BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

KIRSTIE HARRIS, Claimant, vs. PRK WILLIAMS, INC., d/b/a TO THE RESCUE, Employer, and UNITED WISCONSIN INSURANCE COMPANY, Insurance Carrier, Defendants.	:	File No. 5067352 ARBITRATION DECISION Head Note Nos.: 1402.40, 1403.30, 1802, 1803, 2907, 3003, 4000.2

STATEMENT OF THE CASE

Kirstie Harris, claimant, filed a petition for arbitration against PRK Williams d/b/a To the Rescue, as the employer and United Wisconsin Insurance Company as the insurance carrier. This case came before the undersigned for an arbitration hearing on June 4, 2020. Pursuant to an order from the Iowa Workers' Compensation Commissioner, all in-person hearings were precluded as of the date of this hearing due to the pandemic currently affecting the state of Iowa. Accordingly, this case was scheduled to be heard via videoconference using CourtCall. Unfortunately, the video platform for CourtCall failed on the date of hearing. With the consent of all parties, this case proceeded via telephone conference call only through CourtCall.

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 18, Claimant's Exhibits 1 through 3, and Defendants' Exhibits A through F. Defendants objected to Claimant's Exhibit 1, page 34, which is a supplemental report from claimant's independent medical evaluator, Farid Manshadi, M.D. The undersigned overruled the objection, but permitted defendants to file a supplemental exhibit (Defendants' Exhibit F) after the live evidentiary hearing. Defendants filed Exhibit F on June 8, 2020. That exhibit is

received and the evidentiary record closed on June 8, 2020, upon receipt of defendants' supplemental exhibit.

Claimant testified on her own behalf. No other witnesses testified at trial.

Counsel for the parties requested an opportunity to file post-hearing briefs. This request was granted and both parties filed briefs simultaneously on June 19, 2020. The case was considered fully submitted to the undersigned on that date.

ISSUES

The parties submitted the following disputed issues for resolution:

1. Whether claimant is entitled to healing period benefits from April 20, 2018 to May 3, 2018, September 27, 2018 to October 3, 2018, and/or from July 7, 2019 through March 18, 2020.

2. Whether the April 24, 2018 work injury caused permanent disability and, if so, the extent of claimant's entitlement to permanent partial disability benefits.

3. Whether claimant was married on the date of injury and entitled to a weekly rate using a married with two exemption status, including a claim by defendants that claimant's spouse abandoned her prior to the date of injury.

4. Whether claimant is entitled to reimbursement of the full independent medical evaluation fee of Dr. Manshadi pursuant to Iowa Code section 85.39, including an assertion by defendants that claimant failed to prove Dr. Manshadi's fee is consistent with the average cost to obtain an impairment rating in the locale where the rating was provided.

5. Whether penalty benefits should be awarded for an alleged unreasonable denial of permanent disability and/or an unreasonable calculation and underpayment of the weekly rate.

6. Whether claimant's costs should be assessed.

The hearing report also includes disputes about whether claimant gave timely notice of her injury and a dispute about whether the injury involved an unscheduled injury to be compensated with industrial disability. At the commencement of hearing, claimant withdrew any potential claims for mental health injuries and stipulated that the injury involved the right wrist and right ankle only. Based on these stipulations, the injury is to be compensated as a scheduled member injury and defendants withdrew any notice defense. These issues will not be discussed further and no findings or conclusions will be entered on these issues.

In her post-hearing brief, claimant withdrew her claim and conceded that she is not entitled to additional healing period benefits beyond January 27, 2020. Claimant also stipulated in her post-hearing brief that defendants accurately asserted the

commencement date for permanent partial disability benefits should be January 28, 2020. Both of those concessions are accepted as stipulations and no healing period benefit claim will be considered after January 27, 2020 and permanent partial disability benefits will be ordered to commence on January 28, 2020.

FINDINGS OF FACT

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

Kirstie Harris is a 50-year-old woman, who worked for To the Rescue assisting clients with mental disabilities in their places of residence. (Claimant's testimony; Joint Exhibit 16, page 1) In that capacity, Ms. Harris passed medications, assisted with activities of daily living, transported clients to doctor appointments, and assisted with grocery shopping. On April 24, 2018, while working for To the Rescue, one of her clients went into a manic phase and began threatening claimant with physical violence. As she tried to escape the situation, Ms. Harris fell down a flight of stairs in the client's home. (Claimant's testimony)

As a result of the fall, Ms. Harris sustained injuries to her right wrist and right ankle. (Hearing Report; Claimant's testimony) Claimant sought treatment at the emergency room on the evening of the fall. Defendants admitted the injury and provided initial care through St. Luke's Work Well Clinic. (Joint Ex. 16) Ann McKinstry, M.D. at Work Well Clinic recommended a right wrist MRI and was suspicious that clamant sustained a scaphoid fracture. (Joint Ex. 16, p. 2)

Claimant returned to Work Well Clinic on May 8, 2018. At that time, Cindy L. Hanawalt, M.D. noted an abnormality on claimant's right wrist MRI and made a referral to an orthopaedic surgeon. (Joint Ex. 16, p. 5) Defendants directed claimant for care at the University of Iowa Hospitals and Clinics. On June 25, 2018, Lindsey Caldwell, M.D., evaluated Ms. Harris.

Dr. Caldwell diagnosed claimant with a scapholunate ligament strain but identified no evidence of instability in the wrist. (Joint Ex. 18, p. 3) Dr. Caldwell recommended and performed an injection in claimant's right wrist. (Joint Ex. 18, p. 3)

Upon re-evaluating claimant on July 23, 2018, Dr. Caldwell added a diagnosis of de Quervain's tenosynovitis and performed another injection into the right wrist. (Joint Ex. 18, p. 7) Unfortunately, that injection provided symptomatic relief for only two weeks and then claimant's symptoms returned. (Joint Ex. 18, p. 10) Dr. Caldwell recommended surgical intervention. (Joint Ex. 18, p. 14)

On October 9, 2018, defendants had Steven Adelman, D.O. perform an independent medical evaluation. Dr. Adelman is a neurologist. He opined that claimant had no spasticity present in either the right hand or right ankle prior to the work injury. However, he opined that claimant did not sustain a permanent exacerbation of her spastic hemiparesis because he identified no spasticity on his evaluation. He further

opined that claimant did not sustain any permanent impairment because she did not sustain a permanent aggravation of any underlying or pre-existing condition as a result of her work fall. (Joint Ex. 6, p. 3)

Dr. Caldwell evaluated Ms. Harris again on October 10, 2018, noting that she performed a first dorsal compartment release in claimant's right wrist to address the de Quervain's syndrome. Dr. Caldwell indicated that the surgery was successful and allowed claimant to return to light duty work at that time. (Joint Ex. 18, p. 24)

On November 7, 2018, claimant reported worsening pain in her right wrist, as she attempted to increase her activity and use of the right hand and wrist. (Joint Ex. 18, p. 26)

Matthew D. Karam, M.D., an orthopaedic surgeon at the University of Iowa Hospitals and Clinics, evaluated claimant's right ankle on January 8, 2019. Dr. Karam noted significant stiffness in the right ankle and indicated that her condition was likely due to an underlying prior stroke but also the result of "some contribution from her work-related injury." (Joint Ex. 18, p. 32) Dr. Karam noted right ankle weakness and spasticity. (Joint Ex. 18, p. 32) However, Dr. Karam permitted light duty work activities following his January 8, 2019 evaluation. (Joint Ex. 18, p. 35)

When asked by defendants to clarify his causation opinions, Dr. Karam repeated that he believed his diagnosis and claimant's right ankle condition resulted from a work injury that "continues to manifest with pain and disability." (Joint Ex. 18, p. 36) Dr. Karam opined that claimant was not yet at maximum medical improvement for her right ankle as of January 11, 2019, but also opined that she did not sustain any permanent disability as a result of the right ankle injury. (Joint Ex. 18, p. 37)

Defendants elected to have an independent medical evaluation (IME) performed on claimant's right wrist by an orthopaedic surgeon, Michael A. Gainer, M.D., on March 7, 2019. (Joint Ex. 5) Dr. Gainer diagnosed claimant with right wrist de Quervain's tenosynovitis post release with resulting stiffness of the radiocarpal joint. Dr. Gainer concluded that claimant's "stiffness is related to her fall and subsequent surgery." (Joint Ex. 5, p. 4) He specifically opined that claimant's ongoing right wrist condition was not related to her pre-existing stroke that occurred in 2011. (Joint Ex. 5, p. 4) Dr. Gainer opined that claimant had not yet achieved maximum medical improvement (MMI) for her right wrist as of March 7, 2019. (Joint Ex. 5, p. 5) However, he did permit claimant to return to light duty work. (Joint Ex. 5, p. 5)

On March 18, 2019, Dr. Caldwell re-evaluated claimant after the IME performed by Dr. Gainer. Dr. Caldwell had no other treatment recommendations at that time and indicated that MMI would occur six weeks later. (Joint Ex. 18, pp. 44-45) Claimant never returned for further evaluation by Dr. Caldwell.

Instead, claimant moved from Iowa to South Carolina. Ms. Harris established care with another orthopaedic surgeon, John Hibbitts, M.D. on July 2, 2019. Dr. Hibbitts evaluated claimant's right wrist and her right ankle. He diagnosed claimant with a

potential ligament tear in the right wrist as well as an equinus contracture of the right ankle. He recommended an EMG test for the right upper extremity. (Joint Ex. 8, p. 1) Dr. Hibbitts removed claimant from work on July 2, 2019. (Joint Ex. 8, p. 3)

Upon re-evaluation, Dr. Hibbitts noted that claimant's right hand examination was worse and different than the IME findings recited by Dr. Gainer. Dr. Hibbitts recommended an MRI of claimant's brain to determine if she had an intervening brain bleed. (Joint Ex. 8, p. 4) Fortunately, the subsequent EMG testing was normal. (Joint Ex. 8, p. 5) The brain MRI fortunately also demonstrated no brain bleed or intracranial mass. (Joint Ex. 8, p. 7)

Defendants followed up with Dr. Hibbitts to inquire about whether claimant's right hand and wrist symptoms were related to the work injury. Dr. Hibbitts noted the change in claimant's right hand and wrist evaluations between Dr. Gainer's evaluation in March 2019 and Dr. Hibbitts' evaluations. Dr. Hibbitts opined that the right wrist condition was "not related to work injury. This is to be addressed by private insurance." (Joint Ex. 8, p. 9)

On the other hand, Dr. Hibbitts concluded and opined that the right ankle condition "probably was not present prior to her injury, this would have to be causally related." (Joint Ex. 8, p. 8) Dr. Hibbitts recommended surgical intervention for the right ankle to address the contracture issues claimant experienced. (Joint Ex. 8, p. 8) Dr. Hibbitts took claimant to surgery and performed a VY lengthening procedure on her right ankle to address her contracture and loss of range of motion in the right ankle. By January 7, 2020, Dr. Hibbitts opined that claimant could return to regular duty work. (Joint Ex. 8, p. 14) He assigned a zero percent permanent impairment rating pursuant to the sixth edition of the AMA Guides to the Evaluation of Permanent Impairment. (Joint Ex. 8, p. 15)

Ms. Harris obtained an independent medical evaluation with Farid Manshadi, M.D., on March 29, 2020. Dr. Manshadi noted reduced ranges of motion in claimant's right wrist and right ankle. He diagnosed claimant with right ankle pain with reduced range of motion, post VY lengthening of the right gastrocnemius. Dr. Manshadi also diagnosed claimant as status-post first dorsal compartment release for de Quervain's tenosynovitis with pain and reduced range of motion of the right wrist. (Claimant's Ex. 1, p. 20) Dr. Manshadi also opined that claimant likely also sustained a partial-thickness tear of the scapholunate ligament in the right wrist. (Claimant's Ex. 1, p. 20) Dr. Manshadi did not address causation in any great detail, but it appears that he causally related the right wrist and right ankle conditions to the work injury.

Dr. Manshadi opined that claimant had achieved maximum medical improvement by the date of his evaluation for both the right wrist and the right ankle. He identified 8 percent permanent functional impairment of the right upper extremity pursuant to the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition. He also identified 11 percent permanent functional impairment of the right lower extremity using the AMA Guides, Fifth Edition. (Claimant's Ex. 1, p. 20) Dr. Manshadi also

recommended permanent work restrictions for both the right wrist and the right ankle injuries.

Considering all of the medical opinions in this record, I find the opinions of Dr. Hibbitts to be most credible. Realistically, I accept the causation opinion of Dr. Gainer with respect to the right wrist and find that claimant proved her right wrist condition was causally related to the work injury through the date of Dr. Gainer's evaluation. However, Dr. Hibbitts documents thereafter that claimant developed contractures of the right small, ring, and index fingers. He explained that claimant had supple motion of the fingers during Dr. Gainer's evaluation. Therefore, Dr. Gainer's opinions and Dr. Hibbitts' opinions can be read as consistent.

At the time claimant was evaluated by Dr. Gainer, her right wrist condition remained causally related. Thereafter, Ms. Harris developed some finger contractures diagnosed by Dr. Hibbitts. Claimant's condition worsened after Dr. Gainer evaluated her and Dr. Adelman also documented no spasticity during his evaluation in October 2018. Therefore, I find claimant proved causal connection of the right wrist through March 7, 2019. Dr. Manshadi seems to assume causation of the right wrist and hand but provides no analysis of the issue. His opinion is not as convincing as the other physician's opinions.

I find Dr. Hibbitts' causation opinion most convincing and find that claimant failed to prove the ongoing right wrist and hand condition as of August 2019 were related to the initial work injury. (Joint Ex. 8, pp. 4, 9) Having found that claimant failed to prove her current right wrist condition is causally related to the initial injury, I do not find Dr. Manshadi's permanent impairment rating of the right wrist and arm to be causally related. I find that claimant failed to prove permanent functional impairment of the right wrist and arm that is causally related to the work injury.

With respect to the right ankle, I acknowledge the opinion of Dr. Adelman that indicates claimant did not aggravate her pre-existing right ankle condition as a result of the work injury. (Joint Ex. 6, p. 3) However, I find the opinion of Dr. Hibbitts to be more convincing. He opines that claimant's ankle contracture "probably was not present prior to her injury. This would have to be causally related." (Joint Ex. 8, p. 8) Similarly, Dr. Karam at the University of Iowa Hospitals and Clinics opined that there was likely some contribution from the work injury to the right ankle condition in addition to the pre-existing and underlying condition resulting from claimant's 2011 stroke. (Joint Ex. 18, p. 32) I find both of these causation opinions to be realistic, consistent with claimant's testimony about her pre-existing condition, and convincing. Therefore, I find that claimant has proven her ongoing and current right ankle condition is causally related to the work injury, or at least materially aggravated by the work injury.

I note that Dr. Karam opines claimant sustained no permanent disability of the right ankle. (Joint Ex. 18, p. 38) I also acknowledge Dr. Adelman's opinion that claimant did not sustain permanent impairment of the right ankle because she did not prove an aggravation of her pre-existing condition. Finally, I acknowledge Dr. Hibbitts'

impairment rating of zero percent, using the sixth edition of the AMA Guides. However, this agency has not adopted the sixth edition of the AMA Guides.

Moreover, having found that claimant did prove an aggravation of the underlying right ankle condition, I also find that claimant has ongoing symptoms that include loss of range of motion. Given the loss of range of motion in claimant's right ankle, I do not find it credible or convincing to assign her a zero percent permanent functional impairment for this work injury. The only physician that assigned a permanent impairment rating for the right ankle (other than a zero percent rating) is Dr. Manshadi. I find Dr. Manshadi's permanent impairment rating for the right ankle to be convincing and accurate. Therefore, I find that claimant proved she sustained an 11 percent permanent functional impairment of the right leg as a result of the work injury.

Defendants also dispute whether claimant is entitled to all of the healing period claimant seeks. Claimant seeks healing period from April 20, 2018 through May 3, 2018, from September 27, 2018 through October 3, 2018, and from July 7, 2019 through March 18, 2020. Claimant revised this request in her post-hearing brief, conceding that she is not entitled to healing period benefits beyond January 27, 2020.

Defendants contend that Ms. Harris voluntarily resigned her employment with To the Rescue and, in doing so, she forfeited any future right to healing period benefits. Defendants introduced a letter from their Human Resources Director to claimant in January 2019, setting forth an offer of light duty, or modified duty, work. Ms. Harris signed the letter, indicating that she declined the modified duty work assignment. The letter specifically notified claimant that "my workers [*sic*] compensation benefits will be in a period of suspension pursuant to §85.33(3) during my time off for FMLA leave." (Defendants' Ex. E, p. 3)

Defendants also introduce a letter or note from Ms. Harris dated April 9, 2019, indicating that she was voluntarily resigning her position with To the Rescue as of that date. In the letter, claimant acknowledges that modified duty work continued to be offered to her by the employer and that such work was within her restrictions for her work injury. Ms. Harris acknowledged that she was resigning and refusing suitable modified duty work. (Defendants' Ex. E, p. 7) Claimant did not dispute this fact and I find that she voluntarily resigned her position with To the Rescue effective April 9, 2019.

The parties also submitted a dispute to the undersigned about claimant's marital status and entitlement to exemptions on the date of injury. While the parties stipulated that Ms. Harris's average gross earnings were $458.57 per week on the date of injury, defendants challenged Ms. Harris's marital status and entitlement to two exemptions. Specifically, defendants asserted that claimant's spouse abandoned her prior to the date of injury.

At hearing, Ms. Harris testified that she was married at the time of her injury and at the present time. She acknowledged that she is now living apart from her spouse, but testified that there had not been a legal separation or divorce. Claimant testified that she stopped living with her spouse in November 2018, after the injury date.

Ms. Harris produced tax returns from 2017 that demonstrated claimant was married and filed joint tax returns for the calendar year immediately preceding this injury.

Defendants contend that claimant failed to produce her 2018 tax returns to document her ongoing marital status. Ms. Harris explained that she physically separated from her spouse in 2018. However, she testified that they filed a joint tax return in 2018. She explained that she did not produce a copy of the return because she does not possess a copy of the return. I accept Ms. Harris' trial testimony on this issue and find that she convincingly proved she was married on the date of injury.

Defendants produced no convincing evidence to demonstrate spousal abandonment prior to the date of injury or that Ms. Harris was not married on the date of injury. Claimant produced convincing evidence, including her 2017 tax return and her unrebutted trial testimony, that she was married on the date of injury. I find that Ms. Harris proved she was married on the date of injury and that she is entitled to two exemptions for purposes of calculating her weekly workers' compensation rate.

Claimant seeks an award of her independent medical evaluation fees. With respect to her independent medical evaluation, it appears that defendants concede liability for at least a portion of the independent medical evaluation fees. However, defendants challenge whether claimant is entitled to reimbursement of the entirety of the fees charged. Specifically, defendants contend that the fees charged by Dr. Manshadi exceed the average cost of obtaining an impairment rating evaluation in the locale where Dr. Manshadi provides services.

Claimant sought and obtained a late report from Dr. Manshadi confirming the reasonableness of his fees in his locale. Defendants objected to that report. Although I overruled the objection, I permitted defendants to file a supplemental exhibit on the issue of Dr. Manshadi's fees. Defendants did file a supplemental exhibit and produced invoices from other impairment ratings presumably obtained by defendants in other claims.

Those invoices provide no context as to whether the medical provider rendering those ratings was a treating physician or acted exclusively as an independent medical evaluator. There is not necessarily an explanation in those invoices as to the amount of time spent by each physician to render the impairment rating, or the condition evaluated or rated. There is no explanation of the amount of records reviewed for each evaluation produced by defendants.

Certainly, a treating physician that only needs to write a report for an impairment rating is likely to charge significantly less than a physician that must review all prior records, interview and evaluate the claimant, and then prepare a report. Claimant also points out that defendants did not introduce the invoice for their own independent medical evaluator (Dr. Gainer) in this case, which is an interesting fact but essentially requests that I speculate about evidence not actually in the record. I decline to speculate about the amount of Dr. Gainer's charges or the reason that his invoice was not submitted into the evidentiary record.

At the end of my analysis of this issue, I find that claimant proved the charges performed by Dr. Manshadi for an independent medical evaluation for purposes of rendering a permanent impairment rating are reasonable for the locale where Dr. Manshadi provided those services. While defendants produced competing evidence, it lacks context or explanation and would require some conjecture or speculation on the undersigned's part to find that the average cost of an impairment rating in Dr. Manshadi's locale is less than he charged. Instead, I specifically find that Dr. Manshadi's charges are reasonable and representative of the average charges for an independent medical evaluation for purposes of rendering an impairment rating in his locale.

Finally, Ms. Harris asserted a claim for penalty benefits. Claimant urged penalty benefits under two theories. First, claimant asserted that defendants unreasonably underpaid weekly benefits while challenging claimant's marital status and entitlement to exemptions. Ultimately, I concur with claimant. Defendants likely had an initial basis to challenge the claimant's marital status and pursue further investigation through discovery. Realistically, however, when discovery closed and the case was ready for trial, defendants had not generated a reasonable basis for denial of claimant's marital status or entitlement to exemptions.

Defendants urge that claimant did not produce her 2018 tax returns to prove her marital status. Yet, all of the credible evidence in this record established that claimant was married on the date of injury and entitled to two exemptions. Claimant produced a 2017 tax return establishing her marital status. Claimant testified to her marital status and referenced it during a record statement early in the investigation. While defendants may have been suspicious about claimant's marital status, they failed to generate a reasonable basis for their continued denial of her marital status before trial.

Realistically, as the case proceeded to trial, defendants did not have a reasonable basis for denial or a realistic chance at prevailing on the issue. In short, they generated almost no evidence to support their theory of spousal abandonment. Ms. Harris answered their questions and concerns with straight-forward information that rebutted any such defense. I find that defendants did not have a reasonable basis for continued denial of claimant's marital status or payment of weekly benefits for something less than married with two exemption status prior to the date of trial.

Ms. Harris also asserted that defendants should be penalized because they unreasonably denied payment of permanent partial disability benefits. With respect to this argument, I do not agree with claimant's assertion. Defendants possessed medical opinions that challenged current causal connection of either the right wrist condition or the right ankle condition. They possessed medical opinions that suggested claimant had no work restrictions and that claimant had no permanent impairment for the right ankle. Ultimately, defendants prevailed on the right wrist and owe no permanent disability for that condition. With respect to the right ankle, Dr. Adelman, Dr. Karam, and Dr. Hibbitts all suggested that claimant had no permanent impairment. I find that defendants had reasonable bases to challenge causal connection of either the right

ankle or the right wrist and a reasonable basis to challenge whether claimant sustained permanent impairment related to the right ankle.

CONCLUSIONS OF LAW

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).

While a claimant is not entitled to compensation for the results of a preexisting injury or disease, its mere existence at the time of a subsequent injury is not a defense. Rose v. John Deere Ottumwa Works, 247 Iowa 900, 76 N.W.2d 756 (1956). If the claimant had a preexisting condition or disability that is materially aggravated, accelerated, worsened or lighted up so that it results in disability, claimant is entitled to recover. Nicks v. Davenport Produce Co., 254 Iowa 130, 115 N.W.2d 812 (1962); Yeager v. Firestone Tire & Rubber Co., 253 Iowa 369, 112 N.W.2d 299 (1961).

In this case, I found that claimant failed to prove her alleged permanent functional impairment in the right wrist is causally related to the work injury. Accordingly, I conclude that claimant failed to carry her burden of proof with respect to the right wrist and is not entitled to an award of permanent disability for the right wrist condition.

With respect to the right ankle injury, I found that claimant did prove by a preponderance of the evidence that the right ankle sustained permanent functional impairment and that the impairment was causally related to the work injury. Accordingly, I conclude that claimant has carried her burden of proof with respect to the right ankle injury and is entitled to an award of permanent disability benefits in some amount.

Under the Iowa Workers' Compensation Act, permanent partial disability is compensated either for a loss or loss of use of a scheduled member under Iowa Code section 85.34(2)(a)-(u) (2017) or as an unscheduled injury pursuant to Iowa Code section 85.34(2)(v). The extent of a scheduled member disability is determined by using the functional method. Functional disability "is limited to the loss of the physiological capacity of the body or body part." Mortimer v. Fruehauf Corp., 502 N.W.2d 12, 15 (Iowa 1993); Sherman v. Pella Corp., 576 N.W.2d 312 (Iowa 1998).

In 2017, the Iowa legislature modified Iowa Code section 85.34(2)(x). Pursuant to the revised statutory language, scheduled member injuries are to be compensated pursuant to the functional method and lay testimony or agency expertise is not to be utilized in determining the loss or permanent impairment. The relevant governing statutory language for this claim provides: "the extent of loss or percentage of permanent impairment shall be determined solely by utilizing the guides to the evaluation of permanent impairment, published by the American medical association [*sic*], as adopted by the workers' compensation commissioner by rule pursuant to chapter 17A." The Iowa Workers' Compensation Commissioner has enacted an administrative rule that adopts the fifth edition of the AMA Guides to the Evaluation of Permanent Impairment. 876 IAC 2.4.

Having found the impairment rating offered by Dr. Manshadi convincing and noting that it was offered pursuant to the fifth edition of the AMA Guides, I conclude that claimant has proven by a preponderance of the evidence that she is entitled to an award commensurate to 11 percent of the right lower extremity.

Iowa Code section 85.34(2)(p) (2017) provides that the leg is compensated on a 220-week schedule. Pursuant to Iowa Code section 85.34(2)(w) permanent partial disability benefits should be awarded commensurate with the loss of the scheduled member. In this instance, an 11 percent permanent functional loss of the right leg is equivalent to 24.2 weeks of permanent partial disability benefits. Iowa Code section 85.34(2)(p), (w) (2017). I conclude claimant is entitled to an award of 24.2 weeks of permanent disability benefits for her right ankle injury with permanent disability benefits to commence on the stipulated commencement date of January 28, 2020.

The next disputed issue was claimant's claim for healing period benefits. There appears to be no dispute that claimant is entitled to healing period benefits from April 20, 2018 through May 3, 2018 or from September 27, 2018 through October 3, 2018. Those benefits will be awarded.

Defendants dispute the claim for healing period benefits from July 7, 2019 through March 18, 2020. The relevant statutory provision is Iowa Code section 85.33(3)(a) (2017). This statute was also amended in 2017 and now provides:

> If an employee is temporarily, partially disabled and the employer for whom the employee was working at the time of injury offers to the employee suitable work consistent with the employee's disability the employee shall accept the suitable work, and be compensated with

> temporary partial benefits. If the employer offers the employee suitable work and the employee refuses to accept the suitable work offered by the employer, the employee shall not be compensated with temporary partial, temporary total, or healing period benefits during the period of the refusal.

In this case, claimant refused suitable modified work when offered by the employer in January 2019. Claimant subsequently voluntarily terminated her employment with To the Rescue. In resigning her employment, claimant again acknowledged that suitable modified work was being offered and she declined that work offer. Claimant has not urged that she subsequently withdrew her refusal. Accordingly, I found that claimant refused suitable work and conclude that she forfeited any claim for healing period or temporary disability benefits after her refusal in January 2019. Therefore, I conclude that claimant cannot prove entitlement to healing period benefits from July 7, 2019 through March 18, 2020. Iowa Code section 85.33(3)(a).

The parties also disputed the applicable weekly rate at which benefits should be awarded. The dispute revolves around claimant's marital status. Ms. Harris produced 2017 tax returns demonstrating she was married and testified that she remained married on the date of injury and at the time of hearing. Claimant did concede that her spouse physically (though not legally) separated from her in November 2018, after the injury date.

Defendants asserted that claimant was not entitled to claim married status or two exemptions. Defendants asserted the defense of spousal abandonment disqualified claimant from claiming married status or two exemptions. Defendants did not identify any governing law that necessarily disqualified claimant from her marital status or claim for exemptions. More importantly, I found that the convincing evidence in the record established claimant was married at the time of the work injury. Therefore, I conclude that claimant has proven she was married and entitled to two exemptions on the date of injury. To the extent defendants may have raised a viable defense of spousal abandonment, I conclude they failed to prove that defense. Claimant should be compensated as a married individual entitled to two exemptions on the date of injury. Given her stipulated weekly gross earnings of $458.57, her applicable weekly rate of compensation is $316.72.

Finally, claimant asserts a claim for penalty benefits, alleging that defendants acted unreasonably in denying benefits in two respects. First, claimant asserts that defendants unreasonably underpaid the weekly rate in asserting or challenging claimant's marital status and entitlement to two exemptions. I found that defendants did not have a reasonable basis by the date of trial to continue to assert the spousal abandonment defense or challenge claimant's marital status or entitlement to two exemptions for purposes of calculating her weekly rate.

Defendants did not cite any applicable statutory language that supported or establishes a spousal abandonment defense. Defendants did not cite any agency or appellate case law that supports or establishes such a defense. Most importantly,

defendants did not produce viable, credible, or convincing evidence to establish a claim of spousal abandonment prior to the date of injury.

Defendants paid weekly benefits at the rate of $292.89. They owed benefits at the rate of $316.72 per week. This results in an underpayment of $23.83 per week for which defendants did not have a reasonable basis to challenge the rate by the date of trial. The parties stipulate that defendants paid 32.571 weeks of benefits prior to hearing, resulting in an underpayment of the weekly rate totaling approximately $776.17.

Iowa Code section 86.13(4) provides:

> a. If a denial, a delay in payment, or a termination of benefits occurs without reasonable or probable cause or excuse known to the employer or insurance carrier at the time of the denial, delay in payment, or termination of benefits, the workers' compensation commissioner shall award benefits in addition to those benefits payable under this chapter, or chapter 85, 85A, or 85B, up to fifty percent of the amount of benefits that were denied, delayed, or terminated without reasonable or probable cause or excuse.
>
> b. The workers' compensation commissioner shall award benefits under this subsection if the commissioner finds both of the following facts:
>
> (1) The employee has demonstrated a denial, delay in payment, or termination in benefits.
>
> (2) The employer has failed to prove a reasonable or probable cause or excuse for the denial, delay in payment, or termination of benefits.

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

> Based on the plain language of section 86.13, we hold an employee is entitled to penalty benefits if there has been a delay in payment unless the employer proves a reasonable cause or excuse. A reasonable cause or excuse exists if either (1) the delay was necessary for the insurer to investigate the claim or (2) the employer had a reasonable basis to contest the employee's entitlement to benefits. A "reasonable basis" for denial of the claim exists if the claim is "fairly debatable."
>
> Christensen, 554 N.W.2d at 260.

The supreme court has stated:

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

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

(3) Reasonable causes or excuses include (a) a delay for the employer to investigate the claim, Christensen, 554 N.W.2d at 260; Kiesecker v. Webster City Meats, Inc., 528 N.W.2d at 109, 111 (Iowa 1995); or (b) the employer had a reasonable basis to contest the claim—the "fairly debatable" basis for delay. See Christensen, 554 N.W.2d at 260 (holding two-month delay to obtain employer's own medical report reasonable under the circumstances).

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

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

Id.

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

> (6) In determining the amount of penalty, the commissioner is to consider factors such as the length of the delay, the number of delays, the information available to the employer regarding the employee's injury and wages, and the employer's past record of penalties. Robbennolt, 555 N.W.2d at 238.
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> (7) An employer's bare assertion that a claim is "fairly debatable" does not make it so. A fair reading of Christensen and Robbennolt, makes it clear that the employer must assert facts upon which the commissioner could reasonably find that the claim was "fairly debatable." See Christensen, 554 N.W.2d at 260.
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> Meyers v. Holiday Express Corp., 557 N.W.2d 502 (Iowa 1996).

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

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

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

In this case, I found that defendants did not offer a reasonable excuse for the underpayment of weekly benefits based on the marital status dispute. Iowa Code section 86.13(4)(b)(2). Defendants bore the burden to establish a reasonable basis, or excuse. Defendants failed to carry their burden of proof on the penalty issues, and a penalty award is appropriate. Iowa Code section 86.13.

The purpose of Iowa Code section 86.13 is both punishment for unreasonable conduct but also deterrence for future cases. Robbennolt, 555 N.W.2d at 237. In this regard, the Commission is given discretion to determine the amount of the penalty imposed with a maximum penalty of 50 percent of the amount of the delayed, or denied, benefits. Christensen v. Snap-On Tools Corp., 554 N.W.2d 254, 261 (Iowa 1996).

In exercising its discretion, the agency must consider factors such as the length of the delays, the number of delays, the information available to the employer regarding the employee's injury and wages, and the employer's past record of penalties. Meyers v. Holiday Express Corp., 557 N.W.2d 502, 505 (Iowa 1996). Having considered the relevant factors and the purposes of the penalty statute, I conclude that a section 86.13 penalty in the amount of $350.00 is sufficient to penalize defendants and consistent with the principles and objectives of Iowa Code section 86.13's penalty provisions.

Claimant's second asserted basis for her claim of penalty benefits is that defendants did not have a reasonable basis for denial of permanent partial disability benefits. I do not agree with claimant's assertion on this issue. Defendants had medical causation opinions that challenged the current causal connection of both claimant's right wrist and right ankle conditions. Claimant ultimately did not prove the current right wrist condition or permanent impairment were related to the injury date. Claimant did not recover permanent disability for the right wrist. Defendants clearly had a reasonable basis to deny permanent disability for the right wrist.

The medical causation opinions challenging causation of the right ankle are sufficient bases for defendants to deny the right ankle injury caused permanent disability. Defendants also possessed medical opinions suggesting that claimant sustained no permanent disability as a result of the right ankle injury. Therefore, I conclude that defendants had a reasonable basis to challenge permanent disability for the right ankle. I find no basis for award of penalty benefits for the defendants' failure to pay permanent disability benefits for either the right wrist or right ankle.

Ms. Harris also seeks reimbursement of her independent medical evaluation fees. Defendants appear to acknowledge liability for reimbursement in some amount. However, defendants challenged the reasonableness of Dr. Manshadi's fees pursuant to Iowa Code section 85.39. The relevant statutory language was modified in 2017 and now reads, "A determination of the reasonableness of a fee for an examination made pursuant to this subsection, shall be based on the typical fee charged by a medical provider to perform an impairment rating in the local area where the examination is conducted." Iowa Code section 85.39(2).

Claimant introduced a late report from Dr. Manshadi opining that his fees were reasonable for his locale. Defendants introduced a supplemental exhibit to challenge the reasonableness of Dr. Manshadi's fees. I found defendants' evidence would require speculation on my part to determine whether those charges included an examination and whether the examination was performed by a treating physician. Ultimately, I found the fees charged by Dr. Manshadi were reasonable and in line with other examination fees for permanent impairment ratings within his locale. I conclude claimant is entitled to reimbursement of Dr. Manshadi's independent medical evaluation fee totaling $2,200.00. Iowa Code section 85.39(2).

In addition, claimant seeks transportation costs for a flight she took from South Carolina to Iowa to attend the independent medical evaluation with Dr. Manshadi. I find and conclude that there were likely many physicians that could have conducted a similar examination in South Carolina or many states between South Carolina and Iowa. I find and conclude that claimant's flight expense is not a reasonable expense pursuant to Iowa Code section 85.39(2). I conclude that claimant failed to prove entitlement to reimbursement for her flight expenses to attend the evaluation with Dr. Manshadi.

Finally, claimant seeks assessment of her costs. Costs are assessed at the discretion of the agency. Iowa Code section 86.40.

Claimant prevailed on her claims to some extent. I conclude it is reasonable to assess costs in some amount. Claimant seeks costs that include her filing fee ($100.00) and the cost of serving her original notice and petition upon defendants (13.34) Both requests are reasonable and permitted by agency rule 876 IAC 4.33. Therefore, I conclude that claimant's costs totaling $113.34 should be assessed against defendants.

ORDER

THEREFORE, IT IS ORDERED:

Defendants shall pay claimant twenty-four point two (24.2) weeks of permanent partial disability benefits commencing on January 28, 2020.

All weekly benefits shall be payable at the weekly rate of three hundred sixteen and 72/100 dollars ($316.72) per week.

Defendants shall be entitled to the stipulated credit on the hearing report.

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. See Gamble v. AG Leader Technology File No. 5054686 (App. Apr. 24, 2018).

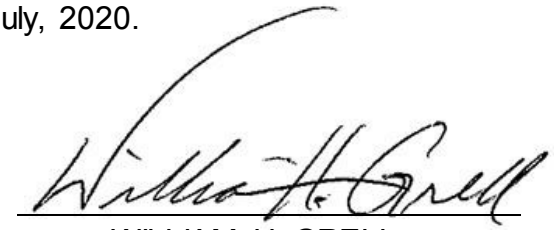
Defendants shall reimburse claimant for the expense of Dr. Manshadi's independent medical evaluation in the amount of two thousand two hundred and 00/100 dollars ($2,200.00).

Defendants shall pay penalty benefits to claimant in the amount of two hundred fifty and 00/100 dollars ($250.00).

Defendants shall reimburse claimant's costs in the amount of one hundred thirteen and 34/100 dollars ($113.34).

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 9th day of July, 2020.



WILLIAM H. GRELL
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Gary B. Nelson (via WCES)

Laura Ostrander (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.