BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

TERRY TILTON, Claimant, vs. H.J. HEINZ COMPANY, Employer, and LIBERTY MUTUAL INSURANCE COMPANY, Insurance Carrier, Defendants.	File No. 5053002 REMAND DECISION Head Note Nos.: 1108, 1108.20, 1402.30, 1402.40, 1402.50, 1402.60, 1701, 1804, 2204, 2206, 2209, 2401, 2402, 2501, 2502, 2701, 2802, 2907, 3002

This matter is before the Iowa Workers' Compensation Commissioner on remand from a decision of the Iowa Court of Appeals dated July 20, 2022. This is the second remand to the agency from the Iowa Court of Appeals. The commissioner originally delegated this matter to another deputy workers' compensation commissioner to issue the final agency action. Following a ruling on a motion to recuse the commissioner delegated this matter to the undersigned to issue the final agency action.

On March 27, 2015, Claimant Terry Tilton filed a petition in arbitration against Defendant H.J. Heinz Company ("Heinz"), her employer, and its insurer, Defendant Liberty Mutual Insurance Company ("Liberty Mutual"), alleging she sustained an injury to her whole body while working for Heinz on April 15, 2013. Heinz and Liberty Mutual filed an answer on April 8, 2015.

An arbitration hearing was held on March 16, 2016. Attorney Thomas Wertz represented Tilton. Tilton appeared and testified. Stanley Mathew, M.D., a treating physiatrist, also testified on behalf of Tilton. Attorney Nathan McConkey represented Heinz and Liberty Mutual. Guy Loushin appeared and testified on behalf of Heinz and Liberty Mutual. Exhibits 1 through 18, and A through G and I through X were admitted into the record.

At the start of the hearing the parties submitted a hearing report of the parties' stipulations and issues to be decided. Defendants' rate calculation was attached to the hearing report. A hearing report order with Defendant's attached rate calculation was entered at the conclusion of the hearing. Heinz and Liberty Mutual raised the

affirmative defenses of lack of timely notice under Iowa Code section 85.23 and untimely claim under Iowa Code section 85.26 and waived all other affirmative defenses.

STIPULATIONS

1. An employer-employee relationship existed between Heinz and Tilton at the time of the alleged injury.

2. Temporary benefits are no longer in dispute.

3. If the disability is found to be the cause of permanent disability, the disability is an industrial disability.

4. If the disability is found to be the cause of permanent disability, the commencement date for permanent partial disability benefits, if any are awarded, is April 16, 2013.

5. At the time of the alleged injury Tilton was single and entitled to one exemption.

ISSUES

1. Did Tilton sustain an injury which arose out of and in the course of her employment with Heinz on April 15, 2013?

2. What is the nature of the injury?

3. Is the alleged injury a cause of temporary disability during a period of recovery?

4. Is the alleged injury a cause of permanent disability?

5. If the alleged injury is a cause of permanent disability, what is the extent of the disability?

6. Has Tilton established she is permanently and totally disabled under the statute or under the common law odd-lot doctrine?

7. What is the rate?

8. Does apportionment apply?

9. Is Tilton entitled to medical expenses set forth in Exhibit 14?

10. Is Tilton entitled to alternate medical care under Iowa Code section 85.27?

11. Are Heinz and Liberty Mutual entitled to a credit of $45,550.00 under Iowa Code section 85.38 for payment of sick pay/disability income?

12. Is Tilton entitled to an award of penalty benefits?

13. Is Tilton entitled to recover the cost of the independent medical examination ("IME")?

14. Is Tilton entitled to recover costs set forth in Exhibit 16?

The record was held open through May 2, 2016, for the receipt of post-hearing briefs. The briefs were received and the record was closed.

A deputy workers' compensation commissioner issued an arbitration decision on July 1, 2016, finding Tilton "knew no later than 2011 that her back injury was connected to work, serious, affecting her work, and possibly compensable but she did not provide notice to the defendants until May of 2013." The deputy commissioner found claimant's claim was barred under Iowa Code section 85.23, for failure to provide timely notice. The deputy commissioner also found Tilton

> was aware of the nature, seriousness, and probable compensability of her injury well before April 15, 2013, the date of injury that claimant alleged on the face of her petition. The petition was filed March 27, 2015. No benefits were paid on the claim. Claimant did not comply with Iowa Code section 85.26(1). She filed her petition in an untimely fashion. It was filed more than two years after the date of injury. All other issues are therefore moot.

The deputy commissioner found claimant should take nothing.

On July 6, 2016, Tilton filed a notice of appeal with the workers' compensation commissioner. On appeal, Tilton alleged the deputy commissioner erred in finding her injury date was in 2011, erred in finding her claim is barred for failure to provide timely notice under Iowa Code section 85.23, erred in finding her claim is barred by the statute of limitations under Iowa Code section 85.26, and erred in failing to make any assessment of costs. Tilton alleged the date of injury is April 15, 2013, and that she provided timely notice to Heinz on or about May 3, 2013, and that she timely filed her petition before April 15, 2015. Tilton alleged she met her burden of proof she sustained a cumulative injury to her low back and a permanent adjustment disorder with mixed anxiety and depressed mood while working for Heinz and that she is permanently and totally disabled under the statute and common law odd-lot doctrine. Tilton alleged her gross weekly earnings at the time of the injury were $605.20, and that her weekly rate is $385.13. Tilton alleged she is entitled to an award of penalty benefits. Tilton alleged she is entitled to recover the $837.90 cost of the IME performed by Stanley Matthew, M.D. under Iowa Code section 85.39. Tilton alleged she is entitled to recover the

$100.00 filing fee, the $1,179.40 cost of the vocational report of Barbara Laughlin, and the $850.00 cost of the report from Mark Mittauer, M.D.

Heinz and Liberty Mutual averred the arbitration decision should be affirmed in its entirety and averred Tilton is not entitled to an award of permanency benefits, penalty benefits, or costs.

On January 3, 2018, the workers' compensation commissioner delegated authority to issue the final agency action to a deputy workers' compensation commissioner as an appeal deputy.

On April 5, 2018, the appeal deputy issued an appeal decision modifying the arbitration decision. The appeal deputy found the manifestation date of Tilton's injury is September 8, 2010. The appeal deputy found claimant failed to provide notice of her injury to Heinz and that her claim is barred by Iowa Code sections 85.23 and 85.26.

Tilton filed a petition for judicial review. On August 24, 2018, the Iowa District Court for Polk County issued a decision finding the agency failed to apply the appropriate legal standard regarding cumulative trauma injuries set forth in Herrera v. IBP, Inc., 633 N.W.2d 284, 288 (Iowa 2001). The court found the agency blurred the concept of when the injury is said to occur, or manifests, with the separate analysis under the discovery rule. The court concluded the agency erroneously determined September 8, 2010, as the date Tilton or any reasonable person in her position should have known she suffered from a serious work injury having a serious adverse impact on her employability, noting "[u]nder this record, she was not and could not have been reasonably aware until 2013," and finding Tilton was under no obligation to give Heinz notice of her claim on September 8, 2010. The district court remanded the case to the agency for the proper application of the discovery rule announced in Herrera consistent with the following facts: on September 8, 2010, Terry (1) had returned to work with no permanent restrictions; (2) she was performing the same job at the same rate of compensation; and (3) she continued to perform that same work until on or about April 15, 2013. Heinz and Liberty Mutual appealed the district court decision.

On July 24, 2019, the Iowa Court of Appeals issued an appeal decision, affirming, in part, and reversing, in part, the district court decision, and remanding the matter. The court of appeals agreed the agency blurred the concept of when the injury manifests with the separate analysis under the discovery rule, but held the blurring, by itself, does not mandate reversal. The court of appeals found the agency's determination that the tolling of the limitations period ended on September 8, 2010, was not supported by substantial evidence because as of that date no physician had given Tilton permanent work restrictions and remanded the case for further proceedings.

The commissioner delegated final agency action to the same appeal deputy who rendered the April 5, 2018, appeal decision. On February 4, 2021, the appeal deputy issued a remand decision, finding Tilton knew or should have known, of the seriousness of her disability on or before February 4, 2010, and found the manifestation date of the

injury is February 4, 2010. The appeal deputy found Tilton did not provide notice of her injury until May 3, 2013, and that her claim was barred under Iowa Code section 85.23. Tilton filed a petition for judicial review.

On November 9, 2021, the Iowa District Court for Polk County issued a ruling on petition for judicial review. The district court found based on the determination by the court of appeals that Tilton could not have known her condition was serious enough to have a permanent impact on her employability as of September 8, 2010, because no doctor had ever given her permanent work restrictions at that time. The district court held

> it was irrational, illogical, and wholly unjustifiable for the Remand Deputy to conclude Tilton somehow could have known this *seven months earlier* on February 4, 2010. As she had not even had a doctor's note giving her permanent restrictions as of September 8, 2010, she clearly could not have had a doctor's note giving her permanent restrictions seven months prior to that.

The court found it could not determine the correct date the tolling of the limitations period should end and remanded the case to the agency to "make this determination by the proper application of the discovery rule to the facts of this case as set forth in the record and discussed herein." Heinz and Liberty Mutual appealed the decision.

On July 20, 2022, the Iowa Court of Appeals issued an appeal decision, affirming the district court's decision remanding the matter to the agency for a determination of the date Tilton knew or should have known her injury would have a permanent adverse effect on her employment.

FINDINGS OF FACT

Tilton commenced full-time employment with Heinz in Cedar Rapids on November 29, 1999. (Ex. 10:8; Tr.:44, 104) Heinz made soup at the location where Tilton worked. (Tr.:44, 104) Tilton worked in several positions for Heinz throughout her employment. (Tr.:45) In 2010 she moved to a "Clean As You Go" position. (Tr.:45) Tilton continued to work in the "Clean As You Go" position through the last day she worked for Heinz, April 15, 2013. (Tr.:45) At the time of the original hearing in 2016, Tilton was 56. (Tr.:43)

This case concerns an alleged back injury and mental health injury. Tilton has a long history of treatment for chronic low back pain and a history of mental health treatment.

Between May 31, 2000 and November 2004, Tilton received 11 chiropractic manipulation treatments from Dennis Bradley, D.C. for low back pain. (Ex. J:1-8)

On November 24, 2004, Tilton attended an appointment with Matthew Gray, M.D., her family medicine provider, complaining of back pain and left leg pain. (Ex. L:1) Dr. Gray noted Tilton had a longstanding history of back pain across both sides of her back and that she had treated with a chiropractor for years. (Ex. L:1) Tilton complained of numbness pain in her leg that comes and goes and is worse with certain positions. (Ex. L:1) Tilton reported for the past several months she had noticed pain all the way down to her toes. (Ex. L:1)

Tilton underwent lumbar spine magnetic resonance imaging on December 1, 2004. (Ex. M:1) The reviewing radiologist listed a conclusion of a small focal disc herniation on the left at L4 through L5 with a slight lateral recess compromise and lower lumbar facet arthropathy. (Ex. M:1)

During a follow-up appointment on December 2, 2004, Dr. Gray's assistant noted Tilton underwent magnetic resonance imaging which was abnormal with a small disc herniation and that she would need to go to the pain clinic for an epidural steroid injection. (Ex. L:1) In December 2004, Tilton received a chiropractic manipulation treatment from Dr. Bradley for low back pain. (Ex. J:8-11)

On December 27, 2004 Tilton returned to Dr. Gray regarding her Lexapro prescription for depression. (Ex. L:2) Tilton reported she had undergone an epidural steroid injection that helped her back pain "immensely." (Ex. L:2)

Between February and April 2005, Tilton received six chiropractic manipulation treatments from Dr. Bradley for low back pain. (Ex. J:9-11)

Tilton called Dr. Gray's office on April 12, 2005 and reported she was having back problems again and she requested an injection. (Ex. L:3)

On June 30, 2005, Tilton completed a pain management services pain assessment for the pain clinic. (Ex. M:2-5) Tilton reported she had lower back pain for four to five months that spread to her right side by her hip, noting her back hurts when she bends over and her left leg has a tingling feeling on the right side by her hip with stabbing pain. (Ex. M:2) Tilton relayed there was no injury and it was not "a workman's compensation claim." (Ex. M:3)

Tilton called Dr. Gray's office on July 25, 2005, reporting she had undergone three epidural steroid injections, but she had made no progress and she still had back pain. (Ex. L:3)

Tilton underwent lumbar spine magnetic resonance imaging on July 30, 2005. (Ex. M:6) The reviewing radiologist listed an impression of:

1. Small-shallow left paracentral disc bulge-protrusion at L4-5, without significant change from the December 2004 exam.

2. Mild-moderate hypertrophic degenerative changes in the facets at L3-4 through L5-S1. No significant progression from the 2004 study.

(Ex. M:6)

Tilton called Dr. Gray's office following the imaging and reported she did not want to go to physical therapy. (Ex. L:3) Tilton asked about surgery and Dr. Gray's office referred her to Chad Abernathey, M.D., a neurosurgeon. (Ex. L:3)

Tilton attended an appointment with Dr. Abernathey on August 24, 2005. (Ex. 7:1) Dr. Abernathey examined Tilton, listed an impression of a chronic lumbosacral strain, and recommended conservative treatment. (Ex. 7:1)

On January 12, 2006, Dr. Bradley imposed temporary restrictions of no lifting over 25 pounds, shoveling part-time, no sledge swinging, and no work over eight hours per day or over 40 hours for one week. (Ex. J:12)

Tilton returned to Dr. Gray complaining of low back pain on January 20, 2006. (Ex. L:4) Dr. Gray noted Tilton had undergone three epidural steroid injections that had not helped much. (Ex. L:4) Tilton relayed the last couple of weeks she had some left back pain 90 percent of the time in her back and 10 percent of the time down her leg, but reported she felt better overall. (Ex. L:4) Dr. Gray assessed Tilton with back pain and recommended she undergo therapy. (Ex. L:4)

In January and March 2006, Tilton received 18 chiropractic manipulation treatments from Dr. Bradley. (Ex J:13-21) In response to an inquiry from Heinz, Dr. Bradley opined Tilton was unable to do any work at her job from February 16, 2006 through March 27, 2006. (Ex J:22) Dr. Bradley diagnosed Tilton with lumbar disc bulges/herniation causing severe low back pain with exacerbation caused by bending, lifting, pushing, and pulling and noted she had recently made good progress and was ready to return to work. (Ex. J.:22)

Tilton attended an appointment with Loren Mouw, M.D., a neurosurgeon, on March 2, 2006. (Ex. N) Tilton reported she had a history of back and left leg pain extending down her foot for one year that is worse with strenuous activities and sitting. (Ex. N:1) Dr. Mouw noted her prior imaging showed moderate degenerative changes at L4 through L5 and L5 through S1 with no significant neural compression and he recommended additional imaging. (Ex. N:1)

On March 9, 2006, Tilton underwent lumbar spine magnetic resonance imaging. (Ex. O) The reviewing radiologist listed an impression of:

1. No significant changes are demonstrated since 1-30-05. The dominant finding is bilateral facet arthropathy and ligamentum flavum thickening at L5-S1, exerting mass effect upon both S1 nerve roots in the lateral recess, right greater than left.

2. Similar though much less pronounced findings of the facet joints at L4-5, with no obvious localized neural element compromise.

(Ex. O)

On March 14, 2006, Tilton returned to Dr. Mouw. (Ex. N:2) Dr. Mouw noted the imaging showed spondylotic disease at L4 through L5 and L5 through S1, but no significant neural compression. (Ex. N:2) Dr. Mouw did not recommend surgical intervention and recommended conservative treatment. (Ex. N:2)

Dr. Bradley's records note between April 2006 and July 2007 Tilton received 36 chiropractic manipulation treatments for low back pain. (Ex. J:23-27)

Tilton attended a follow-up appointment with Dr. Gray on July 13, 2007, for left-sided back pain that started earlier in the week. (Ex. L:5) Tilton reported it gradually developed without an injury or trauma. (Ex. L:5) Dr. Gray noted Tilton worked for Heinz and did a lot of pulling and pushing at work "which has been a concern obviously for her." (Ex. L:5) Tilton requested to go to physical therapy. (Ex. L:5) Dr. Gray prescribed muscle relaxers and anti-inflammatory medication. (Ex. L:5)

On August 12, 2007, Tilton underwent lumbar spine magnetic resonance imaging. (Ex. M:7) The reviewing radiologist listed an impression of:

1. Left paracentral and left lateral disk protrusions L4-5, please assess for radiculopathy of the L5 segment.
2. Large focal spur right facet joint L5, S1, abutting the posterior margin of the right S1 nerve root in the lateral recess, please assess clinically.

(Ex. M:7-8)

On September 20, 2007, Tilton attended an appointment with Dr. Gray regarding her mood. (Ex. L:6) Tilton reported she had been seeing a counselor because of irritability, anxiousness and feeling down, which she attributed to being perimenopausal. (Ex. L:6)

During an appointment with Dr. Gray on July 8, 2008, Tilton complained of back pain on her left side that radiates down her left hip and leg with some left foot numbness after working on a flooded home. (Ex. L:7) Tilton reported her back had been hurting for about a week and it was getting worse. (Ex. L:7) Dr. Gray noted Tilton had back pain for several years and she had been moving boxes following the flood, and she reported a tingling feeling in her left foot and shooting pain from her left buttock to her left knee, which she has had before, but it was worse. (Ex. L:7) Tilton relayed she was receiving disability benefits at work and noted she "cannot work because she has a fairly heavy job of lifting." (Ex. L:7)

Tilton underwent lumbar spine magnetic resonance imaging on July 14, 2008. (Ex. M:11) The reviewing radiologist listed an impression of:

> 1. The primary abnormality at L5-S1 is a large posterior facet spur that encroaches on the right neural foramen. This was also present on prior examination of 08/12/2007.
> 2. There is a small left central and lateral disk protrusion that causes some narrowing of the left neural foramen at L4-L5. This is unchanged.

(Ex. M:11)

On July 31, 2008, Tilton attended an appointment with Farid Manshadi, M.D., a physiatrist, complaining of progressive worsening chronic low back pain into her left buttock and left lateral hip, but does not go below the knee with some intermittent numbness and tingling in her left foot. (Ex. Q:1) Dr. Manshadi examined Tilton, listed an impression of low back pain, left sacroiliac joint dysfunction, and MRI findings of right neuroforaminal stenosis secondary to a large posterior facet spur at L5 through S1 and small left central and lateral disk protrusion at L4 through L5. (Ex. Q:2) Dr. Manshadi performed a left SI joint adjustment and Tilton reported she felt a lot better and her lumbar flexion/extension was less painful. (Ex. Q:2) Dr. Manshadi recommended back stabilization exercises, hip girdle strengthening, and electromyography. (Ex. Q:2) The nerve conduction study of Tilton's left lower extremity was normal with no evidence of lumbosacral radiculopathy. (Ex. Q:3-4)

Tilton received 15 sessions of physical therapy in July and August 2008 for low back pain with radiation and numbness, hip pain and leg pain. (Ex. P:1-4)

Tilton received regular chiropractic manipulation treatments from Dr. Bradley and from 2007 through July 2010. (Ex. J:27-37)

On February 4, 2010, Dr. Bradley issued a note stating he had been treating Tilton for a disc protrusion at L4 and large disc bulge with bone spur. (Ex. J:43) Dr. Bradley noted the conditions were permanent barring any surgery and "will be a source of flare ups in the future – some of these flareups will cause her to miss work," once every two to four months for one to three days per episode. (Ex. J:43-44) On cross-examination, Tilton testified Dr. Bradley did not tell her that her condition in her spine was permanent at that time. (Tr.:92)

Tilton underwent additional lumbar spine magnetic resonance imaging on July 8, 2010. (Ex. M:12) The reviewing radiologist listed an impression of "[n]ew tiny right posterior disk protrusion at L1-2 and new mild broad-based left far-lateral disk protrusion at L2-3. Findings at other levels are unchanged from 07/14/2008 MRI." (Ex. M:12)

Tilton received regular chiropractic manipulation treatments from Dr. Bradley and from August 2010 through October 2011. (Ex. J:38-42)

On March 22, 2010, Tilton attended an appointment with Stanley Mathew, M.D., a physiatrist, on a referral from Dr. Gray for low back pain radiating into her left buttock and left leg above the knee, occasionally associated with numbness and tingling. (Ex. 1:8) Dr. Mathew examined Tilton, listed an impression of left sacroiliac joint dysfunction, low back pain, and myofascial pain, noted her leg length discrepancy resolved after he performed a left sacroiliac joint manipulation, and recommended a comprehensive rehabilitation program and a home exercise program. (Ex. 1:9)

During physical therapy sessions between March and June 2010, Tilton reported having increased pain and numbness while cleaning her home, sweeping dirt, bending while doing laundry, gardening, mowing, and while lifting car parts. (Ex. P:5-13)

Tilton continued to treat with Dr. Mathew and she was not working. (Ex. 1:10-11) Dr. Mathew noted she had tenderness over the left sacroiliac joint and her gait is "mildly antalgic," ordered physical therapy, prescribed medication, and recommended and administered injections. (Ex. 1:10-13) Tilton reported improvement with physical therapy, but continued to complain of non-radiating dull achy pain in her left low back, that is aggravated by activity, walking, standing, bending, and lifting and better with rest. (Ex.:1:12)

During an appointment with Dr. Mathew on July 7, 2010, Tilton asked to return to work. (Ex. 1:14) Dr. Mathew listed an impression of left sacroiliitis and chronic low back pain, prescribed medication, ordered magnetic resonance imaging and released Tilton to return to work on July 12, 2010. (Ex. 1:14, 16)

On July 13, 2010, Tilton returned to Dr. Mathew reporting she tried to return to work on July 12, 2010, but her pain was so severe she was unable to do so. (Ex. 1:17) Tilton complained of low back pain radiating down both of her legs with the left more severe than the right with occasional numbness and tingling. (Ex. 1:17) Dr. Mathew noted magnetic resonance imaging showed "new tiny right posterior disc protrusion at L1-2, new mild broad-based left far-lateral disc protrusion at L2-3. She also has a mild broad-based left lateral and far-lateral disc protrusion at L3-4 and L4-5. Unchanged right facet arthropathy." (Ex. 1:17) Dr. Mathew recommended stretching, heat, weight loss and listed goals of improving range of motion, decreasing pain, and returning to work. (Ex. 1:18)

Tilton underwent epidural steroid injections. During an appointment on August 10, 2010, Tilton reported she had been pain free for two weeks after the injections and she requested two weeks of physical therapy before returning to work. (Ex. 1:19) Dr. Mathew listed an impression of chronic low back pain, myofascial pain, left sacroiliac joint dysfunction, and sacroiliitis. (Ex. 1:19) Dr. Mathew noted Tilton underwent electromyography that was negative for left L5 radiculopathy and he ordered outpatient rehabilitation. (Ex. 1:19) During an appointment on September 1, 2010, Dr. Mathew released Tilton to return to work on September 8, 2010. (Ex. 1:21-22)

Tilton returned to Dr. Mathew on February 25, 2011, reporting her back pain flared and was occasionally radiating into both of her legs after she did some work and bending and lifting and she had not worked for three weeks. (Ex. 1:27) Dr. Mathew ordered physical therapy and prescribed medication. (Ex. 1:28) Tilton received additional treatment, including injections and medication. (Exs. 1:30-46; R:2) Additional electromyography testing was normal. (Ex. 1:45)

Tilton continued to treat with Dr. Mathew. (Ex. 1:23-26) Tilton complained of pain during physical therapy following a fall on her right hip on the ice, while lifting a box, while rearranging furniture, and while helping her son pack and move. (Ex. P:15-19)

On December 21, 2011, Tilton returned to Dr. Mathew following an epidural steroid injection, reporting she received minimal improvement of her pain, relaying her low back pain was radiating into her left hip, and reporting the colder weather has been aggravating her symptoms. (Ex. R:3) Dr. Mathew documented Tilton was "not taking her medications as prescribed," he advised her to adjust her medications, and he prescribed a topical compounding cream. (Ex. R:3)

On April 6, 2012, Tilton attended an appointment with Dr. Mathew reporting she recently slipped and fell while walking her dog, which exacerbated her pain. (Ex. 1:48) Tilton complained of dull, achy pain localized to her back, radiating down her left leg and aggravated by activity. (Ex. 1:48) Dr. Mathew adjusted her pain medication and later referred Tilton for a transforaminal epidural steroid injection. (Ex. 1:48-50) Tilton reported pain relief following a facet joint injection and underwent another facet block injection. (Ex. 1:52)

On June 25, 2012, Tilton underwent radiofrequency lesioning of the lateral branches of S1 to S4 with Douglas Sedlacek, M.D., a pain management specialist. (Ex. S:3) Dr. Sedlacek noted Tilton had responded to prior lateral branch blocks and he listed an impression of left low lumbosacral pain, new onset of bilateral leg pain, and prior "history of right-sided L1-L2 disc and a left-sided L2-L3 disc." (Ex. S:3)

On July 31, 2012, Tilton attended an appointment with Dr. Gray reporting her heart was racing while using a treadmill. (Ex. L:8) Tilton reported feeling stressed, anxious, and "down in the dumps." (Ex. L:9) Dr. Gray assessed Tilton with an anxiety disorder and recommended Lexapro. (Ex. L:9) During a follow up appointment Tilton reported her mood had improved substantially and he continued her medication. (Ex. L:10-11)

During an appointment with Dr. Mathew on August 10, 2012, Tilton reported she was doing fairly well and she requested another sacroiliac joint injection. (Ex. 1:54) Dr. Mathew administered the injection and continued her medication. (Ex. 1:54) Dr. Mathew continued to treat Tilton for her pain. (Ex. 1:55-63)

Tilton received regular chiropractic manipulation treatments for her low back pain with Dr. Bradley in 2012. (Ex. J:48-52)

Tilton returned to Dr. Gray on January 17, 2013, reporting she had been to the emergency room with chest pain and heart fluttering. (Ex. L:12) Dr. Gray documented he believed Tilton was having panic attacks. (Ex. L:13) Tilton called a week later and reported she had missed work due to her anxiety issues and she requested a work excuse which Dr. Gray provided. (Ex. L:14-15)

Heinz sent Dr. Gray a copy of Tilton's job description and inquired whether she could perform her "Clean As You Go" position. (Ex. L:16-19) Dr. Gray documented he had been treating Tilton for a year for anxiety. (Ex. L:17) Dr. Gray responded Tilton's condition did not render her unable to perform any of her job functions, but she may need to attend appointments and work part-time or on a reduced scheduled on an "as needed" basis for her condition, noting during a flare-up "she is unable to work." (Ex. L:17-18) Dr. Gray documented based on her history Tilton had a flare-up two to three times per month. (Ex. L:18)

On January 11, 2013, Tilton returned to Dr. Mathew reporting she had slipped and fell, which exacerbated her pain in her neck, mid back, and low back. (Ex. R:4) Dr. Mathew administered a Toradol injection and continued her medications. (Ex. R:4-5)

Tilton went to work on April 15, 2013. (Tr.:66) After starting her day her pain became so unbearable she determined "I just can't do this no more. I just – it just hurts too bad." (Tr.:66) Tilton went to her boss and told her she could not stand the pain anymore and that she was "going to go back on disability." (Tr.:75) Tilton testified when she left Heinz that day she thought she would be able to go back to work. (Tr.:80)

On May 3, 2013, Tilton's counsel sent Heinz a letter reporting Tilton sustained an injury on or about April 15, 2013, while working for Heinz, and asking Heinz to provide his office with Heinz's workers' compensation carrier's contact information. (Ex. 13:1)

On June 26, 2013, Tilton attended an appointment with Dr. Mathew and reported she had been unable to work due to her severe low back pain. (Ex. 1:64) Dr. Mathew examined Tilton, listed an impression of chronic low back pain, sacroiliits, and left trochanteric bursitis, restricted her from working for six weeks, and prescribed medication. (Ex. 1:64)

Liberty Mutual requested Dr. Mathew's opinion on causation. (Ex. 1:1) Dr. Mathew sent a letter on September 10, 2013, stating he had treated Tilton for low back pain since 2012. (Ex. 1:2) Dr. Mathew opined Tilton's low back pain, hip pain, degenerative joint disease, sacroiliitis, and trochanteric bursitis conditions are causally related to her work-related injury and stated she was continuing to receive chronic pain management including injections and medication management. (Ex. 1:2)

On September 18, 2013, Tilton attended a follow-up appointment with Dr. Mathew for her chronic low back pain and sacroiliitis. (Ex. 1:67) Tilton reported she was doing very well after injections, but she continued to have moderate to severe pain and she did not believe she could work. (Ex. 1:67)

Tilton received regular chiropractic manipulation treatments for her low back pain with Dr. Bradley in 2013. (Ex. J:53-56)

Tilton attended an appointment with Dr. Bradley on January 20, 2014, for her low back pain and complaining of left knee pain due to a significant change of gait three times per week. (Ex. 2:1) Dr. Bradley performed a chiropractic manipulation and provided regular treatment to her from January 2014 through May 2014. (Ex. 2:1-12)

Tilton continued to treat with Dr. Mathew. (Ex. 1) During an appointment on February 7, 2014, Tilton relayed she had experienced a flare in her pain due to the cold weather. (Ex. 1:70) Dr. Mathew noted she was walking with a cane. (Ex. 1:70) Tilton also complained of knee pain. (Ex. 1:70)

Tilton underwent an independent psychological evaluation with Kevin Krumvieda, Ph.D. for an application for Social Security disability benefits on July 3, 2014. (Ex. U) Dr. Krumvieda examined Tilton, administered the Beck Anxiety Inventory, Beck Depression Inventory-II, and the Mini-Mental State Exam Second Edition: Expanded Version, and issued his report on July 21, 2014. (Ex. U). Tilton reported she was sexually abused by an uncle when she was quite young. (Ex. U:1) Tilton relayed her husband died of cancer 18 to 19 years ago and she raised her children by herself. (Ex. U:1) Tilton reported she lived with a man who is an alcoholic and did not treat her very well. (Ex. U:1) Tilton told Dr. Krumvieda her medical condition slows her down and makes it difficult to put on clothing, clean her home, and mow. (Ex U:2)

Dr. Krumvieda listed a diagnostic impression of generalized anxiety disorder and adjustment disorder with depressed mood. (Ex. U:3) Dr. Krumvieda concluded:

> Ms. Tilton's ability to remember and understand instructions and procedures (spoken) is variable and decreases as the amount of material to remember increases. Performance anxiety was reported during the Story Memory task which may have markedly interfered with her performance on this task. Her ability to remember and understand locations appears intact. Her ability to maintain attention and concentration was adequate during the interview portion of her evaluation. In performance situations (e.g., tests) her ability may be markedly limited due to performance anxiety. Her ability to maintain pace in a work-like setting was not formally assessed; however, Ms. Tilton reported greater difficulty conducting her ADLs and noted that her current employment aggravates her physical condition, suggesting lowered ability to maintain pace. She also noted that her current level of depression will interfere with her ADLs. Ms. Tilton's ability to interact appropriately with supervisors, coworkers, and the public is considered fairly intact given her statement that she socializes at work. She reported reduced socialization in other areas of her life due to her depression. Her ability to use good

> judgment and respond appropriately to changes in the workplace is considered fairly intact.

(Ex. U:4)

Counsel for Heinz and Liberty Mutual requested Dr. Abernathey perform a records review IME without examining Tilton. (Ex. 7:2-26) Dr. Abernathey signed a check-the-box letter from defendants' counsel on August 1, 2014. (Ex. 7:26) Dr. Abernathey agreed, without providing any written comments with the statement, "Ms. Tilton's work in general for H.J. Heinz Company did NOT cause any structural damage or change to her spine/back." (Ex. 7:26) Dr. Abernathey further agreed, without providing any written comments with the following statement:

> Provided the above, Ms. Tilton suffered at most temporary soft-tissue strains and/or temporary aggravations of preexisting degenerative conditions in relation to her work in general for H.J. Heinz company, which would have healed within a time period of several weeks and which did not result in any permanent impairment, pursuant to the *AMA Guides, 5th Ed.*, the need for any permanent work/activity restrictions, and where no further medical treatment would be medically related to, or necessitated by, her work for H.J. Heinz.

(Ex. 7:26)

On August 15, 2014, Tilton returned to Dr. Mathew regarding her chronic low back pain. (Ex. 1:74) Dr. Mathew noted Tilton was doing really well with Percocet and he recommended a referral to pain psychology due to her chronic pain and stress due to her mother's illness. (Ex. 1:74)

On September 15, 2014, Tilton attended an appointment with Luke Hansen, PsyD., a pain psychologist. (Ex. 6:1) Dr. Hansen examined Tilton, diagnosed her with an adjustment disorder with mixed anxiety and depressed mood, and recommended behavioral pain management services and continuing medication management with Dr. Mathew. (Ex. 6:2) Tilton continued to treat with Dr. Hansen from October 24, 2014, through November 3, 2015. (Ex. 6:3-22) Throughout her treatment with Dr. Hansen, Tilton continued to struggle with her relationship with her boyfriend at home and he documented Tilton was having problems with her brother and she believed her brother was taking advantage of her mother.

Tilton attended an appointment with Dr. Mathew on December 4, 2014, reporting she had a significant exacerbation of her low back pain after doing some moving. (Ex. 1:76) Dr. Mathew examined Tilton, listed an impression of chronic low back pain, sacroiliitis, and enthesopathy of the hips. (Ex. 1:76) Tilton requested trigger point injections and Dr. Mathew administered four trigger point injections in the thoracic and lumbar paraspinals and injections in the bilateral trochanteric bursas. (Ex. 1:76)

On April 2, 2015, Dr. Bradley issued a note stating Tilton reported "she was scooping her yard and raking her yard and the lumbar, left sacroiliac, right sacroiliac, sacral and bilateral radicular leg, foot and toe pain sharply increased again." (Ex. J:58) Dr. Bradley noted Tilton had an ongoing condition that had flared and he planned to administer additional chiropractic treatment for the next two to three weeks. (Ex. J:58)

Tilton returned to Dr. Mathew complaining of severe pain on April 24, 2015. (Ex. 1:79) Dr. Mathew opined, "I do not feel the patient would be able to work due to her severe pain. She is on multiple medications that also altered her mental status." (Ex. 1:79)

On May 20, 2015, Dr. Bradley wrote a letter in response to Tilton's application for disability benefits. (Ex. 2:13) Dr. Bradley documents he had been treating Tilton for years for her low back condition and her condition has had a major impact on her life and ability to work, noting she had missed a substantial amount of time from work due to her back and that she had slowly deteriorated to the point where she is unable to work. (Ex. 2:13) Dr. Bradley opined Tilton could not lift or carry weight exceeding 10 pounds with any frequency, her maximum lift was 20 pounds, but could not be done with any repetition, she could walk for 10 to 15 minutes before her pain increased and up to 20 minutes until it would be intense, she could sit for 30 minutes to a maximum of 45 minutes, and she should avoid stooping, climbing, kneeling, and crawling. (Ex. 2:13)

On July 20, 2015, Tilton attended an appointment with Dr. Mathew reporting she responded to a Medrol Dosepak and was doing fairly well on Percocet. (Ex. R:6) Dr. Mathew administered a Toradol injection. (Ex. R:6)

Tilton's counsel sent Dr. Mathew a check-the-box letter on November 2, 2015. (Ex. 1:3-7) Dr. Mathew wrote he had diagnosed Tilton with chronic low back pain, sacroiliits, enthesopathy of the hips, degenerative joint disease, and radiculopathy. (Ex. 1:4) Dr. Mathew agreed Tilton's "Clean As You Go" position, which required repetitive bending, lifting, squatting and walking permanently aggravated her preexisting chronic low back condition. (Ex. 1:4-5) Dr. Mathew agreed Tilton's complaints and symptoms were consistent and credible compared with his evaluation and findings. (Ex. 1:6)

With respect to the progressive nature of her pain, Dr. Mathew wrote "[p]atient pain/deficits where [*sic*] so severe that she had to stop working, per medical recommendations. Pain has improved since stopping work, continues to have progressive degeneration of low back/hips." (Ex. 1:5) Dr. Mathew agreed he supported her decision to stop working and stated "I feel Mrs. Tilton would be suffering more causing worsening of her lumbar spine instability." (Ex. 1:5)

Using Table 15-3 of the Guides to the Evaluation of Permanent Impairment (AMA Press, 5th Ed. 2001) ("AMA Guides"), Dr. Mathew assigned Tilton a 20 percent whole person impairment and he assigned permanent restrictions of avoiding prolonged standing, walking, sitting, repetitive bending and squatting, and lifting more than 15

pounds . (Ex. 1:6) Dr. Mathew opined Tilton is not capable of full-time employment due to her chronic pain and permanent restrictions. (Ex. 1:6)

On December 4, 2015, Mark Mittauer, M.D., a psychiatrist, conducted an IME for Tilton and issued his report on December 6, 2015. (Ex. 4) Dr. Mittauer reviewed Tilton's medical record and examined her. (Ex. 4) Dr. Mittauer diagnosed Tilton with an adjustment disorder with mixed anxiety and depressed mood. (Ex. 4:11) Dr. Mittauer opined,

> The prognosis is poor for complete resolution of Ms. Tilton's Adjustment Disorder. As long as she has chronic pain, and associated disability, she will most likely have persistence of her Adjustment Disorder. Note that the pain interferes with work, performance of yardwork and household chores, as well as walking and driving. It also interferes with her ability to play with her children and grandchildren. Her inability to work has created financial stress.

(Ex. 4:11) Dr. Mittauer opined Tilton's April 15, 2013, work injury was a substantial contributing factor in bringing about her adjustment disorder with mixed anxiety and depressed mood and has caused the condition to persist. (Ex. 4:12) Dr. Mittauer acknowledged Tilton had a preexisting history of anxiety and depression, but opined the April 15, 2013 work injury exacerbated her adjustment disorder with mixed anxiety and depressed mood. (Ex. 4:12)

Dr. Mittauer found Tilton's adjustment disorder is chronic and was caused by her work injury. (Ex. 4:13) Dr. Mittauer noted the psychiatric literature and studies recognize chronic pain as a well-known stressor in bringing about and/or exacerbating a psychiatric condition. (Ex. 4:13) Dr. Mittauer found, "[a]ssuming that Ms. Tilton's chronic pain is likely permanent, her Adjustment Disorder diagnosis is also likely permanent. It is highly unlikely that her Adjustment Disorder would substantially improve, or resolve, as long as she has chronic pain." (Ex. 4:13)

Dr. Mittauer recommended Tilton receive psychotherapy for six to 12 months, that she be referred to a psychiatrist for psychotrophic medications for six to 12 months, and noted she may benefit from a tricyclic antidepressant and/or anticonvulsant medication for her pain. (Ex. 4:13)

Dr. Mittauer opined Tilton "is not capable of full-time, gainful employment because of her Adjustment Disorder diagnosis. The specific symptoms that would interfere with full-time gainful employment include her fatigue and panic attacks. These would interfere with her ability to perform sustained work, and the panic attacks would obviously interrupt any type of work." (Ex. 4:12)

Tilton's counsel sent Dr. Bradley a check-the-box letter asking for his opinion regarding Tilton's low back condition. (Ex. 2:14-16) On January 5, 2016, Dr. Bradley responded, agreeing he continued to treat Tilton for her chronic low back condition and

he wrote he had treated her 10 times in 2015 for lumbar disc displacement, myositis, lumbalgia, and associated subluxations. (Ex. 2:15) Dr. Bradley agreed Tilton's "Clean As You Go" position permanently aggravated her chronic low back condition and noted the prolonged standing, bending, and lifting of the job increased pressure on the discs and joints of her lumbar spine. (Ex. 2:16) Dr. Bradley agreed the condition was permanent and that Tilton presented to him in a consistent and credible manner in regard to his evaluations and findings. (Ex. 2:17)

Tilton attended an appointment with Staci Becker, ARNP with Dr. Mathew's office on January 8, 2016. Tilton reported she received pain relief of two weeks on average after receiving injections and she requested injections in her low back and bilateral hips. (Ex. R:7) Becker administered six trigger point injections in her lumbar paraspinals, and administered injections in her bilateral trochanteric bursae and bilateral SI joints. (Ex. R:8)

Marc Hines, M.D., a neurologist and pain management specialist, conducted an IME for Tilton on January 9, 2016, and issued his report on January 12, 2016. (Ex. 3) Dr. Hines reviewed Tilton's medical records and examined her. (Ex. 3) Dr. Hines found Tilton has multilevel disc disease and facet arthropathy in her lumbar spine that have contributed to sacroiliitis and greater trochanteric bursitis, opined her problems have an etiology in her work with Heinz, and opined the conditions are permanent. (Ex. 3:14-15) Dr. Hines noted he did not detect a radiculopathy per se, but found Tilton has lumbosacral disease and using the AMA Guides, opined,

> In order to achieve these ratings, I have used table 15-3, page 384 for the lumbar spine. She has a DRE Category II 8% impairment for the lumbar spine at this time. In addition to this, the patient has ratings from the tabled difficulties from table 17-33, page 546, ischial bursitis for 3% and trochanteric bursitis for 3%, all ratings thus far being at whole person impairments. Using the combined values tables 8% plus 3% is 11%, 11% plus 3% is 14% whole person impairment.

(Ex. 3:15) Dr. Hines found Tilton can rarely engage in repetitive bending and side bending and noted prolonged standing and walking, and walking steps or rough ground could easily exacerbate her low back disease, sacroiliitis, and greater trochanteric bursitis. (Ex. 3:15) He imposed a 10-pound lifting and carrying restriction, a restriction of no repetitive pushing or pulling, or lifting from floor to waist, and recommended Tilton continue to treat with Dr. Mathews, engage in water therapy, injections, and physical therapy. (Ex. 3:16)

Dr. Hines responded to a check-the-box letter from Tilton's attorney on February 15, 2016. (Ex. 3:17-22) Dr. Hines agreed Tilton's "Clean As You Go" position is a substantial contributing factor in permanently aggravating her chronic low back pain. (Ex. 3:19) Dr. Hines stated he agreed with her decision to stop working, stating "I feel Mrs. Tilton would be suffering more causing worsening of her lumbar spine instability." (Ex. 3:19) Dr. Hines wrote Tilton's mental/depressive condition "[i]n the past it had

significantly impaired her ability to function" in the workplace. (Ex. 3:21) Dr. Hines recommended she continue taking Lexapro and receive counseling and pain relieving treatment. (Ex. 3:21)

On February 6, 2016, Eli Sagan Chesen, M.D., a psychiatrist and neurologist, conducted an IME for Heinz and Liberty Mutual and issued a report. (Ex. V) Dr. Chesen reported he reviewed a "[s]ampling of records" and examined Tilton. (Ex. V:1) Dr. Chesen used the Guidelines for Forensix Evaluation of Disability compatible with the AMA Guides 6th Edition for evaluating permanent impairment and found:

1. Whether Ms. Tilton suffers any diagnosable psychiatric/psychological condition: She manifests a mixed personality disorder or maladaptational adjustment pattern. This is a life long condition . . . it has no known cause. She might have opiate addiction with drug seeking behaviors.
2. Whether this condition is related to the incident: No
3. From a psychiatric standpoint she has no work restrictions at all.
4. I believe Dr. Hines and Mittauer have over-diagnosed this patient based upon the following:
    a. The patient's symptom complaints are marked and disproportionate given a paucity of object medical injury.
    b. The patient's condition almost never responds to multiple forms of treatment.
    c. The pre-existing history of this patient's pain, depression and anxiety have been and will continue to occur with or with further treatment.

(Ex. V:6-7)

Counsel for Heinz and Liberty Mutual sent Dr. Abernathey a check-the-box letter. (Ex. W) Dr. Abernathey sent a response on February 11, 2016, agreeing with the following statements to a reasonable degree of medical certainty without providing any written comments:

> 1) The degenerative conditions in relation to Ms. Tilton's lumbar spine, as evidence by her numerous MRI's and x-rays, etc., were neither caused nor substantially aggravated by her work for Heinz and/or her alleged injury of April 15, 2013, where such are solely the natural, and age appropriate, progression of her degenerative conditions. . . .
> 2) As you opined previously, Ms. Tilton's work in general for Heinz and/or her alleged injury of April 15, 2013, did NOT cause any structural damage or change to her spine/back.

(Ex. W:2-3)

After receiving additional medical records, Dr. Chesen issued a supplement report on February 14, 2016. (Ex. V:8) Dr. Chesen found nothing in the records alters his original opinion and further found:

B. The notion that Ms. Tilton might be as much as 100% disabled or that she is unemployable greatly exaggerates her medical plight.
C. The patient's symptoms and subjective complaints are disparate and do not appear related to any one or a few acute injuries e.g. as per her MRI scans.
D. The patient long ago reached MMI but will likely continue to voice her complaints with or without treatment.

(Ex. V:9)

Dr. Mathew testified at hearing he has treated Tilton since March 2010 for chronic low back pain. (Tr.:19) Dr. Mathew opined Tilton's work in janitorial services at Heinz involved repetitive bending, lifting, prolonged standing, twisting, and squatting aggravated her degenerative pathology and symptoms. (Tr.:26) Dr. Mathew testified he agreed it was appropriate for Tilton to stop working on April 15, 2013 and at the time of the hearing he did not believe she was capable of performing gainful employment because she would need frequent breaks and she would have problems with prolonged sitting, walking, and altering body positions. (Tr.:28-30)

At the time of the hearing Heinz had not terminated Tilton's employment. (Tr.:44) Tilton has not worked since April 15, 2013, and she testified she has not looked for work and does not intend to look for work. (Tr.:68) Tilton received long-term disability benefits through Heinz through October 2015. (Tr.:81)

Tilton testified on cross-examination her back pain has not improved since she left work in 2013. (Tr.:83) Tilton relayed, "I've got it to where I can manage my pain because if it hurts really bad I can go like lay down or sit down or - - whereas if I am working it's harder to manage." (Tr.:83)

Tilton reported she can sit comfortably between 10 and 30 minutes at a time depending on whether she is having a bad or a good day. (Tr.:86)

I. Arising Out of and in the Course of Employment

In the original arbitration decision the deputy commissioner found Tilton "knew no later than 2011 that her back injury was connected to work, serious, affecting her work, and possibly compensable" and found she did not provide timely notice within 90 days under Iowa Code section 85.23, or timely file her petition within two years under Iowa Code section 85.26. The deputy commissioner made no findings as to whether Tilton sustained an injury which arose out of and in the course of her employment or regarding the nature of the injury.

This is a disputed claim. At hearing Heinz and Liberty Mutual denied Tilton sustained an injury arising out of and in the course of her employment. They also disputed the nature of the injury and whether Tilton sustained temporary or permanent disability. Before notice and limitations defenses may apply, it is first necessary to determine if the claimant sustained an injury arising out of and in the course of employment and the nature of the injury.

To receive workers' compensation benefits, an injured employee must prove, by a preponderance of the evidence, the employee's injuries arose out of and in the course of the employee's employment with the employer. 2800 Corp. v. Fernandez, 528 N.W.2d 124, 128 (Iowa 1995). An injury arises out of employment when a causal relationship exists between the employment and the injury. Quaker Oats Co. v. Ciha, 552 N.W.2d 143, 151 (Iowa 1996). The injury must be a rational consequence of a hazard connected with the employment, and not merely incidental to the employment. Koehler Elec. v. Willis, 608 N.W.2d 1, 3 (Iowa 2000). The Iowa Supreme Court has held, an injury occurs "in the course of employment" when:

> it is within the period of employment at a place where the employee reasonably may be in performing his duties, and while he is fulfilling those duties or engaged in doing something incidental thereto. An injury in the course of employment embraces all injuries received while employed in furthering the employer's business and injuries received on the employer's premises, provided that the employee's presence must ordinarily be required at the place of the injury, or, if not so required, employee's departure from the usual place of employment must not amount to an abandonment of employment or be an act wholly foreign to his usual work. An employee does not cease to be in the course of his employment merely because he is not actually engaged in doing some specifically prescribed task, if, in the course of his employment, he does some act which he deems necessary for the benefit or interest of his employer.

Farmers Elevator Co. v. Manning, 286 N.W.2d 174, 177 (Iowa 1979).

A cumulative injury is an occupational disease that develops over time, resulting from cumulative trauma in the workplace. Baker v. Bridgestone/Firestone, 872 N.W.2d 672, 681 (Iowa 2015); Larson Mfg. Co., Inc. v. Thorson, 763 N.W.2d 842, 851 (Iowa 2009); McKeever Custom Cabinets v. Smith, 379 N.W.2d 368, 372-74 (Iowa 1985). "A cumulative injury is deemed to have occurred when it manifests – and 'manifestation' is that point in time when 'both the fact of the injury and the causal relationship of the injury to the claimant's employment would have become plainly apparent to a reasonable person.'" Baker, 872 N.W.2d at 681. The Iowa Supreme Court has held:

> a cumulative injury is manifested when the claimant, as a reasonable person, would be plainly aware (1) that he or she suffers from a condition or injury, and (2) that this condition or injury was caused by the

> claimant's employment. Upon the occurrence of these two circumstances, the injury is deemed to have occurred.

Herrera v. IBP, Inc., 633 N.W.2d 284, 288 (Iowa 2001).

The question of medical causation is "essentially within the domain of expert testimony." Cedar Rapids Cmty. Sch. Dist. v. Pease, 807 N.W.2d 839, 844-45 (Iowa 2011). The commissioner, as the trier of fact, must "weigh the evidence and measure the credibility of witnesses." Id. The trier of fact may accept or reject expert testimony, even if uncontroverted, in whole or in part. Frye v. Smith-Doyle Contractors, 569 N.W.2d 154, 156 (Iowa 1997). When considering the weight of an expert opinion, the fact-finder may consider whether the examination occurred shortly after the claimant was injured, the compensation arrangement, the nature and extent of the examination, the expert's education, experience, training, and practice, and "all other factors which bear upon the weight and value" of the opinion. Rockwell Graphic Sys., Inc. v. Prince, 366 N.W.2d 187, 192 (Iowa 1985).

It is well-established in workers' compensation that "if a claimant had a preexisting condition or disability, aggravated, accelerated, worsened, or 'lighted up' by an injury which arose out of and in the course of employment resulting in a disability found to exist," the claimant is entitled to compensation. Iowa Dep't of Transp. v. Van Cannon, 459 N.W.2d 900, 904 (Iowa 1990). The Iowa Supreme Court has held,

> a disease which under any rational work is likely to progress so as to finally disable an employee does not become a "personal injury" under our Workmen's Compensation Act merely because it reaches a point of disablement while work for an employer is being pursued. It is only when there is a direct causal connection between exertion of the employment and the injury that a compensation award can be made. The question is whether the diseased condition was the cause, or whether the employment was a proximate contributing cause.

Musselman v. Cent. Tel. Co., 261 Iowa 352, 359-60, 154 N.W.2d 128, 132 (1967).

A. Low Back

Four medical providers have provided causation opinions with respect to Tilton's low back condition, Dr. Mathew, a treating physiatrist, Dr. Abernathey, a past treating neurosurgeon who conducted a records review IME for Heinz and Liberty Mutual, Dr. Hines, a neurologist and pain management specialist who conducted an IME for Tilton, and Dr. Bradley, a treating chiropractor. I find the opinion of Dr. Mathew, as supported by the opinions of Dr. Hines and Dr. Bradley, to be the most persuasive.

Dr. Mathew began treating Tilton on March 22, 2010. (Ex. 1:8) At the time of the March 16, 2016, hearing, he was still treating Tilton.

Dr. Abernathey saw Tilton on one occasion on August 24, 2005. (Ex. 7:1) At that time he listed an impression of chronic lumbosacral strain and recommended conservative treatment. (Ex. 7:1) Nearly nine years later, pursuant to a request from Heinz and Liberty Mutual, Dr. Abernathey conducted a records review and responded to a check-the-box letter without providing any written comments on August 1, 2014. (Ex. 7:2-26) Dr. Abernathey agreed Tilton's work with Heinz did not cause any structural damage or change to her spine and agreed at most she sustained a temporary soft-tissue strain or temporary aggravation of "preexisting degenerative conditions" that would have resolved within a period of several weeks and did not result in any permanent impairment under the AMA Guides. (Ex. 7:26)

After reviewing additional records, Dr. Abernathey responded to a second check-the-box letter from Defendants on February 11, 2016, agreeing with contention statements without providing any written comments. (Ex. W:2-3) Dr. Abernathey agreed Tilton's degenerative lumbar spine condition was not caused or substantially aggravated by her work at Heinz and is solely the result of the natural and age appropriate progression of her degenerative disease. (Ex. W:2-3) Dr. Abernathey again agreed Tilton's work for Heinz did not cause any structural damage or change in her spine. (Ex. W:2-3)

Dr. Mathew diagnosed Tilton with chronic low back pain, sacroiliits, enthesopathy of the hips, degenerative joint disease, and radiculopathy, and opined her "Clean As You Go" position with Heinz permanently aggravated her preexisting low back condition. (Ex. 1:4-5) In November 2015, Dr. Mathew opined Tilton's condition is permanent, he assigned Tilton 20 percent permanent impairment to the lumbar spine using the AMA Guides, and he assigned permanent restrictions. (Ex. 1:4-6)

Dr. Hines performed an IME for Tilton in January 2016 after reviewing her medical records and examining her. (Ex. 3) Dr. Hines did not find Tilton had radiculopathy on exam, but opined the multilevel disc disease and facet arthropathy in her lumbar spine contributed to sacroiliits and greater trochanteric bursitis, he found her problems had an etiology in her work with Heinz, he assigned permanent impairment to her lumbar spine and for ischial and trochanteric bursitis, and he assigned permanent restrictions. (Ex. 3:14-15)

Dr. Bradley responded to a check-the-box letter from Tilton's counsel agreeing he treated Tilton for her low back condition and that her "Clean As You Go" position with Heinz permanently aggravated her chronic low back condition. (Ex. 2:14-17)

Dr. Mathew, Dr. Hines, and Dr. Abernathey all have superior training as physicians, to Dr. Bradley, a chiropractor. Dr. Abernathey has superior training to Dr. Mathew as a neurosurgeon, but he only examined Tilton one time, nearly nine years before he conducted the records review IME. Dr. Abernathey did not provide any written comments supporting his opinion. Dr. Mathew has treated Tilton over time. His opinion on causation has been consistent since Heinz and Liberty Mutual first contacted him to address causation in September 2013.

The record supports Tilton's preexisting chronic low back pain became worse over time while she was working for Heinz to the point where she could no longer tolerate the pain on April 15, 2013, and she sought short-term and long-term disability benefits through Heinz. While the record supports Tilton had preexisting low back pain and degenerative changes to her spine, Tilton has established, through the opinion of Dr. Mathew, as supported by the opinions of Dr. Bradley and Dr. Hines, and her medical records and all the record evidence, her work for Heinz permanently aggravated, lit-up, or accelerated her lumbar spine condition and chronic pain.

B. Adjustment Disorder

Three physicians have given causation opinions with respect to Tilton's mental health condition, Dr. Mittauer, a psychiatrist who conducted an IME for Tilton, Dr. Chesen, a psychiatrist and neurologist who conducted an IME for Heinz and Liberty Mutual, and Dr. Hines, a neurologist who conducted an IME for Tilton. I find the opinion of Dr. Mittauer, as supported by the opinion of Dr. Hines, to be the most persuasive.

Dr. Mittauer examined Tilton on December 4, 2015, and diagnosed Tilton with an adjustment disorder with mixed anxiety and depressed mood. (Ex. 4:11) Dr. Mittauer acknowledged Tilton had a preexisting history of anxiety and depression, but opined the April 15, 2013, work injury exacerbated her condition. (Ex. 4:12) Dr. Mittauer opined the condition was permanent and that Tilton's prognosis is poor given her chronic pain and associated disability. (Ex. 4:11)

In responding to a check-the-box letter, Dr. Hines agreed Tilton's preexisting mental health condition was aggravated by her work injury. (Ex. 3:21) While he noted her symptoms were minimal at the time he examined her, Dr. Hines found her mental health condition significantly impaired her ability to function in the past. (Ex. 3:21)

Dr. Chesen diagnosed Tilton with a mixed personality disorder or maladaptive adjustment pattern, which he found was a life-long condition, which he opined is not related to her work. (Ex. V:6) He also opined Dr. Mittauer and Dr. Hines had over-diagnosed Tilton. (Ex. V:6) Dr. Chesen noted his exam was compatible with the AMA Guides 6th Edition.

Dr. Mittauer and Dr. Chesen have superior training to Dr. Hines in diagnosing and treating mental health conditions as psychiatrists. Dr. Mittauer used the AMA Guides 5th Edition in providing his opinions. Dr. Chesen used the AMA Guides 6th Edition in providing his opinions. The Iowa Workers' Compensation Commissioner has adopted the AMA Guides 5th Edition for evaluating permanent impairment. 876 IAC 2.4. Dr. Chesen's reliance on the AMA Guides 6th Edition is misplaced. For this reason, I do not find his opinion persuasive.

Moreover, Dr. Chesen is the only practitioner in this case who has diagnosed Tilton with a mixed personality disorder. Dr. Krumvieda, a psychologist, examined

Tilton and performed psychological testing for purposes of her application for Social Security disability benefits in 2014. (Ex. U) Dr. Krumvieda diagnosed Tilton with generalized anxiety disorder and an adjustment disorder with depressed mood. (Ex. U:3) Dr. Mathew referred Tilton to Dr. Hansen, a pain psychologist, for treatment in 2014. Dr. Hansen also assessed Tilton with an adjustment disorder with mixed anxiety and depressed mood. (Ex. 6:2) Dr. Krumvieda's and Dr. Hansen's diagnoses are consistent with Dr. Mittauer's diagnosis. Based on the foregoing, I find Dr. Mittauer's opinion more persuasive than Dr. Chesen's opinion. I find Tilton has established her mental health condition was permanently aggravated or lit up by the April 15, 2013, work injury.

II. Manifestation, Notice and Timeliness

In 2017, the Iowa Legislature enacted changes to Iowa Code sections 85.23 and 85.26(1), involving notice and statute of limitations. The changes to the statute went into effect on July 1, 2017. This case involves a work injury occurring before July 1, 2017, therefore, the new provisions of the statute from 2017 do not apply to this case. 2017 Iowa Acts chapter 23.

At the time of the alleged work injury, Iowa Code section 85.23, provided:

> Unless the employer or the employer's representative shall have actual knowledge of the occurrence of an injury received within ninety days from the date of the occurrence of the injury, or unless the employee or someone on the employee's behalf or a dependent or someone on the dependent's behalf shall give notice thereof to the employer within ninety days from the date of the occurrence of the injury, no compensation shall be allowed.

Iowa Code section 85.26(1) also provided:

> An original proceeding for benefits under this chapter . . . shall not be maintained in any contested case unless the proceeding is commenced within two years from the date of the occurrence of the injury for which benefits are claimed or, if weekly compensation benefits are paid under section 86.13, within three years from the date of the last payment of weekly compensation benefits.

Under the common law, the discovery rule applies to both notice and limitations issues in workers' compensation claims. See Baker, 872 N.W.2d at 684-85. Under the discovery rule the notice and limitations periods do "not begin to run until the claimant knows or in the exercise of reasonable diligence should know the 'nature, seriousness[,] and probable compensable character' of his or her work injury." Id.

While the injury date of a cumulative injury is relevant to notice and limitations issues, the Iowa Supreme Court has clearly stated,

Although the date of injury is relevant to the notice and statute-of-limitations issues, the cumulative injury rule is not to be applied in lieu of the discovery rule. *See McKeever*, 379 N.W.2d at 372-73. As we said in *McKeever*, although "[t]hese two rules are closely related, . . . they are not the same." *Id.* Thus, although an injury may have occurred, the statute of limitations period does not commence until the employee, acting as a reasonable person, recognizes its 'nature, seriousness and probable compensable character.'" *Orr v. Lewis Cent. Sch. Dist.*, 298 N.W.2d 256, 257 (Iowa 1980) (applying discovery rule to workers' compensation actions).

The *McKeever* "missed work" test was later refined in *Tasler*, where we endorsed an analysis of more general applicability. In *Tasler*, we adopted the manifestation test, fixing the date of injury "as of the time at which the 'disability manifests itself.'" 483 N.W.2d 829 (quoting 1B Arthur Larson, *Workers' Compensation Law* § 39.10 (1991)). We held that an injury manifests itself when both "'the fact of the injury and the causal relationship of the injury to the claimant's employment would have been plainly apparent to a reasonable person.'" *Id.* (quoting *Peoria County Belwood Nursing Home v. Indus. Comm'n*, 115 Ill.2d 524, 106, Ill.Dec. 235, 238, 505 N.E.2d 1026, 1029 (1987)).

This court had the opportunity to apply the manifestation test in the case of *George A. Hormel & Co. v. Jordan*, 569 N.W.2d 148 (Iowa 1997). In that case we declined to add a third element – compensability – to the test. *Jordan*, 569 N.W.2d. at 152. We also held that a permanency rating is not a prerequisite for meeting the manifestation test. *Id.* Nonetheless, in upholding the agency's date-of-injury finding, we noted that on the date chosen by the agency – October 1, 1991 – the employee had "knowledge of the *permanent* impairment of his shoulder" and realized the "causal *impact* that injury would have on his job." *Id.* (emphasis added); *accord Venega*, 498 N.W.2d at 425 (stating "more is required than knowledge of an injury or receipt of medical care. The employee must realize that his or her injury will have an impact on employment."). We also observed that it was not until this date that the employee learned "that he *would not recover* from the cumulative injury to his shoulder and that *permanent* restrictions on his work activities would be required." *Jordan*, 569 N.W.2d at 152 (emphasis added).

Although we accurately stated in *Jordan* that the cumulative injury rule/manifestation test has only two elements – knowledge of the injury and its causal relationship to employment, our discussion addressed essentials of the discovery rule – impact on employment and permanency. We take this opportunity to reaffirm what we said in *McKeever*, that these tests, while related, are distinct. The preferred analysis is to first

> determine the date the injury is deemed to have occurred under the *Tasler* test, and then to examine whether the statutory period commenced on that date or whether it commenced upon a later date based upon application of the discovery rule.
>
> To summarize, a cumulative injury is manifested when the claimant, as a reasonable person would be plainly aware (1) that he or she suffers from a condition or injury, and (2) that this condition or injury was caused by the claimant's employment. Upon the occurrence of these two circumstances, the injury is deemed to have occurred. Nonetheless, by virtue of the discovery rule, the statute of limitations will not begin to run until the employee also knows that the physical condition is serious enough to have a permanent adverse impact on the claimant's employment or employability, i.e., the claimant knows or should know the "nature, seriousness, and probable compensable character" of his injury or condition. *Orr*, 298 N.W.2d at 257.

Herrera, 633 N.W.2d at 287-88.

As discussed in Herrera, application of the cumulative injury rule requires the factfinder to determine when Tilton knew she suffered from a condition or injury that was caused by her employment. The district court and court of appeals noted the appeal deputy blurred the cumulative injury rule and discovery rule in the initial appeal and decision on remand. Tilton testified at hearing she first realized her back problems were related to her work at Heinz in 2001. (Tr.:91) I find the injury manifested in 2001. This finding is in accord with the first appeal decision by the court of appeals, noting the deputy concluded "Tilton realized she suffered from a work-related injury by 2001."

In addressing the discovery rule, the court of appeals noted as of September 8, 2010, no physician had given Tilton permanent work restrictions. No physician in this case provided Tilton with permanent restrictions before her last day of employment on April 15, 2013.

On February 4, 2010, Dr. Bradley documented Tilton's low back condition was permanent, barring surgery and noted, her condition "will be a source of flare ups in the future – some of these flareups will cause her to miss work," once every two to four months for one to three days per episode. (Ex. J:43-44) Tilton testified on cross-examination Dr. Bradley did not tell her that her condition in her spine was permanent at that time. (Tr.:92) There is no evidence Dr. Bradley communicated his belief regarding the permanent nature of Tilton's condition to her in 2010. While Tilton was treated extensively for low back pain over the course of many years, there is no evidence any medical practitioner told Tilton her condition was permanent before April 15, 2013. I find the limitations period was tolled under the discovery rule until April 15, 2013, the last day she worked for Heinz.

As noted above, Iowa Code section 85.23 requires an employee to provide notice to the employer within 90 days of the injury. On May 3, 2013, Tilton's counsel sent Heinz a letter reporting Tilton sustained a work injury on or about April 15, 2013, while working for Heinz, and asking Heinz to provide his office Heinz's workers' compensation carrier's contact information. (Ex. 13:1) Tilton's counsel sent the letter to Heinz within 90 days of April 15, 2013, providing proper notice.

This is a denied claim. No benefits have been paid. As a result, the statute of limitations for this case is two years. Iowa Code § 85.26. On March 27, 2015, Tilton filed the petition in this case, in compliance with the statute of limitations.

III. Rate

The parties dispute the rate for this case. Tilton testified she worked full-time for Heinz. Tilton relayed in the weeks before she left her employment, she was missing work and her hours do not reflect her normal hours. (Tr.:67)

Iowa Code section 85.36 sets forth the basis for determining an injured employee's compensation rate. Mercy Med. Ctr. v. Healy, 801 N.W.2d 865, 870 (Iowa Ct. App. 2011). The basis of compensation shall be the "weekly earnings of the injured employee at the time of the injury." Iowa Code § 85.36. The statute defines "weekly earnings" as

> gross salary, wages, or earnings of an employee to which such employee would have been entitled had the employee worked the customary hours for the full pay period in which the employee was injured, as regularly required by the employee's employer for the work or employment for which the employee was employed . . . rounded to the nearest dollar.

Id. The term "gross earnings" is defined as "recurring payments by employer to the employee for employment, before any authorized or lawfully required deduction or withholding of funds by the employer, excluding irregular bonuses, retroactive pay, overtime, penalty pay, reimbursement of expenses, expense allowances, and the employer's contribution for welfare benefits." Id. § 85.61. Weekly earnings for employees paid on an hourly basis:

> shall be computed by dividing by thirteen the earnings, including shift differential pay but not including overtime or premium pay, of the employee earned in the employ of the employer in the last completed period of thirteen consecutive calendar weeks immediately preceding the injury. If the employee was absent from employment for reasons personal to the employee during part of the thirteen calendar weeks preceding the injury, the employee's weekly earnings shall be the amount the employee would have earned had the employee worked when work was available to other employees of the employer in a similar occupation. A week which

> does not fairly reflect the employee's customary earnings shall be replaced by the closest previous week with earnings that fairly represent the employee's customary earnings.

Id. § 85.36(6). Thus, under the statute, overtime is counted hour for hour, and shift differential, vacation, and holiday pay are also included. Premium and irregular pay are not included.

Heinz and Liberty Mutual submitted Tilton's paystubs. (Ex. C) Tilton submitted a chart showing 40 hours of work per week at the rate of $15.13 per hour for the 13 weeks prior to the work injury. (Ex. 12) Tilton did not submit any prior paystubs, tax returns, or other documents supporting her rate calculation. Tilton's calculations are not supported by the paystubs in evidence. The paystubs are the best evidence of her pay. I do not find Tilton's chart persuasive.

Heinz and Liberty Mutual attached their rate calculation to the hearing report that was approved at hearing. For the weeks ending March 3, 2013, and March 17, 2013, Tilton received gift cards of $100.00 each. While no evidence was presented as to the nature of the gift cards, defendants conceded the gift cards should be included in the rate calculation. I find the gift cards should be included per defendants' concession.

The paystubs in evidence are for the 13 weeks ending January 6, 2013, through March 3, 2013, and March 17, 2023, through April 14, 2013. (Ex. C) For all the weeks in question Tilton's regular hourly rate was $15.13. (Ex. C)

For the week ending April 14, 2013, Tilton worked 30.75 hours. (Ex. C:1) Tilton received $465.25 in countable gross earnings for the week ending April 14, 2013.

For the week ending April 7, 2013, Tilton worked 20.75 hours and she was paid for 17 hours of vacation, for a total of 37.75 hours. (Ex. C:2) Tilton received $571.16 in countable gross earnings for the week ending April 7, 2013.

For the week ending March 31, 2013, Tilton worked 30.50 hours and she was paid for 2 hours of vacation, for a total of 32.50 hours. (Ex. C:3) Tilton received $491.73 in countable gross earnings for the week ending March 31, 2013.

For the week ending March 24, 2013, Tilton worked 32 hours and she was paid .25 hours of overtime, for a total of 32.25 hours. (Ex. C:4) Given overtime is calculated at the regular hourly rate, Tilton received $487.94 in countable gross earnings for the week ending March 24, 2013.

For the week ending March 17, 2013, Tilton worked 32 hours. (Ex. C:5) Tilton also received a $100.00 gift card. I find Tilton received $584.16 in countable gross earnings for the week ending March 17, 2013.

For the week ending March 3, 2013, Tilton worked 33.75 hours and she was paid for 14 hours of vacation, for a total of 47.75 hours. (Ex. C:6) Tilton also received a $100.00 gift card. Tilton received $822.46 in countable gross earnings for the week ending March 3, 2013.

For the week ending February 24, 2013, Tilton worked 30.50 hours. (Ex. C:7) Tilton received $461.47 in countable gross earnings for the week ending February 24, 2013.

For the week ending February 17, 2013, Tilton worked 24 hours and she was paid .25 hours of overtime, for a total of 24.25 hours. (Ex. C:8) Given overtime is calculated at the regular hourly rate, Tilton received $366.90 in countable gross earnings for the week ending February 17, 2013.

For the week ending February 10, 2013, Tilton worked 31.25 hours. (Ex. C:9) Tilton received $472.81 in countable gross earnings for the week ending February 10, 2013.

For the week ending February 3, 2013, Tilton worked 22 hours and she was paid for 17 hours of vacation, for a total of 39 hours. (Ex. C:10) Tilton received $590.07 in countable gross earnings for the week ending February 3, 2013.

For the week ending January 27, 2013, Tilton worked 34.25 hours. (Ex. C:11) Tilton received $518.20 in countable gross earnings for the week ending January 27, 2013.

For the week ending January 20, 2013, Tilton worked 19 hours and she was paid for 9 hours of vacation, for a total of 28 hours. (Ex. C:12) Tilton received $423.64 in countable gross earnings for the week ending January 20, 2013.

For the week ending January 6, 2013, Tilton worked 15.75 hours. (Ex. C:13) Tilton was paid .25 hours of overtime, eight hours for holiday premium, and 16 hours for holiday pay, for a total of 40 hours. Given overtime is calculated at the regular hourly rate, Tilton received $605.20 in countable gross earnings for the week ending January 6, 2013.

For the 13 weeks ending January 6, 2013 through March 3, 2013, and March 17, 2023, through April 14, 2013 Tilton received in countable gross earnings of $6,860.99. Dividing this sum by 13 results in an average gross weekly wage of $527.77, which is rounded to $528 per week. The parties stipulated at the time of the alleged injury Tilton was single and entitled to one exemption. Under the ratebook in effect at the time of the work injury for injuries between July 1, 2012, and June 30, 2013, Tilton's weekly rate is $339.66. https://www.iowaworkcomp.gov/ratebook.

IV. Extent of Disability

I found Tilton established the work injury permanently aggravated her low back and mental health conditions. The parties stipulated if the disability is found to be the cause of permanent disability, the disability is an industrial disability. Tilton alleges she is permanently and totally disabled under the statute and common law odd-lot doctrine. Heinz and Liberty Mutual dispute her assertion.

"Industrial disability is determined by an evaluation of the employee's earning capacity." Pease, 807 N.W.2d at 852. In considering the employee's earning capacity, the deputy commissioner evaluates several factors, including "consideration of not only the claimant's functional disability, but also [his] age, education, qualifications, experience, and ability to engage in similar employment." Swiss Colony, Inc. v. Deutmeyer, 789 N.W.2d 129, 137-38 (Iowa 2010). The inquiry focuses on the injured employee's "ability to be gainfully employed." Id. at 138. The statute also requires the factfinder "to take into account . . . the number of years in the future it was reasonably anticipated that the employee would work at the time of the injury." Iowa Code § 85.34(2).

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

In Iowa, a claimant may establish permanent total disability under the statute, or through the common law odd-lot doctrine. Michael Eberhart Constr. v. Curtin, 674 N.W.2d 123, 126 (Iowa 2004) (discussing both theories of permanent total disability under Idaho law and concluding the deputy's ruling was not based on both theories, rather, it was only based on the odd-lot doctrine). Under the statute, the claimant may establish the claimant is totally and permanently disabled if the claimant's medical impairment together with nonmedical factors totals 100 percent. Id. The odd-lot doctrine applies when the claimant has established the claimant has sustained something less than 100 percent disability but is so injured that the claimant is "unable to perform services other than 'those which are so limited in quality, dependability or quantity that a reasonably stable market for them does not exist.'" Id.

"Total disability does not mean a state of absolute helplessness." Wal-Mart Stores, Inc. v. Caselman, 657 N.W.2d 493, 501 (Iowa 2003) (quoting IBP, Inc. v. Al-Gharib, 604 N.W.2d 621, 633 (Iowa 2000)). Total disability "occurs when the injury wholly disables the employee from performing work that the employee's experience, training, intelligence, and physical capacity would otherwise permit the employee to perform." IBP, Inc., 604 N.W.2d at 633.

At the time of the hearing in 2016, Tilton was 56. (Tr.:43) Tilton commenced working for Heinz in 1999. She has not worked since April 15, 2013. (Tr.:44) Tilton

graduated from high school in Cedar Rapids in 1978, earning C and D grades. (Exs. 5:4; X:9) Tilton has not received any education beyond high school. (Ex. 5:4) Tilton's past work includes working as a housekeeper, school janitor, school lunch cook, dishwasher, and in customer service for a photography business. (Ex. X:10) Tilton types with two fingers. (Ex. 5:4)

As analyzed above, I found the opinions of Dr. Mathew and Dr. Mittauer most persuasive. Dr. Mathew assigned Tilton 20 percent whole person impairment and assigned permanent restrictions of avoiding prolonged standing, walking, sitting, repetitive bending and squatting, and lifting more than 15 pounds. (Ex. 1:6) Dr. Mathew and Dr. Mittauer both opined Tilton is not capable of working. (Exs. 1:5-6; 4:12)

Connie Oppedal, M.S., provided a vocational opinion for defendants opining Tilton is capable of performing sedentary to light work as a night worker, rental sales agent, hotel front desk worker, pharmacy technician trainee, customer service desk associate, parking lot attendant, verification clerk, and greeter. (Ex. X:13) Tilton has limited education. Tilton's past relevant work as a janitor and in housekeeping and working for Heinz does not fall within her current restrictions. Oppedal did not identify any specific available positions in the Cedar Rapids area Tilton is capable of engaging in considering her functional limitations and residual capacities. I find, considering all the factors of industrial disability, including the opinions of Dr. Mathew and Dr. Mittauer, Tilton is permanently and totally disabled under the statute. I find Tilton is entitled to permanent total disability benefits from the date of injury, April 15, 2013, at the rate of $339.66.

V. Credit for Short-Term and Long-Term Disability Payments

Heinz and Liberty Mutual seek a credit of $45,550.00 for short-term and long-term disability benefits that were paid to Tilton under Iowa Code section 85.38. Tilton disputes defendants are entitled to a credit.

Iowa Code section 85.38(2) (2016) provides:

> 2. *Benefits paid under group plans.*
>
> *a.* In the event the employee with a disability shall receive any benefits, including medical, surgical, or hospital benefits, under any group plan covering nonoccupational disabilities contributed to wholly or partially by the employer, which benefits should not have been paid or payable if any rights of recovery existed under this chapter, chapter 85A, or chapter 85B, then the amounts so paid to the employee from the group plan shall be credited to or against any compensation payments, including medical, surgical, or hospital, made or to be made under this chapter, chapter 85A, or chapter 85B. The amounts so credited shall be deducted from the payments made under these chapters. Any nonoccupational plan shall be reimbursed in the amount deducted. This section shall not apply to payments made under any group plan which would have been payable

> even though there was an injury under this chapter or an occupational disease under chapter 85A or an occupational hearing loss under chapter 85B.

The Iowa Supreme Court has held that the purpose of Iowa Code section 85.38(2) is to preclude an employee with a disability from receiving a double recovery of workers' compensation benefits and group disability plan benefits provided by the employer. State v. Erbe, 519 N.W.2d 812, 815 (Iowa 1994)

Tilton admitted at hearing she received both short-term and long-term disability benefits from Heinz after she left her employment on April 15, 2013, until 2015. According to the disability payment records Tilton received long-term disability benefits through October 14, 2015. (Ex. E:13-14) The record evidence supports Tilton was paid $7,785.52 in net short-term disability benefits and $37,764.48 in long-term disability benefits. (Exs. D:10; E:17) The benefits total $45,550.00.

The Short Term Disability Coverage Plan provided by Heinz, states in part:

> SHORT TERM DISABILITY COVERAGE
>
> Disability Benefit Exclusions
>
> A Weekly Benefit will not be payable if a Covered Person because Disabled due to:
>
> 1. Injury that arises out of or in the course of employment; or
>
> 2. Sickness when a benefit is payable under a Workers' Compensation Law, or any other act or law of like intent.

(D:5) The short-term disability benefit clearly states weekly short-term disability payments are not payable if the employee is disabled due to a sickness payable under workers' compensation laws. Heinz and Liberty Mutual are entitled to a credit for the $7,785.52 in short-term disability benefits paid to Tilton.

The Group Disability Income Policy governing long-term disability benefits offered by Heinz includes multiple classes with differing provisions for each class. Tilton's employment in Cedar Rapids is governed under the provisions for "Class 7." (Ex. E:3)

The Group Disability Income Policy for Class 7 provides the amount of insurance is "60% of Basic Monthly Earnings not to exceed a Maximum Monthly Benefit of $3,000 less Other Income Benefits and Other Income Earnings as outlined in Section 4. (Ex. E:6) Section 4, pertaining to Disability Income Benefits for Class 7 defines "Other Income Benefits" to include "[t]he amount for which the Covered Person is eligible under" workers' compensation laws. (Ex. E:8)

The Group Disability Income Policy provides the monthly benefit shall not exceed $3,000, less Other Income Benefits, which are defined to include amounts the employee is eligible for under workers' compensation laws. Under the Group Disability Income Policy pertaining to long-term disability benefits for Class 7, Heinz and Liberty Mutual are entitled to a credit of $37,764.48 for long-term disability benefits paid to Tilton.

VI. Medical Bills, Medical Mileage, and Alternate Medical Care

Tilton seeks to recover the medical expenses set forth in Exhibit 14, including medical mileage totaling $206.33. On the Hearing Report Tilton requested alternate care. In her post-hearing brief and briefs on appeal she never identified what care she was requesting.

An employer is required to furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance, hospital services and supplies, and transportation expenses for all conditions compensable under the workers' compensation law. Iowa Code § 85.27(1). The employer has the right to choose the provider of care, except when the employer has denied liability for the injury. Id. § 85.27(4). "The treatment must be offered promptly and be reasonably suited to treat the injury without undue inconvenience to the employee." Id.. If the employee is dissatisfied with the care, the employee should communicate the basis for the dissatisfaction to the employer. Id. If the employer and employee cannot agree on alternate care, the commissioner "may, upon application and reasonable proofs of the necessity therefor, allow and order other care." Id. The statute requires the employer to furnish reasonable medical care. Id. § 85.27(4); Long v. Roberts Dairy Co., 528 N.W.2d 122, 124 (Iowa 1995) (noting "[t]he employer's obligation under the statute turns on the question of reasonable necessity, not desirability"). The Iowa Supreme Court has held the employer has the right to choose the provider of care, except when the employer has denied liability for the injury or has abandoned care. Iowa Code § 85.27(4); Bell Bros. Heating & Air Conditioning v. Gwinn, 779 N.W.2d 193, 204 (Iowa 2010).

Heinz and Liberty Mutual denied Tilton's claim and did not authorize medical care for her conditions. Tilton sought treatment on her own. Tilton admitted at hearing she was not seeking reimbursement for prescriptions for her high blood pressure/heart condition or for antibiotics. (Tr.:14-15) I find Tilton is not entitled to reimbursement for any high blood pressure, high cholesterol, antibiotic medications, or any medications that are not related to the work injury. Heinz and Liberty Mutual are responsible for the medical bills related to Tilton's work injury set forth in Exhibit 14, including any out-of-pocket costs paid by Tilton, and are responsible for reimbursing Tilton $206.33 for medical mileage.

Heinz and Liberty Mutual offered Tilton no care in this case. Tilton has treated with Dr. Mathew and Dr. Bradley for many years. I find Tilton's request for alternate care should be granted and find Heinz and Liberty Mutual should authorize ongoing care with Dr. Bradley and Dr. Mathew for care related to Tilton's work injury. Heinz and

Liberty Mutual are responsible for all future medical care causally related to Tilton's work injury.

VII. Penalty

Tilton alleges Liberty Mutual failed to conduct a reasonable investigation into her claim and contends she is entitled to an award of penalty benefits. Heinz and Liberty Mutual deny Tilton is entitled to penalty benefits.

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

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

Benefits must be paid beginning on the 11th day after the injury, and "each week thereafter during the period for which compensation is payable, and if not paid when due," interest will be imposed. Iowa Code § 85.30. In Robbennolt, the Iowa Supreme Court noted, "[i]f the required weekly compensation is timely paid at the end of the compensation week, no interest will be imposed . . . . As an example, if Monday is the first day of the compensation week, full payment of the weekly compensation is due the following Monday." Robbennolt, 555 N.W.2d at 235. A payment is "made" when the check addressed to the claimant is mailed, or personally delivered to the claimant.

Meyers v. Holiday Express Corp., 557 N.W.2d 502, 505 (Iowa 1996) (abrogated by Keystone Nursing Care Ctr. v. Craddock, 705 N.W.2d 299 (Iowa 2005) (concluding the employer's failure to explain to the claimant why it would not pay permanent benefits upon the termination of healing period benefits did not support the commissioner's award of penalty benefits)).

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

On May 3, 2013, Tilton's counsel sent Heinz a letter reporting Tilton sustained a work injury on or about April 15, 2013, while working for Heinz, and asking Heinz to provide his office with Heinz's workers' compensation carrier's contact information. (Ex. 13:1)

On August 14, 2013, Tilton's counsel sent Liberty Mutual a letter stating Liberty Mutual had offered no care to Tilton for her back complaints and requesting medical treatment. (Ex. 13:3) Liberty Mutual sent a response letter on August 19, 2013, stating it did not have medical support for the work injury and that it was investigating the claim. (Ex. 13:4)

Dr. Mathew testified on September 10, 2013, he informed the adjuster for Liberty Mutual that he believed Tilton's low back condition was caused by work-related cumulative trauma. (Tr.:32-33, 37) Dr. Mathew sent the adjuster a letter stating he had treated Tilton for low back pain since 2012. (Ex. 1:2) In the letter Dr. Mathew opined Tilton's low back pain, hip pain, degenerative joint disease, sacroiliitis, and trochanteric bursitis conditions are causally related to her work-related injury and stated she was continuing to receive chronic pain management including injections and medication management. (Ex. 1:2) Heinz and Liberty Mutual did not pay Tilton any weekly benefits after receiving Dr. Mathew's causation letter or provide Tilton with a copy of Dr. Mathew's causation letter.

On October 14, 2013, Tilton's counsel sent Liberty Mutual a letter stating Tilton was receiving treatment from Dr. Mathew and asking whether Liberty Mutual would authorize treatment. (Ex. 13:5) Liberty Mutual's adjuster sent a response letter on October 17, 2013, stating,

> At this time we have nothing to show an injury at work occurred, nor was it reported to your employer. Your file has been placed under investigation, pending the review of your medical records surrounding the incident. Once I can access and determine whether the injury claimed is a

> work related injury and compensable under Iowa Workers' Compensation law, I will send confirmation.

(Ex. 13:6) The adjuster did not enclose a copy of Dr. Mathew's opinion or mention it in her response letter. She sent a records request to Dr. Mathew and to other providers. (Ex. 13:7-10) Tilton's counsel did not receive a copy of Dr. Mathew's opinion until November 2, 2015, when Defendants first produced it pursuant to a discovery request. (Ex. 13:13)

I find Heinz and Liberty Mutual failed to conduct a reasonable investigation of Tilton's claim. Heinz and Liberty Mutual were aware Tilton was not working and receiving long-term disability benefits for her low back condition. Pursuant to its own inquiry in September 2013 Liberty Mutual was aware Dr. Mathew had opined Tilton's low back condition was caused by her work with Heinz. Heinz and Liberty Mutual did not commence weekly benefits, request an IME, seek any medical opinion contrary to Dr. Mathew's opinion, or conduct any other investigation into Tilton's claim. I find their investigation unreasonable.

Months later, in an undated letter, counsel for Heinz and Liberty Mutual requested Dr. Abernathey perform a records review IME without examining Tilton. (Ex. 7:2-26) Dr. Abernathey had examined Tilton on one occasion in August 2005, long before Tilton's work injury. (Ex. 7:1) At that time, Dr. Abernathey examined Tilton, he listed an impression of a chronic lumbosacral strain and he recommended conservative treatment. (Ex. 7:1

On August 1, 2014, Dr. Abernathey signed a check-the-box letter from defendants' counsel. (Ex. 7:26) Dr. Abernathey agreed, without providing any written comments with the statement, "Ms. Tilton's work in general for H.J. Heinz Company did NOT cause any structural damage or change to her spine/back." (Ex. 7:26) Dr. Abernathey further agreed, without providing any written comments with the following statement:

> Provided the above, Ms. Tilton suffered at most temporary soft-tissue strains and/or temporary aggravations of preexisting degenerative conditions in relation to her work in general for H.J. Heinz company, which would have healed within a time period of several weeks and which did not result in any permanent impairment, pursuant to the *AMA Guides, 5th Ed.*, the need for any permanent work/activity restrictions, and where no further medical treatment would be medically related to, or necessitated by, her work for H.J. Heinz.

(Ex. 7:26)

On August 28, 2014, Liberty Mutual sent Tilton's counsel a letter denying the claim, as follows:

> Our investigation has revealed that your claim did not arise out of and in the course of your employment with H.J. Heinz company. Per the opinion received from Dr. Chad Abernathey of Cedar Neurological Surgeons, he was in agreement that Ms. Tilton's work for H.J. Heinz Company **DID NOT** cause any structural damage or change to her spine/back. In addition, Dr. Abernathey agreed that Ms. Tilton suffered at most a temporary soft-tissue strain and/or a temporary aggravation of a preexisting degenerative condition in relation to her work in general for H.J. Heinz Company, which would have healed within a time period of several weeks and which did not result in any permanent impairment, pursuant to the AMA Guides, 5th Ed, the need for any permanent work/activity restrictions, and where no further medical treatment would be medically related to, or necessitated by, her work for H.J. Heinz. Therefore benefits under the Iowa Workers Compensation Act are denied.

(Ex. 13:11)

Tilton continued to treat with Dr. Mathew and she continued to receive long-term disability benefits for her low back condition after Heinz and Liberty Mutual denied her claim. Heinz and Liberty Mutual never sent Tilton for an in-person IME to investigate her claim. I do not find Heinz and Liberty Mutual conducted a reasonable investigation into her claim.

After receiving a copy of Dr. Mathew's causation letter, counsel for Tilton inquired on November 3, 2015, why defendants were not providing Tilton with weekly workers' compensation benefits given Dr. Mathew's September 10, 2013, letter. (Ex. 13:12) Counsel for Heinz and Liberty Mutual sent an e-mail stating he sent Dr. Mathew's response to Heinz and Liberty Mutual as soon as it was found. (Ex. F:5) Liberty Mutual was in possession of the opinion for more than two years at that point. On November 9, 2015, Tilton's attorney again requested an explanation why Liberty Mutual did not produce Dr. Mathew's September 2013 report for two years. (Ex. 13:14) The record does not contain a response.

In November 2015, Dr. Mathew responded to a letter from Tilton's counsel again opining Tilton's low back condition was causally connected to her work with Heinz, agreeing the condition was permanent, and stating he supported her decision to stop working due to her severe pain. (Ex. 1:1-7) In January 2016, Dr. Bradley issued an opinion causally relating Tilton's low back condition to her work with Heinz and opining the condition is permanent. (Ex. 2:15-16)

Tilton attended an IME with Dr. Hines on January 9, 2016, and issued his report on January 12, 2016. (Ex. 3) Dr. Hines also opined Tilton's low back condition was permanent and causally related to her employment with Heinz. .

After receiving the additional opinions from Dr. Mathew, Dr. Bradley, and Dr. Hines, counsel for Heinz and Liberty Mutual sent Dr. Abernathey an undated check-the-

box letter. (Ex. W) On February 11, 2016, Dr. Abernathey sent a response, agreeing with the following statements without providing any written comments:

> 1) The degenerative conditions in relation to Ms. Tilton's lumbar spine, as evidence by her numerous MRI's and x-rays, etc., were neither caused nor substantially aggravated by her work for Heinz and/or her alleged injury of April 15, 2013, where such are solely the natural, and age appropriate, progression of her degenerative conditions. . . .
> 2) As you opined previously, Ms. Tilton's work in general for Heinz and/or her alleged injury of April 15, 2013, did NOT cause any structural damage or change to her spine/back.

(Ex. W:2-3) Heinz and Liberty Mutual did not request Dr. Abernathey examine Tilton or request any physician examine her back to investigate her claim. They did not seek any additional information from any of the treating providers.

Dr. Mathew testified at hearing he was contacted once by counsel for Heinz and Liberty Mutual two to three weeks prior to the arbitration hearing. (Tr.:33-34) Dr. Mathew discussed his care of Tilton over the years and when asked whether he found her to be reliable he responded he believed her symptoms were true and that she was being honest and up front with him. (Tr.:34)

Heinz and Liberty Mutual refused to pay any temporary or permanent disability benefits after receiving multiple opinions from treating physicians causally relating Tilton's low back condition to her work for Heinz, opining the condition was permanent, and stating she was unable to work because of her condition. I do not find Heinz and Liberty Mutual conducted a reasonable investigation of Titlon's claim, that they had a reasonable basis to contest Tilton's entitlement to benefits, or that the claim was fairly debatable.

Tilton submitted a lengthy list of cases where Liberty Mutual was assessed penalty awards dating back to 1990. (Ex. 15) Liberty Mutual has a long history of unreasonably investigating and handling claims. Heinz and Liberty Mutual failed to pay Tilton any weekly workers' compensation benefits from the date she stopped working, April 15, 2013, through the date of the hearing, March 16, 2016. Based on their failure to properly investigate the claim and lengthy history of prior penalties, I find Tilton is entitled to an award of $20,000.00 in penalty benefits to deter Heinz and Liberty Mutual and other employers and insurance carriers from engaging in similar conduct in the future.

VIII. IME

Tilton seeks to recover the $850.00 cost of Dr. Mittauer's IME. (Ex. 16) Iowa Code section 85.39 (2016), provides, in part:

> After an injury, the employee, if requested by the employer, shall submit for examination at some reasonable time and place and as often as reasonably requested, to a physician or physicians authorized to practice under the laws of this state or another state, without cost to the employee; but if the employee requests, the employee, at the employee's own cost, is entitled to have a physician or physicians of the employee's own selection present to participate in the examination. If an employee is required to leave work for which the employee is being paid wages to attend the requested examination, the employee shall be compensated at the employee's regular rate for the time the employee is required to leave work, and the employee shall be furnished transportation to and from the place of examination, or the employer may elect to pay the employee the reasonable cost of the transportation. . . . If an evaluation of permanent disability has been made by a physician retained by the employer and the employee believes this evaluation to be too low, the employee shall, upon application to the commissioner and upon delivery of a copy of the application to the employer and its insurance carrier, be reimbursed by the employer the reasonable fee for a subsequent examination by a physician of the employee's own choice, and reasonably necessary transportation expenses incurred for the examination. . . .

After Dr. Abernathey issued his opinion finding Tilton did not sustain a permanent impairment, Tilton sought an IME from Dr. Mittauer, also a physician. In Kern v. Fenchel, Doster & Buck, P.L.C., No. 20-1206, 2021 WL 3890603 (Iowa Ct. App. Sept. 1, 2021), defendants' expert found there was no causation. Kern disagreed with the opinion and sought an IME at defendants' expense. The commissioner found Kern was not entitled to recover the cost of an independent medical examination. The Iowa Court of Appeals reversed, finding the "opinion on lack of causation was tantamount to a zero percent impairment rating," which is reimbursable under Iowa Code section 85.39. Under Kern, Tilton is entitled to recover the cost of Dr. Mittauer's IME from Heinz and Liberty Mutual.

IX. Costs

Tilton seeks to recover the $100.00 cost of the filing fee, the $1,179.40 cost of the vocational report prepared by Barbara Laughlin, and the $837.90 cost of Dr. Mathew's rating and chart review. (Ex. 16)

Iowa Code section 86.40, provides, "[a]ll costs incurred in the hearing before the commissioner shall be taxed in the discretion of the commissioner." Rule 876 IAC 4.33(6), provides,

> Costs taxed by the workers' compensation commissioner or a deputy commissioner shall be (1) attendance of a certified shorthand reporter or presence of mechanical means at hearings and evidential depositions, (2) transcription costs when appropriate, (3) costs of service

of the original notice and subpoenas, (4) witness fees and expenses as provided by Iowa Code sections 622.69 and 622.72, (5) the costs of doctors' and practitioners' deposition testimony, provided that said costs do not exceed the amounts provided by Iowa Code sections 622.69 and 622.72, (6) the reasonable costs of obtaining no more than two doctors' or practitioners' reports, (7) filing fees when appropriate, (8) costs of persons reviewing health service disputes.

The rule expressly allows for the recovery of the filing fee and the reports. I find Tilton is entitled to recover the $612.60 cost of Dr. Mathew's rating report and the cost of Laughlin's report. Laughlin spent four hours preparing the report at the hourly rate of $110.00. I find Tilton is entitled to recover $440.00 for the cost of Laughlin's report.

Defendants raised apportionment on the hearing report in this case. Defendants did not present any facts related to apportionment or address apportionment in their post-hearing brief or any briefs on appeal. I find defendants waived the issue of apportionment.

ORDER

IT IS THEREFORE ORDERED:

Defendants shall pay Claimant permanent total disability benefits from April 15, 2013, as long as Claimant remains permanently and totally disabled, and at the rate of three hundred thirty-nine and 66/100 ($339.66).

Defendants are entitled to a credit for short-term and long-term disability benefits paid to Tilton totaling forty-five thousand five hundred fifty and 00/100 dollars ($45,550.00) pursuant to Iowa Code section 85.38.

Defendants shall pay all accrued benefits in a lump sum. Interest for all weekly benefits payable and not paid when due which accrued before July 1, 2017, is payable at the rate of 10 percent; all interest on past due weekly compensation benefits accruing on or after July 1, 2017, is payable 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. Sanchez v. Tyson, File No. 5052008 (Apr. 23, 2018 Ruling on Defendant's Motion to Enlarge, Reconsider, or Amend Appeal Decision Re: Interest Rate Issue); Gamble v. AG Leader Tech., 2018 WL 2006435, File No. 5054686 (Iowa Workers' Comp. Comm'n Apr. 24, 2018).

Defendants are responsible for the medical bills set forth in Exhibit 14 and medical mileage causally related to the work injury set forth in this decision.

Defendants shall authorize ongoing care with Dr. Bradley and Dr. Mathew related to the work injury and are responsible for all future medical care causally related to the work injury.

Defendants shall pay Claimant twenty thousand and 00/100 dollars ($20,000.00) in penalty benefits.

Defendants shall reimburse Claimant eight hundred fifty and 00/100 dollars ($850.00) for the cost of Dr. Mittauer's IME under Iowa Code section 85.39.

Defendants shall reimburse Claimant $100.00 for the cost of the filing fee, $612.60 for the cost of Dr. Mathew's rating report, and $440.00 for the cost of Laughlin's report under 876 Iowa Administrative Code 4.33.

Pursuant to rule 876 Iowa Administrative Code 3.1(2), defendants shall file subsequent reports of injury as required by this agency.

Signed and filed this 22nd day of May, 2023.

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HEATHER L. PALMER
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served as follows:

Thomas Wertz (via WCES)

Nathan McConkey (via WCES)