BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

WENDY KISH, Claimant, vs. UNIVERSITY OF DUBUQUE, Employer, and TRAVELERS INDEMNITY COMPANY OF CONNECTICUT, Insurance Carrier, Defendants.	File No. 5066482 ARBITRATION DECISION Head Note Nos: 1402.40; 1803; 2907; 4000.2

STATEMENT OF THE CASE

Claimant Wendy Kish filed a petition in arbitration seeking worker's compensation benefits against University of Dubuque, employer, and Travelers Indemnity Company of Connecticut, insurer, for an accepted work injury date of May 30, 2018. The case came before the undersigned for an arbitration hearing on June 25, 2020. This case was scheduled to be an in-person hearing occurring in Des Moines. However, due to the outbreak of a pandemic in Iowa, the Iowa Workers' Compensation Commissioner ordered all hearings to occur via video means, using CourtCall. Accordingly, this case proceeded to a live video hearing via CourtCall with all parties and the court reporter appearing remotely. The hearing proceeded without significant difficulties.

The parties filed a hearing report prior to the commencement of the hearing. On the hearing report, the parties entered into numerous stipulations. Those stipulations were accepted and no factual or legal issues relative to the parties' stipulations will be made or discussed. The parties are now bound by their stipulations.

The evidentiary record includes Joint Exhibits 1 through 5, Claimant's Exhibits 1 through 7, and Defendants' Exhibits A through C.

Claimant testified on her own behalf. Julie McTaggert testified on behalf of the employer. The evidentiary record closed at the conclusion of the evidentiary hearing on June 25, 2020. The parties submitted post-hearing briefs on August 6, 2020, and the case was considered fully submitted on that date.

ISSUES

1. Whether claimant has sustained an industrial disability to her back as a result of the accepted work injury on May 30, 2018;
2. If so, the extent of industrial disability;
3. Whether claimant is entitled to penalty benefits pursuant to Iowa Code section 86.13; and
4. Taxation of costs.

FINDINGS OF FACT

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

Claimant's testimony was consistent as compared to the evidentiary record, and her demeanor at the time of hearing gave the undersigned no reason to doubt her veracity. Claimant is found credible.

At the time of the hearing, claimant was 49 years old. (Testimony) She graduated from Maquoketa High School in 1989. (Defendants' Exhibit A, p. 2) After high school, she took business classes at American Institute of Commerce in Davenport in 1991 through 1993, but did not complete a degree. (Def. Ex. A, pp. 2-3)

Following high school, claimant had held several different jobs. First, she went to work at the Honda Warehouse pulling and packing auto parts. She also worked at KJ Convenience Store in the 1990s in the deli area. She worked as a waitress and bartender at various establishments during the early 1990s. In approximately 1994, she began working as a front desk clerk and night auditor at the Holiday Inn. In approximately 1998 she began working at a gift shop and was the assistant manager. From 2000 to 2006, claimant worked as the night manager at a Burger King restaurant in Dubuque. In 2006, claimant went to work at Hy-Vee in the kitchen, where she stayed until approximately 2011. Finally, in 2011, claimant was placed at University of Dubuque through Sedona Staffing. She was hired as a permanent employee by the University in 2012 and has worked there since that time. (Def. Ex. A, pp. 3-8; Claimant's Exhibit 3, pp. 3-7)

Claimant was initially hired as a custodian at the University. As a custodian, claimant is required to maintain the cleanliness of campus buildings. Her job duties include vacuuming, sweeping, mopping floors, dusting, washing walls and windows, emptying trash, helping with event set-up, operating floor and carpet machines, and other duties as assigned. As part of her job requirements, she must have the ability to lift up to 40 pounds, bend, stoop, and kneel, climb a 6-foot ladder, and stand for long periods of time. (Def. Ex. B, p. 8)

In March of 2016, claimant was promoted to the lead custodian position at the University. (Testimony) As lead custodian, claimant maintained the same job duties as a regular custodian, with the additional duties of helping supervise, inspect, and direct

work crews, as well as training new staff. She was also responsible for keeping track of inventory, filling in for other workers as needed, maintaining the exteriors of campus buildings, completing paperwork, and additional general supervisory duties. (Def. Ex. B, pp. 6-7) According to the job description, the lead custodian position required the same physical abilities as a regular custodian, including the ability to lift up to 40 pounds. In addition, the lead custodian is required to work on ladders up to 12-feet, and use an aerial lift up to 40-feet. (Def. Ex. B, p. 7)

The lead custodian is paid $1.00 per hour more than a regular custodian. Claimant testified that as lead custodian she was paid $14.79 per hour. (Testimony; Def. Ex. A, p. 9)

On May 30, 2018, claimant was injured while working. Claimant was cleaning a dorm room which contained an armoire. As she was cleaning the armoire she reached up and said that her body "locked up" and she felt pain in her low back and tension in her muscles. (Testimony) She testified that she tried to keep working, but eventually had to stop. Since her shift was almost over, she iced her back in the break room and went to the office to report the injury.

Claimant was seen on June 1, 2018, at Finley Occupational Health for back pain. (Joint Exhibit 1, p. 1) At that time, she reported that she did not feel she could perform her job duties of moving furniture and lifting mattresses to clean dorm rooms. The record also indicates that she reported "this episode is not as severe as the last time." It was noted that a prior MRI from 2017 showed L3 and L4 posterior disc bulging with a disc herniation that abutted the right L3 nerve root. She also had a L4-L5 posterior disc herniation which may have abutted the right L5 nerve root. She had a cortisone injection for her 2017 injury and was placed at MMI with no impairment on September 28, 2017. (Jt. Ex. 1, p. 1)

During her examination on June 1, 2018, claimant had tenderness over the L4-L5 region, which radiated into her hip. She also reported numbness and tingling into her bilateral legs and was unable to do lateral twisting due to pain. (Jt. Ex. 1, p. 1) She was also unable to do lateral flexion to the right or left and was unable to do extension back. She was diagnosed with low back pain with numbness and tingling radiating into the bilateral legs. She was provided with temporary restrictions of no lifting greater than 10 pounds, no twisting at the waist, no bending, and allow for frequent position changes. She was also told to do home stretches and attend physical therapy. (Jt. Ex. 1, p. 1)

Claimant returned to Finley on June 4, 2018. (Jt. Ex. 1, p. 2) She reported her pain level as 9 out of 10 and she was tearful. She stated that sitting was the worst and stated that "going from sitting to a standing position is almost unbearable." She had been following her restrictions while working and she was off work on June 3 and 4. Claimant had a physical therapy pain session at that visit, which decreased her pain level to a 4-5 out of 10. It is noted that she appeared much more comfortable after the session. Her restrictions were continued, and she was told to follow up in a week. (Jt. Ex. 1, pp. 2-3)

Claimant's next appointment at Finley was June 18, 2018. (Jt. Ex. 1, p. 4) At that time she reported a pain level of 7 out of 10. Physical therapy had been approved, but due to telephone issues therapy had not yet been scheduled. Claimant noted that she continued to follow her restrictions at work, but as lead custodian one of her job duties is to drive between different buildings in a company truck or van. She complained that getting in and out of her truck at work was aggravating her back. As such, her work restrictions were changed to include limited driving. She was also given the phone number to schedule physical therapy. (Jt. Ex. 1, p. 4)

Claimant had another follow up appointment on June 25, 2018. Again, claimant was tearful. She still had not started physical therapy but was scheduled to begin on July 2. Her restrictions were not changed. (Jt. E. 1, p. 6) At her next visit on July 2, 2018, she continued to report mild to moderate pain. (Jt. Ex. 1, p. 8) She had her first session of physical therapy that same day, and was told to continue with therapy and restrictions, and was also referred to a pain clinic. (Jt. Ex. 1, pp. 8-9) She was seen on July 9, 2018, at which time she was advised that the workers' compensation insurer had told her to complete 6 sessions of physical therapy prior to approving the referral to pain management. (Jt. Ex. 1, p. 10) At her appointment on July 16, 2018, her pain had gotten somewhat worse, and she did not believe physical therapy was helping. (Jt. Ex. 1, p. 12) On July 23, 2018, she felt a slight improvement in her symptoms. It is also noted that she had an appointment scheduled with Timothy J. Miller, M.D., at Finley Pain Clinic on August 2, 2018. (Jt. Ex. 1, pp. 14-15)

At her appointment with Dr. Miller, it was noted that claimant had good response to an epidural injection in September 2017. Dr. Miller proceeded with a lumbar epidural steroid injection at L4-L5. (Jt. Ex. 2, p. 2) Claimant then returned to Finley Occupational Health on August 6, 2018, and noted that the injection on August 2 did not provide as much relief as the injection she had received the year prior. (Jt. Ex. 1, p. 16) However, she did feel some improvement. Work restrictions were increased to no lifting over 20 pounds, and she was to continue with physical therapy. (Jt. Ex. 1, pp. 16-17) She returned on August 13, 2018. She reported feeling that she was 60 percent back to baseline, but also that she felt it was taking "too long" after her injection. The record also notes that she mentioned being afraid of hurting again, and that she is being overly cautious as a result. She was to continue work restrictions and physical therapy. (Jt. Ex. 1, p. 18)

Claimant next returned on August 27, 2018. At that time, she reported that the pain was "almost as bad as when we started." She stated that she was feeling quite a bit better but the Thursday prior after physical therapy she began stiffening up and felt worse on the drive home. She was in too much pain to work the next day, and only worked half a day on the following Saturday. The examination was limited due to guarding. Claimant was referred back to Dr. Miller at the pain clinic, and physical therapy was put on hold. (Jt. Ex. 1, p. 24)

Claimant returned to Dr. Miller on September 6, 2018. (Jt. Ex. 2, p. 5) Claimant reported that she was not pain free after her recent injection. She also reported an increase in back pain after physical therapy. Dr. Miller provided another lumbar epidural

steroid injection at that time and recommended a surgical consultation if the injection was not successful. (Jt. Ex. 2, pp. 5-9)

Claimant returned to Finley on September 13, 2018. At that time, she rated her pain as 6 out of 10. She further reported that the second steroid injection helped for only 2 days, after which her low back pain returned. At that point, she was referred to a spine specialist. (Jt. Ex. 1, pp. 26-28) She was seen again on September 18 with no changes. (Jt. Ex. 1, pp. 29-31)

On October 12, 2018, claimant reported complaints of saddle bag numbness and urinary incontinence. She rated her pain at 10 out of 10 and said it had gotten progressively worse since October 2. She denied any new injury. Due to the saddle bag numbness and urinary incontinence, she was referred for an MRI that day, and then advised to go to the emergency department. (Jt. Ex. 1, pp. 32-34)

Claimant was seen in the emergency department at the University of Iowa Hospitals and Clinics on October 12, 2018. (Jt. Ex. 3) While there, an orthopedic specialist, Chris Cychosz, M.D., was called for a consultation. (Jt. Ex. 3, pp. 6-8) Finley also sent over the results of claimant's MRI for interpretation. The October 12 MRI showed significant progression at L4-5, with new mild-to-moderate canal stenosis with a broad central protrusion/inferior extrusion as well as superior left lateral recess/left central extrusion and mild-to-moderate bilateral foraminal stenosis. (Jt. Ex. 2, p. 11) Dr. Cychosz assessed claimant with L4-L5 disc herniation based on her MRI, and recommended she follow up with orthopedics as an outpatient. (Jt. Ex. 3, p. 8) Cauda equina syndrome was ruled out, and claimant was discharged in stable condition with instructions to follow up with orthopedics. (Jt. Ex. 3, p. 8)

Claimant returned to Finley on October 15, 2018. At that time she was tearful, and her condition had not changed. Her restrictions were reduced back to no lifting more than 10 pounds and avoiding climbing stairs was added. The record further notes that they were still waiting on the workers' compensation insurance company to approve a follow-up appointment with a back specialist. (Jt. Ex. 1, p. 35)

Claimant went to the emergency room at Finley Hospital on October 18, 2018 due to her back pain. (Jt. Ex. 2, pp. 12-15) She returned to the Occupational Health Clinic on October 19 with continued complaints. A restriction of only working 4-hours per day was added. (Jt. Ex. 1, pp. 38-40) On October 23, 2018, claimant was again seen in the emergency department at Finley for sciatica and leg pain. (Jt. Ex. 2, pp. 17-19)

On October 31, 2018, claimant saw Cassim M. Igram, M.D., at the University of Iowa Hospitals and Clinics. (Jt. Ex. 3, pp. 16-20) Dr. Igram noted that claimant had an initial incident involving her back in April of 2017. The MRI in June of 2017 showed L3-L4 posterior disc bulging with superimposed right extraforaminal disc herniation, which abutted the exiting right L3 nerve root. At L4-L5 there was a right paracentral disc herniation which may have abutted the proximal right L5 nerve root. Her pain was relieved by an epidural injection in 2017, after which she was able to return to work. (Jt. Ex. 3, p. 16)

Dr. Igram noted the second event occurred on May 30, 2018, when claimant was moving furniture while cleaning a dorm room. Following conservative treatment, which did not resolve her pain, she had an MRI. University of Iowa Radiology interpreted the MRI to show multilevel degenerative changes, most significant at L4-L5 with prominent central disc extrusion. (Jt. Ex. 3, p. 16) Dr. Igram diagnosed lumbar disc herniation related to her May 30, 2018 work injury and ordered an EMG/NCS. (Jt. Ex. 3, p. 19) Claimant was released to return to work with the same restrictions in place and told to return to Dr. Igram following the EMG/NCS. (Jt. Ex. 3, p. 20)

Dr. Igram responded to a letter from the insurance carrier dated October 31, 2018. Dr. Igram's response is not dated, but he indicates that claimant's May 30, 2018 work injury was the cause of her current condition and need for treatment. (Jt. Ex. 3, p. 25) There is a note regarding a telephone encounter on November 7, 2018, which indicates that claimant's concerns were relayed to Dr. Igram, and he then took her off work effective November 7, 2018 until her follow up visit on November 28. (Jt. Ex. 3, pp. 32-33)

Claimant had the EMG/NCS studies on November 19, 2018, which showed evidence of left L5 radiculopathy. (Jt. Ex. 3, p. 28) On November 28, 2018, claimant returned to Dr. Igram. Claimant reported stabbing, radiating, burning, aching and pins and needles pain as well as numbness of the left leg, stabbing low back pain and numbness and pins and needles pain in the right foot. She reported limited ability to stand or walk for more than one hour at a time. She had not been working and was interested in discussing surgery. (Jt. Ex. 3, pp. 35-37) Dr. Igram recommended lumbar discectomy at L4-5 on the left side. (Jt. Ex. 3, p. 37) Claimant was to remain off work pending surgery. (Jt. Ex. 3, p. 39)

On January 10, 2019, Dr. Igram performed lumbar discectomy at L4-L5 on the left. (Jt. Ex. 3, pp. 40-41) Claimant was to remain off work until January 20, 2019. (Jt. Ex. 3, p. 43) Claimant had a follow up appointment on January 30, 2019 and was seen by Rhonda Dunn, ARNP. Claimant reported midline low back pain and left hip pain. She also reported numbness going down her left leg if she lies on it or sits for too long. (Jt. Ex. 3, p. 45) Otherwise she was doing quite well. She was to remain off work and continue walking as tolerated. (Jt. Ex. 3, p. 48)

On February 27, 2019, claimant returned to Dr. Igram. Claimant reported that her pain and numbness had completely resolved, and she was doing well with mobilization and walking. She reported some difficulty with sitting for long periods of time, but that had greatly improved. She was only taking ibuprofen. (Jt. Ex 3, p. 53) Dr. Igram gave her a prescription for physical therapy. She was to return to work after completing two full weeks of physical therapy. Her lifting restriction was increased to 20 pounds. (Jt. Ex. 3, pp. 55; 65)

Claimant returned to Dr. Igram on April 10, 2019. (Jt. Ex. 3, p. 56) She reported her pain level at 2 out of 10. She had left-sided low back pain with some spasm and fatigue feeling down her left leg. She had been improving with physical therapy. Her restrictions were changed to allow for a 6-hour shift until April 20, 2019, after which she could increase to an 8-hour shift. She was limited to a 20-pound lifting restriction,

occasional vacuuming and no backpack vacuuming. (Jt. Ex. 3, pp. 58; 60) Claimant returned to work on light duty.

Claimant saw ARNP Rhonda Dunn on May 10, 2019. (Jt. Ex. 3, p. 61) Again, she described her pain as 2-3 on a pain scale of 10, and she had some left-sided achiness. She was back to work with restrictions. Claimant reported occasional sharp pain in her back, and fatigue completing her work shift. As such, she did not feel she could return to working overtime. (Jt. Ex. 3, p. 61) Her restrictions were changed to working an 8-hour shift, no overtime, and lifting up to 25 pounds for two weeks, after which she may increase to 35 pounds for 3 weeks, and then 45 pounds. (Jt. Ex. 3, pp. 63-64)

Claimant's next follow up with Dr. Igram was June 19, 2019. (Jt. Ex. 3, p. 84) At that time she reported that her pain was minimal. She had been doing her home exercise program and was working with restrictions. Dr. Igram advised that she should continue the home exercise program and placed her at maximum medical improvement (MMI). She was released to return to work without restrictions. (Jt. Ex. 3, pp. 87-88) Claimant did return to full duty work on June 19, 2019, in the same position she had on the date of injury, as a lead custodian. (Testimony; Def. Ex. A, p. 9)

On July 24, 2019, Dr. Igram drafted a letter assigning 10 percent functional impairment of the body as a whole based upon DRE Lumbar Category III, according to Table 15-3 on page 384 of the AMA Guides to the Evaluation of Permanent Impairment. (Jt. Ex. 3, p. 90) Defendants note in their brief that the insurance carrier was not provided with the letter until September 13, 2019. Defendants paid the 10 percent functional impairment rating, which is 50 weeks of permanent partial disability benefits.

Claimant underwent an independent medical evaluation (IME) with Richard L. Kreiter, M.D., on July 31, 2019. (Cl. Ex. 1, p. 6) Dr. Kreiter noted that claimant had good results from the surgery, but still had some chronic lumbar discomfort, especially with sitting and standing. (Cl. Ex. 1, p. 6) He recommended claimant continue to work on low back strengthening. He suggested routine daily exercises to strengthen her core musculature and noted that a custom orthotic or other type of back support to use while performing her custodial work might be helpful. Dr. Kreiter suggested claimant reached MMI "about six to eight weeks ago, perhaps around June 1, 2019." (Cl. Ex. 1, p. 6) Using the same table in the AMA Guides as Dr. Igram, Dr. Kreiter assigned a 13 percent functional impairment rating of the body as a whole. Dr. Kreiter further noted that claimant should self-limit her custodial work or she will have increasing symptoms secondary to the disc area or facet problem. He discussed that she must use proper mechanics while lifting, avoid jumping, and avoid forward flexed position with lifting unless done with proper body mechanics. He noted that "any 70-pound lift requirement at the University of Dubuque should be avoided and she should continue to ask for help when doing such activity." Finally, he recommended that she be able to alternate standing, walking, and sitting. (Cl. Ex. 1, p. 6)

The two impairment ratings are very close. The main difference appears to be restrictions, as Dr. Kreiter recommended claimant self-limit her work to avoid symptoms and avoid lifting 70 pounds. While I do not discount Dr. Kreiter's opinion entirely, as the surgeon and medical provider who evaluated claimant more frequently during the

healing process, I find that Dr. Igram was most qualified to provide a functional impairment rating and opine regarding permanent restrictions. Therefore, I accept the impairment rating offered by Dr. Igram, and find that claimant sustained a 10 percent impairment of the whole person as a result of her May 30, 2018 work injury.

Claimant returned to her job as a lead custodian on second shift with no restrictions on June 19, 2019. (Testimony) She returned to work at the same rate of pay, $14.79 per hour, and was working the same number of hours. (Testimony; Def. Ex. A, p. 9) At her deposition, taken August 8, 2019, and again at hearing, claimant testified that in her experience the position of lead custodian was physically more demanding as compared to a regular custodial position. (Testimony; Def. Ex. A, p. 9) Claimant was under the impression that the lead custodian position required the ability to lift up to 70-pounds, while the regular custodian position required lifting up to 40-pounds. (Testimony; Def. Ex. A, p. 9) While this was incorrect, it is true that the lead custodian also has more duties involving set up and tear down of campus events, driving between different buildings to transport employees, and carrying large totes of chemicals. (Testimony) Claimant also testified that when she returned to work, she had difficulty cleaning the carpets. She stated that prior to the injury, she was able to "do it all," but after returning to full duty she had to take several breaks so she could stretch and rest her back. While she was never disciplined or counseled regarding her job performance, she testified that she knew she would not be able to handle the lead custodian position once school was back in session. (Testimony) As such, when a regular custodial position opened in August of 2019, she bid into it and won by seniority. (Testimony; Def. Ex. A, p. 9; Def Ex. B, p. 9)

Claimant testified that a regular custodian is paid $1.00 less per hour than a lead custodian. (Testimony; Def. Ex. A, p. 9) Indeed, the letter claimant received from the University dated August 12, 2019, indicated that her hourly wage will be $13.89 per hour as a regular custodian. (Def. Ex. B, p. 10) Claimant continues to work full time, with opportunities for overtime. (Testimony) Claimant testified the main differences as a regular custodian will include not having to tear down tables and chairs, not having to use a swing machine or carry carpet machines around, and she will only have to be in one or two buildings at most, as opposed to three to five buildings as a lead custodian. (Def. Ex. A, p. 13)

Claimant sustained another injury on August 1, 2019, which is not part of this litigation. Claimant was in an elevator that stopped abruptly in between floors. Claimant testified at her deposition that the elevator raised up and slammed back down four times, sending "shocks" into the area of her back where she had surgery. (Def. A, p. 12) Claimant testified that she was doing well until the incident in the elevator, and after the incident she had some tenderness and soreness. (Def. Ex. A, p. 13) Although claimant applied for her new position after her work injury on August 1, 2019, she testified that the new injury did not factor into her decision to transfer positions. (Testimony)

Following the August 1, 2019 injury, claimant was sent for a functional capacity evaluation (FCE). (Jt. Ex. 5) The FCE took place on October 3, 2019. Claimant testified that she was not fully recovered from the August 1, 2019 injury when she participated in the FCE. (Testimony) The FCE was determined to be valid, and the report notes

claimant demonstrated lifting capabilities inconsistent with the demands of the job, diminished functional use of the upper extremities in work above chest, shoulder, and head level, and inability to tolerate sustained sitting. (Jt. Ex. 5, p. 2) Again, the FCE was performed after the August 1, 2019 injury, which is not included in the instant case. At the time of hearing, claimant was continuing to seek treatment related to that injury.

Julie McTaggert testified on behalf of the University. Ms. McTaggert is the Director of Human Resources and has held that position for the past 11 years. (Testimony) She testified with respect to the lead custodian position that the lead works as a custodian but is also in charge of the custodial staff. (Testimony) Both the lead custodian and custodian have the same 40-pound lifting requirement. (Testimony; Def. Ex. B, pp. 6-8) Ms. McTaggert testified that there has never been a 70-pound lifting requirement for lead custodians in the time she has worked for the University. (Testimony) Ms. McTaggert also testified that claimant received a wage increase, and on the date of hearing was making $14.31 per hour as a regular custodian. (Testimony)

Claimant testified that she was making $14.79 per hour as a lead custodian on the date of injury. On the date of hearing, she was making $14.31 per hour as a regular custodian. As such, I find that claimant was earning less at the time of hearing than she was on the date of injury. However, I also find that claimant returned to work after the date of injury as lead custodian, making the same wages she earned on the date of injury. Although claimant later bid into and transferred to a regular custodial position at the University, her decision was voluntary. No physician had imposed permanent work restrictions that would prevent her from continuing to work as lead custodian. The University did not request or require claimant to change positions, and she had not been disciplined or counseled in any way regarding her job performance. Therefore, I find that the employer offered claimant continued employment in a position that paid the same or more than she earned on the date of injury.

CONCLUSIONS OF LAW

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. 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).

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)-(u) or as an unscheduled injury pursuant to the provisions of section 85.34(2)(v). As claimant's injury was to her back, it extends to the body as a whole. The parties agree that claimant's injury should be compensated pursuant to Iowa Code section 85.34(2)(v). The parties dispute whether that section limits claimant's permanent partial disability award to her functional impairment rating.

Iowa Code section 85.34(2)(v) (2017) provides:

> In all cases of permanent partial disability other than those hereinabove described or referred to in paragraphs 'a' through 't' 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.

In this case, claimant returned to work for the University of Dubuque performing the same job duties she performed at the time of her injury. She earned the same wages she earned on the date of injury. Claimant later bid and transferred to a different, less physical position with the University. Her current position as a regular custodian pays less than her prior position as a lead custodian. However, claimant voluntarily elected to bid to this position. Claimant returned to her position as a lead custodian without medical restrictions after the date of injury. The University offered and returned claimant to her prior position with the same pay she received on the date of injury. Claimant elected to bid to a different, lower paying position within the University.

No physician has imposed permanent work restrictions on claimant that medically disqualified her from returning and continuing to perform work as a lead custodian. Therefore, I conclude that claimant returned to work and was offered ongoing work by the University at a wage rate in which claimant would receive the same or greater wages as those earned on the date of injury. As such, I conclude that claimant's current recovery is limited to her permanent functional impairment rating resulting from the injury. Iowa Code section 85.34(2)(v).

Claimant argues that she is not subject to the provisions of Iowa Code section 85.34(2)(v), because she was not "eligible for compensation" at the time she returned to work on June 19, 2019. This is because she was not "eligible for compensation" until September 10, 2019, when defendants received Dr. Igram's impairment rating, and defendants then "knew the extent . . . of permanent partial impairment" pursuant to Iowa Code section 85.34(2). While this is certainly a creative argument, I do not find it persuasive when reading the language of the statue as a whole.

The full sentence reads "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 85.4(2)(v) (emphasis added).

Statutes are to be read as a whole rather than looking at words and phrases in isolation. Iowa Ins. Inst. v. Core Group of Iowa Ass'n for Justice, 867 N.W.2d 58, 72 (Iowa 2015). (citing Phillips v. Chicago Cent. & Pacific R. Co., 853 N.W.2d 636, 649 (Iowa 2014) (noting that statutory terms are often "clarified by the remainder of the statutory scheme"); Den Hartog v. City of Waterloo, 847 N.W.2d 459, 462 (Iowa 2014) ("We have often explained we construe statutory phrases not by assessing solely words and phrases in isolation, but instead by incorporating considerations of the structure and purpose of the statute in its entirety."); In re Estate of Melby, 841 N.W.2d 867, 879 (Iowa 2014) ("When construing statutes, we assess not just isolated words and phrases, but statutes in their entirety. . . ."); See also Iowa Code § 4.1(38) ("Words and phrases shall be construed according to the context and the approved usage of the language. . . . "). When reading the section as a whole, it is clear that the phrase "eligible for compensation under this paragraph," means an employee whose injury fits under subsection (v) as opposed to subsections (a) through (t) of Section 85.34(2).

Having found that claimant's current recovery is limited to her permanent functional impairment rating resulting from the injury pursuant to Iowa Code section 85.34(2)(v), I conclude that claimant is entitled to 10 percent permanent partial disability, pursuant to Dr. Igram's functional impairment rating. This is the equivalent of 50 weeks of benefits.

The next issue to determine is whether claimant is entitled to penalty benefits pursuant to Iowa Code section 86.13.

Iowa Code section 86.13(4) provides:

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

> b. The workers' compensation commissioner shall award benefits under this subsection if the commissioner finds both of the following facts:
>
> > (1) The employee has demonstrated a denial, delay in payment, or termination in benefits.
> >
> > (2) The employer has failed to prove a reasonable or probable cause or excuse for the denial, delay in payment, or termination of benefits.

Claimant argues that she is entitled to penalty benefits because defendants did not send her first check for permanent partial disability until September 19, 2019. Dr. Igram's impairment rating is dated July 24, 2019. As such, claimant contends that the first benefit check was 8.286 weeks late, and defendants did not provide any reason for the delay.

The first paragraph of Iowa Code section 85.34(2) provides:

> Compensation for permanent partial disability shall begin when it is medically indicated that maximum medical improvement from the injury has been reached and that the extent of loss or percentage of permanent impairment can be determined by use of 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.

Defendants note that while Dr. Igram's report is dated July 24, 2019, they did not receive it until September 13, 2019, which was a Friday. (Jt. Ex. 3, p. 90) The first disability check was inputted by the insurance carrier on September 17, 2019, and issued on September 18, 2019. (Def. Ex. C, p. 1) I find that defendants issued payment timely in accordance with Iowa Code section 85.34(2). Claimant is not entitled to an award of penalty benefits.

Finally, claimant seeks a taxation of costs. Costs are to be assessed at the discretion of the deputy commissioner or workers' compensation commissioner hearing the case unless otherwise required by the rules of civil procedure governing discovery. Iowa Administrative Code Rule 876-4.33(86). Exercising my discretion, I decline to award costs in this matter.

ORDER

THEREFORE, IT IS ORDERED:

Defendants shall pay claimant fifty (50) weeks of permanent partial disability benefits, commencing June 19, 2019.

Weekly benefits shall be paid at the stipulated rate of three hundred eighty-four and 99/100 dollars ($384.99).

Defendants shall be entitled to a credit for all permanent partial disability benefits previously paid.

Defendants shall pay accrued weekly benefits in a lump sum together with interest at an annual rate equal to the one-year treasury constant maturity published by the federal reserve in the most recent H15 report settled as of the date of injury, plus two percent. See Gamble v. AG Leader Technology, File No. 5054686 (Appeal April 2018).

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.

The parties shall bear their own costs.

Signed and filed this ___29th_____ day of July, 2021.

JESSICA L. CLEEREMAN
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Thomas Wertz (via WCES)

Julie Burger (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.