BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

KEYATTA SHAW, Claimant, vs. AMERICAN INCOME LIFE INSURANCE COMPANY, Employer, and ZURICH AMERICAN INSURANCE COMPANY, Insurance Carrier, Defendants.	File No. 5061293 ARBITRATION DECISION Head Note Nos.: 1100, 1108, 1803, 2001, 2002, 3001

STATEMENT OF THE CASE

Claimant, Keyatta Shaw, filed a petition in arbitration seeking workers' compensation benefits from American Income Life Insurance Company, employer, and Zurich American Insurance Company, insurance carrier, both as defendants, as a result of an alleged injury sustained on January 11, 2018. This matter came on for hearing before Deputy Workers' Compensation Commissioner Erica J. Fitch. The record in this case consists of Joint Exhibits 1 through 22, Claimant's Exhibits 1 through 5, Defendants' Exhibits A through F, and the testimony of the claimant and Eric Cochran.

ISSUES

The parties submitted the following issues for determination:

1. Whether an employer-employee relationship existed at the time of the alleged injury;

2. Whether claimant sustained an injury on January 11, 2018 which arose out of and in the course of employment;

3. Whether the alleged injury is a cause of permanent disability;

4. The extent of any industrial disability;

5. The proper rate of compensation;

6. Whether defendants are responsible for claimed medical expenses;

7. Whether claimant is entitled to reimbursement of an independent medical examination; and

8. Whether claimant is entitled to an award of penalty benefits and, if so, how much.

The parties filed a hearing report at the commencement of the arbitration hearing. On the hearing report, the parties entered into various stipulations. All of those stipulations were accepted and are hereby incorporated into this arbitration decision and no factual or legal issues relative to the parties' stipulations will be raised or discussed in this decision. The parties are now bound by their stipulations.

FINDINGS OF FACT

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

Claimant was 42 years of age at the time of hearing. She resides in Des Moines, Iowa. (Claimant's testimony) Claimant attended high school through the ninth grade. She earned her GED in 1999. Claimant's early work history included housekeeping, server, retail, hotel customer service, assistant manager at fast food restaurant, and intake/registration coordinator at medical facilities. (Claimant's testimony; CE3, pages 51-53) Claimant worked as a hemodialysis technician from 2007 to 2011, earning her hemodialysis technician certification in 2009. (CE3, p. 53) Thereafter, claimant worked as an assistant community manager and customer service representative at a financial institution. Claimant returned to work as a hemodialysis technician in April 2014 at Fresenius Medical Care. (CE3, p. 53) From 2013 to 2016, claimant pursued nursing education at Des Moines Area Community College, but did not complete the program. She earned her advanced certified nursing aide certification in 2016. (Claimant's testimony; CE3, p. 51) Her work history also includes seasonal tax preparation. (Claimant's testimony; CE3, p. 53)

Claimant's medical history is positive for back pain and fibromyalgia.

In December 2007, claimant was seen at Broadlawns Medical Center (Broadlawns) emergency department with complaints of severe left-sided back pain after she caught her son during a fall the prior day. She was diagnosed with back pain and muscle spasms, and treated with Toradol and physical therapy. (JE1, pp. 1-2) In January 2010, she was seen at Broadlawns for a flare of fibromyalgia after being diagnosed six months prior. She sought to establish care with a primary care provider and obtained a pain medication refill. (JE2, pp. 3-4) In June 2011, claimant presented to Broadlawns with moderate low back pain after cleaning a shed two days prior. She was treated with Toradol and Valium. (JE3, pp. 5-6)

From 2013 through 2015, the medical records in evidence indicate claimant received more frequent care of back and fibromyalgia complaints. In April 2013, claimant was seen at Mercy South Family Practice (Mercy South) by Nancy Thurtell, ARNP, in follow up of a motor vehicle accident. She was the seat-belted driver at a

stoplight, struck from behind at a speed of 45 to 50 miles per hour. Ms. Thurtell assessed mid-back pain and treated claimant with opioid pain medication and prednisone. (JE4, pp. 7-8) In July 2013, claimant saw Ms. Thurtell at Broadlawns. She complained of sudden onset moderate bilateral lower back pain and was treated with medication. (JE4, pp. 9-11) In October 2013, claimant was seen at Mercy South with complaints of severe acute pain throughout her trunk region. The provider assessed fibromyalgia and chronic pain. She was treated with Toradol injection, nerve pain medication and nonsteroidal anti-inflammatories. (JE5, pp. 12-14) Approximately one week later, claimant returned to Mercy South with an acute flare of low back pain after lifting heavy boxes. She was treated with Toradol injection and hydrocodone/acetaminophen. (JE5, pp. 15-16) In December 2013, claimant sought emergent care for lumbar pain after a slip and fall on ice. She was treated with muscle relaxers. (JE6, pp. 17-19)

In February 2014, claimant presented to Mercy South and requested medication for low back pain with radiation down legs. The provider declined to add additional medication due to concern of medication interaction, as claimant was already taking amitriptyline, Cymbalta, and meloxicam for fibromyalgia, and deferred to an upcoming appointment with rheumatologist. (JE7, pp. 20-21) Shortly thereafter, claimant presented to Broadlawns complaining of low back pain with radiation down her legs. Lab studies and lumbar spine x-rays were undergone; she was treated with hydrocodone/acetaminophen, gabapentin, and a course of physical therapy. (JE8, pp. 22-27) In May 2014, claimant presented to Mercy South in follow up of recent hospitalization for gastritis and hiatal hernia. At that time, she also complained of back pain and fibromyalgia. The provider noted that while hospitalized, claimant underwent diagnostic studies which showed evidence of osteoarthritis and some malformation at T10 level. Claimant was referred for a pain management consult relative to back pain complaints. (JE9, pp. 28-30)

As a result of the referral, on July 16, 2014, claimant presented to Broadlawns Pain Center and was examined by Mohammad Iqbal, M.D. Claimant complained of bilateral low back pain into the left hip and buttock. Dr. Iqbal noted a history of left hip pain with left leg radicular pain for prior 12 months, with numbness and tingling in the S1 nerve distribution. He opined an MRI showed mild levoscoliosis and early degenerative changes at L5-S1 level. Examination revealed a positive straight leg raise test on the left side. Dr. Iqbal performed an epidural steroid injection (ESI) at the left S1 level. (JE10, pp. 31-35) In November 2014, claimant returned to Dr. Iqbal and reported a recent return of pain. Dr. Iqbal performed a repeat ESI at left S1. (JE10, pp. 36-41) In January 2015, claimant informed her physician at Broadlawns that her chronic back pain was severe enough to return to Dr. Iqbal for repeat injection. (JE11, pp. 56, 59) As a result, claimant returned to Dr. Iqbal on March 3, 2015 and underwent a repeat ESI at left S1. (JE10, pp. 42-47) One week later, claimant was seen in the emergency department for a fibromyalgia flare; she was treated with oxycodone and Valium. (JE12, pp. 62-64) In May 2015, claimant was again seen in the emergency department for fibromyalgia and back pain; she was treated with oxycodone and Lyrica. (JE14, pp. 69-73)

At evidentiary hearing, claimant admitted to experiencing preexisting back symptoms. Claimant testified her back could hurt after certain movements of her back; she also reported muscle spasms. Despite ongoing pain complaints, claimant testified she last received medical attention for these complaints in May 2015. Claimant testified she was diagnosed with fibromyalgia in approximately 2007 or 2008. During fibromyalgia flares, claimant reported experiencing most symptoms in her hips, knees, shoulders, and hands. Claimant denied receiving ongoing medical treatment for fibromyalgia and testified her last such care took place a "few years" prior to hearing. (Claimant's testimony)

In addition to her back pain and fibromyalgia complaints, claimant received treatment for a work-related right ankle injury on April 6, 2015. On September 2, 2016, claimant underwent an independent medical examination (IME) with board certified occupational medicine physician, Sunil Bansal, M.D. Dr. Bansal evaluated complaints relative to the April 6, 2015 work-related injury to her right ankle, as well as worsening back pain. (JE15, pp. 79-80) Dr. Bansal ultimately opined claimant suffered work-related posterior tibial tendinitis and peroneal tendinitis with traction injury to the superficial peroneal nerve. He found insufficient basis to relate claimant's worsened back complaints to the work injury. (JE15, pp. 83-84) Dr. Bansal opined claimant suffered permanent impairment of 20 percent lower extremity; he opined claimant did not demonstrate ratable impairment to her back. (JE15, pp. 84-85) Dr. Bansal recommended permanent restrictions of: no lifting greater than 10 pounds occasionally or 5 pounds frequently with the left arm; avoidance of multiple stairs, steps, or ladders; and avoid work on uneven ground or ladders. (JE15, p. 86)

Claimant initiated a workers' compensation claim regarding her April 6, 2015 work injury[1]. By an arbitration decision dated December 8, 2016, a deputy workers' compensation commissioner found claimant to be a credible witness and further found her to be honest and sincere. (DEF, pp. 43, 48) The deputy ultimately opined claimant suffered a 10 percent loss of her right leg as a result of the ankle injury. He also found claimant suffered a 20 percent loss of earning capacity and was entitled to benefits from the Second Injury Fund of Iowa, as a combined result of the right leg injury and a prior left arm injury. (DEF, pp. 45, 48)

Claimant pursued a career selling life insurance. In order to work as a life insurance agent, claimant was required to pass a test and earn her insurance license from the State of Iowa. (Claimant's testimony)

On November 27, 2017, claimant signed defendant-employer's agent contract, with accompanying special notice acknowledgement. The agent contract specifically states an agent is not an employee, but rather, is an independent contractor. The contract indicates an agent may choose the time and manner in which services were performed, did not have fixed work hours, and would not be eligible for unemployment

[1] The agency assigned File No. 5053578 to claimant's claim for benefits related to the April 6, 2015 work injury.

or workers' compensation benefits. (DEA, p. 3) The contract further states an agent is responsible for all expenses, specifically including transportation, any place of business, advertisements, form letters, letterheads, circulars, or retained assistants. However, the contract states experienced agents would be available to assist and at times, there may be optional training and/or sales meetings. (DEA, p. 1) An agent's pay was identified as commission-based, with the potential for advanced commissions which must be repaid. (DEA, pp. 1-2) Claimant and Eric Cochran, identified as state general agent, signed the contract on November 27, 2017. (DEA, p. 4)

The accompanying special notice acknowledgement was also signed by claimant on November 27, 2017. (DEA, p. 6) The acknowledgement specifically states an agent would not be considered an employee, but would be considered an independent contractor. It states the agent would control the manner and means of work, set the work schedule, and choose the manner in which work was performed. Further, the agent would be responsible for providing equipment, materials, and supplies. The acknowledgement indicates that from time to time, training and/or sales meetings may be made available to agents by defendant-employer. In terms of compensation, the acknowledgment states an agent would be paid on a commission-only basis and would not be eligible for unemployment or workers' compensation benefits. (DEA, p. 5)

Eric Cochran testified at evidentiary hearing. Mr. Cochran has since retired, but previously served as the Iowa state director/state general agent for defendant-employer. In that role, Mr. Cochran operated five offices throughout Iowa. His duties involved hiring, training, and growing the base of agents in the state. He was considered an independent contractor in his role. Mr. Cochran testified a prospective agent is interviewed and offered a standing contract which goes into effect after the individual passes the state insurance licensure test. (Mr. Cochran's testimony)

In early January 2018, claimant obtained her Iowa life insurance license. (CE3, p. 51) At that time, claimant began a training program for defendant-employer. Claimant testified Sarah Acker acted as her "supervisor." Claimant testified she and Ms. Acker would meet at the office and go see clients in their homes. (Claimant's testimony) Claimant testified Ms. Acker advised claimant she would earn $600.00 per week during a 90-day training period. Claimant understood that after this 90-day period, she would be an independent contractor and her earnings would be based on commission. (Claimant's testimony; CE5, pp. 69-70)

Mr. Cochran testified after an agent passes their insurance test, they are assigned a mentor and provided a suggested schedule. If the suggested schedule is followed, the agent can be trained within approximately two weeks. The suggested schedule can be modified based on the availability of the new agent. Mr. Cochran testified most agents utilized the free office space he provided through the Cochran Agency, the entity he utilized in his contract relationship with defendant-employer. Similarly, he provided materials and supplies for agents to use, free of charge to the agent. The only supply he did not provide was a laptop computer; he testified a laptop is not required to perform agent duties. (Mr. Cochran's testimony)

Mr. Cochran testified the role of the mentor is to teach new agents to be proficient in various insurance products and to ensure the new agents use proper language so as to not misrepresent or mislead customers regarding products. Defendant-employer provided a previously-prepared presentation for agents to use via their laptops. In the event a customer is misled, Mr. Cochran indicated a customer may file a claim with the Iowa Insurance Commissioner and Mr. Cochran would be liable for the misstep of any agent contracted to him. If such an event were to transpire, Mr. Cochran possessed the ability to terminate the agent contract or institute some form of contract probation. (Mr. Cochran's testimony)

Mr. Cochran indicated the training program included a period of observation of the mentor by the agent, of the agent by the mentor, and concluded after a "release meeting" with Mr. Cochran. The release meeting consisted of a conversation between himself, the mentor, and the agent, to ensure the agent is ready to act on their own. It is following this meeting that the agent is "released from their mentor" and may choose their work hours and begin setting appointments. While Mr. Cochran cannot prohibit an agent from selling insurance without passing the "release meeting," he can withhold the customer leads he possesses. Mr. Cochran testified the Cochran Agency never paid wages or commissions to agents; any compensation came from defendant-employer. Mr. Cochran testified claimant never passed her "release meeting" during her engagement with defendant-employer. Mr. Cochran admitted he was not privy to the details of conversations between claimant and Ms. Acker involving any assigned work schedule, duties, or compensation. Mr. Cochran believed Ms. Acker served as an independent contractor and was not an employee of defendant-employer. (Mr. Cochran's testimony)

On January 11, 2018, claimant and another agent-in-training were riding in Ms. Acker's car on the way to a client's home when they were involved in a motor vehicle accident. Claimant testified Ms. Acker told claimant to meet her at the office, so that claimant could observe client meetings that afternoon. Claimant testified she had observed Ms. Acker give presentations to clients on more than one occasion prior to January 11, 2018. Claimant testified she did not believe she had a choice regarding attending Ms. Acker's appointments and if she wanted her job, she needed to mimic Ms. Acker's hours and work schedule. Claimant testified she did not believe she had the option to decline to attend these appointments or perform work in some manner other than that directed by Ms. Acker. At the time of the motor vehicle accident, claimant testified Ms. Acker was driving her own vehicle and claimant was seated in the backseat when the vehicle was struck from behind. They were en route to a customer's home to complete updates relative to her insurance coverage. After the impact, claimant experienced pain in her neck, face, shoulders, back, hips, and pelvis. Additionally, claimant testified she experienced nausea, memory loss, and headaches. (Claimant's testimony)

Police responded to the scene of the accident. An officer's report denotes Ms. Acker was the driver of the vehicle and following the accident, she complained of head and neck pain. The officer identified Kyla Smith as the front seat passenger and claimant as a back seat passenger, with both individuals complaining of head and neck

pain after the impact. (CE4, pp. 59, 61) The Des Moines Fire Department also responded to the accident scene. An incident report noted claimant was found belted in the backseat of the car and the car that struck the vehicle reported driving 5 miles per hour at the time of impact. The report noted claimant complained of pain and was transported to the hospital via ambulance. (JE16, pp. 99-100)

EMS transported claimant to the emergency department at Mercy Medical Center, where claimant was evaluated by Stephanie Turcotte, D.O. Dr. Turcotte's records denote a history of minor motor vehicle accident, where claimant was a belted backseat passenger in a vehicle rear-ended at low speed. Claimant complained of neck, back, and jaw pain, as well as bilateral ringing in her ears. (JE17, p. 101) Claimant underwent normal CT scans of the brain and cervical spine. Dr. Turcotte found no neurologic deficits on exam and opined the CT scans were unremarkable, without evidence of injury or fracture. (JE17, p. 105) Dr. Turcotte assessed cervical and thoracic strains and discharged claimant with prescriptions for tramadol and cyclobenzaprine. Claimant was excused from work and advised to follow up at Broadlawns. (JE17, p. 106)

Claimant presented to Broadlawns on January 16, 2018 in follow up of the motor vehicle accident. Claimant reported she was unrestrained in the back seat of a vehicle which was rear-ended at "neighborhood speed." Claimant reported continued pain in her neck, as well as increasing lower back and bilateral hip pain. (JE18, p. 109) Following examination and x-rays, Marc Baumert, PA-C, assessed acute bilateral low back pain without sciatica and bilateral hip pain. Claimant received a Toradol injection and was advised to continue use of the previously prescribed muscle relaxer and tramadol. Claimant was issued a work excuse and a prescription for physical therapy. (JE18, pp. 113-114)

On January 19, 2018, claimant returned to Broadlawns for evaluation by primary care provider, Rebecca Bollin, D.O. Claimant reported experiencing low back pain since the motor vehicle accident, with movement triggering pain. The pain was described as localized in the low back, radiating to the right leg. (JE19, p. 119) Dr. Bollin assessed back pain. (JE19, p. 123) Claimant received a repeat Toradol injection; Dr. Bollin issued a prescription for gabapentin. (JE19, p. 122)

On January 22, 2018, claimant underwent a physical therapy evaluation at Broadlawns with William Fellows, PT. Mr. Fellows noted a primary complaint of sharp, shooting low back pain, with secondary pain into the bilateral hips and lower cervical spine. Claimant reported a history of lower back pain, as well as prior injections with Dr. Iqbal which resulted in relief. Mr. Fellows assessed left low back pain, poor core strength, and mechanical low back pain. He recommended therapy sessions 1 to 2 times per week, for 4 weeks. (JE18, pp. 115-117)

Claimant filed an Original Notice and Petition in arbitration on February 1, 2018, alleging she sustained an injury while performing employment duties on January 11, 2018. Defendants filed an answer on February 26, 2018, thereby asserting defendant-

employer was not claimant's employer and further, that claimant was acting as an independent contractor at the time of the alleged injury. (Agency File)

On February 2, 2018, claimant returned to Broadlawns and was evaluated by Tara Brockman, D.O. Claimant reported increased low back pain following a motor vehicle accident. Claimant reported she was attending physical therapy and was scheduled for pain clinic evaluation. She requested an ibuprofen refill. (JE20, p. 125) Dr. Brockman assessed back pain, as well as an upper respiratory infection. To treat the back pain, Dr. Brockman refilled a prescription for ibuprofen and encouraged claimant to continue physical therapy and attend the pain clinic evaluation. (JE20, p. 128)

Claimant presented to Dr. Iqbal on February 15, 2018. Dr. Iqbal noted he last saw claimant for an ESI on March 3, 2015 and claimant was "well" until a motor vehicle accident on January 11, 2018. Claimant reported she initially had aches and pains all over her body, but current symptoms included continued low back pain with radiation to the left hip and front of pelvis. (JE10, p. 49) Dr. Iqbal performed a lumbar ESI. (JE10, pp. 49, 53)

Claimant never returned to work duties at defendant-employer following the January 11, 2018 accident. She did not receive payment for the $600.00 per week represented by Ms. Acker. Claimant testified she may have received small advance commission checks from defendant-employer. Defendant-employer did not issue claimant a 1099 for the 2018 taxable year. (Claimant's testimony) Commission ledger statements from defendant-employer were introduced into evidence, bearing dates of January 24, February 24, and March 24, 2018. The miscellaneous summaries reveal claimant received three small sums of compensation, each totaling less than $250.00. The initial January 24, 2018 statement denotes claimant received $218.13 in prepaid commissions. (DEB, pp. 7-16) Mr. Cochran testified he possessed these "paychecks" and provided them to claimant following the motor vehicle accident. (Mr. Cochran's testimony)

In late February 2018, claimant began work as a life insurance agent at Primerica. She was paid on commission and received a 1099 at the end of the calendar year. (Claimant's testimony; CE3, p. 54) In March 2018, claimant obtained a position at Aetna Insurance as a care management associate. She initially performed these duties in addition to life insurance sales at Primerica, but ultimately chose to focus upon her employment at Aetna Insurance and the stable income it provided. (Claimant's testimony) In her position as a care management associate, claimant works from home, processing medical documentation. Claimant remained in this position at the time of evidentiary hearing. At the time of hire, claimant worked full time and earned $17.50 per hour. At the time of evidentiary hearing, claimant worked 40 to 48 hours per week and earned $17.85 per hour. The work is sedentary in nature and she is able to alternate between sitting and standing, as needed. Claimant testified she loves her work at Aetna Insurance. (Claimant's testimony; CE3, p. 54)

On March 12, 2018, claimant presented to Dr. Brockman and reported the recent ESI provided relief for approximately two weeks, but back pain then returned. Claimant stated Dr. Iqbal desired a low back MRI prior to proceeding with additional injections. Claimant also reported increasing knee pain over the prior couple of weeks, currently worse on the left side. Dr. Brockman ordered knee x-rays, performed a Toradol injection of the left glut, and recommended continued follow up with pain management. (JE20, pp. 130-133)

Per Dr. Iqbal's recommendation, claimant underwent a lumbar spine MRI on March 22, 2018. A prior June 27, 2011 lumbar spine MRI was used for comparison. The reading physician opined the results revealed development of a small L5-S1 left foraminal disc protrusion which contacted the exiting left L5 nerve root and produced mild left neural foraminal stenosis. (JE21, pp. 135-136)

On April 6, 2018, Dr. Iqbal performed an ESI at left L5-S1 to treat claimant's back pain and an intraarticular injection of the left knee joint due to left knee pain. (JE10, p. 55)

Claimant returned to Dr. Iqbal on April 24, 2018. Dr. Iqbal noted claimant's leg pain improved, but back pain remained. Dr. Iqbal opined that after diagnostic lumbar facet joint injections bilaterally at L4-5 and L5-S1, claimant was positive to proceed with lumbar facet denervation. (JE10, p. 55)

Claimant continued to receive periodic care of her right ankle/lower extremity related to the April 6, 2015 work injury. Bryan Trout, DPM opined claimant achieved maximum medical improvement (MMI) with respect to the right ankle injury, with subsequent surgical intervention, effective March 22, 2018. On May 24, 2018, Dr. Trout opined claimant sustained permanent impairment of 5 percent lower extremity and imposed permanent restrictions limiting claimant to sedentary duty only. (JE22, p. 137)

On May 25, 2018, defendants filed a motion for summary judgment, arguing claimant was not an employee of defendant-employer and was, instead, an independent contractor. Claimant resisted. A distinct deputy commissioner issued a ruling denying defendants' motion on June 11, 2018, finding defendants were not entitled to judgment as a matter of law. (Agency File)

On January 30, 2019, claimant returned to Dr. Bansal for an IME related to the alleged January 11, 2018 work injury. (JE15, p. 87) Dr. Bansal performed a medical records review. His summary did not identify his prior IME of claimant, but did detail claimant's medical care, including care related to claimant's right ankle condition. (JE15, pp. 88-93) Dr. Bansal also took a history from claimant regarding the motor vehicle accident and resulting pain. She reported preexisting back problems, but denied ongoing low back pain immediately preceding the motor vehicle accident. Claimant reported continued low back pain with radiation into her hips and legs. (JE15, p. 93) Dr. Bansal performed a physical examination. (JE15, pp. 94-95)

Following records review, interview, and examination, Dr. Bansal issued a report containing his findings and opinions dated February 9, 2019. Thereby, he diagnosed

cervical strain and aggravation of lumbar spondylosis related to the January 11, 2018 motor vehicle accident. (JE15, p. 95) Dr. Bansal opined the mechanism of impact from the motor vehicle accident was consistent with aggravation of preexisting lumbar spondylosis. (JE15, p. 96) He opined claimant shared elements of a DRE Lumbar Category II impairment. Based upon the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, Table 15-3, Dr. Bansal opined claimant suffered a 7 percent whole person impairment for radicular complaints, loss of range of motion, guarding, and continued pain. He recommended permanent restrictions of no lifting greater than 15 pounds, no frequent bending or twisting, and no prolonged sitting or standing greater than 30 minutes at a time. In terms of further care, Dr. Bansal opined claimant may benefit from intermittent epidural injections, facet injections, radiofrequency ablation, pain medication, or other modality recommended by a pain specialist. (JE15, p. 97)

At the time of evidentiary hearing, claimant testified she continued to experience back pain and that back pain formed the basis of her claim for benefits. Claimant testified she is pain-free on some days, but on other days, is unable to roll over in bed due to pain. She described ongoing nerve pain and muscle spasms. Claimant also experienced difficulty lifting heavy objects, lifting items from the floor, sweeping, and shoveling. She testified any prior complaints of neck, facial, shoulder, hips, or pelvic pain resolved, as did any headaches and memory problems. (Claimant's testimony)

Claimant incurred medical bills in treatment of injuries related to the alleged January 11, 2018 injury. A summary of the expenses is included in Claimant's Exhibit 2, with the supportive bills found in Claimant's Exhibit 1. (See CE1, pp. 1-49; CE2, p. 50) Defendants did not provide or pay for any of the incurred medical expenses. She recently began seeing a chiropractor due to back pain complaints, but her symptoms are not severe enough to warrant a return to Dr. Iqbal. (Claimant's testimony)

Claimant's testimony was clear and consistent as compared to the evidentiary record and her deposition testimony. Claimant was personable and sincere. Her eye contact and demeanor at the time of evidentiary hearing were excellent and gave the undersigned no reason to doubt claimant's veracity. Claimant is found credible.

Mr. Cochran's demeanor at the time of evidentiary hearing gave the undersigned no reason to doubt his veracity. Mr. Cochran's testimony appeared genuine, without an intention to mislead. That being said, his testimony was somewhat circuitous and on occasion, he did not provide direct answers on cross-examination. Mr. Cochran is found credible.

CONCLUSIONS OF LAW

The first issue for determination is whether an employer-employee relationship existed at the time of the alleged injury.

The party who would suffer loss if an issue were not established has the burden of proving that issue by a preponderance of the evidence. Iowa Rule of Appellate Procedure 6.14(6).

The workers' compensation act provides coverage for "all personal injuries sustained by an employee arising out of and in the course of the employment." Iowa Code section 85.3(1). Section 85.61(11) provides, in part:

> "Worker" or "employee" means a person who has entered into the employment of, or works under contract of service, express or implied, or apprenticeship, for an employer . . . .

It is claimant's duty to prove, by a preponderance of the evidence, that claimant or claimant's decedent was an employee within the meaning of the law. Where claimant establishes a prima facie case, defendants then have the burden of going forward with the evidence which rebuts claimant's case. The defendants must establish, by a preponderance of the evidence, any pleaded affirmative defense or bar to compensation. Nelson v. Cities Serv. Oil Co., 259 Iowa 1209, 146 N.W.2d 261 (1966).

Section 85.61(11)(c)(2) states an independent contractor is not deemed a worker or employee. In construing these legislative definitions, our courts have indulged a "measure of liberality" and "doubt as to whether a claimant was an employee or independent contractor is resolved in favor of the former status." Stark Constr. v. Lauterwasser, 847 N.W.2d 612 (Iowa Ct. App. 2014); See Daggett v. Nebraska-Eastern Exp., Inc., 107 N.W.2d 102, 105 (Iowa 1961); see also Usgaard v. Silver Crest Golf Club, 127 N.W.2d 636, 639 (Iowa 1964) (noting act is "liberally construed to extend its beneficent purpose to every employee who can fairly be brought within it").

"When the issue is whether an individual is an employee or an independent contractor, many factors are relevant." Iowa Mut. Ins. Co. v. McCarthy, 572 N.W.2d 537, 542 (Iowa 1997); See Nelson. The Iowa Supreme Court has considered numerous factors through a series of "rather elusive tests or indicia by which an employer-employee relationship and status as an independent contractor may be determined." Nelson at 264.

In Nelson, the Iowa Supreme Court stated:

> The often cited cases of Mallinger v. Webster City Oil Co., 211 Iowa 847, 851, 234 N.W. 254, 256, contains this statement: "An independent contractor under the quite universal rule may be defined as one who carries on an independent business and contracts to do a piece of work according to his own methods, subject to the employer's control only as to results. The commonly recognized tests of such a relationship are, although not necessarily concurrent or each in itself controlling: (1) The existence of a contract for the performance by a person of a certain piece or kind of work at a fixed price; (2) independent nature of his business or of his distinct calling; (3) his employment of assistants with the right to supervise their activities; (4) his obligation to furnish necessary tools, supplies, and materials; (5) his right to control the progress of the work, except as to final results; (6) the time for which the workman is employed; (7) the method of payment, whether by time or by job; (8) whether the

> work is part of the regular business of the employer." See also Usgaard v. Silver Crest Golf Club, 256 Iowa 453, 456, 127 N.W.2d 636.
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> And as revealed in Hassebroch v. Weaver Construction Co., 246 Iowa 622, 628, 67 N.W.2d 553: "The principal accepted test of an independent contractor is that he is free to determine for himself the manner in which the specified results shall be accomplished."
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> Then in Hjerleid v. State, 229 Iowa 818, 826-827, 295 N.W. 139, 143, this court pointed out the accepted criteria by which to determine whether an employer-employee relationship exists, are as follows: "* * * (1) (t)he right to selection, or to employ at will; (2) responsibility for the payment of wages by the employer; (3) the right to discharge or terminate the relationship; (4) the right to control the work; and (5) is the party sought to be held as the employer the responsible authority in charge of the work or for whose benefit the work is performed." See also section 85.61(2), Code, 1962, and Usgaard v. Silver Crest Golf Club, 256 Iowa 453, 455-456, 127 N.W.2d 636.
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> Also, in Schlotter v. Leudt, 255 Iowa 640, 643, 123 N.W.2d 434, 436, we said: "The most important consideration in determining whether a person giving service is an employer or an independent contractor is the right to control the physical conduct of the person giving service. If the right to control, the right to determine, the mode and manner of accomplishing a particular result is vested in the person giving service he is an independent contractor, if it is vested in the employer, such person is an employee."
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> Finally in this connection we called attention in the Usgaard and Hassebroch cases, both supra, to another possible element which, when applicable, might be used with others as an aid in determining whether one person is or is not the employee of another, to-wit: the intention of the parties as to the relationship created or existing. Standing alone this may be somewhat misleading.
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> But as explained in Restatement, Agency 2d, comment m., under section 220: "It is not determinative that the parties believe or disbelieve that the relation of master and servant exists, except insofar as such belief indicates an assumption of control by the one and submission to control by the other. However, community custom in thinking that a kind of service, such as household service, is rendered by servants, is of importance."

Nelson at 264-265.

At the time of the January 11, 2018 motor vehicle accident, claimant was participating in a training program implemented to benefit defendant-employer's business. During the training program, she was shadowing an existing agent in her

duties, as prescribed by the mentorship arrangement. No dispute has been presented which would lead to the conclusion claimant was not rendering services to defendant-employer.

Accordingly, the burden shifts to defendants to establish claimant was an independent contractor, as opposed to an employee of defendant-employer. In support of this position, defendants rely heavily upon the signed agent contract and special acknowledgement notice designating claimant as an independent contractor. Defendants further argue any oversight utilized by defendant-employer was minimal and only designed to ensure agents complied with applicable insurance laws and regulations. Claimant argues the language of the contract is not controlling and the facts of claimant's employment scenario contradicts the contract terms.

The contracts signed by claimant specifically state an agent is an independent contractor, not an employee. They further state agents are paid on a commission basis. Claimant acknowledged that, as an agent, she understood she would be an independent contractor and paid on a commission-basis. These factors strongly support a conclusion that an employer-employee relationship is not applicable to agents of defendant-employer. However, the specific facts of this case draw that conclusion into question.

The contracts make no mention of a training period wherein claimant's daily activities were overseen by a mentor or supervisor. Despite contentions to the contrary, this training period involved oversight more extensive than simply insuring agent compliance with applicable insurance laws and regulations. Mr. Cochran testified that during the training period, trainees learned about products, observed mentor presentations, and were observed by mentors. During the training period, claimant was required to, at minimum, coordinate her work hours to match those of her mentor, Ms. Acker. While claimant may have possessed the ability to state she could not attend certain meetings or presentations, Ms. Acker controlled whether claimant progressed through her training program and progress could not be made without claimant attending appointments scheduled by Ms. Acker. Under the facts of this case, it can more accurately be stated that Ms. Acker set claimant's hours and duties. Claimant credibly testified Ms. Acker advised her the training period would last 90 days; Ms. Acker did not testify to refute this testimony. While Mr. Cochran testified the trainees possess flexibility in setting their schedules and training schedules were generally shorter, he admitted he was not privy to the training details set by Ms. Acker.

This training period did not end until trainees passed a release meeting with their mentor and Mr. Cochran, after which trainees were released from their mentors and could perform tasks as agents without immediate oversight. Mr. Cochran testified trainees could technically sell insurance without participating in this training period and release meeting; however, it is clear that the training period and release meeting were expectations for all trainees hoping to act as an agent within the framework set forth by the Cochran Agency. It was logical for claimant to rely upon these clear expectations as requirements of her employment arrangement. These limitations upon claimant's ability to act as an insurance agent are not consistent with the idea that claimant, as an

independent contractor, ran her business independently, by her own means and methods.

A certain level of oversight over insurance agents is acceptable and prudent, as the individuals who purchase such products are relying upon agents to provide insurance designed to meet their specific needs. The consequences to a customer if an agent were to misrepresent these products could be staggering. Mr. Cochran testified the Iowa Insurance Commission would direct any complaints for the actions of his contracted agents to him specifically and he would be liable for missteps. In those instances, he possessed the power to terminate or suspend agent contracts. Given these ramifications, it is clear why Mr. Cochran valued training of prospective agents; however, the level of control exerted over workers during this training period is inconsistent with an independent contractor relationship.

The contract terms were further inconsistent with the manner in which business at the Cochran Agency was managed. The contracts outline that agents held responsibility for furnishing supplies and materials. Mr. Cochran testified the Cochran Agency provided such supplies for trainees and agents. The only exception was procurement of a laptop, which Mr. Cochran indicated made presentations easier, but was not required. The contracts further indicate agents are responsible for providing their own workspace; Mr. Cochran testified the vast majority of contracted agents used the office space provided by the Cochran Agency, at no cost to the agent.

Also relevant to consideration is the compensation arrangement. The contracts state agents were paid on a commission-only basis; however, claimant was not yet truly acting as an independent agent. The contracts also state claimant could receive advance commissions, but such sums must be repaid. In this case, it appears defendant-employer issued claimant payments categorized as prepaid commissions; however, claimant was never asked to repay these sums. Defendant-employer did not issue claimant a 1099 for the 2018 tax year. Claimant testified Ms. Acker advised her she would receive $600.00 per week during a 90-day training period. Mr. Cochran testified defendant-employer generally did not pay wages during a training period; however, he admitted he was not privy to specific discussions between claimant and Ms. Acker. Claimant is a credible witness; Ms. Acker did not testify at hearing to contradict claimant's testimony. Further, it is rational for claimant to expect some form of compensation during a training period that could last 90 days, during which her work schedule and duties were directly overseen by Ms. Acker.

Based on the facts of this case, claimant was not yet acting as an independent agent for defendant-employer at the time of the January 11, 2018 motor vehicle accident. Claimant was working under the direction of Ms. Acker and the oversight of Mr. Cochran during an effectively mandatory training period. She had not clearly been entrusted with the independent ability to sell insurance for defendant-employer. Her work schedule and duties were set by Ms. Acker and Mr. Cochran required a release meeting before claimant was free to act as an agent. The level of control over the day-to-day performance of duties was inconsistent with premise of claimant carrying on her own enterprise. Claimant's unrebutted testimony indicates she was to be paid a set

amount of $600.00 per week during a training period; a compensation schedule different than that outlined in the agent contract. What compensation claimant did receive was paid by defendant-employer as advanced commissions, but claimant was never asked to repay such commissions, as outlined in the signed contracts. Importantly, defendant-employer did not mount a defense alleging claimant was an employee of the Cochran Agency, as opposed to defendant-employer.

After consideration of the above and all other relevant factors, it is determined defendants have failed to prove claimant was acting as an independent contractor at the time of the January 11, 2018 motor vehicle accident. Claimant has proven she was rendering services in benefit of defendant-employer. Claimant is therefore considered an employee of defendant-employer as of January 11, 2018. This result is fact-specific and by no means stands for the precedent that all insurance agents or any prospective agent participating in a training program is an employee. However, the specific facts of this case and liberal construction in favor of finding an employee-employer relationship yield a determination that claimant was an employee of defendant-employer on January 11, 2018.

The next issue for determination is whether claimant sustained an injury on January 11, 2018 which arose out of and in the course of employment.

The claimant has the burden of proving by a preponderance of the evidence that the alleged injury actually occurred and that it both arose out of and in the course of the employment. Quaker Oats Co. v. Ciha, 552 N.W.2d 143 (Iowa 1996); Miedema v. Dial Corp., 551 N.W.2d 309 (Iowa 1996). The words "arising out of" referred to the cause or source of the injury. The words "in the course of" refer to the time, place, and circumstances of the injury. 2800 Corp. v. Fernandez, 528 N.W.2d 124 (Iowa 1995). An injury arises out of the employment when a causal relationship exists between the injury and the employment. Miedema, 551 N.W.2d 309. The injury must be a rational consequence of a hazard connected with the employment and not merely incidental to the employment. Koehler Electric v. Wills, 608 N.W.2d 1 (Iowa 2000); Miedema, 551 N.W.2d 309. An injury occurs "in the course of" employment when it happens within a period of employment at a place where the employee reasonably may be when performing employment duties and while the employee is fulfilling those duties or doing an activity incidental to them. Ciha, 552 N.W.2d 143.

On January 11, 2018, claimant was involved in a motor vehicle accident while riding in a vehicle driven by her mentor. The mentor was transporting herself, as well as claimant and another trainee, to the home of a customer. The group travelled to the location in order to complete updates to existing insurance coverage with defendant-employer. No argument was presented that the motor vehicle accident occurred outside the scope of the employment relationship. It is determined the injury of January 11, 2018 arose out of and in the course of claimant's employment.

The next issue for determination is whether the alleged injury is a cause of permanent disability.

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).

At the time of evidentiary hearing, claimant testified her only residual, ongoing complaints were related to her low back. She credibly testified to complaints of back pain and spasms that waxed and waned, which impacted her ability to perform certain tasks. Dr. Bansal opined claimant sustained a 7 percent whole person impairment due to radicular complaints, loss of range of motion, guarding, and continued pain. He recommended permanent restrictions of: no lifting greater than 15 pounds; no frequent bending or twisting; and no prolonged sitting or standing for greater than 30 minutes. Interestingly, Dr. Bansal performed a preinjury evaluation of claimant in an unrelated workers' compensation claim. In conjunction with that evaluation, Dr. Bansal opined claimant had sustained no ratable permanent impairment relative to back complaints. Claimant relies upon her own credible testimony and the opinion of Dr. Bansal in support of her claim of permanent disability.

Defendants did not offer a medical opinion to rebut the opinions of Dr. Bansal. Rather, defendants argue claimant's back complaints are a result of a preexisting condition and challenge Dr. Bansal's opinions on the argument he did not consider claimant's history of preexisting conditions.

Claimant does not dispute she has suffered with back complaints for a number of years. However, the medical records in evidence reveal claimant last received medical care of any preexisting complaints in May 2015. No records establish any ongoing care or complaints severe enough to warrant medical care from May 2015 until January 2018, after the work-related motor vehicle accident.

Following the motor vehicle accident, claimant has continued to experience back complaints. These complaints and limitations formed the basis of Dr. Bansal's impairment rating. While Dr. Bansal did not restate each element of claimant's medical history, his failure to restate each element does not render his opinions inaccurate. Dr. Bansal did not miss any material elements of claimant's medical history. He was aware of claimant's preexisting back complaints and evaluated these preexisting complaints on another occasion; the fact he did not recount this event in his report does not warrant disregarding his opinion. Defendants have not presented a battle-of-the-experts scenario where Dr. Bansal's opinion could be weighed against the opinion of another medical provider to determine whose opinion is based upon a more accurate history. Rather, Dr. Bansal's opinion is unrebutted.

Based upon the entirety of the evidentiary record, I find claimant has proven by a preponderance of the evidence that the work injury of January 11, 2018 is a cause of permanent disability.

The next issue for determination is the extent of any industrial disability.

Under the Iowa Workers' Compensation Act, permanent partial disability is compensated either for a loss or loss of use of a scheduled member under Iowa Code section 85.34(2)(a)-(t) or for loss of earning capacity under section 85.34(2)(u).

Since claimant has an impairment to the body as a whole, an industrial disability has been sustained. Industrial disability was defined in Diederich v. Tri-City R. Co., 219 Iowa 587, 258 N.W. 899 (1935) as follows: "It is therefore plain that the legislature intended the term 'disability' to mean 'industrial disability' or loss of earning capacity and not a mere 'functional disability' to be computed in terms of percentages of the total physical and mental ability of a normal man."

Functional impairment is an element to be considered in determining industrial disability which is the reduction of earning capacity, but consideration must also be given to the injured employee's age, education, qualifications, experience, motivation, loss of earnings, severity and situs of the injury, work restrictions, inability to engage in employment for which the employee is fitted and the employer's offer of work or failure to so offer. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963); Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961).

Compensation for permanent partial disability shall begin at the termination of the healing period. Compensation shall be paid in relation to 500 weeks as the disability bears to the body as a whole. Section 85.34.

Claimant credibly testified of continued, waxing and waning, back complaints. She testified these symptoms impact performance of activities. Dr. Bansal's unrebutted medical opinion found claimant sustained a 7 percent whole person impairment. He also imposed permanent restrictions of no lifting over 15 pounds, no frequent bending or twisting, and no prolonged sitting or standing over 30 minutes. Work restrictions have previously been imposed relative to claimant's right ankle condition. Dr. Bansal

recommended the following restrictions following a 2016 evaluation: no lifting greater than 10 pounds occasionally or 5 pounds frequently with the left arm; avoidance of multiple stairs, steps, or ladders; and avoid work on uneven ground or ladders. Dr. Trout also imposed a sedentary work restriction relative to the ankle injury; his opinion was issued following claimant's January 2018 work injury. Claimant continued to perform sedentary work, consistent with these opinions. Following the January 11, 2018 work injury, claimant's work restrictions have expanded to include consideration of her back condition, but claimant remains capable of sedentary employment. Although she did not return to work at defendant-employer, claimant did return to life insurance sales with another company shortly following the work injury. Claimant subsequently obtained a position at Aetna Insurance; this position brought her consistent, full time wages of $17.85 per hour. Claimant's earnings have not decreased as a result of the work injury.

Following consideration of the above and all other relevant factors of industrial disability, it is determined claimant has suffered a 20 percent industrial disability as a result of the work injury of January 11, 2018. This award entitles claimant to 100 weeks of permanent partial disability benefits (20 percent x 500 weeks = 100 weeks), commencing on the stipulated date of January 12, 2018.

The next issue for determination is the proper rate of compensation.

Section 85.36 states the basis of compensation is the weekly earnings of the employee at the time of the injury. The section defines weekly earnings as the gross salary, wages, or earnings to which an employee would have been entitled had the employee worked the customary hours for the full pay period in which the employee was injured as the employer regularly required for the work or employment. The various subsections of section 85.36 set forth methods of computing weekly earnings depending upon the type of earnings and employment.

Under section 85.36(7), the gross weekly earnings of an employee who has worked for the employer for less than the full 13 calendar weeks immediately preceding the injury are determined by looking at the earnings of other similarly situated employees employed over that full period, but if earnings of similar employees cannot be determined, by averaging the employee's weekly earnings computed for the number of weeks that the employee has been in the employ of the employer.

At the time of the work injury of January 11, 2018, claimant had been in the employ of defendant-employer for less than 13 weeks. The evidentiary record is devoid of earnings of similarly situated employees. The best evidence of claimant's earnings is found in claimant's unrebutted testimony. Claimant testified Ms. Acker guaranteed she would earn $600.00 per week during her 90-day training period. Given this testimony is the best evidence of claimant's intended wages at the time of the injury, I adopt $600.00 as claimant's gross average weekly wage. The parties stipulated claimant was married and entitled to 2 exemptions at the time of the work injury. The proper rate of compensation is therefore, $403.05.

The next issue for determination is whether defendants are responsible for claimed medical expenses.

The employer shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance, and hospital services and supplies for all conditions compensable under the workers' compensation law. The employer shall also allow reasonable and necessary transportation expenses incurred for those services. The employer has the right to choose the provider of care, except where the employer has denied liability for the injury. Section 85.27. Holbert v. Townsend Engineering Co., Thirty-second Biennial Report of the Industrial Commissioner 78 (Review-Reopening October 16, 1975).

Claimant suffered a work-related injury on January 11, 2018. Defendants did not authorize, provide, or pay for any medical care; defendants denied liability for claimant's claim. Claimant obtained medical treatment of her injuries and incurred expenses, found in Claimant's Exhibits 1 and 2. The treatment was reasonable and necessary in treatment of the compensable, work-related injury and the responsibility for this care should be borne by defendants. Defendants are hereby found responsible and shall hold claimant harmless for the medical expenses detailed in Claimant's Exhibits 1 and 2.

The next issue for determination is whether claimant is entitled to reimbursement of an independent medical examination.

Section 85.39 permits an employee to be reimbursed for subsequent examination by a physician of the employee's choice where an employer-retained physician has previously evaluated "permanent disability" and the employee believes that the initial evaluation is too low. The section also permits reimbursement for reasonably necessary transportation expenses incurred and for any wage loss occasioned by the employee attending the subsequent examination.

Defendants are responsible only for reasonable fees associated with claimant's independent medical examination. Claimant has the burden of proving the reasonableness of the expenses incurred for the examination. See Schintgen v. Economy Fire & Casualty Co., File No. 855298 (App. April 26, 1991). Claimant need not ultimately prove the injury arose out of and in the course of employment to qualify for reimbursement under section 85.39. See Dodd v. Fleetguard, Inc., 759 N.W.2d 133, 140 (Iowa App. 2008).

Claimant underwent an independent medical examination with Dr. Bansal, for which Dr. Bansal charged $2,674.00: $580.00 for an examination and $2,094.00 for the written report. (JE15, p. 98) In order to be entitled to reimbursement of an IME, there must first have been an evaluation of permanent disability by an employer-retained physician. In this case, no employer-provided physician ever opined as to the extent of permanent disability. Defendants' denial of claimant's claim is not tantamount to a zero-percent impairment rating. Accordingly, claimant is not entitled to reimbursement of Dr. Bansal's IME expense.

The final issue for determination is whether claimant is entitled to an award of penalty benefits and, if so, how much.

If weekly compensation benefits are not fully paid when due, section 86.13 requires that additional benefits be awarded unless the employer shows reasonable cause or excuse for the delay or denial. Robbennolt v. Snap-on Tools Corp., 555 N.W.2d 229 (Iowa 1996).

Delay attributable to the time required to perform a reasonable investigation is not unreasonable. Kiesecker v. Webster City Meats, Inc., 528 N.W.2d 109 (Iowa 1995).

It also is not unreasonable to deny a claim when a good faith issue of law or fact makes the employer's liability fairly debatable. An issue of law is fairly debatable if viable arguments exist in favor of each party. Covia v. Robinson, 507 N.W.2d 411 (Iowa 1993). An issue of fact is fairly debatable if substantial evidence exists which would support a finding favorable to the employer. Gilbert v. USF Holland, Inc., 637 N.W.2d 194 (Iowa 2001).

An employer's bare assertion that a claim is fairly debatable is insufficient to avoid imposition of a penalty. The employer must assert facts upon which the commissioner could reasonably find that the claim was "fairly debatable." Meyers v. Holiday Express Corp., 557 N.W.2d 502 (Iowa 1996).

If the employer fails to show reasonable cause or excuse for the delay or denial, the commissioner shall impose a penalty in an amount up to 50 percent of the amount unreasonably delayed or denied. Christensen v. Snap-on Tools Corp., 554 N.W.2d 254 (Iowa 1996). The factors to be considered in determining the amount of the penalty include the length of the delay, the number of delays, the information available to the employer and the employer's past record of penalties. Robbennolt, 555 N.W.2d at 238.

Iowa Code 86.13, as amended effective July 1, 2009, states:

> 4. 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 of 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.

By this decision, the undersigned determined claimant suffered a 20 percent industrial disability, entitling claimant to an award of 100 weeks of permanent partial disability benefits. Defendants have not paid any permanent disability benefits; claimant has therefore, established a delay in payment of benefits. Although such benefits commenced on the stipulated date of January 12, 2018, no physician opined claimant suffered permanent disability or required permanent restrictions until Dr. Bansal's report dated February 9, 2019. By that date, defendants had already filed an answer and a motion for summary judgment denying liability for claimant's claim on the argument claimant was an independent contractor. Claimant was represented by counsel and served with copies of both items. Accordingly, the basis of the denial was communicated to claimant prior to any evidence being obtained which would indicate claimant did suffer permanent impairment. Defendants' contention that claimant was an independent contractor was reasonable and the issue of whether claimant was an employee of defendant-employer was fairly debatable. On these bases, I find no penalty benefits are warranted.

ORDER

THEREFORE, IT IS ORDERED:

The parties are ordered to comply with all stipulations that have been accepted by this agency.

Defendants shall pay unto claimant one hundred (100) weeks of permanent partial disability benefits commencing January 12, 2018 at the weekly rate of four hundred three and 05/100 dollars ($403.05).

Defendants shall pay claimant's prior medical expenses submitted by claimant at the hearing as set forth in the decision.

Defendants shall pay accrued weekly benefits in a lump sum.

Defendants shall pay interest on unpaid weekly benefits awarded herein as set forth in Iowa Code section 85.30. Defendants shall pay accrued weekly benefits in a lump sum together with interest at an annual rate equal to the one-year treasury constant maturity published by the federal reserve in the most recent H15 report settled as of the date of injury, plus two percent. See Gamble v. AG Leader Technology, File No. 5054686 (App. Apr. 24, 2018).

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

Costs are taxed to defendants pursuant to 876 IAC 4.33.

Signed and filed this 7th day of August, 2020.

ERICA J. FITCH
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Randall P. Schueller (via WCES)

Jason A. Kidd (via WCES)
Garrett A. Lutovsky (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.