BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

MARIA TELLEZ, Claimant, vs. AMITY FELLOWSERVE – IOWA, INC., Employer, and ARGENT/WEST BEND MUTUAL INSURANCE COMPANY, Insurance Carrier, Defendants.	:	File Nos. 1661847.01, 19001291.01 ARBITRATION DECISION Head Note Nos.: 1803, 1803.1, 2502, 2907, 3000

STATEMENT OF THE CASE

Claimant, Maria Tellez, has filed two petitions for arbitration seeking workers' compensation benefits against Amity Fellowserve-Iowa, Inc., employer, and Argent/West Bend Mutual 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 via Zoom on April 8, 2022, and considered fully submitted upon the simultaneous filing of briefs on April 29, 2022.

The record consists of Joint Exhibits 1-15, Claimant's Exhibits 1-7, Defendants' Exhibits A-H, and the testimony of the claimant.

ISSUES

File No. 1661847.01 with a date of injury of 02/06/2019:

1. Whether claimant sustained a permanent disability arising out of the injury of February 6, 2019;

2. The application of Iowa Code section 85.34(2)(v);

3. The appropriate commencement date of PPD benefits, if any are awarded;

4. Whether claimant is entitled to reimbursement of an IME under Iowa Code section 85.39;

5. Whether claimant is entitled to reimbursement and/or payment of medical expenses itemized in Exhibit 5;

6. Rate;

7. Assessment of costs.

File No. 19001291.01 with a date of injury of 02/21/2019:

1. Whether claimant sustained a permanent disability arising out of the injury of February 21, 2019;

2. The application of Iowa Code section 85.34(2)(v);

3. The appropriate commencement date of PPD benefits, if any are awarded;

4. Whether claimant is entitled to reimbursement of an IME under Iowa Code section 85.39;

5. Whether claimant is entitled to reimbursement and/or payment of medical expenses itemized in Exhibit 5;

6. Assessment of costs.

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 claimant sustained an injury arising out of and in the course of her employment with defendant employer on February 6, 2019, and February 21, 2019. They agree that the alleged injury was the cause of a temporary disability during a period of recovery entitlement to which is no longer in dispute.

Prior to the hearing, claimant was paid 10 weeks of permanent partial disability benefits at the rate of $344.46 per week. The parties agree that at the time of the February 21, 2019, injury, claimant's gross weekly wages were $520.86. At all material times hereto, claimant was single and entitled to two exemptions. Based on the foregoing, the weekly benefit rate for the February 21, 2019, injury, was $346.26.

All affirmative defenses are waived.

FINDINGS OF FACT

Claimant, Maria Tellez, was a 25-year-old person at the time of the hearing. Her educational background includes high school followed by completion of a medical office specialist program at Kaplan. While she was studying, she waited tables and cleaned. She moved to MercyOne as a health unit coordinator and then switched to patient accounts.

At the time of her injury, she was working for defendant employer as a receptionist. She began working for defendant employer in November 2018. Her job duties involved sitting at the desk, answering phone calls, slight computer work, and unlocking the building. She was not allowed to get up and move around during her shift unless she had someone relieve her at the desk.

During maternity leave in 2019, claimant took new employment with Allen Hospital as an admitting tech. This job required her to register patients for outpatient services, answer phone calls in the ER, verify insurance eligibility, and check in ambulances. After a second maternity leave, she obtained a full-time position as a cash posting specialist for Allen Hospital. She currently earns $19.95 per hour. Due to COVID, there has been increased competition for health care workers and thus higher wages are being offered. She testified that she uses FMLA approximately four times a month for her leg pain.

None of her prior positions other than waitressing and cleaning required much lifting or other physical exertions. Instead, the job duties included walking, standing and sitting. However, because of the fast-paced nature of her previous jobs, claimant does not think she would be able to do those positions without taking FMLA. Her current position is a work at home job that allows her to take breaks and move as needed.

She fell on two different dates close in time, suffering injuries to her low back, left hip, leg, and right hip and right knee. At the time of her falls, claimant was pregnant.

During her 2017 pregnancy, claimant was seen at a chiropractor for cervical, thoracic, lumbar, and sacral pain. (JE 1:1) A medical note from September 22, 2017, noted claimant suffered back pain. (JE 2:10) She continued to have sporadic chiropractic treatment in 2018 and 2019. (JE 1:2)

On February 6, 2019, claimant reported that she had slipped and fallen on the sidewalk. (CE 3:67) At the time, she identified pain in the back and left hip and leg. (CE 3:67) She was sent to Allen Occupational Health and seen by Steven Olsen, M.D., who diagnosed claimant with contusion of her left lumbar region and buttocks. (JE 3:12) At the visit, she reported aching and numbness from the left lateral back, down the left buttock and into the lateral thigh. Her pain rating was 6 out of 10 on a 10 scale. (JE 3:13) Patient was seen in follow-up on February 8, 2019. At that time her straight leg raise test was negative, deep tendon reflexes were normal as was her gait. (JE 3:16) She exhibited normal flexion and extension. (JE 3:16) Dr. Olsen wondered if she had a

piriformis injury. (JE 3:16) He gave her back exercises, physical restrictions of sitting, standing, and walking only as necessary, and sent her to physical therapy. (JE 3:17)

On her PT intake document, her complaints included low back pain at the L5-S1 level that referred down the left lateral leg to the top of her knee. (JE 4:42)

On February 21, 2019, claimant reported the second fall on ice wherein she landed on the right hip and identified pain in her right hip and right knee. (CE 3:69) This time she was seen by Dr. Jabbari at Allen Occupational Health. (JE 3:18) She reported right knee and hip pain with a pain rating of 3 on a 10 scale. (JE 3:18) She was given work restrictions of seated work only along with knee exercises and Tylenol. (JE 3:20)

She continued to have problems on her left side with her pain varying from 3/10 at rest to 8/10 with certain movements. (JE 3:21) She was attending physical therapy and experiencing numbness and hearing popping in her low back. (JE 3:21) At the February 27, 2019, visit, claimant was provided an SI joint support belt.

On March 4, 2019, claimant was seen at the emergency room for pain shooting into her buttock region. (JE 5:48) The left SI joint was tender to palpation, but her examination was otherwise normal. Id. Jeffrey Gudes, D.O., ordered physical therapy and prescribed Mobic. (JE 6:49)

At the March 6, 2019, visit, claimant reported worsening pain with numbness, tingling and sharp pain in the left piriformis and SI joint. (JE 3:22) Pain radiated into the left buttock. Id. She exhibited abnormal flexion and extension and a slow/antalgic gait. (JE 3:22) Dr. Field diagnosed claimant with left piriformis and sciatic nerve pain with positive Faber test and positive tenderness over the piriformis. Id. Claimant was returned to work with restrictions and instructed to use a cane as necessary. Id.

Claimant was offered light duty work on March 25, 2019, which she accepted. (DE B:6) The accommodations included mostly sit down work where she could sit, stand, and walk as needed and work only four hours a day during the AM shift. (DE B:6)

On March 26, 2019, claimant was discharged from PT as she had not returned since the March 4, 2019, session. (JE 4:43) The notes documented she had increased pain in the last PT session and PT was limited due to her pregnancy. (JE 4:43)

On April 4, 2019, her work accommodations were revised to include frequent back stretches and back exercises as described. (DE B:8-9)

On April 11, 2019, Kenneth McMains, M.D., wrote a letter in response to an inquiry on behalf of defendants. (JE 3:23) In the letter, Dr. McMains opined that claimant suffered a fall causing a direct contusion to her sciatic nerve and her buttock on the left side. (JE 3:23) Over time, claimant was diagnosed with left piriformis syndrome. Id. He anticipated that claimant would have full resolution of her symptoms but that recovery times were unpredictable. Id. He then saw claimant on April 16, 2019, for an in-person visit where she complained of increased pain radiating down her left leg following an increase of her work hours from four to eight a day. (JE 3:25) She exhibited abnormal flexion and extension along with a deliberate gait. (JE 3:26) Dr. McMains diagnosed claimant with chronic left piriformis syndrome. (JE 3:26)

During an April 30, 2019 follow-up visit, claimant reported she had left work the previous day due to increased pain in the left hip. (JE 3:27) She was also having increased numbness and tingling from the hip into the calf with low back tightness. Id. She was using a cane due to pain in her leg. Id. She reported that her pain was 7 out of 10 on a 10 scale. She was noted to have abnormal movement in bilateral flexion, extension, rotation, heel walking, and toe walking. (JE 3:28) There was a positive straight leg raise test on the left and abnormal gait with use of the cane. (JE 3:28)

During April and May, claimant was seen at Fuelling Chiropractic for treatment to her low back and left leg. (JE 1:3-4)

On May 1, 2019, Dr. McMains wrote a second letter in response to an inquiry on behalf of the defendants. (JE 3:29) In the letter, Dr. McMains described the April 30, 2019, visit with claimant. (JE 3:29) She had reported back to work but was experiencing a great deal of pain and as a result left work due to increased pain in the left leg, buttocks, and hip area. Id. During the examination, claimant was unable to sit on the left cheek/buttock due to pain radiating down the leg, posterior thigh and into the calf area. Id. She had significant limited range of motion in the lumbar area in all planes of motion and was using a cane for ambulation. Id. She had positive straight leg raising on the left, weakness in the great toe on the left with knee and ankle reflexes normal bilaterally. Id. Dr. McMains continued to diagnose claimant with chronic left piriformis syndrome with an acute exacerbation. (JE 3:29)

Dr. McMains could not state with any degree of medical certainty as to whether claimant's condition was related to the piriformis syndrome or her pregnancy but rather felt that they were both likely related. (JE 3:29). He wrote:

> As she is closer to her due date, she has more laxity of ligaments, which is causing increased pressure in the low back area and buttocks, likely contributing to the increasing discomfort, but underlying condition is the piriformis syndrome that appears to be work related. The good news of this is that she has an excellent prognosis of full recovery that likely will occur while she is on maternity leave and prior to her returning [to] work after delivery. At this time, the treatment is to allow her to lay down, elevate the legs, keep the weight off the left buttocks/low back area, and start increasing ambulation as tolerated. The worker was advised today at the time of exam that if she is [*sic*] has decreasing symptoms and feels she is able to return to work later in the week, a phone call to the clinic will allow us to send you a fax stating that she is able to return at a limited number of hours per day. The worker reports that she is anxious to be able to return to work but feels at this time the pain is intolerable and has a need to lie down and get off her feet as much as possible.

(JE 3:29)

On May 20, 2019, claimant's hours increased to 8 hours a day and lifting restrictions of no more than 5 pounds was imposed. (DE B:12) On May 31, 2019, claimant requested, and was granted, 8 weeks of maternity leave. (DE B:16) She anticipated a return on July 29, 2019. Id.

On June 24, 2019, claimant's counsel requested additional treatment for claimant due to injuries sustained on February 6, and February 21, 2019. (CE 2:62)

On June 26, 2019, Dr. McMains wrote a letter accounting the June 19, 2019, medical visit to the Allen Occupational Health Services. (JE 3:33) Claimant's symptoms were improving following the delivery of the child but she still had some intermittent paresthesias of the posterior thigh and buttocks pain with certain activities. (JE 3:33) Her diagnosis was chronic left piriformis syndrome, slowly improving. (JE 3:33) Dr. McMains anticipated claimant would be able to return to work and perform the essential functions of her job at the end of her maternity leave on July 29, 2019. (JE 3:33)

On July 8, 2019, claimant was seen by Gregory Harter, M.D., at Cedar Valley Family Medicine. The left hip was tender to palpation along the lateral to posterior margin. (JE 6:49) The plan was to obtain x-rays and begin physical therapy. Id. X-rays of the left hip that were ordered by Dr. Harter were normal. (JE 7:67-68)

On July 11, 2019, Dr. McMains documented the re-examination of claimant on the same date. (JE 3:36) Since the delivery of her baby, claimant still reported some discomfort localized to the buttocks area on the left, more medially and distally. Id. At times, depending on activity, claimant experienced some radiculopathy that radiated down the left leg to her calf. Id. During the evaluation, claimant had some limitation of lumbar flexion with increased pain, but lumbar extension was normal. Id. Her heel/toe walking was normal, but heel walking was painful on the left. The rest of the examination was normal. Id. She did report that when she has pain, she had a slight limp but otherwise no gait abnormality. Id.

Dr. McMains opined claimant reached MMI and assessed a 2 percent impairment of the whole person due to a history and consistent reporting of sciatica, based on the event. (JE 3:36) He further stated that while the claimant had no evidence of any observable asymmetry or any verifiable radicular complaints, she had consistent symptoms. (JE 3:35) No permanent restrictions were imposed due to the expected decrease in symptoms over time. Id.

On July 19, 2019, claimant signed a resignation form stating that the reason she was resigning was due to lack of communication by management and not enough to do. (DE B:17) On July 17, 2019, claimant received a welcome message as a new member of the Unity Point team. (DE C:4) After maternity leave, claimant started a new position as an admitting tech. At hearing, claimant testified that she is able to move around and change positions which has resulted in less pain during the day although she does feel pain at the end of her shift. She described her pain as a tense ache that she could feel in her back. At work, if she is careful, her pain averages 3/10 on a 10 scale. When she is at home, she uses ice packs, heating pads, Tylenol and Ibuprofen for treatment. She also maintained that a few times a month she experiences intermittent right-sided pain that radiates into her right leg to the knee area.

She related she has difficulty lifting her child and believes that she is only able to lift about 25 pounds more than once. She has trouble pushing heavy things and slight problems bending over. Her husband has taken over the laundry, and she has attempted to shovel snow. The pain affects her ability to sleep.

On July 23, 2019, the claimant was seen by Michaela Johnson, ARNP, for a return to work note. (JE 6:50) Her x-rays were normal and the MRI which had been scheduled was cancelled on the advice of her attorney. Id. She had numbness and tingling in the left lower leg and tenderness to palpation over the left piriformis muscle. Id. Ms. Johnson advised claimant to schedule the MRI and if the MRI is normal, she could return to work. (JE 6:51)

After her return to work, claimant continued to complain of pain and discomfort in the left hip and down the left leg and back. On August 20, 2019, Dr. McMains examined claimant and reviewed the MRI of the left hip taken on July 25, 2019. (JE 3:39) The July 25, 2019, MRI demonstrated a trochanteric bursitis versus a contusion at the level of the gluteus medius tendon at the trochanteric insertion. (JE 8:70) There was also a small, nonspecific subchondral cyst inferior and anterior to the femoral head but no evidence of any stress fractures, avascular necrosis, or femoral acetabular impingement. (JE 3:39) The claimant continued to demonstrate normal deep tendon reflexes at the knee and ankle bilaterally with some mild EHL weakness on the left compared to the right. (JE 3:39) Dr. McMains recommended a referral to a pain clinic for an evaluation and possible injection of the trochanteric bursa. (JE 3:39) He opined that should the injection have no benefit, then her likely diagnosis would be chronic piriformis syndrome that should improve over time with conservative treatment. (JE 3:39) He also felt that therapy would not be beneficial if the problem was with her piriformis. (JE 3:39)

Based on a referral, claimant was seen at Allen Pain Clinic by Asher Afzal, M.D., on September 24, 2019, for a possible trochanteric bursa injection. (JE 9:72) According to the intake notes, claimant's pain started in the paraspinal region on the left side between the iliac crest and rib cage. Id. The dull, aching sensation radiated down the left thigh, calf and even the foot. (JE 9:72) She found it difficult to walk on toes and heels due to pain in the right[1] foot. (JE 9:73) Lumbar spine lateral flexion was worse on the right side which resulted in aggravation of pain in the upper back region and pain into the leg. Id. Patrick maneuver caused low back pain. Compression test resulted in pain across the left iliac crest. Fairs test for provocation of piriformis was negative. Range of motion of hip was negative for reproduction of pain. Id. The MRI was consistent with possible trochanteric bursitis versus tendinitis, tendinosis or what is reported as a contusion of the gluteus medius at its insertion. Id. Dr. Afzal determined that a trochanteric bursa injection was not likely to alleviate her symptoms and instead recommended that she retry physical therapy given that therapy during her pregnancy might not have had any beneficial effects. Id. If there was no improvement of her symptoms after four to six weeks of physical therapy, he recommended obtaining an MRI. (JE 9:73)

On October 3, 2019, claimant underwent an evaluation with David B. Kirkle, D.O. (JE 10:83) He documented her primary pain as located in the left side. Id. The pain was described as constant, sharp, stabbing that was aggravated by sitting and walking. Id.

[1] It is unclear whether this was an error or whether claimant had right foot pain.

Claimant had secondary pain in the back. Id. A tertiary problem was right-sided pain. (JE 10:83) Dr. Kirkle referred claimant for an MRI and an EMG.

The EMG was conducted on October 9, 2019, of both lower extremities. (JE 11:88) The results were normal and there was no EMG evidence for lumbosacral motor radiculopathy, polyneuropathy, or myopathy. (JE 11:88) On October 11, 2019, claimant underwent an MRI of the lumbar spine. (JE 8:71) The results were normal, and the impression was that "no abnormality is identified to explain for the patient's symptoms." (JE 8:71)

Claimant began physical therapy on October 15, 2019. (JE 4:45) The notes document that she was initially told the problem was an SI joint, but the diagnosis changed to piriformis syndrome. (JE 4:44) She presented with sciatica, decreased lumbar ROM, decreased trunk/BLE strength, and difficulty walking. (JE 4:45)

She returned to Dr. Kirkle on October 16, 2019, with sharp shooting pain in the left low back. (JE 10:84) At this visit, her pain level at rest was 8 out of 10. Id. The pain was radiating into the buttock and down the left posterior leg to the calf. Id. It was noted that both the EMG and MRI were normal. Id. He prescribed Naproxen and instructed her to continue physical therapy, chiropractic care and home stretches. (JE 10:85)

On November 26, 2019, the claim was denied based on the opinion of Dr. Kirkle. (CE 2:64; JE 10:87) He signed off on a prepared letter that stated, "Given Ms. Tellez was a 'no call', 'no show' for her 11/22/19 office visit and given what appears to be completely clean MRI and EMG" he agreed that the claimant sustained a temporary soft tissue strain which did not result in any permanent impairment, any permanent work restrictions, and no further medical care. (JE 10:87) Claimant testified at hearing she had been in California and when she called to reschedule, she was told Dr. Kirkle would no longer see her as a patient. She then began directing her own medical care.

Claimant was discharged from PT on December 12, 2019. (JE 4:46) She met 2 of the 7 goals that were established on her initial evaluation. Id. Goals not met were secondary to a continued high pain level that limited her ability to perform sustained activities in either aquatic or land-based settings, decreased core/LE strength and limited A/PROM BLE's. Id. She did not attend any PT appointments in the four weeks prior to December 12, 2019, and thus was discharged. Id.

Claimant returned to Dr. Afzal on January 24, 2020, reporting no improvement following 6 weeks of PT. (JE 9:74) He recommended an MRI of the lumbar spine as opposed to the left hip. Id. On February 3, 2020, claimant underwent the MRI of the lumbar spine. (JE 7:69) The MRI showed mild degenerative changes in the low lumbar spine. Id. There was no comparison between the February 2020 MRI and the October 2019 MRI.

On February 13, 2020, claimant returned to Dr. Afzal with complaints of significant buttock pain radiating into the leg. (JE 9:77) Dr. Afzal did not find that the MRI results corresponded to the symptoms but did administer a piriformis injection which reduced claimant's pain by 50-60 percent for two weeks. (JE 9:77-78) A second injection was administered on March 11, 2020, without relief. (JE 9:78, 80) Dr. Afzal

reminded claimant to continue to do stretching exercises. (JE 9:78) Dr. Afzal believed that claimant's symptoms could be arising from facet-mediated pain as she was quite tender over the facet joints. (JE 9:81)

On April 3, 2020, claimant was seen by Gregory K. Harter, M.D., who noted that claimant reported no more left hip pain. (JE 6:53) Instead, the pain was in the lumbar musculature on the left side. (JE 6:53) On examination, she had no tenderness to palpation along the LS spine or around her left hip, but she did note tenderness in the left lumbar musculature consistent with her verbal complaints. (JE 6:54) Her past treatment included injections which were ultimately not helpful, physical therapy, and medications which did not do much for her. (JE 6:53) Dr. Harter prescribed Zanaflex and Diclofenac Sodium Tablet Delayed Release. (JE 6:55) He agreed she should continue to see the pain doctors but did not continue physical therapy as it had not been helpful in the past. (JE 6:55)

On May 12, 2020, claimant returned to Cedar Valley Medical Specialists and saw Ms. Johnson. (JE 6:56) Claimant reported that some days were better than others. (JE 6:56) Her examination was normal but for tenderness upon palpation along the left piriformis muscle. (JE 6:57) The anti-inflammatory prescribed by Dr. Harter was not helpful. (JE 6:56) Ms. Johnson prescribed indomethacin and advised claimant to return to PT as PT was the main treatment for piriformis syndrome along with heat/ice and stretches. (JE 6:58)

Claimant began physical therapy again on May 20, 2020. (JE 12:90) During therapy, claimant was very tender to palpation throughout her gluteal and left SI joint. (JE 12:91) Even with light palpation she reported radicular symptoms down to the ankles. Id.

On June 12, 2020, claimant returned to Ms. Johnson with reports that physical therapy was going well and she would be starting dry needle therapy the following week. (JE 6:59) She was also experiencing right leg and right hip pain. Id. On examination, she had tenderness to palpation along the left piriformis area and in the right hip and lumbar region. (JE 6:60) Although claimant had been referred for an ortho consult, no ortho would see her. (JE 6:59)

On July 6, 2020, claimant was seen by Lynn Galloway, PA-C, at Allen Neurosurgery for complaints regarding left-sided low back and buttock pain that radiated down the posterior leg to the calf. (JE13:93) She was tender to palpation over the left SI joint. She had full range of motion without pain in the left leg. Patrick test on the left caused increased pain in the buttocks into the posterior thigh. On the right, she had full range of motion in the leg without pain. She was diagnosed with sacroiliac pain, lumbosacral disc degeneration, and foraminal stenosis of the lumbosacral region. Ms. Galloway recommended claimant return to Dr. Afzal for an injection in the SI joint on the left. (JE 13:94)

On July 29, 2020, claimant returned to Dr. Afzal who recommended bilateral lumbar facet joint injections at L4-5 and L5-S1. (JE 9:81) It appears that authorization was not given for these injections as they were not administered.

On August 18, 2020, claimant returned to Cedar Valley Family Medicine and was seen by Michaela Johnson, ARNP, who noted that the lumbar facet injections recommended by the pain clinic had been denied by insurance and that there was no further care the pain clinic could provide. (JE 6:62) Ms. Johnson made a referral for a second opinion at Mercy Neurosurgery. (JE 6:63)

On September 22, 2020, claimant was seen by Marietta Walsh, D.O., for "low back pain/bilateral leg pain." (JE 14:95) Claimant stated that she had been experiencing this pain since her fall on February 6, 2019, and that it originated in the bilateral buttocks radiating into the posterior aspect of her lower extremities to her ankles. (JE 14:95) The radiation of pain was in both lower extremities, but worse on the left than the right according to the report. Id. Dr. Walsh diagnosed claimant with lumbago, bilateral lumbar radiculopathy, and lumbar facet arthropathy. (JE 14:96) The physical examination revealed no motor or sensory deficits. Dr. Walsh recommended claimant consult with a different pain management clinic as there were no surgical options recommended. Id.

On October 12, 2020, claimant was seen by Justin J. Elwood, M.D., a pain management doctor, at MercyOne for symptoms in her low back and left lower extremity and some symptoms on the right side. (JE 14:99) In the intake notes, claimant's pain was in the low lumbar region, most significant in the left buttock with pain, numbness and tingling radiating in the lower left extremity and into the bottom of the foot. (JE 14:100) She also reported occasional discomfort in the right buttock and lower extremity. Id.

Another EMG was obtained which had normal results. (JE 14:97-98) On November 12, 2020, claimant returned to MercyOne and was seen by Dr. Walsh to review the EMG results. (JE 14:103) She had no motor or sensory deficits, absent patellar reflexes bilaterally, no hyperreflexia, negative Hoffman sign and no clonus. (JE 14:103) Dr. Walsh concluded that there was no neurosurgical intervention recommended and suggested claimant continue to work with pain management. (JE 14:103)

On November 20, 2020, claimant returned to Dr. Harter with the primary concern about some dysfunctional uterine bleeding. (JE 6:64) She mentioned that she does have some low back pain at times and wanted a refill of her muscle relaxer. (JE 6:64) On examination, she had full range of motion of her back, no costovertebral angle tenderness but some tenderness in the low back and lumbar musculature. (JE 6:65) Dr. Harter refilled the Zanaflex prescription and recommended claimant continue with stretches. (JE 6:66)

On December 28, 2020, claimant was seen by Dr. Elwood via Telemedicine following bilateral sacroiliac joint injections with posterior superior iliac spine trigger point injections of December 4, 2020. (JE 14:104) The injections alleviated claimant's pain for approximately two weeks but then her pain returned to its previous level. (JE 14:104) He concluded that based on claimant's lack of positive response to the injections and other treatment along with the unremarkable MRI and EMG, claimant's

symptoms were not likely radicular. (JE 14:108) He recommended a trial of gabapentin. Id.

On February 1, 2021, claimant was seen for a routine well woman examination. (JE 14:109) Test results revealed she was pregnant. (JE 14:110) She had normal examination of her extremities and it was noted that she would cease taking her medications for her "chronic hip pain." Id.

On April 14, 2021, claimant reported an injury to her upper thigh and right hip which she struck as she was trying to walk around a desk. (DE C:9) On May 4, 2021, she reported an injury to her right shoulder which she struck against a door that did not fully open. (DE C:10)

Video surveillance of claimant was taken on September 1, 2021. (DE H) In the video at 00:10-00:22, claimant is pregnant and walking with a visible limp. At 00:23, she is seen exiting a car, putting a backpack over her shoulders, and then lifting her son out of the car. An antalgic gait is not noticeable. At 1:38, she is shopping, pushing a cart while wearing a backpack. At 4:12 she bends over without apparent difficulty. At 6:15 she exits the building and walks to her car while holding her son's hand. She appears to have an antalgic gait. At 7:18, she walks toward her car with one child on her hip.

Dec 11, 2021, 8:50. Claimant is outside with two young boys. There is some snow on the ground. She is seen pushing a shovel along the ground. At times, the shovel is caught and requires a harder push or kick. The snow is light enough that the young boy is seen lifting snow in a smaller shovel. Claimant bends slightly at the 2:30 mark but is mostly seen to be pushing the shovel while in an upright position. After approximately four minutes of pushing snow on the side of the house, claimant moves to the opposite side and is out of view for another six minutes according to the surveillance time stamps. At 9:00 she is seen in front of a garage again pushing and kicking snow with her shovel. At the 5:00 minute mark on the video, she is seen slightly bending or rotating at the waist. At 9:08 she returns inside the house. There are large areas of snow not removed.

December 12, 2021, claimant is seen shopping at a warehouse. She pushes a stroller. She lifts a bottle of oil which is retrieved by a man who then places it in a cart. At 8:15 she lifts cans of tuna which she hands to her male companion who places it in the cart. She is wearing a backpack. At 9:53 she appears to be walking with a slight antalgic gait . At 10:24 she is seen pushing the grocery cart. At 10:42 she lifts a child from the cart and walks a few steps to hand the child off to her male companion. She then gets into her car on the passenger side. The surveillance report described her as walking with a "waddling gait." (DE H)

On March 19, 2021, claimant was seen by David H. Segal, M.D., for an independent medical evaluation. (CE 1) At the time of the examination, claimant's current pain was 3 out of 10 on a 10 scale with an average of 6 out of 10 on a 10 scale. (CE 1:3) There was no explanation in the report as to why claimant's pain was lower than average at the time of the IME. She reported that the pain was constant across the low back at the belt line, worse on the left than the right. Id. The pain radiated down the

posterior left leg to the bottom of the foot and down the right posterior leg to the calf. (CE 1:4) Claimant also reported occasional "shocks" of pain going down the leg that last 2-3 minutes and constant numbness and intermittent tingling in the left posterior leg to the foot. Id.

The pain was aggravated by prolonged activity or position with standing causing the most pain and relieved by rest, lying down, heat, ice, Biofreeze, and muscle relaxers. Id. She was currently taking Ibuprofen or Tylenol but neither helped. Id. She reported that the first piriformis injection alleviated the leg pain by 50 percent, but the second injection worsened her condition. (CE 1:4) The SI joint injection reduced pain by about 50 percent for two weeks. Id. Physical therapy did not help. Id.

During the examination, Dr. Segal observed claimant to have substantial findings of radicular symptoms on the left while the right leg sensory motor and reflex exams were normal. (CE 1:7) He found her to have tenderness of the lower lumbar region, prominent left S1 dermatomal distribution losses; L5 and S1 myotomal distribution loss in the leg and foot; equivocal straight leg raise on the left; positive provocative SI joint testing bilaterally; and gait deviation with antalgic circumduction gait. (CE 1:12) There is mild foraminal stenosis at L5-S1 which does correspond with claimant's symptoms according to Dr. Segal. Id.

The IME noted claimant was pregnant during her falls at work in February 2019. Following the delivery of her child, there was no change in the back or leg pain and her eight-week maternity leave did not help to alleviate symptoms.

As a result of her injuries, claimant reported to Dr. Segal that she is unable to pick up her youngest child, that she cannot do many chores, that she must take frequent breaks to sit while cooking. She cannot run, play soccer, or take her children to the park because she cannot stand and watch them play. Even walking is difficult. Her testimony at hearing and her presentation in the surveillance video presented a more capable, less disabled person than she presented in her subjective complaints to Dr. Segal.

Claimant relayed that the second injury worsened her condition by 20 percent. (CE 1: 8) Dr. Segal adopted this figure without further explanation.

Dr. Segal concluded:

> Ms. Tellez sustained damage not only to her low back, but specifically her lumbar nerve roots causing radiculopathy, lumbar facet joints, SI joint, piriformis area and greater trochanteric bursa. Additionally, she either directly or secondarily injured the greater trochanteric bursa. These symptoms persist and cause her substantial dysfunction, indication for further treatments including consideration of injections and surgery, impairment in work and life activities, as well as decreased quality of life.
>
> Ms. Tellez's mechanism of injury, symptoms, exam findings, and records as a whole support that multiple body areas in her lumbar spine region were injured at the same time. There is overlap in symptomatology,

especially in regard to the low back pain that radiates down the left leg. This is known as *double crush syndrome* and is a common phenomenon in clinical medicine where symptoms in a body region may have more than one source.

CE 1:8

Ms. Tellez has symptoms of lumbar radiculopathy that are classic textbook symptoms. She has been given the diagnosis of lumbar radiculopathy by many providers many times in the records.

There are four factors which are unusual in her case but do not negate the diagnosis or radiculopathy: mild findings on imaging, negative response to epidural steroid injection, and negative or equivocal straight leg raise.

Ms. Tellez had the diagnosis of lumbar radiculopathy based on her symptoms and exam findings. Imaging is not necessary per the *AMA Guides*, 5th Edition. A lumbar radiculopathy is diagnosed by symptoms and findings and often is (but does not have to be) associated with compressive disc herniations. Radiculopathy is described as pain, numbness, tingling, or weakness caused by inflammation of the nerve root. While it is typically a compressive lesion that causes that inflammation, it does not have to be. A diagnosis of radiculopathy is based on symptoms both in general clinical care as well as based on the *AMA Guides.*

CE 1:8-9

Dr. Segal placed claimant at MMI as of January 20, 2021, as it was unlikely she would improve further based on treatment. (CE 1:24) As a result of her lumbar radiculopathy, facet arthropathy, SI joint pain, piriformis syndrome, and trochanteric bursitis, Dr. Segal assigned a 23 percent whole person impairment. (CE 1:26)

He recommended the following work restrictions:

- Walking: 30 minutes consecutive, rest for 10 minutes, then can walk again (4 hours/day) – should have walking cane available
- Sitting: 15 minutes consecutive, total 4 hours with breaks as needed
- Standing: 15 minutes consecutive with shifting
- Bending, 1-2 times: Occasionally
- Bending, repetitive: Never
- Lifting once 0-15 pounds: Occasionally
- Lifting once 16-30 pounds: Rarely
- Lifting over 30 pounds: Never
- Lifting repetitive: 0-10 pounds: Occasionally
- Lifting repetitive: over 11 pounds: Rarely
- Pushing/Pulling up to 30 pounds on wheels: Occasionally
- Pushing/Pulling up to 10 pounds without wheels: Occasionally
- Squatting: Rarely

- Ladders: Rarely
- Crawling: Rarely

(CE 1:26-27)

Dr. Segal reviewed additional records as well as the surveillance video and interviewed claimant via the telephone for an updated report issued on March 14, 2022. (CE 1:54) Dr. Segal noted that claimant's subjective complaints were unchanged and that she has had no further treatment. Id. Dr. Segal wrote,

> [t]here are times she needs to bend, so she does it, but it hurts. She states short trips to the store are manageable. When she was seen in my office for the IME, it was after a long car ride here, so she was in more pain and bent less easily than when she had been resting and going to the store in August. She thinks the day of the surveillance video was a "better" day.

(CE 1:55) However, claimant's pain was 3 on a 10 scale at the time of the 2021 examination when she averaged 6 on a 10 scale.

Nonetheless, Dr. Segal maintained his position on claimant's injuries and believed that the surveillance videos were generally consistent with the history and examination reflected in the IME report and disagreed with the "cursory" conclusions of Dr. Abernathey. (CE 1:57)

Dr. Segal was detailed in his report and provided many medical justifications, however he arrived at some factual conclusions without substantial backing such as concluding claimant sustained a 20 percent increase in pain and disability based solely on claimant's assessment. He also ignored the fact that he had previously recorded claimant's pain on the low end of the scale at the time of the 2021 examination and instead suggested in his 2022 opinion that she was worse off at the time of the IME than she was on the days surveillance was taken.

On March 2, 2022, Chad D. Abernathey, M.D., issued an opinion that claimant did not suffer any objective anatomic or structural change or damage to her low back and spine. (DE G) The MRI of the lumbosacral spine and EMG studies were unrevealing with the MRI from 2019 and 2021 showing minimal degenerative changes consistent with age. Id. He did not mention the hip MRI results and subsequent treatment related to that. He characterized claimant's injury as a musculoskeletal strain and did not anticipate any permanent impairment or restrictions as a result. Id. He found her MMI date to be six months from the date of injury, due to a paucity of clinical or radiographic findings. Id. He further did not anticipate that any additional medical management would be of any "significant benefit" nearly three years post injury. Id. (DE G) He favored conservative treatment. (DE G:3)

Claimant has not seen Dr. Elwood since January 2021 because of her pregnancy, but since she has delivered the child, she would like to return to Dr. Elwood and attempt injections. She testified that with her most recent pregnancy there was no change in her symptoms.

Her medical bills are included in Exhibit 5. The adjusted amount claimed is $34,720.55. (CE 5:76) Claimant also asserts entitlement to reimbursement of mileage of $610.28 in Exhibit 6. (CE 6:138)

Additionally, claimant seeks reimbursement for costs such as the filing fee, copy of the deposition, and the IME of Dr. Segal which is broken down as follows:

Records review:	$937.50
Exam:	$937.50
Report:	$2250.00

(CE 7:141)

Defendants request a specific finding of credibility as it relates to the claimant. Defendants argue that based on the video surveillance as well as the lack of objective findings supporting claimant's subjective complaints, claimant was not a credible witness. While the objective tests such as EMGs, MRIs, and x-rays did not find evidence of radicular symptoms, claimant's complaints of left-sided pain and discomfort were consistent. Further, while claimant did show more function in her surveillance video than she testified to or that she related to her medical providers at times, she was seen walking with an altered gait. The surveillance report described her walking with a "waddling gait." (DE H) Her testimony that she could lift her child and hand him off to her husband was seen in the surveillance video. The way that she kicks and pushes a shovel in the snow was consistent with the scene in the surveillance video. The one place where she may be characterized as exaggerating her complaints may have been in the report of Dr. Segal, but it might be more accurate to suggest that the way in which Dr. Segal portrayed her as disabled did not match the claimant's overall condition rather than the claimant herself not being fully forthcoming or being contradictory.

Pain is a subjective complaint. AMA Guides 5th Edition, p. 566. Each person experiences pain differently due to biological, psychological, and social components. Id. There are no precise tests to measure pain. Id.

> Physicians are confronted with ambiguity as they attempt to assess severity and significance of chronic pain in their patients. In large part, this stems from the fundamental divide between the person who suffers from pain and an observer who attempts to understand that suffering. Observers tend to view pain complaints with suspicion and disbelief, akin to complaints of dizziness, fatigue and malaise. As Scarry remarked, "To have great pain is to have certainty, to hear that another person has pain is to have doubt."

Id.

Because of claimant's consistent complaints of pain since her February 6, 2019, fall, along with the extensive treatments including months of physical therapy, multiple injections, and medications, it is found that claimant is a credible witness. Accepting claimant as a credible witness does not mean her testimony is given greater weight than

surveillance, objective tests, and expert testimony, but only that her testimony was largely consistent, and while her pain complaints may not perfectly match the objective tests and surveillance, it does not mean the pain is not present.

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).

A personal injury contemplated by the workers' compensation law means an injury, the impairment of health or a disease resulting from an injury which comes about, not through the natural building up and tearing down of the human body, but because of trauma. The injury must be something that acts extraneously to the natural processes of nature and thereby impairs the health, interrupts or otherwise destroys or damages a part or all of the body. Although many injuries have a traumatic onset, there is no requirement for a special incident or an unusual occurrence. Injuries which result from cumulative trauma are compensable. Increased disability from a prior injury, even if brought about by further work, does not constitute a new injury, however. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); Ellingson v. Fleetguard, Inc., 599 N.W.2d 440 (Iowa 1999); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995); McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985). An occupational disease covered by chapter 85A is specifically excluded from the definition of personal injury. Iowa Code section 85.61(4)(b); Iowa Code section 85A.8; Iowa Code section 85A.14.

The parties agree claimant sustained an injury to her left hip, low back, and lower left extremity on February 6, 2019. They further agree, she injured her right hip and right lower extremity on February 21, 2019. The parties disagree as to whether these two injury dates resulted in permanent disabilities.

With the February 21, 2019, injury claimant argued she aggravated her February 6, 2019, injuries. The mechanism of the February 21, 2019, injury was falling on the right side.

Claimant has consistently complained of left lower extremity radiculopathy. Her complaints for right lower extremity radiculopathy are not as unchanging. In her extensive testing with Dr. Segal, right-sided pain and weakness was not documented. (See CE 1:7 wherein Dr. Segal found claimant to have full motor responses in all muscle groups on the right, no sensory loss on the right, negative provocative SI joint testing on the right, negative straight leg test on the right). In the list of diagnoses, Dr. Segal wrote "right hip and knee injury (resolved)."

While claimant did report bilateral pain in November 2020 to Dr. Elwood, the primary focus of her treatment in the months preceding was on the left side and there were few documented complaints of right-sided pain in the course of claimant's treatment including with medical providers claimant chose on her own. In August 2021 Fuelling Chiropractic Clinic records, claimant identified left lower back pain going into her left leg. (JE 15:111) In the December 2021 Fuelling Chiropractic Clinic records, claimant's pain was located in the left leg along with neck and middle back. (JE 15:112) Her January 21, 2022, complaints to the chiropractor were of lower back pain radiating into the left leg. Id.

Based on the medical records and the conclusion of Dr. Segal that the right-sided injuries were resolved at the time of his examination, it is determined that claimant sustained a temporary injury to the right side arising out of the February 21, 2019, fall and that any right-sided injuries have since resolved, leaving no residual disability.

Turning to the fall of February 6, 2019, and any exacerbation of the injuries to the low back and left lower extremity that may have occurred on February 21, 2019, the record does support a finding that claimant sustained some amount of permanent disability, even if it is only by subjective complaints. Dr. Abernathey's opinion of March 4, 2022, stated that claimant presented with chronic subjective lumbosacral strain following two falls at work. (DE G:2) Dr. McMains assessed a 2 percent permanent impairment as a result of the February 6 and February 21, 2019, low back injury. (DE E:1) Claimant had multiple injections, physical therapy referrals, and prescription medications to treat the lumbar strain suggesting that several health care providers found claimant's complaints to be of a serious enough nature that they warranted treatment.

This is sufficient evidence to support a finding that claimant sustained a permanent disability. Having determined claimant has sustained a permanent disability, the question then turns to the extent.

Claimant currently earns $200 more per week than she earned at the time of her injury. While with defendant employer and at all relevant times, her hourly wage was $13.80. Her currently hourly wage is $19.95.

Iowa Code sec. 85.34(2)(v) limits the amount of recovery to only a functional impairment and not in relation to claimant's earning capacity when an injured worker returns to work at an equal or higher wage. However, the Commissioner has deemed that this is only applicable if the claimant is employed with the same employer and earning the equal or higher wages. See Martinez v. Pavlich, Inc., File No. 5063900 (App. July 30, 2020) It should be noted that in the Commissioner's decision, the positions taken by the Martinez parties were "the inverse of what might be anticipated in a 'normal' scenario—when a claimant's potential entitlement to industrial disability exceeds his or her functional disability. In such 'normal' cases, the claimant would be arguing for an interpretation of the statute which would entitle him or her to benefits under the industrial disability analysis and the defendants would be arguing for an interpretation that limited the claimant's benefits to his or her functional disability." Zachary Martinez, Claimant, File No. 5063900, 2020 WL 5412838, at *6 (July 30, 2020)

Regardless, the Commissioner's argument applies to this case as the employment and earning facts between the two cases are similar. Like Martinez, claimant voluntarily separated from defendant employer and sought out new employment. She is earning $200 more per week than she had previously. Using the Commissioner's interpretation, claimant's loss should be measured on an industrial basis.

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 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.

In support of the claimant's position that she has sustained a significant industrial disability, claimant relies on the expert testimony of Dr. Segal along with the fact that she had no prior record of complaints of radicular symptoms in either of her legs nor sought anything but minor and sporadic chiropractic treatment for low back complaints.

Dr. Segal's report is lengthy and detailed but not without errors and questionable assumptions. For instance, claimant maintained that she had a twenty percent increase in her pain following the second fall on February 21, 2019. Dr. Segal accepts this assessment without question and without pointing to any medical records for support.

After viewing claimant's surveillance video, Dr. Segal continued to hew to his original opinions and even incorrectly identified that her pain was 6 out of 10 at the IME visit, and that the pain at the IME visit must have been worse than during the times the surveillance video was taken. However, claimant's current pain at the time of her examination with Dr. Segal was 3 out of 10. (CE 1:3)

Dr. Segal stated the right radicular pain was well document in the records as a whole when the medical records for most of 2019 and 2020 and well into 2021 contained only the occasional reference to right-sided radiculopathy. (CE 1:24)

Dr. Segal also disagrees with most of claimant's medical providers. For instance, Dr. Elwood commented on November 11, 2020, that it was likely claimant did not have radiculopathy because of the lack of effect the epidural had. (CE 1:9) He also disagreed with Dr. McMains who concluded that the claimant was suffering from chronic left piriformis syndrome because Dr. McMains' opinion excluded well-documented lumbar pain and that Dr. McMains did not document severe tenderness in the piriformis area, meaning Dr. McMains diagnosis was not complete. (CE 1:10)

Dr. Segal has lengthy explanations for why claimant continues to have significant debilitating complaints despite no objective support. Her MRIs and EMGs were both normal or at least within the range of normalcy given her age. Claimant was pregnant at the time of her fall which Dr. Segal does not give much of any weight as it relates to possible back or lower extremity problems. Claimant was given a full duty release by Dr. McMains, Nurse Practitioner Johnson, and Dr. Kirkle. Even Dr. Elwood, a doctor who

was not retained by defendants, found it highly unlikely that claimant's condition included radicular symptoms given that she was not responsive to the bilateral steroid injections and that her EMG was normal.

At hearing, claimant testified that her pain waxes and wanes with an average of 3 or 4 on a 10 scale but can go higher with activity. (Tr., p. 26: Ln 14-25) She does not usually walk with a limp but does when her pain flares up. There are portions of the day she is pain free in her back and leg. Claimant attributes this to her ability to take frequent breaks and move as needed. She does her current position without any work restrictions and has not had work restrictions since taking the position with Allen Hospital in 2019.

Claimant's own testimony along with the objective test results, the surveillance videos, and the opinions of Dr. Elwood, Nurse Practitioner Johnson, Dr. McMains and Dr. Kirkle support a finding that claimant has sustained a modest industrial loss. Dr. McMains assessed a 2 percent permanent disability, however the AMA Guides 5th Edition allow for 5-8 percent BAW permanent impairments for patients with nonverifiable radicular complaints. 5th Edition at 384.

Claimant is a 25-year-old person which means she can gain skill and experience or even undergo retraining. She has a high school education but has taken post-secondary learning courses including completing a medical office specialist program. She was able to move from a receptionist position to a cash posting specialist position, increasing her earnings despite her impairment. These factors weigh toward a smaller industrial disability finding. She is motivated to return to work and actively looked for employment even during her maternity leave in 2019. She has ongoing pain and discomfort. Weighing all these factors, it is found claimant's industrial disability is 12 percent.

The appropriate PPD date is January 20, 2021, based on the treatment provided by Dr. Elwood and his conclusion that claimant was suffering from a chronic pain not likely radicular in nature. She has had no treatment since that date.

Because it is found that the dates of injury are not severable and that the February 21, 2019, injury exacerbated the February 6, 2019, injury, the appropriate benefit rate is $346.26 which is the stipulated benefit rate of the February 21, 2019, injury.

As to the medical expenses, including the mileage, defendants advised claimant that no further medical treatment was authorized and that she should seek treatment through other sources. As such, an authorized defense is not available to the defendants. R.R. Donnelly & Sons v. Barnett, 670 N.W.2d 190 (Iowa 2003). Under the Bell Bros. standard, if a claim is denied, the injured worker can select his or her own medical care. Bell Bros. Heating & Air Conditioning v. Gwinn, 779 N.W.2d 193, 207 (Iowa 2010)

While claimant did not obtain full recovery from the treatment she sought and received, the treatment was reasonable and necessary to treat the musculoskeletal strain that she suffered from her February 2019 falls while at work. Therefore, it is found that claimant is entitled to recover the expenses in Exhibit 5 and Exhibit 6.

Claimant seeks reimbursement of the IME of Dr. Segal. According to Des Moines Area Reg'l Transit Auth. v. Young, 867 N.W.2d 839, 841–42 (Iowa 2015), an IME is recoverable if the claimant complies with the procedure described in Iowa Code section 85.39. 85.39 requires a triggering event. That triggering event is when a physician retained by the defendant employer issues an impairment rating that is deemed too low by the claimant. Iowa Code section 85.39. In this case, Dr. McMains issued a 2 percent impairment rating on July 11, 2019. This opinion triggered claimant's right to obtain an IME, which she did on March 19, 2021, with Dr. Segal.

Thus, the examination portion of the IME is awarded under Iowa Code section 85.39 while the report is assessed as a cost under 876 IAC 4.33. See also Kern v. Fenchel, Doster & Buck, P.L.C., 966 NW2d 326 (Iowa Ct. App. 2021) (ordering the commissioner to reconsider the question of reimbursement for the cost of report preparation). In addition to the filing fee, claimant also seeks recovery for the cost of the deposition. 876 IAC 4.33 allows for the recovery of the attendance of a certified shorthand reporter or presence of mechanical means at hearings and evidential depositions. Iowa Admin. Code r. 876-4.33(86) In this case, it was not clear what the cost of the deposition fee was, whether it was the cost of a copy of the deposition or the fee of the certified shorthand reporter. Thus, the cost of the deposition is not recoverable due to lack of evidence submitted by claimant.

ORDER

THEREFORE IT IS ORDERED:

Defendants shall pay claimant sixty (60) weeks of permanent partial disability benefits commencing on January 20, 2021, at the weekly rate of three hundred forty-six and 26/100 dollars ($346.26).

Defendants shall receive credit for all benefits previously paid.

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 shall pay all causally related medical expenses in Exhibit 5 as well the mileage expenses claimed in Exhibit 6

Defendants shall provide claimant with future medical care for all treatment causally related to the musculoskeletal strain to the low back and left-sided hip pain.

Defendants shall pay the costs of the examination of Dr. Segal pursuant to Iowa Code section 85.39.

Pursuant to rule 876 IAC 4.33, defendants shall pay claimant's costs of the arbitration proceeding as set forth in the arbitration decision, along with the cost of the hearing transcript.

Signed and filed this 20th day of July, 2022.

JENNIFER S. GERRISH-LAMPE
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Benjamin Roth (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.