2500, 2502, 4000, 4000.10

STATEMENT OF THE CASE

Claimant, Teresa Walton, has filed a petition for arbitration seeking workers' compensation benefits against Compass Group USA, Inc., employer, and New Hampshire Insurance Company, insurer, both as defendants.

In accordance with agency scheduling procedures and pursuant to the Order of the Commissioner in the Matter of Coronavirus/COVID-19 Impact on Hearings, the hearing was held on June 24, 2021, via CourtCall. The case was considered fully submitted on July 22, 2021, upon the simultaneous filing of briefs.

The record consists of Joint Exhibits 1-7; Claimant's Exhibits 1-9; Defendants' Exhibits A—I, and the testimony of claimant and Louis Lynxwiler.

ISSUES

1) Whether the work injury of December 27, 2018 was limited to the leg or also involved her back/hip;
2) Entitlement to permanent disability;
3) Commencement date of permanent partial disability (PPD).
4) Reimbursement of medical expenses.
5) Independent medical examination (IME).
6) Costs associated with Requests for Admissions; and
7) Penalty benefits.

STIPULATIONS

The parties filed a hearing report at the commencement of the arbitration hearing. On the hearing report, the parties entered into various stipulations. All of those stipulations were accepted and are hereby incorporated into this arbitration decision and

no factual or legal issues relative to the parties' stipulations will be raised or discussed in this decision. The parties are now bound by their stipulations.

The parties stipulate the claimant sustained an injury on December 27, 2018, which arose out of and in the course of his employment. The parties agree that if permanent benefits are found to be owing, the commencement date of those benefits is May 4, 2020.

Defendants waive all affirmative defenses. Prior to the hearing, claimant was paid 15.4 weeks of compensation at the rate of $308.02 per week.

The parties also specifically stipulate that the Exhibit H, letter of Dr. Hill, should be given the same weight as if Dr. Hill had signed and dated the letter on June 24, 2021.

FINDINGS OF FACT

At the time of the hearing, claimant was a 60 old person. Her educational background included graduation from high school and some college courses focused on accounting and bookkeeping. No degree was obtained.

Claimant is currently working for REM Iowa taking care of disabled individuals in her community. She earns $11.28 per hour and works approximately 39 hours per week. Her current job duties include cooking for the residents, assisting them in bathing or showering, and other general care.

She had a prior injury of a fracture in her mid back but testified that as of the time of the injury, she had no problems with her low back, knee or hip. Her past medical history includes three treatments for neck and lower back pain with chiropractor Matthew Betterton, D.C., in 2016. (JE 1:1-3) Claimant expressed concern that her work at a hotel which required heavy lifting on occasion may be the cause. (JE 1:1)

For the defendant employer, claimant was employed as a food service worker. Her duties included preparing the evening meals for the Whirlpool plant in Amana, Iowa.

On December 27, 2018, claimant was preparing the evening meal for Whirlpool employees. While in the kitchen, she slipped and fell on her left knee. She had immediate pain, redness, and swelling. When she approached the Whirlpool nurse's station, she was told they could not provide any assistance because she was not a Whirlpool employee. She was provided ice and sent home. Upon contacting her supervisor, she was instructed to go to a medical facility. Unfortunately, she was turned away as the defendant employer did not have a contract with the facility.

Claimant took herself to the emergency room. (JE 2:21) X-rays revealed a fracture of the patella. (JE 2:23) Claimant was instructed to follow up with a physician. She sought treatment from Amber Collum, PA. (JE 3:32) On January 3, 2019, she reported that her knee pain had improved by 50 percent, but she was continuing to have

mild mid back pain. (JE 3:32) She sought a release to return to work which was provided. (JE 3:33)

She returned to PA Collum on January 10, 2019, voicing pain with any types of stairs or pressure along with calf pain and swelling. (JE 3:35) An MRI was ordered which confirmed the patella fracture without any other injury or tears. (JE 2:24)

Claimant then saw Gregory Hill, M.D., on February 1, 2019, for treatment for the left knee non displaced inferior pole patella fracture. (JE 4:42) She was fitted for an orthotic and instructed to return. During the return visit, Dr. Hill noticed a palpable click in the patella and mentioned the possibility of smoothing any irregularity in the healed fracture. (JE 4:45) On that same date, she was provided with a full leg boot. (JE 4:44)

Claimant returned to Dr. Hill on March 6, 2019 and he commented her condition "may or may not improve" and suggested surgery if the condition did not improve. (JE 4:45)

Claimant was referred for physical therapy. (JE 5:60) Her first visit was March 25, 2019. (JE 5:60-65) The physical therapy records noted Walton was having back pain while wearing the first leg brace. (JE 5:61) The records also noted, "Pt reports that the R ankle hurts more and the L hip is really bad" (JE 5:61). The records documented increased pain in the hip during the functional tests, hip pain while walking, and left hip pain due to "compensatory movement patterns" due to the immobilized knee which had been in a full length brace for 6 weeks. (JE 5:62-64) Left hip pain was noted in the second visit at a 6-7 on a 10 scale. (JE 5:67, 70). Claimant continued to express her pain was more in her hip rather than her knee. (JE 5:73; 77)

On April 18, 2019, which was her eighth physical therapy appointment, claimant reported left lower extremity pain, a burning sensation, along with an increased work load. (JE 5:82) She had pain in the knee, left hip, and leg. (JE 5:83-84) In the last approved physical therapy visit, on May 2, 2019, claimant continued to have pain behind the kneecap, a tight IT band along with soreness in the leg. (JE 5:91) She was tender along the superior edge of the patella and at the lateral fat pad. (JE 5:91) She had pain with ascending and descending. (JE 5:91-92) Her long term and short term goals were not met, but claimant was moving toward them. (JE 5:93)

On May 6, 2019, claimant saw Dr. Hill for pain in the knee, stiffness, and difficulties with activities of daily living. (JE 5:48-50) He found her to have full range of motion, no effusion, smooth glide and a normal patella track. (JE 4:48) He believed her fracture had fully healed but that she might have continued pain. (JE 4:48) He indicated he had nothing further to offer. He established permanent restrictions of limited kneeling and no lifting greater than 40 pounds and placed her at maximum medical improvement (MMI). (Jt. Med. Ex. 4:48; 4:50). He noted that it was difficult to "rate" pain. (JE 4:48)

Following Dr. Hill's last appointment, claimant reported to the adjuster, Maureen Davidson, that claimant continued to experience back pain. However, claimant was told that the workers' compensation claim was for the knee only.

On September 4, 2019, Dr. Hill wrote to the defendant insurer relating that claimant had reached MMI with the aforementioned work restrictions of limited kneeling and a weight limit of 40 pounds. (JE 4:52) Dr. Hill then assigned a 7 percent lower extremity impairment for the knee injury. (JE 4:52)

Claimant continued to work for defendant employer until January of 2020. She testified her restrictions from Dr. Hill were followed, and, in particular, she did not have to mop.

On October 2, 2019, claimant returned to PA Collum with complaints of left knee and left leg pain. (JE 3:36) She shared she had seen her chiropractor for back issues. (JE 3:38) An MRI of the lumbar spine showed mild degenerative changes at L4-L5. (JE 2:30-31)

Sarah A. Hemming-Meyer, D.O., concluded that the lower extremity symptoms such as increased swelling in the ankle and persistent pain along the left medial knee and pain radiating from her hip down to the knee was associated with her patella fracture in December 2018. (JE 6:170)

Claimant underwent an ultrasound of her lower extremity on October 2, 2019, which showed normal gray scale echogenicity, Doppler flow, augmentation, and compressibility without evidence of deep venous thrombosis. (JE 2:27; 6:169)

An x-ray of the knee conducted on December 28, 2019, showed no acute fracture or dislocation. (JE 2:29)

On March 28, 2020, she was seen again by Dr. Betterton for left hip and lateral thigh pain. (JE 1:4) Claimant related she had continued to experience this pain since the fracture of the left knee in 2018. (JE 1:4) She also mentioned suffering lower cervical spine pain. (JE 1:4) No specific reports of lumbar pain were documented although lumbar pain and lumbar disc without myelopathy were noted in the assessment section. (JE 1:4)

On April 7, 2020, claimant reported constant sciatic pain that radiated into the left lower extremity, especially into the posterior gluteal, thigh and distal calf. (JE 1:6) A few days later, on April 10, 2020, claimant reported a 20 percent improvement in the sciatic condition. (JE 1:7) On April 14, 2020, claimant woke up with soreness in the lateral thigh and low back. (JE 1:8) She attributed this to lifting stock at work which aggravated her low back. (JE 1:8) Work increased her pain again the weekend before April 24, 2020. (JE1:10) After chiropractic treatment, the pain regressed. (JE 1: 11) On May 7, 2020, claimant shared she was wearing a back brace while working which was helping to

reduce her pain. (JE 1:12) On May 29, 2020, she shared that the pain in her leg was waxing and waning, sore at one point and better at another. (JE 1:14)

On June 2, 2020, claimant reported pain in the left leg was severe with no cause. (JE 1:15) On June 3, 2020, claimant reported to PA Collum that pain in her lower back radiating into the left leg which she maintained was intermittent since the work injury but worsened over the last six months. (JE 3:38) She mentioned that she was seeing a chiropractor. PA Collum ordered an MRI which showed a broad-based disc bulge with mild bilateral foraminal stenosis at L4-L5. (JE 2:30-31; 3:39; JE 7:184)

On June 29, 2020, claimant reported exacerbation of unknown cause, especially present while trying to sleep at night. (JE 1:16) On July 2, 2020, claimant reported improvement after the prior adjustment which lasted for approximately 48 hours. (JE 1:17)

On July 8, 2020, claimant returned to see PA Collum for the back and leg pain. (JE 7:175) Claimant rated her pain vacillating from 2 – 9 on a 10 scale. (JE 7:175) PA Collum recommended an epidural steroid injection at the L4-L5 level to which claimant agreed. (JE 7:177) On July 28, 2020, claimant called in reporting increased pain. She was offered another injection but refused. (JE 7:181)

PA Collum referred claimant to physical therapy and suggested claimant return for an injection with a lower dose of the steroid. (JE 5:60; JE 7:185-86) Claimant restarted therapy September 16, 2020. (JE 5:94) In the subjective portion, claimant related that the pain began in December 2018 when she fell and fractured her left knee and that since the fall she has had increasing pain in the back and legs with reports of throbbing pain across her back, radiating down the back and lateral aspects of her legs. (JE 5:95)

These low back symptoms were not documented during the 2019 visits to physical therapy.

Her treatment diagnosis was low back pain, bilateral lower extremity pain, weakness, and difficulty walking. (JE 5:94) She attributed this back pain to her fall in 2018. (JE 5:94) During the examination, the therapist recorded “Pt ambulates with no AD with antalgic gait pattern with lack of TKE on the left, rigid trunk and shortened step length/stance time.” (JE 5:96) Claimant also had pain to palpation through the bilateral glutes most notable at the glute insertion along with discomfort through glutes/piriformis and down bilateral IT Bands. (JE 5:95) On September 30, 2020, she reported that the shoe orthotic increased her hip pain bilaterally. (JE 5:105)

On October 5, 2020, it was noted that claimant was changing jobs soon and hoped that the change in job would alleviate some pain. (JE 5:108) She was approved for 20 visits which was scheduled to end on November 16, 2020[1]. (JE 5:133) During the November 16, 2020, visit, claimant still had pain and weakness in her left hip which

[1] She only attended thirteen appointments by November 16, 2020, due to scheduling issues. (JE 5:134)

affected her standing and walking tolerance. (JE 5:134) On December 16, 2020, claimant was doing well with a reported 70 percent improvement. (JE 5:146)

Approval was requested and granted for an additional 12 therapy visits through January 16, 2021. (JE 5:153)

As of the January 13, 2021, visit, claimant had not met her goals. (JE 5:162) She was compliant with her home exercise program but continued to complain of pain and discomfort in the left hip and low back. (JE 5:162) She rated her pain at 5 out of 10 on a 10 scale. (JE 1:162) She was discharged on this date. (JE 1:164)

Claimant was discharged again on March 12, 2021. (JE 5:164) The therapy plan was updated but claimant did not return for additional therapy. (JE 5:164)

On December 23, 2019, Sunil Bansal, M.D., examined claimant for the purposes of an IME. (CE 1) She reported to Dr. Bansal that she had no prior problems with her low back and no treatment for her low back; however, the chiropractor records showed some treatment for her low back. Prior to her work injury, claimant was working full duty with no restrictions and thus despite the small variance between claimant' s memory at the time of her IME and the chiropractic records of 2016, the recitation of prior injuries to Dr. Bansal is accepted as largely credible.

On examination, she had reduced flex ion of the left knee, a positive Fabre's test on the left, negative straight leg tests, full range of motion in the hip with tenderness into the sacroiliac joint, tenderness on the right ankle and loss of sensory discrimination over the posterior lower leg. (CE 1:10)

Dr. Bansal concluded claimant sustained a left knee patellar fracture as a result of the work injury on December 27, 2018, when she slipped and fell, striking her left knee on the cement floor. (CE 1:10) He further opined that as a result of her fall, her pre existing sacroiliitis worsened from the altered gait she developed following the December 2018 knee fracture. (CE 1:11) Sacroiliac pain often manifests as hip pain. (CE 1:11) He recommended intermittent joint injections and aqua therapy. (CE 1:12) For impairment, he assessed a 7 percent lower extremity impairment which was the same as Dr. Hill but added a 5 percent impairment for the low back injury. (CE 1:12) Dr. Bansal also agreed with Dr. Hill's restrictions for claimant's knee and recommended further restrictions due to claimant's aggravated low back injury including no prolonged standing or walking greater than 15 minutes at a time, avoidance of frequent kneeling or squatting, bending or twisting, and multiple stairs or ladders. (CE 1:12) Dr. Bansal assigned a 7 percent impairment rating for the left lower extremity and a 5 percent impairment rating to the whole person due to the back complaints. (JE 1:12)

Dr. Bansal charged $570.00 for the examination and $2,211.00 for the report. (CE 9:71)

On May 19, 2020, Dr. Hill signed a checklist opinion letter finding that claimant's alleged back, hip, sacroiliitis condition(s) and/or complaint(s) were not causally related to the remote work injury to the knee dated December 27, 2018. (JE 4:54)

On May 19, 2021, PA Collum signed a checklist opinion letter opining claimant's left knee injury was a contributing factor to the development of low back pain and that it was because of the back pain that PA Collum referred claimant for the MRI, physical therapy, and to Dr. Saddler. (JE 3:40-41). PA Collum charged $60.00 for the report and consult).

On May 17, 2021, Dr. Saddler opined the December 27, 2018, work injury was a substantial contributing factor for the treatment provided (JE 7:190). She also agreed it is not uncommon to develop hip and back problems as a result of an injury such as claimant sustained on December 27, 2018 (JE 7:190). Dr. Saddler charged $295.00 for the report and consult.

On May 10, 2021, Dr. Betterton was of the opinion the December 2018 work injury was a substantial contributing factor in bringing about Walton's lumbar pain for which he provided care and treatment (JE 1:19). He further stated that the location of the pain and problems he treated along with the complaints and symptoms of the claimant were consistent with a sequela injury due to an altered gait from the work injury of December 2018. (JE 1:19)

In a checklist letter, Dr. Betterton opined that the left knee fracture described by the claimant was of the type that could result in an altered gait and permanent injury to the hip. (JE 1:18) He further opined that the left knee fracture of December 2018 was a substantial contributing factor in bringing about the lumbar pain for which he provided treatment and that the March 2020 through July 2020 treatment was related to the work injury. (JE 1:19) He recommended claimant continue treatment with the primary care physician and consider an MRI. (JE 1:19) Dr. Betterton charged $50.00 for the report and consult.

Currently, claimant takes over the counter ibuprofen. She does not use an assistive device to walk.

Claimant's supervisor at Compass, Mr. Lynxwiler, testified that had claimant not been terminated and had she not voluntarily quit on January 7, 2020, she would still be an employee of Compass. At the time she quit, claimant earned more money than she was at the time of her injury. (Def. Ex. C:10). Her 2018 W2 earnings were $19,998.00. (DE E:3) Her 2019 W2 earnings were $24,359.27. (DE E:5)

Claimant testified that after her work injury she was able to perform her job with defendant employer. Mr. Lynxwiler further testified that he did not see claimant exhibit signs of pain during her employment post injury such as an altered gate or limping.

When claimant applied for a new position, she agreed that she could do work that required bending, squatting, kneeling, twisting and lifting of 50 pounds. (DE F:4) She testified at hearing that she was able to do the work required of her for a year.

Claimant initially did not include dependents when she first reported her injury and at the time of her hiring with Compass. (Def. Ex. C:2) On March 31, 2021, claimant provided a copy of her tax returns to defendants, which showed entitlement to two exemptions. (CE 3:16)

Defendants challenge claimant's credibility. Specifically, they argue that claimant is not credible because she did not report her prior back complaints to Dr. Bansal. They also argue that the claimant is not credible because while she complains of altered gait and limping problems at the hearing, there were few mentions of altered gait issues in her therapy and other medical records.

While claimant's account to Dr. Bansal of her past medical treatments may have omitted a few chiropractic treatments, on the whole, claimant's complaints of pain and discomfort have been consistent throughout her treatment in 2019 and 2020. Several healthcare providers have seen and treated claimant during that time and there was no mention of claimant being a poor historian or malingering. Her testimony at hearing was also consistent with her past medical treatments. Therefore, it is specifically found claimant was a credible witness.

CONCLUSIONS OF LAW

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

The claimant has the burden of proving by a preponderance of the evidence that the alleged injury actually occurred and that it both arose out of and in the course of the employment. Quaker Oats Co. v. Ciha, 552 N.W.2d 143 (Iowa 1996); Miedema v. Dial Corp., 551 N.W.2d 309 (Iowa 1996). The words "arising out of" refer to the cause or source of the injury. The words "in the course of" refer to the time, place, and circumstances of the injury. 2800 Corp. v. Fernandez, 528 N.W.2d 124 (Iowa 1995). An injury arises out of the employment when a causal relationship exists between the injury and the employment. Miedema, 551 N.W.2d 309. The injury must be a rational consequence of a hazard connected with the employment and not merely incidental to the employment. Koehler Elec. v. Wills, 608 N.W.2d 1 (Iowa 2000); Miedema, 551 N.W.2d 309. An injury occurs "in the course of" employment when it happens within a period of employment at a place where the employee reasonably may be when performing employment duties and while the employee is fulfilling those duties or doing an activity incidental to them. Ciha, 552 N.W.2d 143.

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 primary dispute is whether claimant's accepted work injury of December 27, 2018, extended beyond claimant's lower left extremity into her back and hip. In support of this, claimant presented expert opinions of Dr. Bansal, Dr. Saddler, Dr. Betterton and PA Collum.

Dr. Bansal and Dr. Betterton primarily rely on the theory that a left knee facture resulted in claimant's altered gait and thus a permanent injury to the hip. Dr. Saddler opined more generally that it is not uncommon to develop hip and back problems as a result of the fracture and PA Collum opined that the left knee injury was a contributing factor, although not a substantial contributing factor, in the development of low back pain.

Dr. Hill, who claimant saw less than a half dozen times in 2019, opined that the hip and back pain claimant complained of was unrelated to her knee fracture. The contemporaneous medical records have few references to an altered gait. Claimant went to extensive physical therapy in 2019 and 2020. During those visits, she often complained of hip pain and back pain and that the hip pain was due to compensatory movement patterns due to the immobilization of the left knee. Her complaints of left hip pain were consistent throughout her physical therapy treatment in 2019 and during her treatment with Dr. Betterton.

Based on claimant's consistent reports of left hip pain beginning in March 2019, and continuing until the present, along with the expert opinions of Dr. Bansal, Dr. Saddler, Dr. Betterton, and PA Collum, it is found that claimant developed left hip and low back pain as a result of her work injury of December 27, 2018.

Since claimant has an impairment to the body as a whole, an industrial disability has been sustained. Industrial disability was defined in Diederich v. Tri-City Ry. Co. of Iowa, 219 Iowa 587, 258 N.W. 899 (1935) as follows: "It is therefore plain that the Legislature intended the term 'disability' to mean 'industrial disability' or loss of earning

capacity and not a mere 'functional disability' to be computed in the terms of percentages of the total physical and mental ability of a normal man."

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).

Compensation for permanent partial disability shall begin at the termination of the healing period. Compensation shall be paid in relation to 500 weeks as the disability bears to the body as a whole. Section 85.34.

> 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.

Iowa Code section 85.34(v)

It is uncontroverted claimant was earning $19,998.00 in 2018 and $24,359.27 in 2019. Thus, her industrial loss can only be based upon claimant's functional impairment resulting from the injury. Dr. Bansal and Dr. Hill both assigned a 7 percent loss for the lower left extremity and Dr. Bansal assigned a 5 percent loss to the whole body as a result of claimant's left hip and low back pain.

Claimant's functional impairment is 8 percent of the body as a whole.

The parties dispute the commencement date of permanent partial disability benefits. Claimant asserts it is May 7, 2019, and defendants argue it is September 5, 2019. Claimant sought a return to work on January 3, 2019, which was provided. Compensation for permanent partial disability shall begin at the termination of the healing period. Section 85.34.

Section 85.34(1) provides that healing period benefits are payable to an injured worker who has suffered permanent partial disability until (1) the worker has returned to work; (2) the worker is medically capable of returning to substantially similar employment; or (3) the worker has achieved maximum medical recovery. The healing period can be considered the period during which there is a reasonable expectation of improvement of the disabling condition. See Armstrong Tire & Rubber Co. v. Kubli, 312N.W.2d 60 (Iowa App. 1981). Healing period benefits can be interrupted or intermittent. Teel v. McCord, 394 N.W.2d 405 (Iowa 1986).

Given that claimant returned to work on January 3, 2019, doing substantially similar employment that she was engaged in at the time of her injury, the proper commencement date for permanent partial disability benefits would be January 3, 2019.

Because it is found claimant's left hip and low back pain are causally connected to her work injury, the medical expenses identified in Claimant's Exhibit 6 shall be paid for by the defendants.

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

Claimant seeks an award of penalty benefits.

If weekly compensation benefits are not fully paid when due, section 86.13 requires that additional benefits be awarded unless the employer shows reasonable cause or excuse for the delay or denial. Robbennolt v. Snap-on Tools Corp., 555 N.W.2d 229 (Iowa 1996).

Delay attributable to the time required to perform a reasonable investigation is not unreasonable. Kiesecker v. Webster City Meats, Inc., 528 N.W.2d 109 (Iowa 1995).

It also is not unreasonable to deny a claim when a good faith issue of law or fact makes the employer's liability fairly debatable. An issue of law is fairly debatable if viable arguments exist in favor of each party. Covia v. Robinson, 507 N.W.2d 411 (Iowa 1993). An issue of fact is fairly debatable if substantial evidence exists which would support a finding favorable to the employer. Gilbert v. USF Holland, Inc., 637 N.W.2d 194 (Iowa 2001).

An employer's bare assertion that a claim is fairly debatable is insufficient to avoid imposition of a penalty. The employer must assert facts upon which the commissioner could reasonably find that the claim was "fairly debatable." Meyers v. Holiday Express Corp., 557 N.W.2d 502 (Iowa 1996).

The employer's failure to communicate the reason for the delay or denial to the employee contemporaneously with the delay or denial is not an independent ground for imposition of a penalty, however. Keystone Nursing Care Center v. Craddock, 705 N.W.2d 299 (Iowa 2005).

If the employer fails to show reasonable cause or excuse for the delay or denial, the commissioner shall impose a penalty in an amount up to 50 percent of the amount unreasonably delayed or denied. Christensen v. Snap-on Tools Corp., 554 N.W.2d 254 (Iowa 1996). The factors to be considered in determining the amount of the penalty

include the length of the delay, the number of delays, the information available to the employer and the employer's past record of penalties. Robbennolt, 555 N.W.2d at 238.

Claimant argues she is entitled to penalty benefits based on the defendants' delay in the payment of permanent partial disability and the incorrect calculation of her workers' compensation rate.

Dr. Hill placed claimant at MMI on May 6, 2019, and imposed permanent work restrictions. No rating was issued until September 4, 2019, and permanent partial disability benefits were initiated on September 18, 2019. Claimant argues that the permanent partial disability benefits should have been paid or initiated in May of 2019. Defendants offer no explanation for the delay in benefits.

At the time of the hearing, defendants agreed that claimant was entitled to a weekly benefit calculation that included two exemptions. Prior to the hearing, defendants calculated the rate with one exemption. Defendants point to the exemption information provided by claimant which did not include dependents. Claimant did provide a copy of her tax returns to defendants on March 31, 2021, which showed her entitlement to two exemptions. Defendants provided no explanation for the delay in underpayment of benefits following March 31, 2021.

Based on the foregoing, claimant is entitled to penalty benefits of 30 percent for the late paid permanent partial disability benefits from May 6, 2019, to September 17, 2019, and 15 percent for the benefits outstanding for the underpayment of benefits after March 31, 2021.

Claimant seeks reimbursement for filing fee, service of process fees, IME of Dr. Bansal, x-rays associated with Dr. Bansal's examination and report, the consultation and reports of treating providers Collum, Betterton, and Saddler.

Iowa Administrative Code Rule 876—4.33(86) states:

> Costs. 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. Costs of service of notice and subpoenas shall be paid initially to the serving person or agency by the party utilizing the service. Expenses and fees of witnesses or of obtaining doctors' or practitioners' reports initially shall be paid to the witnesses, doctors or practitioners by the party on whose behalf the witness is called or by whom the report is requested. Witness fees shall be paid in

> accordance with Iowa Code section 622.74. Proof of payment of any cost shall be filed with the workers' compensation commissioner before it is taxed. The party initially paying the expense shall be reimbursed by the party taxed with the cost. If the expense is unpaid, it shall be paid by the party taxed with the cost. Costs are to be assessed at the discretion of the deputy commissioner or workers' compensation commissioner hearing the case unless otherwise required by the rules of civil procedure governing discovery. This rule is intended to implement Iowa Code section 86.40.

Dr. Bansal's report is properly characterized by claimant as an IME and therefore not recoverable as a cost. Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839, 846-47 (Iowa 2015) (hereinafter "DART"). The filing fee, service of process fee, and report costs of Collum and Betterton are awarded herein.

Claimant seeks attorney's fees related to the requests for admissions. Defendants denied liability related requests for admissions based on the opinion of Dr. Hill. Claimant argues that this denial was improper due to the lack of credibility of Dr. Hill's opinions. Much of claimant's argument regarding the lack of credibility of Dr. Hill's opinions rests on this theory that Dr. Hill used "and/or" and therefore creates uncertainty as to Dr. Hill's overall opinions. Further, claimant argues that Dr. Hill had not seen claimant for over a year, never formally evaluated claimant for hip or low back problems nor provided explanations for his opinions.

Dr. Hill reviewed medical records, much like Dr. Bansal, in forming his opinions. If reviewing medical records renders a flawed opinion then Dr. Bansal's opinions should similarly be disregarded. Dr. Bansal saw claimant at the end of 2019 and yet the claimant asks the hearing officer to rely on those opinions as well.

The arguments put forward by the claimant in the pursuit of attorneys' fees can be applied to Dr. Bansal's opinions to render them impotent due to lack of credibility. Defendants did not act unreasonably in relying on Dr. Hill's opinions and therefore claimant's request for attorneys' fees for the requests for admissions is denied.

ORDER

THEREFORE, it is ordered:

That defendants are to pay unto claimant forty (40) weeks of permanent partial disability benefits at the rate of three hundred eighteen and 18/100 dollars ($318.18) per week from January 3, 2019.

That defendants are to pay unto claimant penalty benefits in the amount of fifty (50) percent for the late paid benefits from May 6, 2019, to September 17, 2019, and fifteen (15) percent of the underpayment of benefits from March 31, 2021, until such time as the outstanding benefits owed are satisfied.

That defendants shall pay accrued weekly benefits in a lump sum.

That defendants shall pay interest on unpaid weekly benefits awarded herein as set forth in Iowa Code section 85.30.

That defendants are to be given credit for benefits previously paid.

That defendant shall pay the costs of this matter pursuant to rule 876 IAC 4.33 as described above along with the costs of the hearing transcript.

Signed and filed this 22nd day of December, 2021.

JENNIFER S. GERRISH-LAMPE
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Thomas Wertz (via WCES)

Nathan McConkey (via WCES)

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