

demeanor of witnesses is not a substantial factor in either case requiring the matter to be heard again. Greer, Hahn, and Great American settled File Number 5068057 on March 13, 2020.

Joint Exhibits ("JE") 1 through 4 and Exhibits 1 through 19, A through G, and AA, were admitted at the September 13, 2019 hearing. The parties submitted a hearing report, listing stipulations and issues to be decided. Hahn and Travelers waived all other affirmative defenses.

STIPULATIONS

1. An employer-employee existed between Hahn and Greer at the time of the alleged injury.
2. Greer sustained an injury on September 27, 2018, which arose out of and in the course of her employment with Hahn.
3. The alleged injury is a cause of temporary disability during a period of recovery.
4. If the alleged injury is found to be a cause of permanent disability, the disability is an industrial disability.
5. At the time of the alleged injury Greer's gross earnings were \$896.00 per week, she was single and entitled to two exemptions, and the parties believe the weekly rate is \$577.34.
6. Costs have been paid.

ISSUES

1. Is the alleged injury a cause of permanent disability?
2. If the alleged injury is found to be a cause of permanent disability, what is the extent of disability?
3. If the alleged injury is found to be a cause of permanent disability, what is the commencement date for permanency?
4. Is Greer entitled to intermittent temporary benefits from December 11, 2018 through June 21, 2019?
5. Is Greer entitled to recover the cost of the independent medical examination?

6. Should penalty benefits be awarded to Greer for nonpayment of temporary and permanent benefits?

7. Should costs be assessed against either party?

FINDINGS OF FACT

Greer is single and lives in Davenport, Iowa. (Transcript, pages 13-14) Greer attended high school in Davenport, dropping out in 1998 when she was in the eleventh grade. (Tr., p. 14) In 2011 Greer earned a high school diploma. (Tr., p. 15) Greer later attended and completed a front office dental management program through Ashworth College. (Tr., p. 15) Greer holds certificates for stand-up and sit-down forklifts. (Tr., p. 16) At the time of the hearing Greer was thirty-eight. (Tr., p. 14)

Greer worked as a housekeeping supervisor for Isle Casino Hotel from June 2009 through February 2011, earning \$12.50 per hour, and for the Hotel Blackhawk from February 2011 through August 2015, earning \$11.50 per hour. (Exhibit 4, p. 16; Tr., pp. 16-17) Greer was responsible for hiring, training and supervising housekeepers, disciplining employees, completing paperwork, and cleaning. (Tr., pp. 17-18) After leaving the Hotel Blackhawk, Greer worked for Manpower cleaning at John Deere. (Tr., p. 19)

From August 2015 through September 2016, Greer was a stay-at-home mother. (Ex. 4, p. 16)

In 2016 Greer obtained a Class A commercial driver's license ("CDL") after completing a course at Hawkeye Community College. (Tr., pp. 16, 20) In September 2016, CR England hired Greer as a no touch over-the-road truck driver where she was paid \$.23 per mile. (Ex. 4, p. 16; Tr., pp. 20-21) The position required Greer to travel nearly the entire month. (Ex. 4, p. 16) Greer quit on December 7, 2016, to spend more time with her family. (Ex. 4, p. 16)

In May 2017, Hahn hired Greer to drive a concrete mixer truck and paid her \$15.00 per hour. (Ex. 4, p. 16; Tr., pp. 22-23) Greer underwent a pre-employment physical for Hahn, which she passed. (Exs. 7, p. 26; 8; Tr., p. 23) At the time of the hearing Greer continued to work for Hahn. (Tr., p. 22) The position Greer holds with Hahn is the highest paying position Greer has held.

On September 27, 2018, Greer obtained and delivered two loads of concrete for Hahn. (Tr., pp. 23-24) Greer returned for her third load and she had to change to a larger truck that held more concrete. (Tr., p. 24) After dumping the load of concrete she cleaned off the removable chute extensions attached to the concrete chute on her truck and she went to place the moveable chute extensions back on her truck. (Tr., p. 25) Greer testified,

[t]he first one, I put the first one in there. Once I put the first one in there, I felt the pinch in my back at that time. Me not – Me not even paying no mind, I just kept continuing on, just getting the rest of my chutes off.

I get to my second chute. The guy that was in front of me that was pouring before me, he was standing there, and then he – he asked me about, I mean, was I having trouble with my chutes.

I told him yes, but I told – but when he was asking me that, I already had the second one in there; and then when I went down, that's when I felt another pain in my – you know, in my – in my lower back. It was in my lower back and then, like, down my left – on my left side or whatever, and – but it was mostly on my lower back at that time, but – and it was pinching like needles or something was pinching

(Tr., p. 27) Greer reported the pain felt like someone was standing behind her and grabbing both of her sides and squeezing. (Tr., p. 29) Greer continued with the last chute, rinsed down her truck, and went back to the plant. (Tr., p. 29) About fifteen or twenty minutes after she returned to the plant Greer reported her injury to the plant batch manager. (Tr., p. 29)

Hahn sent Greer to Ora Orthopedics Urgent Care Clinic for treatment the day of her injury. (JE 1, p. 4; Tr., pp. 31-32) Jessica McKearney, ARNP, examined Greer. (JE 1, p. 4) Greer was complaining of back pain she described as sharp, stabbing, and radiating up and down her back at times, but denied having weakness in her legs, numbness, and tingling. (JE 1, p. 1) Greer reported her symptoms were exacerbated by stairs and twisting, and improved with sitting. (JE 1, p. 4) McKearney noted Greer's gait and coordination were normal, and she ordered x-rays, which she documented showed no acute fractures, dislocations, or other abnormalities. (JE 1, pp. 3-4) McKearney assessed Greer with a lumbar strain, prescribed meloxicam and cyclobenzaprine, ordered physical therapy, directed Greer to rest with ice and heat therapy, and released Greer to return to work with a restriction of no lifting over five pounds until her next appointment. (JE 1, pp. 3-5)

On October 9, 2018, Greer attended an appointment with Cheryl Benson, PA-C, with Genesis Occupational Health, complaining of back pain. (JE 3, p. 40) Benson documented Greer reported on the date of the accident she was lifting three chutes back on her truck and when she was lifting the third chute she felt a "big pinch" in her lower back and next to her shoulder blade. (JE 3, p. 40) Benson examined Greer, noted her exam and history were consistent with a thoracic and lumbar strain with intermittent neuritis symptoms in the left lower extremity, diagnosed Greer with sprains of the ligaments of the thoracic and lumbar spine, discontinued her cyclobenzaprine, prescribed baclofen, reduced her meloxicam, ordered physical therapy, and imposed restrictions of no lifting over ten pounds, no commercial vehicle operation, and rare bending and twisting. (JE 3, pp. 40-42)

During her July 2019 deposition, Greer reported after the September 2018 work injury she felt her “[r]ight shoulder, left – down my spine. My left and my right was – was really achy. I had – I have a knot in – in my middle back, and my lower back was really – was hurting really bad also.” (Ex. A, p. 10) Greer explained the knot was in the middle of both sides of her back and her lower back also hurt. (Ex. A, p. 10)

The adjuster for Hahn and Travelers sent a note to Genesis Occupational Health on October 11, 2018, asking whether Greer’s condition was related to the alleged injury and, if so, what treatment had been recommended. (JE 3, p. 43) Benson wrote Greer’s condition was consistent with a lifting injury. (JE 3, p. 43)

During a physical therapy appointment on October 15, 2018, Greer reported her lower back pain had improved and she complained more of mid/upper back and arm pain. (JE 2, p. 9) On October 17, 2018, Greer attended physical therapy again reporting her lower back pain was less than it used to be and reporting her chief complaint was the pain in her upper back and neck. (JE 2, p. 11) Greer attended a follow-up physical therapy appointment on October 22, 2018, reporting her lower back pain was better, her arms were sore and she felt weak, and her thoracic and lower neck pain had been slow to improve since starting therapy. (JE 2, pp. 13-14)

On October 24, 2018, Greer attended a follow-up appointment with Benson, complaining of pain into her left arm, and noting she had not filled the baclofen prescription. (JE 3, pp. 44-46) Benson examined Greer, noted her exam and history were consistent with a thoracic and lumbar sprain, documented Greer’s low back pain had improved, but she was experiencing ongoing significant myofascial pain, prescribed prednisone, continued her physical therapy, and continued her restrictions. (JE 3, pp. 45-47)

During a physical therapy session on October 25, 2018, the therapist documented “LBP is doing totally better,” and “mid back pain is still pretty sore,” but she believed it was improving. (JE 2, p. 16) On October 29, 2018, Greer attended a physical therapy appointment reporting her middle and upper back felt like it was “on fire” and reporting while her low back pain is present, “the pain is not bad enough to need therapy,” but she could not function due to her upper back pain. (JE 2, p. 20)

On October 30, 2018, Greer returned to Benson. (JE 3, p. 48) Benson noted Greer reported her low back pain had improved, she was experiencing pain in her mid and upper thoracic region, and the physical therapy and prednisone provided no benefit. (JE 3, p. 48) Benson continued Greer’s baclofen, ordered magnetic resonance imaging, stopped the physical therapy, continued her restrictions, and recommended a follow-up appointment with Rick Garrels, M.D., an occupational medicine physician. (JE 3, pp. 49-51)

On November 6, 2018, Greer attended an appointment with Dr. Garrels, complaining of sharp, shooting, and burning neck pain and dull, achy, sharp, shooting, and burning upper back pain, and bilateral arm pain. (JE 3, p. 52) During his first appointment with Greer, Dr. Garrels opined “[h]er pain behavior is out of proportion to

the clinical findings,” diagnosed Greer with a sprain of the ligaments of the thoracic spine and sprain of the ligaments of the lumbar spine, recommended magnetic resonance imaging, and continued her restrictions. (JE 3, pp. 53-54)

Greer underwent magnetic resonance imaging on November 15, 2018. (JE 4, p. 94) The reviewing radiologist listed an impression of no acute processes, and minimal facet arthropathy on the right. (JE 3, p. 94)

Greer returned to Dr. Garrels on November 19, 2018, reporting her condition had improved since her last visit, but she was continuing to experience sharp, stiff, and burning pain in her left and right sides, and shooting pain in her back that comes “out of nowhere.” (JE 3, p. 57) Dr. Garrels examined Greer, noted he had reviewed the thoracic magnetic resonance imaging, which was normal, recommended physical therapy, prescribed metaxalone, and imposed restrictions of no lifting over twenty pounds, pushing and pulling up to forty pounds, rare above the shoulder reaching, and no commercial vehicle operation. (JE 3, p. 58)

On December 3, 2018, Greer attended an appointment with Dr. Garrels. (JE 3, p. 60) Dr. Garrels documented Greer reported her upper back condition had improved since her previous visit and complained of burning and stabbing pain in the left and right sides of her back and stiffness. (JE 3, p. 60) Dr. Garrels examined Greer, documented he believed her sprain should have improved by that time, continued her physical therapy twice per week, ordered no commercial vehicle driving for the remainder of the week, and recommended Greer return to regular duty effective December 10, 2018. (JE 3, pp. 61, 63)

Greer returned to her normal duties as a ready-mix cement truck driver. (Tr., p. 45) Hahn paid Greer the same rate of pay and offered her the same number of hours she received before the September 2018 work injury. (Tr., pp. 63, 68-69, 77) Greer testified she missed work due to her pain and agreed she worked less hours because she called in sick and took paid time off some days. (Tr., pp. 78-79)

On December 17, 2018, Greer attended a physical therapy appointment, complaining of a burning sensation in the left side of her back, and reporting she had pain “all over her mid and low back.” (JE 2, p. 34) That same date Greer returned to Dr. Garrels, reporting her condition was unchanged and complaining of dull, achy, and burning back pain. (JE 3, p. 64) Greer told Dr. Garrels she was moving around more at work and standing a lot, which hurt her back. (JE 3, p. 64) Dr. Garrels ordered one additional week of physical therapy, documented he assured Greer the soreness she was experiencing was typical, and released Greer to full duty. (JE 3, pp. 65, 67)

During a physical therapy appointment on December 26, 2018, Greer reported she was experiencing pain in her low back, she felt a knot in her left upper scapular region, and when standing at work her back was on fire and she was experiencing left knee pain. (JE 2, p. 37)

On January 4, 2019, Greer attended a follow-up appointment with Dr. Garrels reporting her back pain was unchanged, which she described as deep, dull, achy, and burning. (JE 3, p. 68) Greer relayed she was engaging in a lot of standing at work and noted prolonged standing and sitting hurt her back. (JE 3, p. 68) Dr. Garrels opined Greer was malingering, found she had reached maximum medical improvement, discontinued her physical therapy, and recommended she be released to full duty. (JE 3, pp. 69, 71)

Greer returned to Dr. Garrels on January 10, 2019, reporting her condition was worse from her previous visit after starting her regular job, which required prolonged sitting, noting she had difficulty getting her left leg into her truck due to pain, and took the next two days off due to the pain. (JE 3, p. 72) Dr. Garrels documented Greer “had new complaints today with the low back and right leg that have never been part of the symptom complex of her original complaints.” (JE 3, p. 73) Dr. Garrels examined Greer, noted her exam was normal, and released her to full duty. (JE 3, pp. 73, 75)

Greer did not seek additional medical treatment until her second work injury on March 19, 2019. Greer testified that after she returned to work, in February and March leading up to the second work injury she had been feeling pretty good and she was able to perform her job without any issues. (Tr., pp. 63-64)

Greer testified on March 19, 2019, as she was getting out of her truck,

I get down to the second step. I go to put my right leg – my right foot down onto the ground. Once I put my right foot down onto the ground, my foot slips underneath my – underneath the last step.

It slips. I'm trying to hold onto my door, but I couldn't catch my door. That's when my – that's when my left foot came down, and I just flew straight back. I mean, I flew right back on top of my shoulder onto the ice, which I did not know there was ice out on the ground at that time.

(Tr., p. 36) Greer relayed that when she fell her glasses and hard hat flew across the parking lot. (Tr., pp. 36-37) After the fall Greer returned to work and reported she started feeling strange, like she was spinning. (Tr., pp. 37-41) Hahn arranged medical treatment for Greer. (Tr., p. 41)

Benson examined Greer, imposed restrictions of no commercial driving, rare and no sustained bending or twisting of the head, neck, and torso, and no lifting over ten pounds, through March 20, 2019. (JE 3, pp. 76-77)

Greer testified that after the March 2019 work injury her problems started again, and she had difficulties with pain in her right arm and right shoulder that interfered with her ability to lift her grandchildren. (Tr., p. 64) Greer agreed on cross-examination the symptoms in her right arm and right shoulder developed after the March 2019 work injury. (Tr., p. 64)

On March 26, 2019, Greer returned to Benson, complaining of increased myofascial pain. (JE 3, p. 78) Benson prescribed physical therapy, ordered Benson to ice and stretch daily, and imposed restrictions of no commercial driving, occasional and no sustained bending or twisting of the head, neck, torso, no overhead lifting, and no lifting over fifteen pounds. (JE 3, p. 78)

On April 10, 2019, Dr. Garrels examined Greer for the second injury and issued an impairment rating for the first injury. (JE 3, p. 79; Ex. AA) With respect to the March 2019 work injury, Dr. Garrels diagnosed Greer with an acute sprain/strain of the cervical and thoracic spine. (JE 3, p. 79) Dr. Garrels noted Greer was responding well to physical therapy, continued her physical therapy, and imposed restrictions of no lifting over twenty pounds, to limit pushing and pulling to forty pounds, no commercial vehicle driving, and occasional bending and twisting with the back. (JE 3, pp. 80, 82) Dr. Garrels continued Greer's restrictions and physical therapy through April 14, 2019, and released Greer to return to full duty on April 15, 2019. (JE 3, pp. 84, 86)

Dr. Garrels issued an impairment rating for the September 2018 work injury using the Guides to the Evaluation of Permanent Impairment (AMA Press, 5th Ed. 2001) ("AMA Guides"). (Ex. AA) Dr. Garrels diagnosed Greer with a sprain of the ligaments of the thoracic spine, sprain of the ligaments of the lumbar spine, and malingering. (Ex. AA, p. 1) Dr. Garrels opined Greer reached maximum medical improvement on January 4, 2019, and using Tables 15-3 and 15-4, assigned Greer a zero percent permanent impairment rating for her lumbar and thoracic spine. (Ex. AA, p. 1)

On June 21, 2019, Sunil Bansal, M.D., an occupational medicine physician conducted an independent medical examination for Greer for the September 2018 and March 2019 injuries and issued his report on August 9, 2019. (Ex. 1, p. 1) Dr. Bansal reviewed Greer's medical records and examined her. (Ex. 1) Dr. opined the September 2018 work injury is consistent with Greer's current thoracic back condition, writing,

[i]t is my medical opinion that she aggravated her underlying thoracic facet arthropathy from pulling back on the metal chutes on September 27, 2018.

The force from the pull caused the synovial facet joints to fill with fluid and distend, resulting in pain from stretching the joint capsule. Capsular irritation may also result in reflex spasm of the erector spinae, multifidus, and other paraspinal muscles. This is most likely what is occurring with Ms. Greer, as noted by the severe tightness that she experiences in her back.

(Ex. 1, p. 10) Dr. Bansal opined the March 2019 injury only caused a temporary exacerbation of the thoracic back pain she was experiencing before the second injury. (Ex. 1, p. 10)

Dr. Bansal found Greer reached maximum medical improvement the date of his examination, June 21, 2019. (Ex. 1, p. 9) Dr. Bansal opined under Table 15-4, Greer met the criteria for a DRE Category II impairment, noting she has spasms, loss of range

of motion and continued pain and he assigned a five percent whole person impairment. (Ex. 1, p. 9) Dr. Bansal recommended thoracic facet injections and/or radiofrequency ablation for maintenance, and assigned permanent restrictions of no lifting over twenty-five pounds, no frequent bending or twisting, and to avoid heavy equipment driving, concluding based on his findings Greer could not return to her former work. (Ex. 1, pp. 10-11) Dr. Bansal reviewed additional medical records after he issued his opinion and opined the records did not change his opinion. (Ex. 2, p. 12)

Greer returned to work without restrictions in June 2019 after the March 2019 work injury. (Tr., p. 44) Greer's position job description requires the ability to lift up chutes weighting up to fifty pounds. (Tr., p. 52) Greer testified a week before the hearing Hahn assigned her to a mixer truck, which she could not tolerate due to back and arm pain, and Hahn assigned her to the side dump truck. (Tr., pp. 52-53)

At the time of the hearing Greer was operating the side dump truck for Hahn. (Tr., pp. 47-48) Greer does not have to get out of the truck to move the load. (Tr., p. 48) The side dump truck does not have any chutes. (Tr., p. 48) Greer pushes a button that causes the back of the truck to tilt sideways to dump the load. (Tr., p. 48) Greer continues to wash her truck after making certain loads to avoid cross-contamination of loads. (Tr., p. 49)

During her July 29, 2019 deposition, Greer reported she still develops knots in her back

every now and again. Some days I have, like, it feels like I'm getting poked with something. But it's not in one spot.

Is it consistent? No. It just comes and goes sometimes. The knot, it comes and goes sometimes, depends on what I am doing. It's letting me know maybe I'm doing too much or I'm moving the wrong way or whatever.

This shoulder right here on my right – my right shoulder, this one hurts me the worst. And this is the hand I use mostly, I write with or whatever, but I do more with my left hand that I normally wouldn't do because I'd use my right hand with.

(Ex. A, p. 14) The attorney for Hahn and Travelers inquired whether these symptoms developed after the March 2019 work injury and Greer replied, "[t]hat is correct." (Ex. A, p. 14) The attorney further inquired, "[a]nd you weren't experiencing those after you returned to work after the first one; right" and Greer responded, "[n]o, I wasn't." (Ex. A, p. 14)

When questioned about the two injuries by the attorney for Hahn and Great American, Greer reported the first injury from September 2018 was "[d]own my – down my spine and on my right side, my left side, between my shoulder blades, it hurt. That's where I – that's where all my pain and stuff is at up here on my neck area and my lower

back.” (Ex. A, p. 14) Greer relayed the second injury from March 2019 “[t]hat’s on my shoulders up here and then, you know, from my neck to my shoulder right here.” (Ex. A, p. 14) Greer denied having any other injuries. (Ex. A, p. 14)

Greer testified her lower back hurts, she has a knot in the middle of her back, and “[e]very now and again it will be pinching, pinching sometimes, but this arm, my right arm, still hurts. I get pain. I get a lot of pain in this arm. I rarely try to use it, but do I use it at work, yes, but I don’t put my – I do not put all my pressure on this side. I’ve been using my left hand a lot since I’m right-handed.” (Tr., p. 50) Greer relayed since her work injury she cannot pick up her four-year-old daughter or hold her grandchildren, and her back and arm have affected her intimacy. (Tr., p. 51) Greer reported she can fold laundry and cut up items for cooking, but her fiancé does the cooking and yard work. (Tr., p. 51) Greer testified she has trouble sleeping because she cannot find a comfortable position. (Tr., p. 52)

Greer reported before the hearing she applied for a housekeeping supervisor position. (Tr., p. 55) Greer testified she was offered the position, but she did not take it because the business wanted her to do housekeeping, which she cannot tolerate anymore because “[i]t’s too much.” (Tr., pp. 55-56)

CONCLUSIONS OF LAW

I. Applicable Law

This case involves several issues, including nature and extent of disability, temporary benefits, recovery of the cost of an independent medical examination and costs, penalty benefits, and interest under Iowa Code sections 85.33, 85.34, 85.39, 86.13, 86.40, and 535.3. In 2017, the Iowa Legislature enacted changes to Iowa Code chapters 85, 86, and 535 effecting workers’ compensation cases. 2017 Iowa Acts chapter 23 (amending Iowa Code sections 85.16, 85.18, 85.23, 85.26, 85.33, 85.34, 85.39, 85.45, 85.70, 85.71, 86.26, 86.39, 86.42, and 535.3). Under 2017 Iowa Acts chapter 23 section 24, the changes to Iowa Code sections 85.18, 85.23, 85.26, 85.33, 85.34, 85.39, 85.71, 86.26, 86.39, and 86.42 apply to injuries occurring on or after the effective date of the Act. This case involves an injury occurring after July 1, 2017, therefore, the provisions of the new statute involving nature and extent of disability, temporary benefits, and the recovery of the cost of an independent medical examination under Iowa Code sections 85.33, 85.34 and 85.39 apply to this case.

The calculation of interest is governed by Sanchez v. Tyson, File No. 5052008 (Ruling on Defendant’s Motion to Enlarge, Reconsider, or Amend Appeal Decision Re: Interest Rate Issue), which holds interest for all weekly benefits payable and not paid when due which accrued before July 1, 2017, is payable at the rate of ten 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. Again, given this case concerns an injury occurring after July 1, 2017, the new provision on interest applies to this case.

II. 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 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).

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, 569 N.W.2d at 156. 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).

The parties agree Greer sustained a work injury. Greer avers she has sustained a permanent impairment caused by the work injury. Hahn and Travelers reject her assertion, contending she has only sustained a temporary impairment.

Two physicians have provided expert opinions in this case, Dr. Garrels, a treating occupational medicine physician, and Dr. Bansal, an occupational medicine physician who conducted an independent medical examination for Greer. Dr. Garrels diagnosed Greer with sprains of the ligaments of the thoracic and lumbar spine and malingering. (Ex. AA, p. 1) Dr. Garrels opined Greer reached maximum medical improvement for the September 2018 work injury on January 4, 2019, and using Tables 15-3 and 15-4, assigned Greer a zero percent permanent impairment rating for her lumbar and thoracic spine. (Ex. AA, p. 1) Dr. Bansal found the September 2018 work injury aggravated Greer's underlying thoracic facet arthropathy, causing a permanent impairment, and further opined the March 2019 work injury caused a temporary exacerbation of the thoracic back pain Greer was experiencing before the second work injury. (Ex. 1) Dr. Bansal opined under Table 15-4, Greer met the criteria for a DRE Category II impairment, noting she has spasms, loss of range of motion, and continued pain, assigned a five percent whole person impairment for her thoracic spine condition, and opined she reached maximum medical improvement on June 21, 2019. (Ex. 1, p. 9) Dr. Bansal's finding of thoracic facet arthropathy is consistent with the November 2018 magnetic imaging results. (JE 3, p. 94)

Hahn and Travelers aver Dr. Garrels's opinion is more persuasive than Dr. Bansal's opinion, contending Greer did not sustain a permanent impairment as a result of the September 2018 work injury. Hahn and Travelers contend Greer's deposition testimony supports she did not sustain a permanent impairment because she improved with treatment prior to returning to work in December 2018, she returned to her normal job, and she did not report ongoing symptoms until the March 2019 work injury.

Greer was deposed on July 29, 2019, less than two months before the arbitration hearing. During her deposition, the attorney for Hahn and Travelers inquired, and Greer, responded as follows concerning her recovery after the September 2018 injury:

Q. Did the rest help you while you were off work?

A. Yes. It just – it did a lot for me. Since I was hurt the way I was and then it was a lot of stuff that I couldn't do, you know, while I was still off too so —

Q. So you are off work for a period of time and resting, I presume?

A. Yes.

Q. And doing your physical therapy?

A. Yes.

Q. And you noticed improvement within that time frame?

A. Yes.

Q. All right. So eventually after a few months, it's my understanding that you went back to work; is that correct?

A. Yes.

Q. And did you go back to doing the exact same job you were doing prior to the injury?

A. Yes.

Q. And then was there any change in your pay?

A. No change in my pay.

Q. And then my understanding is you had another incident in March of 2019 that caused you some sort of pain or injury?

A. Yes.

* * * *

Q. Now, prior to the fall, so before you fall, you've been back at work for a while, you said; right?

A. Yes.

Q. Now, were you feeling pretty good before this fall in March?

A. Yes.

Q. Okay. And were you able to do your job up to that point without any issues?

A. Yes.

(Ex. A, pp. 10, 12) This testimony supports Greer improved with treatment following the September 2018 injury, which is supported by her medical records. This testimony also

supports when Greer returned to work she was able to perform her normal job duties without any issues. Greer was not receiving any accommodations to perform her job at Hahn and she did not have any work restrictions from December 10, 2018 through the date of the March 2019 work injury. Greer was not asked whether she was asymptomatic from the time she returned to work until the March 2019 work injury.

During the arbitration hearing Greer admitted she was performing her regular job after she returned to work in December 2018, without restrictions, and without any issues, but she missed some work because she was hurting. (Tr., pp. 45-46, 63-64) Greer agreed on cross-examination it was not until the second injury in March 2019 that her problems started up again. (Tr., p. 64) Greer relayed the problem with the "knots" was the same following the second injury, but worse. (Tr., p. 64)

Counsel for Hahn and Travelers further inquired about Greer's condition during her deposition, and Greer, responded, as follows:

Q. How do you feel as you sit here today generally? Do you have ongoing issues —

A. Yeah.

Q. -- as you sit here today?

A. Yes.

Q. Tell me about those.

A. I still hurt. I still get the knots every now and again. Some days I have, like, it feels like I'm getting poked with something. But it's not in one spot.

Is it consistent? No. It just comes and goes sometimes. The knot, it comes and goes sometimes, depends on what I'm doing. It's letting me know maybe I'm doing too much or I'm moving the wrong way or whatever.

This shoulder right here on my right – my right shoulder, this one hurts me the worst. And this is the hand I use mostly, I write with or whatever, but I do more with my left hand that I normally wouldn't do because I'd use my right hand with.

Q. And these are things that developed after you fell on the black ice?

A. That is correct.

Q. And you weren't experiencing those after you returned to work after the first one; right?

A. No, I wasn't.

(Ex. A, p. 14)

During an appointment on December 3, 2018, Dr. Garrels found Greer could return to regular duty without restrictions on December 10, 2018. (JE 3, pp. 61, 63) Greer testified she did not experience the knots and shoulder symptoms after she returned to work in December 2018 following the September 2018 injury until her second work injury in March 2019. Dr. Garrels' records discuss ongoing pain, but do not record a complaint about "knots" after Greer returned to work in December 2018. (JE 3, pp. 64-75) His records discuss dull, achy, throbbing, and burning pain. (JE 3, p. 64, 68, 72)

Greer's physical therapy records from December 13, 2018, document she was complaining of "tightness" or a "balling up" of her back muscles along the left scapula. (JE 2, pp. 29, 31) During an appointment on December 26, 2018 Greer reported she was experiencing low back pain and "a knot in the left scapular region," and felt like her back was "on fire" when standing at work. (JE 2, p. 37) No additional medical records document a knot or knots following her return to work until the March 2019 injury.

Greer pleaded an injury to her back in the petition. The petition does not indicate which portion of the "back" was involved. Greer did not plead a shoulder injury. No physician has assigned Greer a permanent impairment rating for a shoulder or cervical condition, or causally connected any shoulder complaint to a thoracic condition. Dr. Garrels diagnosed Greer with sprains of the ligaments of the thoracic and lumbar spine. Dr. Bansal found the September 2018 work injury aggravated Greer's underlying thoracic facet arthropathy. (Ex. 1)

I find Dr. Bansal's opinion to be the most persuasive, as supported by the evidence. Dr. Garrels first examined Greer in November 2018. During his first appointment he questioned Greer's complaints, finding, "[h]er pain behavior is out of proportion to the clinical findings." (JE 3, pp. 53-54) He then saw her two more times, on November 19, 2018, and December 3, 2018, and released her to return to work without restrictions on December 10, 2018, ultimately diagnosing Greer with malingering. (JE 3, pp. 57, 61, 63, 69, 71) Contrary to the findings of Dr. Garrels, several providers, including Greer's physical therapist and Benson, documented ongoing problems she was experiencing in her thoracic spine. No other treating provider questioned the veracity of her complaints.

Greer, bears the burden of providing she sustained a permanent impairment caused by the September 2018 work injury. Greer is not an articulate witness. Her testimony is garbled and confusing at times. Inarticulate workers sustain work-related permanent impairments. The evidence supports Greer continued to complain of symptoms in her thoracic spine during physical therapy after she returned to work. After sustaining the second work injury, she again complained of thoracic spine problems, in addition to other problems. Considering all of the evidence, I find the September 2018

work injury aggravated Greer's preexisting thoracic spine condition, consistent with Dr. Bansal's opinion.

III. Extent of Disability

Greer returned to work at Hahn following her work injury. At the time of the hearing she continued to work for Hahn, where she was offered the same number of hours and hourly wage she earned at the time of her work injury. The parties agree if Greer has sustained a permanent impairment, the disability is an industrial disability.

Under the new statute, compensation for an industrial disability

shall be paid during the number of weeks in relation to five hundred weeks as the reduction in the employee's earning capacity caused by the disability bears in relation to the earning capacity that the employee possessed when the injury occurred. A determination of the reduction in the employee's earning capacity caused by the disability shall take into account the permanent partial disability of the employee and the number of years in the future it was reasonably anticipated that the employee would work at the time of the injury. If an employee who is eligible for compensation under this paragraph returns to work or is offered work for which the employee receives or would receive the same or greater salary, wages, or earnings than the employee received at the time of the injury, the employee shall be compensated based only upon the employee's functional impairment resulting from the injury, and not in relation to the employee's earning capacity. Notwithstanding section 85.26, subsection 2, if an employee who is eligible for compensation under this paragraph returns to work with the same employer and is compensated based only upon the employee's functional impairment resulting from the injury as provided in this paragraph and is terminated from employment by that employer, the award or agreement for settlement for benefits under this chapter shall be reviewed upon commencement of reopening proceedings by the employee for a determination of any reduction in the employee's earning capacity caused by the employee's permanent partial disability.

Id. § 85.34(2)(v) (2018). At the time of the hearing Greer had returned to work for Hahn earning the same wages she earned at the time of the injury. Under express terms the statute, Greer is only entitled to compensation based on her functional impairment, and not in relation to her earning capacity. Id. I found Dr. Bansal's opinion on permanency to be the most persuasive. Dr. Bansal assigned Greer a five percent permanent impairment. Greer is entitled to twenty-five weeks of permanent partial disability benefits at the stipulated weekly rate of \$577.34 per week.

Under Iowa Code section 85.34(2), compensation for permanent partial disability benefits begins "when it is medically indicated that maximum medical improvement from the injury has been reached and that the extent of loss or percentage of permanent impairment can be determined" using the AMA Guides. Under the statute, the

commencement date for permanent partial disability benefits is June 21, 2019, the date Dr. Bansal found Greer had reached maximum medical improvement and when the percentage of permanent impairment could be determined.

IV. Temporary Benefits

Greer seeks temporary partial disability benefits for the weeks of December 14, 2018, January 4, 2019, January 7, 2019, January 18, 2019, January 24, 2019, February 8, 2019, February 12, 2019, February 22, 2019, March 2, 2019, March 8, 2019, March 14, 2019, March 30, 2019, April 6, 2019, April 13, 2019, May 4, 2019, May 18, 2019, May 25, 2019, June 1, 2019, June 15, 2019, and June 22, 2019, totaling \$5,579.24. (Exs. 13; 15) Hahn and Travelers aver Greer is not entitled to additional temporary partial disability benefits.

Iowa Code section 85.33 (2018) governs temporary disability benefits, and Iowa Code section 85.34 governs healing period and permanent disability benefits. Dunlap v. Action Warehouse, 824 N.W.2d 545, 556 (Iowa Ct. App. 2012).

An employee has a temporary partial disability when because of the employee's medical condition, "it is medically indicated that the employee is not capable of returning to employment substantially similar to the employment in which the employee was engaged at the time of injury, but is able to perform other work consistent with the employee's disability." Iowa Code § 85.33(2). Temporary partial disability benefits are payable, in lieu of temporary total disability and healing period benefits, due to the reduction in earning ability as a result of the employee's temporary partial disability, and "shall not be considered benefits payable to an employee, upon termination of temporary partial or temporary total disability, the healing period, or permanent partial disability, because the employee is not able to secure work paying weekly earnings equal to the employee's weekly earnings at the time of injury." Id.

As a general rule, "temporary total disability compensation benefits and healing-period compensation benefits refer to the same condition." Clark v. Vicorp Rest., Inc., 696 N.W.2d 596, 604 (Iowa 2005). The purpose of temporary total disability benefits and healing period benefits is to "partially reimburse the employee for the loss of earnings" during a period of recovery from the condition. Id. The appropriate type of benefit depends on whether or not the employee has a permanent disability. Dunlap, 824 N.W.2d at 556.

Temporary total, temporary partial, and healing period benefits can be interrupted or intermittent. Teel v. McCord, 394 N.W.2d 405 (Iowa 1986); Stourac-Floyd v. MDF Endeavors, File No. 5053328 (App. Sept. 11, 2018); Stevens v. Eastern Star Masonic Home, File No. 5049776 (App. Dec. Mar. 14, 2018).

In this case I found Greer sustained a permanent disability, therefore, any temporary disability benefits she is entitled to are healing period benefits. Greer testified at hearing she missed work after she returned to work in December 2018, due to the pain she was continuing to experience. Greer produced her wage records

supporting her claim. I find Greer is entitled to intermittent healing period benefits for the weeks ending December 14, 2018, January 4, 2019, January 7, 2019, January 18, 2019, January 24, 2019, February 8, 2019, February 12, 2019, February 22, 2019, March 2, 2019, March 8, 2019, March 14, 2019, March 30, 2019, April 6, 2019, April 13, 2019, May 4, 2019, May 18, 2019, May 25, 2019, June 1, 2019, June 15, 2019, and June 22, 2019, as supported by Exhibits 13 and 15.

V. Penalty

Greer seeks to recover penalty benefits for the failure to pay temporary partial and permanent partial disability benefits. Hahn and Travelers aver no penalty benefits should be awarded.

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 eleventh 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.

As analyzed above, I found Greer sustained a permanent disability caused by the September 2018 work injury. Hahn and Travelers aver they relied on Dr. Garrels’ opinion in refusing to pay Greer temporary and permanent partial disability payments. There is no evidence Hahn and Travelers conveyed to Greer of their decision, even after receiving Dr. Bansal’s opinion. The record supports Greer worked substantially fewer hours intermittently, due to her pain caused by the work injury after she returned to work from December 2018 through June 2019. No evidence was produced concerning the penalty history of Hahn or Travelers in this case. I find Greer is entitled to \$2,000.00 in penalty benefits to deter Hahn, Travelers, and other employers and insurance carriers from engaging in similar conduct in the future.

VI. Independent Medical Examination

Greer seeks to recover the \$2,864.00 cost of Dr. Bansal’s independent medical examination, which addresses both injury dates. (Ex. 18) Dr. Bansal’s bill is itemized. (Ex. 18) Dr. Bansal charged \$579.00 for the examination and \$2,285.00 for the report.

Iowa Code section 85.39(2) (2018), provides:

2. 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. . . . An employer is only liable to reimburse an employee for the cost of an examination conducted pursuant to this subsection if the injury for which the employee is being examined is determined to be compensable under this chapter or chapter 85A or 85B. An employer is

not liable for the cost of such an examination if the injury for which the employee is being examined is determined not to be a compensable injury. A determination of the reasonableness of a fee for an examination made pursuant to this subsection, shall be based on the typical fee charged by a medical provider to perform an impairment rating in the local area where the examination is conducted.

Dr. Garrels did not find Greer sustained a permanent impairment as a result of the September 2018 work injury. Under the statute, Greer is not entitled to recover the cost of Dr. Bansal's independent medical examination. Given Greer cannot recover the cost of the independent medical examination under Iowa Code section 85.39, it is necessary to determine whether she can recover the cost of Dr. Bansal's report as a cost in addition to other costs.

VII. Costs

Greer seeks to recover the \$100.00 filing fee, the \$6.74 fee for service, the \$133.00 cost of her deposition, and the \$2,285.00 cost of Dr. Bansal's report. (Ex. 19)

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." And rule 876 Iowa Administrative Code 4.33(6), provides

[c]osts 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.

Using my discretion, I find Greer is entitled to recover the \$100.00 filing fee, the \$6.74 fee for service, and \$133.00 cost of her deposition. Dr. Bansal's bill is itemized. Under the administrative rule, Greer is entitled to recover the cost of his report. His report addresses both work injuries. Greer settled her claim for the March 2019 work injury after the hearing in this case. I find Greer is entitled to recover fifty percent of the cost of Dr. Bansal's report for this case, or \$1,145.50.

ORDER

IT IS THEREFORE ORDERED, THAT:

Defendants shall pay the claimant twenty-five (25) weeks of permanent partial disability benefits at the stipulated weekly rate of five hundred seventy-seven and 34/100 dollars (\$577.34), commencing on June 21, 2019.

Defendants shall pay the claimant intermittent healing period benefits for December 1, 2018 through June 21, 2019 for the weeks ending December 14, 2018, January 4, 2019, January 7, 2019, January 18, 2019, January 24, 2019, February 8, 2019, February 12, 2019, February 22, 2019, March 2, 2019, March 8, 2019, March 14, 2019, March 30, 2019, April 6, 2019, April 13, 2019, May 4, 2019, May 18, 2019, May 25, 2019, June 1, 2019, June 15, 2019, and June 22, 2019, as supported by Exhibits 13 and 15.

Defendants are entitled to a credit for all benefits previously paid.

Defendants shall pay accrued weekly benefits in a lump sum together with interest at an annual rate equal to the one-year treasury constant maturity published by the federal reserve in the most recent H15 report settled as of the date of injury, plus two percent. 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).

Defendants shall pay the claimant two thousand and 00/100 dollars (\$2,000.00) in penalty benefits.

Defendants shall reimburse the claimant one hundred and 00/100 dollars (\$100.00) for the filing fee, six and 74/100 dollars (\$6.74) for the cost of service, one hundred thirty-three and 00/100 dollars (\$133.00) for the deposition, and one thousand one hundred forty-five and 50/100 dollars (\$1,145.50) for Dr. Bansal's report.

Defendants shall file subsequent reports of injury as required by this agency pursuant to rules 876 IAC 3.1(2) and 876 IAC 11.7.

Signed and filed this 9th day of April, 2020.



HEATHER L. PALMER
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Erin M. Tucker (via WCES)

James W. Bryan (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.