

## BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

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MARISSA RICHARDSON,

Claimant,

vs.

HY-VEE, INC.,

Employer,

and

EMC PROPERTY &amp; CASUALTY,

Insurance Carrier,  
Defendants.

File No. 5067948

ARBITRATION DECISION

Head Note Nos.: 1108

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STATEMENT OF THE CASE

The claimant, Marissa Richardson, filed a petition for arbitration and seeks workers' compensation benefits from Hy-Vee, Inc., employer, and EMC Property and Casualty Company, insurance carrier. The claimant was represented by Randy Schueller. The defendants were represented by Anne McAtee.

The matter came on for an in-person hearing on December 2, 2021, before Deputy Workers' Compensation Commissioner Joe Walsh in Des Moines, Iowa. The record in the case consists of Joint Exhibits 1 through 15; Claimant's Exhibits 1 through 5; and Defense Exhibits A through I. The claimant testified at hearing, in addition to Ryan Roberts. Chris Quinlan was appointed and served as the court reporter for this proceeding. The matter was fully submitted on January 18, 2022, after helpful briefing by the parties.

## ISSUES

The parties submitted the following issues for determination:

1. Whether the claimant is entitled to a running award of temporary disability benefits from the date of injury through April 21, 2020, and into the future.
2. Whether the stipulated February 23, 2019, work injury is a cause of any temporary disability.

3. Whether the claimant is entitled to penalty benefits for late indemnity payments.
4. Costs.

### STIPULATIONS

Through the hearing report, the parties stipulated to the following. These stipulations are accepted and deemed binding:

1. The parties had an employer-employee relationship as of the alleged date of injury.
2. The claimant sustained an injury which arose out of and in the course of her employment on February 23, 2019.
3. All elements comprising the rate of compensation are stipulated and the parties contend the appropriate weekly rate is \$208.78.
4. Affirmative defense have been waived.
5. Medical expenses are not in dispute.
6. There is no credit issue.

### COURSE OF PROCEEDINGS

This matter was originally scheduled for hearing in April 2020 at the beginning of the Covid pandemic. On April 9, 2020, defendants requested a continuance because of the pandemic, and specifically, defense counsel's unwillingness to participate in the hearing electronically. Claimant initially resisted the continuance and the motion was originally denied. Defense counsel filed for reconsideration. On April 20, 2020, a prehearing conference was held. During the prehearing conference claimant's counsel switched positions (agreeing to the continuance), however, the parties requested and I agreed not to extend hearing completion deadlines from April 21, 2020, thus "locking" the evidence as of that date. (See Ruling on Reconsideration of Motion to Continue, April 21, 2020)

Thereafter, this file was rescheduled for hearing and continued an additional three times after the initial continuance. Both parties were seeking an in-person hearing which was not possible during the timeframe in question. The final continuance occurred on September 10, 2021, after previous defense counsel suddenly retired.

On September 28, 2021, a hearing assignment order was filed setting hearing for December 2, 2021, for an in-person hearing. Anne McAtee filed a motion to continue and motion to dismiss in mid-November 2021. Claimant resisted. A prehearing conference was held on November 29, 2021. Defendants' motions were denied for the reasons set forth therein. (Ruling on Motion to Dismiss/Continue) The undersigned

ruled that the hearing is bifurcated and the only issues for adjudication at the December 2, 2018, hearing are: medical causation, temporary disability and penalty on accrued benefits.

### FINDINGS OF FACT

Claimant Marissa Richardson was 32 years old as of the date of hearing. She testified live and under oath at hearing. I find her testimony to be credible. I find her to be sincere and earnest in all respects. Her hearing testimony was consistent with other sworn testimony given. Her demeanor at hearing was quiet, soft and subdued. She did not present as a sophisticated witness. Ms. Richardson's credibility shall be discussed further herein.

Ms. Richardson is young, bright and well-educated. She has two associate's degrees in liberal arts and business management. She testified that she had been working toward a bachelor's degree but now finds it difficult to study. In her adult working life, she has primarily worked in service sector jobs, such as fast food and call centers. She began working for Hy-Vee in January 2018. She was originally a waitress at the Market Grill and then, in approximately August 2018, moved to a cashier position in the Hy-Vee gas station. She was well-liked and appreciated by her superiors.

Ms. Richardson testified she had been a victim of domestic abuse and trauma when she resided in Florida. (Tr., pp. 49-50) She testified she left Florida in December 2012. She testified she left an abusive relationship and checked herself in for mental health treatment. Ms. Richardson testified that she has not used illegal drugs since she lived in Florida. Around that time she had been diagnosed with schizophrenia. It is noted that Ms. Richardson testified she disagrees with this diagnosis. (Tr., p. 49) She testified she was misdiagnosed and that she suffered from depression. This is generally confirmed by the medical records. Nevertheless, for approximately six years prior to working at Hy-Vee, she was on Social Security Disability (SSD), in part because of this diagnosis. (Tr., p. 92) Ms. Richardson remained out of the workforce on disability from the date she left Florida in 2012, until she began working at Hy-Vee in 2018. There are few medical records in evidence related to her preexisting mental health condition.

There is a record in evidence documenting her past mental health treatment in 2014 from Southern Iowa Mental Health Center. She was referred for therapy by her treating provider, Jimmy Mascaro, D.O. (Jt. Ex. 1, p. 1) This record provides a detailed clinical history which included details about her prior mental health condition. (Jt. Ex. 1, pp. 1-2) The report documents her previous hospitalizations, including a suicide attempt. (Jt. Ex. 1, p. 1) At that time, she reported "fleeting thoughts of self-harm" but denied any plan or intent. (Jt. Ex. 1, p. 3) She was diagnosed with depressive disorder. (Jt. Ex. 1, p. 3) Her GAF score was listed as 50-60 and her functioning level was described as follows:

Current Functioning (Behavioral/Environmental/Social/Cultural): Marissa typicall [sic] wakes at 9:30 on her own and takes her medication and has

breakfast. She will rest until lunch. She will rest again until 2 pm until time to take her medication again. She will then rest until 5 pm and will stay up with her mom until 10 pm.

(Jt. Ex. 1, p. 3) In December 2014, her medications were listed as: (1) Haldol, (2) Ativan, (3) Visterill, and (4) Cogentin. (Jt. Ex. 1, p. 2)

In November 2017, Ms. Richardson established UnityPoint Health as her primary care provider. (Jt. Ex. 2) At that time, she was seen for reasons unrelated to her work injury. The report in evidence from this visit also provides a detailed health history. The following is documented:

Marissa is a 28-year-old female, transferring care to our clinic. Has not had a primary care physician in over 1-2 years. Does see a psychiatrist on a regular basis for history of severe anxiety and PTSD. Was initially diagnosed with schizophrenia with paranoia, but it was later determined that this was likely due to her anxiety from domestic abuse and substance abuse. She has a history of substance addiction to pain medications, marijuana and Sudafed. She has been clean from pain meds since 2012. Still continues to smoke marijuana on rare occasion. Denies regular use of alcohol. Psychiatry is currently managing her symptoms with hydroxyzine, lorazepam, and Cogentin. She no longer sees counseling.

(Jt. Ex. 2, p. 11) It was after this visit that Ms. Richardson got herself off of Social Security Disability and secured employment with Hy-Vee. At the time she began working at Hy-Vee, it appears from the record Ms. Richardson was generally healthy and her mental condition was stable such that she was able to transition off disability to full-time employment.

Ms. Richardson was seen at her primary clinic (with a different physicians' assistant) in October 2018, for tension headaches and neck pain. The following history was documented at this office visit:

29-year-old female with past medical history of PTSD/anxiety presents to clinic to establish care. . . . Patient complains today of neck and shoulder pain that is [sic] been bothering her intermittently since March or April. Has been going to the chiropractor once or twice per month without much improvement of symptoms. Does relate that Flexeril has helped with symptoms as well as Advil. Take 800 mg Advil most mornings and 400 mg at night. Cannot think of any specific injury to cause the symptoms. Patient does relate that she states somewhat active at work and used to be a waitress but now works at the gas station. Is unsure if this is related to her symptoms.

. . . .

No recent illicit drug use and states that she has been clean for about 1 year. Did have history of substance addiction to pain medications,

marijuana, and Sudafed. Has been clean from pain medication since 2012. Psychiatry currently manages her symptoms with hydroxyzine and lorazepam as needed. Sees the same psychiatrist for the past 5 years and follows with them every 6 months. They have been able to successfully taper her anxiety medications.

(Jt. Ex. 2, p. 23) The physician's assistant suggested her pain was due to posture and suggested some exercises. She was instructed to return in 7-10 days if her symptoms had not improved. (Jt. Ex. 2, p. 25) There is no record in evidence she ever returned to follow up for neck symptoms.

As set forth above, she transferred from working as a waitress in the Market Grill into a position as a cashier at the Hy-Vee gas station. She testified that she enjoyed that work. Ms. Richardson testified that on February 23, 2019, she was working at the Hy-Vee gas station preparing food when she was called to the checkout area to ring up a customer. Her initial hearing testimony regarding this incident was simple: "As I was cashing out this customer's purchase, I was grabbed from behind and my head was pulled backwards. After that I remember going to the back of the store to the kitchen." (Tr., p. 30)

At the time of hearing, there is not much in dispute regarding the facts of this incident itself. It is recorded on Hy-Vee video and is in evidence. (Def. Ex. D) In fact there are numerous surveillance videos in evidence. The only one that is particularly relevant to the incident of injury itself is Defendants' Exhibit D, which is edited surveillance footage from the south camera angle, which clearly depicts the incident of injury.

Defendants' Exhibit A is video surveillance from the east and west. There are two simultaneous videos contained in this exhibit, each is approximately 3 hours and 13 minutes long. Claimant's counsel stated that this video was provided to him by Hy-Vee in April 2020. (Tr., p. 19) The incident of injury is depicted in this video at 1 hour 4 minutes and 22 seconds into the video. Defendants' Exhibit B is video surveillance from the south. It is 2 hours and 14 minutes long and does not capture the incident of injury. This video begins less than a minute after the incident of injury occurred. Defendants' Exhibit C is video surveillance, again from the south angle. This video is 1 hour and 35 minutes long. It is the exact same camera angle as Defendants' Exhibit B, but backed up to cover an earlier timeframe. It does depict the incident of injury at 1 hour, 4 minutes and 20 seconds. There is no time stamp on this video either. These videos are primarily relevant for context related to claimant's penalty claim. There is no time stamp on any of these videos. I have reviewed all of the videos in their entirety.

The incident of injury itself has been formally stipulated between the parties. "Stipulated. (a) Claimant sustained an injury, which arose out of and in the course of employment on the following date(s): 02/23/19." (Hearing Report, Par. 2) On February 23, 2019, Ms. Richardson was working at the Hy-Vee gas station with Benjamin Fastje and Janet Edwards. Ms. Richardson testified that she was summoned to the front of the store to ring up a customer. There is no explanation for this in the record. Ms.

Richardson was working in the kitchen which is not seen on video. The store did not appear to be busy. In any event, Ms. Richardson was summoned to the cash register to check out a customer in the store who was purchasing a 12-pack of beer. Ms. Richardson was at the register for less than 30 seconds. During that time, Ms. Edwards placed her hands on Ms. Richardson multiple times and tugged on her ponytail, pulling her head back in the process. Ms. Edwards then abruptly physically moved Ms. Richardson out of the way and completed the sale to the customer. Again, there is very little context for this odd interaction in the record. The entire incident was brief, strange, and mostly unexplained. There is no explanation in the record as to why the claimant was called to the front to handle this sale. There is no explanation in the record why Ms. Edwards placed her hands on Ms. Richardson and pulled her ponytail. There is no explanation in the record why she suddenly moved Ms. Richardson out of the way and finished the sale herself. Neither Mr. Fastje, nor Ms. Edwards testified at hearing to provide further context. It appears that their supervisor, Fred French had left the convenience store just seconds prior to the incident.<sup>1</sup>

Ms. Richardson testified that this incident has caused her both physical and mental injuries that have caused her to be off work up through the date evidence was locked and continuing. This is the primary dispute in the case.

Ms. Richardson reported the incident on February 25, 2019, to Sheila McGuire, Human Resources manager, via email.

I have a deep concern about an altercation that I received at work this past Saturday, February 23, afternoon. It was shortly after Fred left for the day and it was just Ben, Jan, and I working at the gas station. I believe Fred left the store around 1 p.m. and Jan clocked out at 3 p.m. During this two-hour period, Jan hit the doorbell motioning for me to come up the registers from the kitchen. She asked me to ring up the only customer in the store. Ben was working over by the lottery machine, I do not recall what he was specifically doing during this altercation. As I started ringing up the customers [sic] order, Jan stepped behind and pull on my braided ponytail very hard and for a long period of time. This forced my head to be pulled back quickly and she continued to pull on my hair causing my head to be jerked back as far as possible.

Earlier that day, Jan made a comment about my braided ponytail looking like a rattail. At that same time, she asked Ben about him wearing a rattail. This is not the first time Jan has made comments about my hairstyle or appearance. She has also commented on me tucking in my shirt uniform and associated my attire based on my body shape. She has also tugged on my tucked in shirt, making jabbing comments. So, I stopped wearing my shirt tucked in around Jan. I never thought that the

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<sup>1</sup> Defendants' Exhibit C depicts a male employee eating a piece of pizza behind the counter who leaves the building just seconds before the incident took place. This is presumably Mr. French, the supervisor at this location. This employee then returns after the incident and continues to work through the entire duration of Defendants' Exhibit C.

bullying I am receiving at the C-Store would escalate to physical and verbal harassment, but I need your assistance on how to handle these instances and prevent further harassment.

(Claimant's Exhibit 1, pp. 2-3, emphasis in original) Sheila McGuire responded quickly. "Thank you for bring [sic] this issue to my attention. I will try to talk to Fred tomorrow. Give us a few days to get back to you, ok?" (Cl. Ex. 1, p. 1)

Neither Sheila McGuire, nor Fred French testified about the investigation at hearing. These witnesses may have been able to shed light on important, unexplained aspects of the investigation. Hy-Vee's only witness was Ryan Roberts, Hy-Vee District Vice President. Mr. Roberts testified live and under oath. I find his testimony generally credible.

Mr. Roberts testified that in February 2019, he was the store director at the Fleur location in Des Moines. (Tr., p. 141) He was promoted to district vice president in 2021. He has worked for Hy-Vee for 31 years, working his way up from sacking groceries. Mr. Roberts testified that Ms. McGuire alerted him to Ms. Richardson's allegations, shortly after she reported it. "So the first thing I did was I reviewed the video time frame from the information that Marissa provided in her email. And then I had Fred French come up and watch the video with me." (Tr., p. 149) He and Mr. French discerned that the appropriate timeframe was between 1:00 and 3:00 p.m., on February 23, 2019. He specifically testified to the following:

Q. And so did you have information from Marissa as to what time frame she believed this happened?

A. So when I talked to Marissa, she told me - - we spoke about the incident, and she said, you know, 'This happened behind the register. Jan called me from behind the - - from the back room. As I came up, Jan came up behind me and pulled my hair hard enough for me to almost fall down.'

I said, 'Do you remember when that happened?'

And she's like 'No, I don't really remember. I know it was after Fred left.'

I said, 'Okay. Well, what time did Fred leave?'

So I looked at the schedule, and Fred left at one o'clock. Then I looked at the time clock, and he left at 1:30. So we watched from - - I took it back to one o'clock, because about a half-hour before, you know, Fred left, you know, it was like okay, you know, because that's when he was scheduled off.

(Tr., p. 151)

Mr. Roberts testified that Defendants' Exhibit B is the video he watched with Mr. French, Ms. McGuire and Ms. Richardson. (Tr., p. 174) While I have no idea what Mr. French looks like, the only three employees who appear anywhere on Defendants' Exhibit B are Ms. Richardson, Ms. Edwards and Mr. Fastje. (Def. Ex. B) Having reviewed this video thoroughly, I see no sign of any other Hy-Vee employee during the course of the video.

Ms. Richardson repeatedly told investigators two things about when the incident occurred: (1) she did not know exactly when it happened but (2) she thought it occurred after Fred French had left for the day and before Jan Edwards left for the day. In her original email reporting the injury, she stated that she believed Mr. French left for the day around 1:00 p.m. (Cl. Ex. 1, p. 2) Mr. French apparently left just a minute or so before 1:00 p.m., but he returned a few minutes later, right after the incident occurred. Mr. Roberts testified that he believed Ms. Richardson to be an honest person and he was concerned about her report. (Tr., pp. 149, 165)

Mr. Roberts repeatedly insisted that the video which was prepared was based upon Ms. Richardson's timeframe. In fact, he testified that since he believed Mr. French left at 1:32 p.m., the video actually went back a half hour before the incident could have occurred just to be sure. At the time of hearing, he could not recall whether Mr. French ever reappeared on the surveillance video after the incident. He acknowledged that it was possible that Mr. French left the convenience store and completed his shift at the main store, which was situated adjacent. (Tr., p. 182) (Def. Ex. C) Mr. French, however, did not punch out until 1:32 p.m. (Def. Ex. E, p. 2)

The part of Hy-Vee's investigation which is most suspicious is that the video which was used in the investigation (Def. Ex. B) began approximately 40 seconds after the incident in question occurred and a minute or so after Mr. French apparently left the building. At the start of the video, Ms. Richardson, Ms. Edwards and Mr. Fastje are all congregated at the register. I am having a difficult time understanding why this did not prompt the investigators to go back just a couple of minutes on the raw video. (See Def. Ex. B) While Mr. Roberts testified that it is "the normal course of their job" for employees to congregate behind the register, my viewing of Defendants' Exhibit B suggests this was a fairly rare occurrence at least on February 23, 2019. (Tr., p. 176; see also Def. Exs. A, B, C) Moreover, Mr. French was involved in the early portions of the investigation just a few days after the incident, including watching the video with Mr. Roberts. Mr. French is seen reentering the store less than a minute or so after the incident occurred. It is unexplained why this unusual congregation, coupled with Mr. French's return to the building, did not cause the investigators to rewind a few more minutes. There is no question that Hy-Vee had exclusive control over their own video. Ms. Richardson had no access to it at all other than viewing the portions they provided until they released it to her attorney in April 2020.

The videos depict a fairly normal course of business following the incident. In other words, there is very little on the videos which suggests that Ms. Richardson was just assaulted. She is seen talking to customers and her co-workers, including Ms. Edwards, following the incident up through the end of the footage.

It is also noted that none of the surveillance videos in evidence are time-stamped. (Def. Exs. A through D) Hy-Vee has repeatedly asserted that the precise time that the incident occurred was 12:59:20. The claimant does not dispute this, however, it is not in evidence other than bare assertion by defendants. Mr. Roberts did testify that when he was viewing Defendants' Exhibit B, a time stamp was available to him. (Tr., p. 156) I suspect that the time stamp was available to Hy-Vee when viewing the video and they were unaware that the time did not appear on the copies they produced.

Ms. Richardson testified that, after she reported the incident to Hy-Vee, she reported to work for her next shift, Mr. French took her to the office in the main store to meet with Sheila McGuire. (Tr., p. 32) She testified that Mr. French and Ms. McGuire offered her an opportunity to "mediate" with Ms. Edwards. (Tr., pp. 32-33) For his part, Mr. Roberts testified that he was unaware of any "mediation" being offered to Ms. Richardson, however, he acknowledged that sometimes a mediation-type of approach is used for resolving disputes between co-workers. (Tr., p. 164) In any event, Ms. Richardson testified she declined mediation and testified she felt as though Hy-Vee did not take the matter seriously. (Tr., p. 35) She testified that she told them she did not feel safe working with Ms. Edwards. (Tr., p. 33) After this meeting, Ms. Richardson decided to file a police report and she also began seeking medical treatment. (Tr., pp. 36, 39; see also Def. Ex. I, Richardson Depo, pp. 67-68)

She testified that she then met with Ms. McGuire and Mr. French a second time. (Tr., p. 37) She testified that Ms. McGuire asked her if she really wanted to proceed with a complaint suggesting the ramifications would be serious. (Tr., p. 37) Ms. Richardson testified that she said "yes" she wanted to pursue it. Shortly thereafter, she was called to the office with Mr. Roberts to watch the surveillance video which is Defendants' Exhibit B. (Tr., pp. 37-38) The incident in question, of course, is not captured on Defendants' Exhibit B. The incident occurred approximately 40 seconds before that video begins. In any event, Ms. Richardson testified that she watched the video with them in fast motion and never saw the incident. (Tr., p. 38) Ms. Richardson was frustrated that the video was in fast motion, but it obviously would not have made any difference since the incident was not captured on the video. Mr. Roberts testified that Ms. Richardson was watching the video "hard, and she was confused, and so I asked her, I said - - several times I said, 'Did you see what I see?'" (Tr., p. 160) When the video was over, they all agreed that the incident she described was not seen on the video Hy-Vee showed. She asked if she could leave and they told her yes. (Tr., p. 39) She has never returned to work for Hy-Vee. (Def. Ex. H, p. 17)

As a result of her police report, she eventually met with a detective for the Des Moines Police Department sometime in approximately mid-March 2019. Detective Jeffrey Dawson prepared a Case Summary Report on March 27, 2019, summarizing his investigation. His report summarized that there was no assault on the video provided to him by Ryan Roberts. (Def. Ex. F, p. 8) Interestingly, Detective Dawson documented in the report that the video he watched showed Ms. Richardson reporting for work. "I noted that she entered the store at 1415 hours [2:15 p.m.] approximately, hung up her coat in the manager work station, and then leaves the frame of the video and never

returns.” (Def. Ex. F, p. 8) Mr. Roberts believed that the Des Moines Police were provided with Defendants’ Exhibit B, however, this does not quite match up for several reasons. The first problem is that there is no time stamp on Defendants’ Exhibit B. The second problem is that Defendants’ Exhibit B begins with Ms. Richardson and her co-workers congregated around the cash register. The description in the investigative summary is not congruent with Defendants’ Exhibit B. Based upon this discrepancy it is unknown what video surveillance footage Detective Dawson was provided by Hy-Vee. This discrepancy is entirely unexplained in the record. In any event, Detective Dawson reviewed the video both alone and with Ms. Richardson and documented that no assault was depicted on the video. (Def. Ex. F, p. 8) The law enforcement investigation was closed.

The evidence is not conclusive as to whether this was merely an honest, but poorly conducted investigation or something more nefarious occurred. I tend to believe Mr. Roberts that he was genuinely concerned about Ms. Richardson’s complaint. He specifically denied attempting to “cover up” the incident himself. He did, however, admit that it was a mistake to not go back further on the video. (Tr., pp. 162, 170-171) The end result was that Hy-Vee conducted an investigation wherein they brought in the victim of an unwanted, inappropriate touching by a co-employee, showed her a lengthy video which they told her was within the time frame that she, herself, had provided to them, and then essentially told her that the assault she had actually experienced, never happened. By a preponderance of evidence, I find this investigation was not reasonable. The key fact here – which is not in dispute - is that Hy-Vee had exclusive control over the video evidence.

Ms. Richardson first sought treatment at her primary clinic on February 28, 2019. She testified at hearing that she first began having pain in her neck on February 27, 2019. The following is documented: “29-year-old female, who was assaulted at work. Coworker pulled her ponytail. This happened a few days ago. Police report was filed today. Chief complaint is generalized neck pain.” (Jt. Ex. 3, p. 48) Flexeril was prescribed for a “whiplash-like injury.” (Jt. Ex. 3, p. 49) She was instructed to follow-up if the symptoms did not resolve.

Brent Cullinan, D.C., on March 5, 2019, provided Ms. Richardson with a work excuse effective March 5, 2019. (Jt. Ex. 4, p. 50) He provided several more work excuses through May 2, 2019. (Jt. Ex. 4, pp. 51-57) A neck x-ray was obtained on March 12, 2019. “Reversal of the normal cervical lordosis could indicate pain or spasm.” (Jt. Ex. 5, p. 61) She started physical therapy at Athletico Physical Therapy on March 21, 2019, which continued for a few months. (Jt. Ex. 7)

On March 19, 2019, Ms. Richardson was evaluated at Synergy Clinical Services by Amber Wilson, LISW. “Marissa presented to an individual therapy session with this writer to process feelings she has related to an alleged assault that occurred at work.” (Jt. Ex. 6, p. 63) Ms. Wilson diagnosed adjustment disorder and major depressive disorder, recurrent and recommended regular weekly or bi-weekly therapy sessions. (Jt. Ex. 6, pp. 63, 67)

She returned to Synergy a month later in April 2019, and saw a different provider, Brian Vold, ARNP. (Jt. Ex. 6, p. 68) "She reports stressor of being assaulted at work without 'having any closure'." (Jt. Ex. 6, p. 68) Mr. Vold utilized the same diagnosis and prescribed medications for the condition. (Jt. Ex. 6, p. 69) Ms. Richardson followed up with Mr. Vold in May 2019. It is noted that she just began using the medication he prescribed. At that time, Ms. Richardson was reporting mood instability and anxiety. (Jt. Ex. 6, p. 69)

In June 2019, Ms. Richardson was re-evaluated at her primary clinic with complaints of continued neck pain. At that time, she reported her symptoms were significant. She was having occasional numbness and tingling down her left arm. (Jt. Ex. 2, p. 37) She was referred for orthopedic evaluation and prescribed additional medications to address her worsening symptoms. Later that month, she was evaluated by Thomas Klein, D.O., and Angela Conley, PAC, at Iowa Orthopedics. The following history was documented:

Coworker grabbed my ponytail from behind and forcefully yanked my head back, held it back and continued to yank it even further multiple times. My head was pulled straight back and multiple angles backwards, while I was waiting on a customer. I had to arch my lower back, because of the force. I was holding onto the counter-top to keep myself from falling backwards.

(Jt. Ex. 9, p. 112) Ms. Conley performed a thorough evaluation and performed trigger point injections which provided some relief. (Jt. Ex. 9, pp. 119-120) A cervical MRI was performed in July 2019. (Jt. Ex. 5, p. 62)

In August 2019, Ms. Richardson was evaluated by Todd Harbach, M.D. (Jt. Ex. 9, p. 122) Dr. Harbach reviewed the MRI with her. (Jt. Ex. 9, p. 124) He read the MRI to show "kyphotic deformity of the cervical spine ... disk herniation centrally at C3-C4, C4-C5, worse at C5-C6." (Jt. Ex. 9, p. 124) He recommended an EMG and a referral to a pain specialist. It appears he did not recommend any surgical intervention. In August 2019, Ms. Richardson followed up with Mr. Vold for her anxiety and mood instability as well. (Jt. Ex. 6, p. 72) Mr. Vold adjusted her medications again and recommended she continue with "talk" therapy. (Jt. Ex. 6, p. 73)

Later in August 2019, Ms. Richardson was evaluated by Dan Shamir, M.D., for her neck pain. He noted that she had "congenitally tight canal" and recommended she avoid cervical manipulation. (Jt. Ex. 10, p. 154) In September 2019, an epidural steroid injection was performed. (Jt. Ex. 9, p. 127) She returned to Dr. Harbach in September following her EMG. Dr. Harbach documented the following.

She continues to have tingling and burning in the shoulder, upper and lower arm, and all the way to her fingers. She was assaulted at work and has sustained a cervical whiplash injury. Her injury could be muscular, could be the cervical facet joints, or could also be the shoulder. She has had her first injection in the pain clinic this morning. She will continue with the pain clinic for some time, doing differential injections to figure out what

the source of her pain is and then we can better treat her.

(Jt. Ex. 9, p. 125)

Ms. Richardson continued to follow up with orthopedic and pain management treatment thereafter. She also began seeing Amanda Burgod, LISW at Synergy for therapy in October 2019. (Jt. Ex. 6, p. 74) She utilized a process of EMDR with “bilateral stimulation” to reprocess the trauma of being assaulted at work. (Jt. Ex. 6, p. 75) This type of therapy continued thereafter. Ms. Richardson was evaluated at her annual physical in November 2019. (Jt. Ex. 12, p. 170)

On December 17, 2019, Ms. Richardson was seen by Steve Mitchell, MHC, for evaluation. (Jt. Ex. 13, pp. 171-174) She reported ongoing symptoms of “loss of interest, depressed mood, sense of failure, poor concentration, indecisiveness, guilt weight gain and poor sleep.” (Jt. Ex. 13, p. 171) He noted she struggles with symptoms of depression and some possible PTSD.” (Jt. Ex. 13, p. 172) He set a treatment plan to increase her level of functioning. (Jt. Ex. 13, p. 174)

On January 16, 2020, Ms. Richardson underwent cervical intralaminar epidural injection. (Jt. Ex. 9, p. 134)

On January 20, 2020, Ms. Richardson was evaluated by Deanna Boesen, M.D., at Mercy Behavioral South. The following is documented.

Marissa reports nightmares and flashbacks regarding an assault at work in spring 2019 as well as her fiancé who was physically and emotionally abusive. Their relationship ended in 2012. She does not feel that she is depressed. She is going to court regarding a workers comp claim. She reports trouble sleeping, low energy, difficulty concentrating, anxiety, worry about many different things and irritability. She has a very difficult time getting along with others and getting work done. She takes lorazepam rarely for nightmares and flashbacks. Hydroxyzine helps her anxiety.

(Jt. Ex. 13, p. 175) Dr. Boesen diagnosed post-traumatic stress disorder (PTSD) and recommended BuSpar. (Jt. Ex. 13, p. 178) Thereafter, Ms. Richardson continued to follow up with Ms. Burgod for the EMDR with bilateral processing treatments up through March 2020. (Jt. Ex. 6, p. 84)

On January 27, 2020, Mr. Mitchell followed up with Ms. Richardson. He noted her symptoms which included “intrusive thoughts, emotional numbing, feeling detached, relationship problems, fearfulness, startles easily and sleep disturbance.” He also documented the following:

Marissa stated that she was able to see Dr. Boesen and that she didn't think Marissa was exhibiting the signs and symptoms of schizophrenia. ... [S]he did put her on a medication for her anxiety, namely, Buspar.

Marissa stated that she is is [sic] doing better on the medication and feeling more calm.

(Jt. Ex. 13, p. 179) He diagnosed major depression and PTSD. In February 2020, Dr. Boesen increased the dosage of BuSpar due to the continued anxiety. (Jt. Ex. 13, p. 185)

On February 23, 2020, Ms. Richardson returned to Iowa Ortho. She reported improvement in her symptoms following the epidural injection in January. (Jt. Ex. 9, p. 135) She was still reporting symptoms in the neck and left upper arm that increased with any activity. PA-C Conley performed trigger point injections at this time and referred her for pain psychology evaluation and treatment. (Jt. Ex. 9, p. 137)

Ms. Richardson testified that she has continued to seek and receive medical treatment up through the date of hearing although evidence was locked effective April 21, 2020.

In preparation for hearing, claimant secured a number of expert reports from the treating medical providers.

In March 2020, her chiropractor, Brent Cullinan, D.C., prepared a report indicating that from a physical standpoint, Ms. Richardson suffered from cervical and thoracic spine segmental dysfunction with pain, muscle spasms/splinting and decreased range of motion. He opined this condition is causally connected to her February 23, 2019, work injury. (Jt. Ex. 4, p. 60) He noted that she was not released to return to work due to her symptoms from this condition.

In March 2020, her therapist, Amanda Burgod also prepared a report in relation to her mental condition. (Jt. Ex. 6, p. 90) Ms. Burgod opined the following:

1. What is your diagnosis for Marissa Richardson?

Adjustment Disorder/Unspecified Trauma Disorder  
Major Depressive Disorder

2. Is the above diagnosis causally related to her 02/23/19 assault injury at Hy-Vee?

The adjustment disorder & trauma are directly related to her assault. Marissa has struggled with depression in the past, however, symptoms had been successfully managed prior to the assault.

3. What is your opinion on Marissa Richardson's ability to work since March 08, 2019 to the present?

I began seeing Marissa on 10/15/19. During the time I have been seeing her I believe it would be difficult for Marissa to maintain fulltime employment. She struggles on a daily basis with increased irritability &

trauma responses. She is very reactive as a result of the assault & relationships with co-workers & supervisors would be very difficult for her to navigate at this time.

(Jt. Ex 6, p. 90)

In addition, Ms. Richardson sought an independent medical examination with Sunil Bansal, M.D. (Jt. Ex. 14) He diagnosed an aggravation of cervical spondylosis with moderate central C5-C-6 disc protrusion. He placed her at maximum medical improvement for this condition as of March 11, 2020 and assigned permanent functional impairment rating of 5 percent of the whole body. (Jt. Ex. 14, p. 198) He opined that "having her hair pulled multiple times with her head jerking back is consistent with the aggravation of cervical spondylosis." (Jt. Ex. 14, p. 196) He recommended permanent lifting restrictions as well.

Having reviewed the entire file and listened to all of the live testimony, I find that Ms. Richardson was significantly predisposed to suffering a mental injury at the time she began working for Hy-Vee. She had been on Social Security Disability for approximately 6 years prior to beginning to work for Hy-Vee for serious mental health symptoms. It is not clear whether she had a true PTSD diagnosis prior to her work injury or whether she just had PTSD symptoms, however, I am convinced that her prior history of trauma and abuse predisposed her to mental injury and disability.

The incident which occurred on February 19, 2019, precipitated a catastrophic course of events for Ms. Richardson. While the incident itself was not as objectively severe as Ms. Richardson described it in some instances, I am convinced that she felt this incident was as severe as she described it. Stated another way I find it is likely that had the same event occurred involving a worker without Ms. Richardson's medical history, the outcome would not have been as severe.

The medical evidence in the record supports a finding that the February 23, 2019, work injury lit up and materially aggravated her underlying mental health condition. This finding is substantially based upon the opinions of Amanda Burgod, her treating therapist, in addition to the treatment records of her mental health providers including Dr. Boesen. As of March 2020, the appropriate diagnoses were: (1) adjustment disorder/unspecified trauma disorder and (2) major depressive disorder. Ms. Burgod opined that these conditions were causally related to the work injury and rendered her unable to work. (Cl. Ex. 6, p. 90) I find Ms. Burgod's opinions are consistent with the treatment records of the other mental health providers. The claimant's medical expert is not rebutted in this record. Although the opinions of Dr. Bansal and Dr. Cullinan are also unrebutted, I find they are less convincing in relation to claimant's physical injuries for reasons described in the Conclusions of Law below.

#### CONCLUSIONS OF LAW

At the time of hearing, the parties stipulated that Ms. Richardson had sustained an injury which arose out of and in the course of her employment on February 23, 2019.

The defendants had reversed their earlier position that such an injury had never occurred after fully reviewing their own video footage of the work area on the date in question.

The primary issue in this case is whether the injury is a cause of temporary disability during a period of recovery. The claimant is not seeking permanency benefits at the time of hearing.

The claimant has the burden of proving by a preponderance of the evidence that the injury is a proximate cause of the disability on which the claim is based. A cause is proximate if it is a substantial factor in bringing about the result; it need not be the only cause. A preponderance of the evidence exists when the causal connection is probable rather than merely possible. George A. Hormel & Co. v. Jordan, 569 N.W.2d 148 (Iowa 1997); Frye v. Smith-Doyle Contractors, 569 N.W.2d 154 (Iowa App. 1997); Sanchez v. Blue Bird Midwest, 554 N.W.2d 283 (Iowa App. 1996).

The question of causal connection is essentially within the domain of expert testimony. The expert medical evidence must be considered with all other evidence introduced bearing on the causal connection between the injury and the disability. Supportive lay testimony may be used to buttress the expert testimony and, therefore, is also relevant and material to the causation question. The weight to be given to an expert opinion is determined by the finder of fact and may be affected by the accuracy of the facts the expert relied upon as well as other surrounding circumstances. The expert opinion may be accepted or rejected, in whole or in part. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); IBP, Inc. v. Harpole, 621 N.W.2d 410 (Iowa 2001); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995). Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417 (Iowa 1994). Unrebutted expert medical testimony cannot be summarily rejected. Poula v. Siouxland Wall & Ceiling, Inc., 516 N.W.2d 910 (Iowa App. 1994).

It has long been the law of Iowa that Iowa employers take an employee subject to any active or dormant health problems and must exercise care to avoid injury to both the weak and infirm and the strong and healthy. Hanson v. Dickinson, 188 Iowa 728, 176 N.W. 823 (1920). A material aggravation, worsening, lighting up or acceleration of any prior condition has been viewed as a compensable event ever since initial enactment of our workers' compensation statutes. Ziegler v. United States Gypsum Co., 252 Iowa 613; 106 N.W.2d 591 (1961). While a claimant must show that the injury proximately caused the medical condition sought to be compensable, it is well established in Iowa that a cause is "proximate" when it is a substantial factor in bringing about that condition. It need not be the only causative factor, or even the primary or the most substantial cause to be compensable under the Iowa workers' compensation system. Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417 (Iowa 1994); Blacksmith v. All-American, Inc., 290 N.W.2d 348 (Iowa 1980).

When an injury occurs in the course of employment, the employer is liable for all of the consequences that "naturally and proximately flow from the accident." Iowa Workers' Compensation Law and Practice, Lawyer and Higgs, section 4-4. The

Supreme Court has stated the following. "If the employee suffers a compensable injury and thereafter suffers further disability which is the proximate result of the original injury, such further disability is compensable." Oldham v. Scofield & Welch, 222 Iowa 764, 767, 266 N.W. 480, 481 (1936). The Oldham Court opined that a claimant must present sufficient evidence that the disability was naturally and proximately related to the original work injury.

An employer may be liable for a sequela of an original work injury if the employee sustained a compensable injury and later sustained further disability that is a proximate result of the original injury. Mallory v. Mercy Medical Center, File No. 5029834 (Appeal February 15, 2012). A sequela can be an after effect or secondary effect of an injury. Lewis v. Dee Zee Manufacturing, File No. 797154, (Arb. September 11, 1989). One form of sequela of a work injury is an adverse effect from medical treatment for the original injury. Where treatment rendered with respect to a compensable injury itself causes further injury, the subsequent injury is also compensable. Young v. United Fire & Casualty Co., 256 Iowa 813, 129 N.W.2d 75 (1964). For example, the death of a claimant who died on the operating table during surgery for a work injury may be compensable, since the injury caused the need for surgery. Breeden v. Firestone Tire, File No. 966020, (Arb. February 27, 1992). As another example, a claimant who fell as a result of dizziness from medication he was taking to treat a work injury is to be compensated for both the original injury and the resulting fall as a sequela of the first injury. Hamilton v. Combined Ins. Co. of America, File Nos. 854465, 877068, (Arb. February 21, 1991).

A sequela can also take the form of a secondary effect on the claimant's body stemming from the original injury. For example, where a leg injury causing shortening of the leg in turn alters the claimant's gait, causing mechanical back pain, the back condition can be found to be a sequela of the leg injury. Fridlington v. 3M, File No. 788758, (Arb. November 15, 1991).

A sequela can also take the form of a later injury that is caused by the original injury. For example, where a leg injury leads to the claimant's knee giving out in a grocery store, the resulting fall is compensable as a sequela of the leg injury. Taylor v. Oscar Mayer & Co., Ill Iowa Ind. Comm. Rep. 257, 258 (1982).

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

As set forth in the Findings of Fact, I find that Ms. Richardson's mental health condition was lit up or otherwise substantially aggravated by the stipulated work injury of February 23, 2019. The greater weight of evidence further supports a finding that the

claimant is temporarily and totally disabled from the date she was taken off work up through April 20, 2020, and continuing. This is primarily based upon the treatment records of her mental health providers and the opinion of her treating therapist.

The defendants argue that Ms. Richardson provided a false, exaggerated history of the injury to the medical providers. As such, they contend that the claimant's medical experts must be rejected. Much of the defendants' argument focuses on the alleged physical disability. For example, Ms. Richardson described to Dr. Bansal that her "head was pulled back multiple times very violently." (Jt. Ex. 14, p. 193) Based upon this history, he concluded that she had sustained permanent physical disability. It appears Dr. Bansal never reviewed the video evidence.

I agree with the defendants that the claimant's description of the incident of injury does not line up precisely with the event depicted on the video. I find that this is most likely a result of Ms. Richardson's preexisting mental condition, including previous history of trauma and symptoms of PTSD. While this does not concern me as it relates the medical causation of her mental disability, it does make me wonder whether the manifestation her physical symptoms are actually resulting from her mental condition. Because of this, I am unable to find that she has met her burden of proof as it relates to her physical condition. It is certainly possible that her physical diagnosis is a result of the work injury, however, at this time, I cannot find it is probable.

The defendants' argument, however, fails as it relates to the mental health disability. The defendants argue vehemently that Ms. Richardson's preexisting mental condition makes it more difficult for her to prove that the work injury lit up or aggravated her preexisting condition. For example defendants argue the following:

40. Claimant has a long-standing history of psychiatric conditions, including PTSD. Although claimant denied any prior PTSD in her hearing testimony, the record is replete with evidence of this prior diagnosis. On November 3, 2017, Amy Lamberti, PA-C of UnityPoint Health – Family Medicine Southglen, took a history that Claimant was seeing a psychiatrist on a regular basis for a history of severe anxiety and PTSD. [internal citations omitted]. (Jt. Ex. 2, pp. 5-14)

(Defendants' Post Hearing Brief, p. 13)

I would note at the outset, that while the February 23, 2019, injury cannot be fairly characterized as a violent assault, it was in fact, an unwanted touching and inappropriate behavior by a co-worker. I find it was not insignificant. As I described in the Findings of Fact, little context is provided for this incident at hearing. The only real evidence of the incident was the claimant's testimony regarding her memory and perceptions of the incident and the video. In summary, Ms. Edwards called Ms. Richardson to the cash register for no apparent reason (just seconds after their supervisor left the building), immediately placed her hands on her, tugged her hair, pulling her head back in the process, and then forcibly moved her out of her way. This all occurred in a matter of seconds. While this does not appear to be as violent or

forceful as remembered by Ms. Richardson, it is undoubtedly confusing, unsettling and strange. It would be difficult for even the healthiest person to process this strange interaction. Ms. Richardson testified that she felt verbally bullied by Ms. Edwards prior to this incident. Therefore, I find it unsurprising that with Ms. Richardson's history of trauma and abuse, as well as anxiety and PTSD or PTSD symptoms, that this incident would trigger a significant trauma response. A careful reading of the treatment notes from the mental health providers, including the notes of Dr. Boesen, supports this finding and provides further support for Ms. Burgod's mental health opinions.

This would likely be a different case if I did not find Ms. Richardson to be a credible witness. I listened to her live and I reviewed her hearing testimony, as well as her deposition testimony and interrogatory answers. I am convinced by a preponderance of evidence that Ms. Richardson was honest at hearing. I believe her. I believe that she was honest with this agency about her perceptions of the incident and how it impacted her. This is based upon the consistency of her answers as well as her demeanor, which was unsophisticated, flat and reserved.

The next issue is penalty.

Claimant also seeks an award of penalty benefits pursuant to Iowa Code section 86.13. Iowa Code section 86.13(4) provides:

a. If a denial, a delay in payment, or a termination of benefits occurs without reasonable or probable cause or excuse known to the employer or insurance carrier at the time of the denial, delay in payment, or termination of benefits, the workers' compensation commissioner shall award benefits in addition to those benefits payable under this chapter, or chapter 85, 85A, or 85B, up to fifty percent of the amount of benefits that were denied, delayed, or terminated without reasonable or probable cause or excuse.

b. The workers' compensation commissioner shall award benefits under this subsection if the commissioner finds both of the following facts:

(1) The employee has demonstrated a denial, delay in payment, or termination in benefits.

(2) The employer has failed to prove a reasonable or probable cause or excuse for the denial, delay in payment, or termination of benefits.

c. In order to be considered a reasonable or probable cause or excuse under paragraph "b", an excuse shall satisfy all of the following criteria:

(1) The excuse was preceded by a reasonable investigation and evaluation by the employer or insurance carrier into whether benefits were owed to the employee.

(2) The results of the reasonable investigation and evaluation were the actual basis upon which the employer or insurance carrier contemporaneously relied to deny, delay payment of, or terminate benefits.

(3) The employer or insurance carrier contemporaneously conveyed the basis for the denial, delay in payment, or termination of benefits to the employee at the time of the denial, delay, or termination of benefits.

For the reasons set forth in the Findings of Fact, I find that claimant is entitled to a 50 percent penalty for all temporary disability benefits paid from the date claimant was taken off work up through April 21, 2020, the date evidence was locked.

Prior to hearing, Hy-Vee paid temporary disability benefits from February 24, 2019, through November 5, 2019. (Cl. Ex. 5) These payments were undoubtedly "late." The question is whether the delay was unreasonable.

Hy-Vee contends the delay occurred because Ms. Richardson provided incorrect information during the investigation. Specifically, she provided an incorrect timeframe for the investigation, leading Hy-Vee officials to incorrectly look at incorrect video footage. I find that Ms. Richardson repeatedly told Hy-Vee two things about the timeframe: (1) she did not know exactly when the incident occurred, and (2) she believed it occurred after her supervisor left for the day and before her co-worker Ms. Edwards left for the day. In fact, to be clear, she initially told Hy-Vee that she thought her supervisor left for the day at around 1:00 p.m. A review of the video shows that he left the building approximately one minute before 1:00 p.m. A competent review of the video evidence by the employer should have resulted in finding the incident on video. Hy-Vee has repeatedly blamed Ms. Richardson for their investigation errors when in fact, Hy-Vee was in exclusive control of the video evidence.

Mr. Roberts was Hy-Vee's only witness. He testified that he believed Ms. Richardson is an honest person and he was concerned about her report. I understand this to mean he believed she was being truthful that the incident occurred. He testified that, with the benefit of hindsight, he now understands that Hy-Vee made mistakes in the investigation. (Tr., pp. 170-71) Of course a mistake does not automatically equate to being unreasonable. While I tend to believe Mr. Roberts that he personally took the allegation seriously and he was not engaged in any "cover up", I simply cannot find Hy-Vee's investigation to be reasonable. The defendants were in complete control of the videos in question and the claimant repeatedly told them that she did not know when the assault occurred. I find that the investigation was unreasonable and a penalty is mandatory. In this case, the consequences of the unreasonable investigation have been significant. I find that a 50 percent award of penalty is appropriate from the date the claimant stopped working through April 21, 2020.

ORDER

THEREFORE, IT IS ORDERED:

All benefits shall be paid at the rate of two hundred eight and 78/100 dollars (\$208.78) per week.

Defendants shall pay the claimant healing period benefits from the date of injury through the date of hearing, and ongoing until such time as the claimant reaches maximum medical improvement.

Defendants shall pay accrued weekly benefits in a lump sum.


Defendants shall be given a credit for the weeks previously paid.

Defendants shall pay a penalty of fifty (50) percent of all temporary disability benefits paid from the date claimant went off work up through April 21, 2020.

Defendants shall file subsequent reports of injury as required by this agency pursuant to rule 876 IAC 3.1(2).

Costs are taxed to defendants.

Signed and filed this 10<sup>th</sup> day of June, 2022.

  
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JOSEPH L. WALSH  
DEPUTY WORKERS'  
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Randall Schueller (via WCES)

M. Anne McAtee (via WCES)

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