BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

HAZEMA KAPIC, Claimant, vs. HY-VEE, Employer, and UNION INS. CO. OF PROVIDENCE, Insurance Carrier, Defendants.	File No. 21700554.01 ARBITRATION DECISION Head Notes: 1108.50, 1402.40, 1802, 2907, 4000.2

STATEMENT OF THE CASE

Hazema Kapic, claimant, filed a petition in arbitration seeking workers' compensation benefits from Hy-Vee, Inc., employer, and Union Insurance Company of Providence, insurance carrier, as defendants. Hearing was held in-person in Des Moines, Iowa on July 26, 2022.

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.

Claimant, Hazema Kapic, was the only witness to testify live at trial. The evidentiary record also includes Joint Exhibits 1-9, Claimant's Exhibits 1, 3-14, and Defendants' Exhibits A-G. Claimant's Exhibit 2 was withdrawn prior to the start of the hearing. All exhibits were received without objection. The evidentiary record closed at the conclusion of the arbitration hearing.

The parties submitted post-hearing briefs on September 2, 2022, at which time the case was fully submitted to the undersigned.

ISSUES

The parties submitted the following issues for resolution:

1. Whether claimant sustained an injury which arose out of and in the course of her employment on April 28, 2021.

2. Whether the alleged injury is the cause of permanent disability. If so, the amount of permanency benefits claimant is entitled to receive and the appropriate commencement date for any such benefits.

3. Whether the alleged injury is the cause of temporary disability. If so, whether claimant is entitled to benefits from June 28, 2021 through August 28, 2021.

4. Whether penalty benefits are appropriate in this case.

5. Whether defendants are responsible for past medical expenses.

6. Assessment of costs.

FINDINGS OF FACT

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

Claimant, Hazema Kapic, asserts she sustained a work injury to her back on April 28, 2021. At the time of hearing Ms. Kapic was 55 years old. She graduated from high school in Bosnia. After graduating from high school, she took some computer and typing classes. Ms. Kapic moved to the United States in 1997; she has not received any education since moving to the United States. (Hearing Transcript pages 10-13)

Ms. Kapic was hired by Hy-Vee in 2001. She began working as a courtesy clerk, cashier, and worked at the salad bar. Sometime around 2006, Ms. Kapic began working in the Hy-Vee bakery department. Her duties included making doughnuts, baking bread, loading and unloading trucks, and decorating cakes. She regularly moved items, such as flour and sugar, weighing up to 50 pounds without assistance. In 2013 Ms. Kapic sustained an injury to her back while lifting a box of frozen doughnut holes. She bent down and felt pain in the right side of her low back with radiation into her legs. She reported her injury but did not seek medical treatment through Hy-Vee. Ms. Kapic did not miss any time from work, and she continued her regular duties. (Tr. pp. 27-29)

Ms. Kapic admits that she received treatment for back problems prior to the alleged April 28, 2021 injury. From November 2016 through October 2018 she had over 13 visits with Discover Chiropractic for back pain and pain in her legs. (Tr. pp. 29, 53-54; Joint Exhibit 2)

In 2017 Ms. Kapic transferred to the Hy-Vee fulfillment center in Urbandale as a personal/online shopper. Her duties included carrying totes of product to pallets, taking pallets to trucks, and loading trucks. She described the totes as approximately two feet wide. She was able to lift these totes. (Tr. pp. 20-24)

In 2018 Ms. Kapic sustained an injury while working at the fulfillment center. She was rushing and lifting totes when she felt pain. She thought her pain would get better by the next day, but it did not so she reported her injury to human resources. Hy-Vee sent her to see Dr. Myrtil. (Tr. pp. 29-30) Ms. Kapic testified that, "[s]he [Dr. Myrtil] did an x-ray, and she gives me the – the pain medicine, and she said that's not from work – that's not injury at work, because the x-ray shows injury that the person who fell from the building supposed to have it, but not me." (Tr. p. 30)

Ms. Kapic then sought treatment with her primary care physician, Jeffrey L. Bebensee, M.D. Ms. Kapic continued working for Hy-Vee. She stayed in her position at the fulfillment center until 2019 when she transferred to the Waukee Hy-Vee grocery store. (Tr. pp. 23-24)

At the Waukee Hy-Vee grocery store Ms. Kapic worked in online shopping. Her duties were similar to what she did at the fulfillment center. Her duties were to find items ordered by customers, scan the label, and place the items into totes. She would then carry totes and place them onto a pallet. (Tr. pp. 20-26)

On November 16, 2016, Ms. Kapic went to Discover Chiropractic LLC with low back and neck pain. She reported that her pain began over a year ago. The intensity of the pain was severe and constant. She reported that her pain radiated to both right and left legs and to her neck. (JE2, pp. 13-15)

On October 30, 2018, Ms. Kapic presented to Daphney Myrtil, M.D. at UnityPoint Health. She reported neck and low back pain. The description of the injury was lifting a box of donut holes in 2013 and experienced low back pain. Since that time, she had experienced persistent intense back pain. She described her pain as 9/10 in intensity and throbbing in nature. She reported that due to the severity of her symptoms, she was not able to sit, stand or maintain any position for any period of time. Now she was experiencing radiation of the pain to the left lower extremity, and she had numbness and tingling of the left toes. Ms. Kapic reported that she had been receiving chiropractic care which helped alleviate her symptoms temporarily, but as soon as she leaves, she experiences lower back pain and radiation of the pain to the left lower extremity. Her pain now radiated upwards towards her neck. Dr. Myrtil's assessment was chronic neck pain of unclear etiology, likely degenerative in nature; cervical spine degenerative joint and disc disease; chronic lower back pain with left lower extremity radicular symptoms; degenerative joint and disc disease of the lumbar spine; limbus L3 vertebra; probable left SI joint dysfunction. Dr. Myrtil informed Ms. Kapic that her symptoms were chronic in nature and likely not related to the 2013 work incident. She encouraged Ms. Kapic to see her primary care physician for extensive workup for chronic back pain with radiculopathy. Dr. Myrtil stated Ms. Kapic was capable of full duty without restrictions. (JE4, pp. 23-24)

At the recommendation of her primary care physician, Ms. Kapic saw John Piper, M.D. at The Iowa Clinic for a neurosurgical consultation on April 6, 2021. She reported low back pain with radiation down both buttocks and bilateral legs down to her feet, left greater than right. She also had numbness and tingling in both her feet and toes. Additionally, she reported weakness in her legs. Ms. Kapic reported that her symptoms

started in 2013 after an injury at work lifting a 45-pound box of frozen donuts holes. Workers' compensation closed that case in 2018 and stated it was not work related. Ms. Kapic reported her pain had gradually gotten worse. An MRI scan of the lumbar spine showed essentially every lumbar disc was abnormal in appearance, but the scan also suggested the likelihood of some underlying deformity in both the coronal and sagittal plane. The doctor noted she also had some degree of spinal stenosis forming. Dr. Piper's assessment was lower back pain. He noted she had extensive degenerative changes in her spine. She also had significant indicators that there could be a deformity present. He felt it would be reasonable for Ms. Kapic to get some scoliosis x-rays just to assess the severity of her deformity. Dr. Piper felt that if her deformity was mild a more conservative approach would be best, but if she had a significant deformity then it might be worth getting her in to see orthopedic doctors. (JE1, pp. 7-12; Tr. pp. 30-32)

We now turn to the alleged injury on April 28, 2021. On that date Ms. Kapic was performing her usual duties as an online shopper. She was putting groceries in a tote and lifting and placing it onto a pallet when she felt a sharp pain in her lower back on her right side that went to her leg. She thought perhaps she could shake the pain off. However, the pain was so bad she had to leave before her shift was over. Her manager called Ms. Kapic later to find out what happened so the manager could relay the information to Human Resources. Ms. Kapic testified that her manager advised her that she could go to Urgent Care anytime she wanted. (Tr. pp. 32-37)

Ms. Kapic went to Urgent Care that same day. She reported she had symptoms for one day with right low back pain. She reported it happened at work while lifting a tote of groceries. She had some pain down her right leg. Ms. Kapic had a history of back issues, but these flared up again on that date. She had an MRI done by her primary care physician. X-rays were taken. On April 28, 2021, the date of the alleged injury, the impression from the urgent care clinic was lumbar radiculopathy. The x-rays showed no significant change from prior exam. (JE5, pp. 31-39)

On April 30, 2021 Ms. Kapic saw Dr. Myrtil with right low back pain. She reported she was lifting a tote at work and experienced intense right low back pain that radiated to her right leg. X-rays of the lumbar spine performed that day at urgent care demonstrated extensive degenerative changes of the lumbar spine. She reported minimal improvement of her symptoms since that time. Her pain was 10/10 in intensity. Her pain still radiated to her right lower extremity. She also had numbness and tingling of the right lower extremity and her toes. Ms. Kapic had a significant history of chronic back pain. In 2018 she had similar back pain and was told that her symptoms were chronic and not related to an acute injury. Since that time, she had been under the care of her primary care physician for her chronic back pain. She was seen at a pain clinic and underwent two epidural steroid injections that did not improve her symptoms. Dr. Myrtil noted Ms. Kapic had an MRI of her lumbar spine on March 16, 2021 that was read as degenerative changes of the lumbar spine with mild foraminal narrowing. The MRI showed no significant spinal canal narrowing. He noted at the L3-L4 level there was right foraminal end plate osteophytes and mild bilateral facet arthropathy with patent canal and mild bilateral foraminal narrowing. Dr. Myrtil also noted Ms. Kapic's lumbar MRI performed on December 12, 2018. The MRI showed multi-level

degenerative disk disease, facet arthropathy, and scoliotic curvature within the lumbar spine. The MRI also demonstrated significant spinal canal and foraminal narrowing. On April 28, 2021, Dr. Myrtil's assessment included chronic low back pain and recent MRI negative for acute radiculopathy and degenerative joint and disk disease of the lumbar spine. (JE4, pp. 25-28) Dr. Myrtil stated,

> [b]ased on the patient's history, this likely does NOT represent a work related injury. While she attributes her symptoms to a single episode of lifting a heavy tote, physical exam and history are not consistent with a musculoskeletal injury of the low back. Imaging of the low back demonstrates extensive degenerative changes of the low back w/out obvious radiculopathy. Experiencing low back pain while performing job duties does not establish a causal relationship. There is insufficient evidence that lifting or heavy work is a risk factor for chronic low back pain. Her symptoms are obviously pre-existing.

(JE4, p. 27)

Ms. Kapic was encouraged to complete her prednisone burst and taper and continue Robaxin for muscle spasms as needed. Dr. Myrtil noted that Ms. Kapic's imaging revealed extensive degenerative changes of her lumbar spine. She was encouraged to keep the appointment that she currently had with the specialist in Iowa City. She was instructed to follow up in one week or earlier if her symptoms worsened. Dr. Myrtil placed Ms. Kapic on modified work duty effective 4/30/2021. (JE4, pp. 25-28)

On May 4, 2021, Ms. Kapic saw Andrew Pugely, M.D. at the University of Iowa Hospitals and Clinics (UIHC) for low back pain with bilateral lower extremity symptoms with the right more painful than the left. Dr. Pugely noted Ms. Kapic was a 53-year-old female with degenerative scoliosis and bilateral lower extremity radicular symptoms which she said began in 2013. This was a work-related incident that was closed in 2018. She reported she had another work-related incident shortly thereafter. She had seen several providers in the Des Moines area and had two epidural steroid injections which provided no relief. Her most recent injection was in 2018. She described her pain as stabbing throughout the center of her spine and in her low back. She had burning pain throughout the anterior and posterior legs as well as pins and needles feeling in her feet. Dr. Pugely noted that Ms. Kapic's MRI demonstrated chronic degenerative change to the lumbar spine. He did not recommend any operative intervention. Dr. Pugely noted she did have bilateral leg pain, so he referred her for an EMG to see if her pain was caused by nerve pathology. He also placed a referral to pain consult to help with chronic low back pain. She was to return on an as-needed basis. (JE6, pp. 40-46)

Ms. Kapic returned to Dr. Myrtil on May 7, 2021. Her symptoms had worsened since her last visit and her pain was still 10/10. She reported that she had weakness of her right lower extremity, and she was not able to work. A specialist in Iowa City the prior Tuesday informed her that she was not a surgical candidate. Dr. Myrtil's assessment was chronic low back pain with recent MRI negative for acute radiculopathy, unchanged since last visit, and degenerative joint and disk disease of the

lumbar spine. Dr. Myrtil informed Ms. Kapic that her imaging revealed extensive degenerative changes and that her symptoms were not consistent with lifting a tote. She referred Ms. Kapic to neurosurgery versus ortho spine for surgical consideration. Dr. Myrtil stated that her symptoms were quite severe for the description of injury and likely not related to lifting the tote as she described. She recommended seated work only and limited her to four hours of work. From an occupational medicine clinic standpoint, Dr. Myrtil felt she did not have anything to offer. (JE4, pp. 29-30)

Hy-Vee provided Ms. Kapic with light duty work which consisted of separating price tags in the break room. She did this for two weeks. She was then told she could file for short-term disability. (Tr. pp. 42-43)

On May 27, 2021, defendants issued a letter to Ms. Kapic advising that defendants were disputing liability for her workers' compensation claim. (Def. Ex. B, pp. 2-3)

On June 8, 2021, Ms. Kapic underwent electrodiagnostic testing for low back pain radiating down both legs with leg weakness. The testing was normal. (JE7)

Ms. Kapic saw Dr. Bebensee on June 14, 2021, because she was struggling to get her left-sided lower back pain with radicular symptoms under control. She started having an increase in her pain when she was at work on April 28, 2021 while lifting a tote. She had had pain in this area for several years. She saw two neurosurgeons who did not recommend surgery. The assessment was lumbar radiculopathy. She was referred to a pain clinic. (JE9, pp. 69-70)

On July 6, 2021, Ms. Kapic saw Ryan Birkland, D.O. with low back pain and bilateral leg pain. She had longstanding low back pain and an MRI performed on March 16, 2021 which showed degenerative changes with mild foraminal narrowing similar to a prior MRI. There was a symmetric disc bulge with mild effacement of the central thecal sac at T12-L1. Ms. Kapic had a lifting event on April 28, 2021 and reported that since the event she had posterior thigh pain all the way down to the top of her feet and toes bilaterally. This pain was not present before the injury and was not present when she had the MRI on March 16, 2021. Dr. Birkland recommended obtaining a new MRI and then perhaps an epidural steroid injection. (JE8, pp. 49-53)

Ms. Kapic returned to Dr. Bebensee on July 7, 2021 with ongoing complaints of lower back pain with radicular symptoms down both legs. She had received medication from her occupational medicine provider and her pain specialist. She reported the pain specialist wanted her to obtain a new MRI before any more treatment. Dr. Bebensee's assessment was acute midline low back pain with bilateral sciatica. He noted that with her current pain level she was not able to perform her usual job. He noted she began missing work on June 28, 2021 and he estimated she would be off work through August 28, 2021. (JE9, pp. 71-73)

On August 27, 2021, Ms. Kapic saw Dr. Bebensee with pain from her thoracic back all the way down to her lower back. She has some radiation into the left leg. She had an MRI which basically showed not much change from the previous MRI. The injections from the pain specialists had not really helped her very much. Dr. Bebensee

prescribed ibuprofen 800 mg to take up to 3 times per day as needed for pain. He allowed her to return to work on August 29, 2021 with a 15-pound lifting restriction for the next six months. (JE9, pp. 74-76)

Dr. Birkland saw Ms. Kapic again on August 11, 2021 after Ms. Kapic received an ESI on July 23, 2021. Ms. Kapic did not receive any relief from the ESI. She still had severe axial back pain and lateral posterior hip pain. The doctor's impression was lumbar spondylosis. He provided a lumbar medial branch block. (JE8, pp. 54-61)

Ms. Kapic returned to Dr. Birkland on September 14, 2021. She reported that she did not obtain any significant relief of her pain from the medial branch block. Dr. Birkland was surprised because he felt her pain had always appeared to be originating from the lumbar spine. Now that he treated potential lumbar pathology without any improvement, he wanted to shift his focus to a different potential etiology. He felt there could be a sacroiliac component. He recommended a bilateral SI joint injection for diagnostic and therapeutic purposes. His impression was inflammation of sacroiliac joint. (JE8, pp. 64-65)

On October 13, 2021, Ms. Kapic returned to Dr. Birkland for follow-up of her chronic low back and bilateral leg pain status post bilateral SI joint injections that he performed on September 16, 2021. Her lower back pain had improved but she still had pain in her bilateral buttocks and down the side of her legs to her feet bilaterally. Her most recent MRI showed degeneration of the lumbar spine with multiple disc bulges and mild foraminal/spinal stenosis at multiple levels. Dr. Birkland felt further lumbar injections were not going to provide any additional benefit. He noted her degeneration was diffuse and surgery was not a reasonable option. (JE8, pp. 66-68)

At the request of her attorney, Ms. Kapic saw Sunil Bansal, M.D. for an independent medical examination (IME) on April 19, 2022. As the result of the examination and review of the records provided to him by the claimant's counsel, Dr. Bansal issued a report on May 20, 2022. Ms. Kapic reported that on April 28, 2021 she was working at Hy-Vee and experienced a sharp pain in the right side of her low back while lifting a tote that weighed approximately 25 to 30 pounds. She felt that repetitive bending forward to lift and set the totes down probably caused part of it and that her injury was more of a cumulative injury. Dr. Bansal noted that Ms. Kapic had a previous injury to her back while working in 2013. At that time, she was working in the bakery department at a different Hy-Vee. She did not receive any treatment for the 2013 injury because no one wanted to take her to the emergency room. She said she just dealt with the pain, which never went completely away. Ms. Kapic reported that she continued to have numbness of her right fourth and fifth toes. She was not able to sit or stand comfortably for long and she felt a bit unstable when standing and usually held onto something. She continued to work at Hy-Vee, performing her regular job. Dr. Bansal stated that in the absence of additional treatment, he would place her at MMI as of April 19, 2022. His assessment was an aggravation of lumbar spondylosis and an L5-S1 annular tear. He referred to Table 15-3 of the AMA Guides of Evaluation for Permanent Impairment, Fifth Edition, and classified Ms. Kapic as having elements fitting into DRE Lumbar Category II. He noted she had radicular pain, a loss of range of

motion, and guarding. He assigned 7 percent impairment of the body as a whole as the result of her work injury. (Claimant's Exhibit 1) Dr. Bansal opined:

> Ms. Kapic incurred an acute on chronic injury from her work at Hy-Vee. She aggravated her multi-level lumbar spondylosis, facet arthropathy, and disc bulging due to her repetitive bending and heavy lifting performed at Hy-Vee during the April 2021 timeframe. Against that backdrop, she acutely incurred an annular tear from lifting a tote on April 28, 2021 at Hy-Vee.

(Cl. Ex. 1, pp. 14-15)

Dr. Bansal restricted Ms. Kapic to no lifting greater than 20 pounds occasionally, or 10 pounds frequently, no frequent bending or twisting, and no prolonged standing or sitting greater than 30 minutes at a time. She was also to avoid multiple stairs. Dr. Bansal did not answer whether those restrictions were to be considered permanent or continuing. (Cl. Ex. 1, p. 15)

Ms. Kapic was off work on short-term disability from June 28, 2021 until August 28, 2021. She returned to work because she felt she did not have a choice. When she returned to work, she went back to her online shopping job at the same shift, same hourly pay, and same number of hours. At the time of the hearing, Ms. Kapic had been back to Hy-Vee for approximately one year. She has changed the way she performs her job. She shops in paper bags, rather than totes. (Tr. pp. 43-45)

Ms. Kapic testified that she continues to have symptoms. She experiences a burning, tightening pain in her lower back that goes down her right hip and leg. When she bends down, she holds onto a wall or something so she does not fall. She cannot walk long distances without supporting herself. She cannot sit for too long or walk for too long. She has pain every day. (Tr. pp. 46-50)

The first issue to be determined is whether Ms. Kapic sustained an injury which arose out of and in the course of her employment on April 28, 2021. There are a couple of experts who have offered their opinion on this issue. Claimant relies on the opinion of Dr. Bansal, while defendants primarily rely on the opinions of Dr. Myrtil.

On April 30, 2021, Dr. Myrtil, an occupational physician who provided treatment to Ms. Kapic, stated,

> [b]ased on the patient's history, this likely does NOT represent a work related injury. While she attributes her symptoms to a single episode of lifting a heavy tote, physical exam and history are not consistent with a musculoskeletal injury of the low back. Imaging of the low back demonstrates extensive degenerative changes of the low back without obvious radiculopathy. Experiencing low back pain while performing job duties does not establish a causal relationship. There is insufficient evidence that lifting or heavy work is a risk factor for chronic low back pain. Her symptoms are obviously pre-existing.

(JE4, p. 27)

On May 7, 2021, Dr. Myrtil informed Ms. Kapic that her imaging revealed extensive degenerative changes and that her symptoms were not consistent with lifting a tote. (JE4, p. 29; JE3) Defendants contend Dr. Myrtil's opinions are corroborated by Dr. Pugely's diagnosis of degenerative scoliosis and chronic degenerative changes to the lumbar spine. While Dr. Myrtil and Dr. Pugely both recognize that Ms. Kapic has an underlying degenerative back condition, neither physician addresses the issue of aggravation. Unfortunately, the record is void of any opinion from Dr. Myrtil on whether Ms. Kapic's alleged work injury did or did not aggravate her underlying back condition.

Dr. Bansal is the only expert in this case to address the issue of an aggravation of a pre-existing condition. Dr. Bansal's assessment was an aggravation of lumbar spondylosis and an L5-S1 annular tear. Dr. Bansal stated,

> Ms. Kapic incurred an acute on chronic injury from her work at Hy-Vee. She aggravated her multi-level lumbar spondylosis, facet arthropathy, and disc bulging due to her repetitive bending and heavy lifting performed at Hy-Vee during the April 2021 timeframe. Against that backdrop, she acutely incurred an annular tear from lifting a tote on April 28, 2021 at Hy-Vee.

(Cl. Ex. 1, pp. 14-15)

Based on the opinion of Dr. Bansal I find Ms. Kapic sustained an injury that arose out of and in the course of her employment with Hy-Vee on April 28, 2021.

Next, we turn to the issue of whether the injury caused any permanent disability. Dr. Bansal's opinion regarding permanent functional impairment is unrebutted. He opined that pursuant to the AMA Guides, Ms. Kapic sustained 7 percent impairment of the body as a whole. (Cl. Ex. 1, p.14) Thus, I find Ms. Kapic sustained 7 percent impairment of the body as a whole due to the work injury. I further find that since the work injury Ms. Kapic has returned to work in the same job, at the same shift, same hourly pay, and same number of hours. (Tr. pp. 43-45) Thus, I find Ms. Kapic returned to work with the same employer and receives the same or greater wages than she earned at the time of the injury. Therefore, I find Ms. Kapic has demonstrated entitlement to 35 weeks of permanent partial disability benefits.

The next disputed issue is the appropriate commencement date for the permanent partial disability benefits. Claimant contends the benefits should commence on April 19, 2022. This is the date Dr. Bansal placed Ms. Kapic at maximum medical improvement and the date he used The Guides to determine her permanent impairment. (Cl. Ex. 1, pp. 13-14) Defendants contend permanency benefits should commence on October 13, 2021. To support their position defendants argue this is the date of Ms. Kapic's last visit with Dr. Birkland wherein no further injections or surgery were recommended. Ms. Kapic then returned to work at full-time status, and according to defendants, she did not receive any significant medical treatment after that date. (JE8, p. 68) However, the record is void of any expert opinion to indicate that Ms. Kapic's permanent impairment could have been determined by The Guides on this date. Therefore, based on Dr. Bansal's opinion, I find the appropriate commencement date for permanency benefits is April 19, 2022.

We now turn to the issue of whether Ms. Kapic is entitled to any weekly temporary disability benefits. Because Ms. Kapic has demonstrated that she sustained permanent disability as the result of the work injury, any temporary benefits she may be entitled to receive would be classified as healing period benefits. Ms. Kapic is seeking healing period benefits from June 28, 2021 through August 28, 2021. Defendants dispute her entitlement to these benefits but stipulate that she was off work during this period.

First, defendants seem to dispute Ms. Kapic's entitlement to healing period benefits because she received short-term disability benefits during this time. Defendants do not cite any legal authority for this position. While it may be true that defendants are entitled to a credit for the short-term disability benefits she received, I find that receiving short-term disability benefits does not negate claimant's entitlement to healing period benefits.

Second, defendants argue Ms. Kapic is not entitled to healing period benefits because she was capable of performing at least light duty work during the period she was off work. On May 7, 2021, Dr. Myrtil restricted Ms. Kapic to 4 hours of work per day and seated work only. (JE4, p. 30) There is no indication in the record that these restrictions were lifted. Hy-Vee provided Ms. Kapic with light duty work which consisted of separating price tags in the break room. She performed this work for four hours per day for two weeks. Ms. Kapic asked Hy-Vee what her next step was, and she was told she could file for short-term disability. Ms. Kapic filed for and received short-term disability. (Tr. pp. 42-43) Defendants argue they had work for her to perform during this period she was off work and therefore, she is not entitled to benefits. However, there is no evidence in the record that defendants communicated in writing an offer of continued light duty work. Because there was no written communication of the offer of suitable work, I find claimant is entitled to healing period benefits from June 28, 2021 through August 28, 2021 at the stipulated weekly workers' compensation rate of $510.82.

The parties stipulated defendants are entitled to a credit under Iowa Code section 85.38(2) for payment of short-term disability as set forth in Defendants' Exhibit E. (Hearing Report, numbered paragraph 9) Thus, defendants are entitled to said credit.

The next issue to address is penalty. Claimant asserts that penalty benefits are appropriate in this case for defendants' failure to pay any temporary or permanent weekly workers' compensation benefits. Claimant asserts the defendants' reliance on Dr. Myrtil's opinion from April 30, 2021 was not a reasonable basis to deny Ms. Kapic's claim. Defendants contend their denial was reasonably based, and it was not based solely on the opinion of Dr. Myrtil. In addition to Dr. Myrtil's opinion, defendants also relied on their understanding that claimant was actively treating with the UIHC for her back condition prior to the date of injury.

In this case, I find there was a denial of payment of weekly benefits. Claimant alleged she sustained an injury on April 28, 2021. On May 27, 2021, defendants sent a letter to claimant advising claimant that they dispute liability for her claim. The letter discussed Dr. Myrtil's opinion that Ms. Kapic's symptoms were not work related. The

letter also informed Ms. Kapic that defendants had requested her treatment records that predate the alleged injury for her back condition from The Iowa Clinic and the University of Iowa Hospitals and Clinics. (Defendants' Exhibit B) I further find that defendants did offer a reasonable basis for the denial in payment of benefits and that defendants contemporaneously conveyed the bases for denial of benefits to the claimant. Thus, I find an award of penalty benefits is not appropriate in this case.

Next claimant seeks payment of past medical expenses as set forth in Claimant's Exhibit 12. A review of the medical expenses and records demonstrates the expenses submitted by Ms. Kapic were for reasonable and necessary treatment of her low back pain and radiating symptoms which have been found to be related to the work injury. Thus, I find defendants are responsible for the medical expenses set forth in Claimant's Exhibit 12.

CONCLUSIONS OF LAW

The party who would suffer loss if an issue were not established ordinarily has the burden of proving that issue by a preponderance of the evidence. Iowa R. App. P. 6.904(3)(e).

The claimant has the burden of proving by a preponderance of the evidence that the alleged injury actually occurred and that it both arose out of and in the course of the employment. Quaker Oats Co. v. Ciha, 552 N.W.2d 143 (Iowa 1996); Miedema v. Dial Corp., 551 N.W.2d 309 (Iowa 1996). The words "arising out of" refer to the cause or source of the injury. The words "in the course of" refer to the time, place, and circumstances of the injury. 2800 Corp. v. Fernandez, 528 N.W.2d 124 (Iowa 1995). An injury arises out of the employment when a causal relationship exists between the injury and the employment. Miedema, 551 N.W.2d 309. The injury must be a rational consequence of a hazard connected with the employment and not merely incidental to the employment. Koehler 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.

While a claimant is not entitled to compensation for the results of a preexisting injury or disease, its mere existence at the time of a subsequent injury is not a defense. Rose v. John Deere Ottumwa Works, 247 Iowa 900, 76 N.W.2d 756 (1956). If the claimant had a preexisting condition or disability that is materially aggravated, accelerated, worsened or lighted up so that it results in disability, claimant is entitled to recover. Nicks v. Davenport Produce Co., 254 Iowa 130, 115 N.W.2d 812 (1962); Yeager v. Firestone Tire & Rubber Co., 253 Iowa 369, 112 N.W.2d 299 (1961).

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).

Based on the above findings of fact, I conclude Ms. Kapic sustained an injury that arose out of and in the course of her employment with Hy-Vee on April 28, 2021. As previously noted, Dr. Myrtil and Dr. Pugely both recognized that Ms. Kapic had underlying degenerative back conditions, however, neither physician addresses the issue of aggravation. Dr. Bansal is the only expert in this case to address the issue of an aggravation of a pre-existing condition. I further conclude Ms. Kapic sustained an injury to her body as a whole that arose out of and in the course of her employment with Hy-Vee.

Because claimant established by the preponderance of the evidence that her injury extends into the body as a whole, she should be compensated pursuant to Iowa Code section 85.34(2)(v).

Iowa Code section 85.34(2)(v) provides:

> In all cases of permanent partial disability other than those hereinabove described or referred to in paragraphs 'a' through 'u' hereof, the compensation 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.

Iowa Code section 85.34(2)(v).

In this case, I conclude Ms. Kapic returned to work and receives the same or greater wages than she did at the time of the injury. Thus, compensation should be based on Ms. Kapic's permanent impairment resulting from her injury. As such, I conclude that her current recovery is limited to her permanent functional impairment rating resulting from the injury. Iowa Code section 85.34(2)(v).

Iowa Code section 85.34(x) permanent disabilities states:

> In all cases of permanent partial disability described in paragraphs "a" through "u", or paragraph "v" when determining functional disability and not loss of earning capacity, the extent of loss or percentage of permanent impairment *shall be determined solely by utilizing the guides to the evaluation of permanent impairment, published by the American medical association*, as adopted by the workers' compensation commissioner by rule pursuant to chapter 17A. Lay testimony or *agency expertise shall not be utilized in determining loss or percentage of permanent impairment* pursuant to paragraphs "a" through "u", or paragraph "v" when determining functional disability and not loss of earning capacity.

Iowa Code section 85.34 (x) (emphasis added).

This agency has adopted The Guides to the Evaluation of Permanent Impairment, Fifth Edition, published by the American Medical Association for determining the extent of loss or percentage of impairment for permanent partial disabilities. See 876 IAC 2.4.

Based on the above findings of fact, I conclude Dr. Bansal's impairment rating is unrebutted and based solely on The Guides. I accepted the impairment rating offered by Dr. Bansal and found that claimant proved a 7 percent permanent functional impairment of the whole person as a result of the April 28, 2021 work injury. This finding entitles claimant to an award equivalent to 7 percent of the whole person.

Pursuant to Iowa Code section 85.34(2)(v), unscheduled injuries are compensated based upon a 500-week schedule. Seven percent of 500 weeks is 35 weeks. Therefore, I conclude that claimant is currently entitled to an award of 35 weeks of permanent partial disability benefits as a result of the April 28, 2021 work injury.

The next disputed issue is the appropriate commencement date for the permanent partial disability benefits. According to the Code, permanency shall begin when it is medically indicated that maximum medical impairment from the injury has been reached and the extent of permanent impairment can be determined by The

Guides. Iowa Code section 85.34(2). Based on the above findings of fact, I conclude the appropriate commencement date for permanency benefits is April 19, 2022.

Next, claimant is seeking healing period benefits from June 28, 2021 through August 28, 2021. Defendants dispute her entitlement to these benefits but stipulate that she was off work during this period.

Section 85.34(1) provides that healing period benefits are payable to an injured worker who has suffered permanent partial disability until (1) the worker has returned to work; (2) it is medically indicated that significant improvement from the injury is not anticipated; or (3) the employee is medically capable of returning to employment substantially similar to the employment in which the employee was engaged at the time of injury, whichever happens first.

Section 85.33(3)(a) states,

> [i]f an employee is temporarily, partially disabled and the employer for whom the employee was working at the time of the injury offers to the employee suitable work consistent with the employee's disability the employee shall accept the suitable work, and be compensated with temporary partial benefits. If the employer offers the employee suitable work and the employee refuses to accept the suitable work offered by the employer, the employee shall not be compensated with temporary partial, temporary total, or healing period benefits during the period of refusal.

Section 85.33(3)(b) states,

> [t]he employer shall communicate an offer of temporary work to the employee in writing, including details of lodging, meals, and transportation, and shall communicate to the employee that if the employee refuses the offer of temporary work, the employee shall communicate the refusal and the reason for the refusal to the employer in writing and that during the period of the refusal the employee will not be compensated with temporary partial, temporary total, or healing period benefits, unless the work refused is not suitable.

Based on the above findings of fact, I conclude defendants failed to communicate in writing an offer of continued light duty work. The statute provides that the employer shall communicate this offer in writing. Because there was no written communication of the offer of suitable work, I conclude claimant is entitled to healing period benefits from June 28, 2021 through August 28, 2021 at the stipulated weekly workers' compensation rate of $510.82.

The parties stipulated defendants are entitled to a credit under Iowa Code section 85.38(2) for payment of short-term disability as set forth in Defendants' Exhibit E. (Hearing Report, numbered paragraph 9) Thus, defendants are entitled to said credit.

The next issue to address is penalty. Claimant asserts that penalty benefits are appropriate in this case for defendants' failure to pay any temporary or permanent weekly workers' compensation benefits.

With regard to penalty benefits, the Code states:

> a. If a denial, a delay in payment, or a termination of benefits occurs without reasonable or probable cause or excuse known to the employer or insurance carrier at the time of the denial, delay in payment, or termination of benefits, the workers' compensation commissioner shall award benefits in addition to those benefits payable under this chapter, or chapter 85, 85A, or 85B, up to fifty percent of the amount of benefits that were denied, delayed, or terminated without reasonable or probable cause or excuse.
>
> b. The workers' compensation commissioner shall award benefits under this subsection if the commissioner finds both of the following facts:
>
> (1) The employee has demonstrated a denial, delay in payment, or termination in benefits.
>
> (2) The employer has failed to prove a reasonable or probable cause or excuse for the denial, delay in payment, or termination of benefits.

Iowa Code section 86.13(4).

In Christensen v. Snap-on Tools Corp., 554 N.W.2d 254 (Iowa 1996), and Robbennolt v. Snap-on Tools Corp., 555 N.W.2d 229 (Iowa 1996), the supreme court said:

> Based on the plain language of section 86.13, we hold an employee is entitled to penalty benefits if there has been a delay in payment unless the employer proves a reasonable cause or excuse. A reasonable cause or excuse exists if either (1) the delay was necessary for the insurer to investigate the claim or (2) the employer had a reasonable basis to contest the employee's entitlement to benefits. A "reasonable basis" for denial of the claim exists if the claim is "fairly debatable."

Christensen, 554 N.W.2d at 260.

The supreme court has stated:

> (1) If the employer has a reason for the delay and conveys that reason to the employee contemporaneously with the beginning of the delay, no penalty will be imposed if the reason is of such character that a reasonable fact-finder could conclude that it is a "reasonable or probable cause or excuse" under Iowa Code section 86.13. In that case, we will defer to the decision of the commissioner. See Christensen, 554 N.W.2d at 260 (substantial evidence found to support commissioner's finding of

legitimate reason for delay pending receipt of medical report); Robbennolt, 555 N.W.2d at 236.

(2) If no reason is given for the delay or if the "reason" is not one that a reasonable fact-finder could accept, we will hold that no such cause or excuse exists and remand to the commissioner for the sole purpose of assessing penalties under section 86.13. See Christensen, 554 N.W.2d at 261.

(3) Reasonable causes or excuses include (a) a delay for the employer to investigate the claim, Christensen, 554 N.W.2d at 260; Kiesecker v. Webster City Custom Meats, Inc., 528 N.W.2d at 109, 111 (Iowa 1995); or (b) the employer had a reasonable basis to contest the claim—the "fairly debatable" basis for delay. See Christensen, 554 N.W.2d at 260 (holding two-month delay to obtain employer's own medical report reasonable under the circumstances).

(4) For the purpose of applying section 86.13, the benefits that are underpaid as well as late-paid benefits are subject to penalties, unless the employer establishes reasonable and probable cause or excuse. Robbennolt, 555 N.W.2d at 237 (underpayment resulting from application of wrong wage base; in absence of excuse, commissioner required to apply penalty).

> If we were to construe [section 86.13] to permit the avoidance of penalty if any amount of compensation benefits are paid, the purpose of the penalty statute would be frustrated. For these reasons, we conclude section 86.13 is applicable when payment of compensation is not timely . . . or when the full amount of compensation is not paid.

Id.

(5) For purposes of determining whether there has been a delay, payments are "made" when (a) the check addressed to a claimant is mailed (Robbennolt, 555 N.W.2d at 236; Kiesecker, 528 N.W.2d at 112), or (b) the check is delivered personally to the claimant by the employer or its workers' compensation insurer. Robbennolt, 555 N.W.2d at 235.

(6) In determining the amount of penalty, the commissioner is to consider factors such as the length of the delay, the number of delays, the information available to the employer regarding the employee's injury and wages, and the employer's past record of penalties. Robbennolt, 555 N.W.2d at 238.

(7) An employer's bare assertion that a claim is "fairly debatable" does not make it so. A fair reading of Christensen and Robbennolt,

> makes it clear that the employer must assert facts upon which the commissioner could reasonably find that the claim was "fairly debatable." See Christensen, 554 N.W.2d at 260.

Meyers v. Holiday Express Corp., 557 N.W.2d 502 (Iowa 1996).

When an employee's claim for benefits is fairly debatable based on a good faith dispute over the employee's factual or legal entitlement to benefits, an award of penalty benefits is not appropriate under the statute. Whether the issue was fairly debatable turns on whether there was a disputed factual dispute that, if resolved in favor of the employer, would have supported the employer's denial of compensability. Gilbert v. USF Holland, Inc., 637 N.W.2d 194 (Iowa 2001).

In this case, there was a denial of payment of weekly benefits. Therefore, I conclude claimant satisfied her burden of proof on the Iowa Code section 86.13 penalty benefit claim. Once claimant satisfied this burden, the burden of production shifted to defendants to establish that defendants possessed a reasonable basis for denial and that defendants contemporaneously conveyed the basis for denial to claimant.

I conclude defendants did offer a reasonable excuse for the denial in payment of benefits and that defendants contemporaneously conveyed the bases for denial of benefits to the claimant. Thus, I conclude an award of penalty benefits is not appropriate in this case. .

Next claimant seeks payment of past medical expenses as set forth in Claimant's Exhibit 12. Iowa Code provides that 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 1975).

A review of the medical expenses and records demonstrate the expenses submitted by Ms. Kapic for her low back and radiating symptoms have been found to be related to the work injury. Thus, I conclude defendants are responsible for the medical expenses set forth in Claimant's Exhibit 12.

Finally, claimant is seeking an assessment of costs as set forth in Claimant's Exhibit 13. Costs are to be assessed at the discretion of the Iowa Workers' Compensation Commissioner or at the discretion of the deputy hearing the case. 876 IAC 4.33. Defendants have stated that if the injury is found to be compensable then they do not dispute claimant's requested costs. (Defendants' Brief, p. 22) Thus, I conclude claimant is entitled to an assessment of the costs set forth in Claimant's Exhibit 13. Specifically, defendants are assessed costs in the amount of two-thousand nine-hundred forty-one and 88/100 dollars ($2,941.88).

ORDER

THEREFORE, IT IS ORDERED:

All weekly benefits shall be paid at the stipulated rate of five hundred ten and 82/100 dollars ($510.82).

Defendants shall pay healing period benefits from June 28, 2021 through August 28, 2021, less the stipulated credit as set forth in Defendants' Exhibit E.

Defendants shall pay thirty-five (35) weeks of permanent partial disability benefits commencing on April 19, 2022.

Defendants shall be entitled to credit for all weekly benefits paid to date.

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

Defendants shall pay these medical providers, reimburse claimant, reimburse all third-party payers, or otherwise satisfy and hold claimant harmless for medical expenses as set forth in exhibit 12.

Defendants shall reimburse claimant's costs as set forth above.

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

Signed and filed this ___15th___ day of November, 2022.

ERIN Q. PALS
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Erin Tucker (via WCES)

Lindsey Mills (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.