BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

FILED
APR 25 2017
WORKERS' COMPENSATION

ALISON CLAY,	:	
Claimant,	:	File Nos. 5051700, 5051104
vs.	:	
	:	ARBITRATION
BRIDGESTONE AMERICAS,	:	
	:	DECISION
Employer,	:	
OLD REPUBLIC INSURANCE CO.,	:	
Insurance Carrier, Defendants.	:	Head Note Nos. 1100, 1108, 1803

STATEMENT OF THE CASE

Alison Clay filed two petitions for arbitration seeking medical benefits from Bridgestone Americas and Old Republic Insurance Companies.

The matter came on for hearing on April 18, 2016, before Deputy Workers' Compensation Commissioner Joseph L. Walsh in Des Moines, Iowa. The record in the case consists of claimant's exhibits 1 through 21; defense exhibits A through I; as well the sworn testimony of claimant, Alison Clay. Claimant objected to defendant's exhibit A as being untimely under the rules and the hearing order. The exhibit contains treatment records from Christian Ledet, M.D., which were served just prior to hearing. Dr. Ledet is a treating physician who provided treatment in March. The objection was overruled and the exhibit was allowed. The record was held open for two weeks until April 30, 2016, to allow claimant to either obtain a rebuttal report from her expert or arrange a deposition from Dr. Ledet. Claimant submitted an additional report from her expert on May 5, 2016. (Claimant's Exhibit 11, p. 277a-c) Amy Rose-Coenen was appointed court reporter. The parties argued this case and the matter was fully submitted on May 16, 2016.

ISSUES AND STIPULATIONS

File No. 5051700:

Claimant has alleged an abdominal injury which arose out of and in the course of employment on October 25, 2013. The defendants dispute the injury, as well as medical causation to both temporary and permanent disability. The claimant alleges

entitlement to both temporary and permanent disability benefits. The defendants contend the claimant is entitled to no such benefits. The defendants do concede that if claimant is entitled to benefits, her disability is industrial, and that, if benefits are owed, the appropriate commencement date is March 3, 2014. The elements which comprise the rate of compensation are stipulated and affirmative defenses are waived. The claimant alleges entitlement to medical expenses as outlined in exhibit 20 and IME expenses as set forth in exhibit 21. These expenses are disputed. The defendants have alleged entitlement to a credit under Iowa Code section 85.38(2), in the amount of $3,303.37. The parties have requested a specific taxation of costs.

For File No. 5051104:

Claimant has alleged a low back injury which arose out of and in the course of employment on June 27, 2014. The defendants admit the injury, however, they dispute medical causation to both temporary and permanent disability. The claimant alleges entitlement to both temporary and permanent disability benefits. The defendants contend the claimant is entitled to no such benefits. The defendants do concede that if claimant is entitled to benefits, her disability is industrial. The defendants contend that the claimant has not reached maximum medical improvement from her work injury, although the claimant contends she has. The elements which comprise the rate of compensation are stipulated and affirmative defenses are waived. The claimant alleges entitlement to medical expenses as outlined in exhibit 20 and IME expenses as set forth in exhibit 21. These expenses are disputed. The parties have requested a specific taxation of costs.

FINDINGS OF FACT

Alison Clay is a 49 year old employee of Bridgestone Americas. She was born in Scotland in 1966. She obtained a CNA degree in Scotland. She came to the United States in 2006. Her job history includes selling snacks and other items at a kiosk, work at IBM, work for a laundry service, and caring for the elderly at Wesley Acres. She began working at Bridgestone Americas (hereafter, Bridgestone) in 2008 as a pigment stacker.

Claimant testified live, under oath at hearing. I find her to be credible. Her testimony is generally consistent with her discovery answers, as well as the medical reports. There was nothing about her demeanor which caused the undersigned any concern regarding her veracity.

In May and June 2013, claimant had treated with Mercy East for abdominal pain. On May 28, 2013, the following was recorded.

> Saw Reagan 5/10 and given omprazole [sic]. told [sic] if no relief, would get RUQ U/S, possible upper GI Has hx if [sic] hiatal hernia and fam hx if gallbladder disease – all sisters have theirs out. She notes she's had abd pain for about 3 weeks. Pain is in RUQ and epigastric region.

> Pain is off and on. Worse after eating. At first noticed with dairy, but then stopped that and sx's continued with eating other things, too. Pain can last all day/night othertimes just a couple hours. Pain occ radiates to the back, but usually not. Omeprazole helps for a while – but pain always comes back. No fever noticed. No prior belly surgeries. No dysuria, hematuria. Some nausea, but no vomiting.

(Claimant's Exhibit 2, page 58) Ms. Clay was diagnosed with abdominal pain in the right upper belly (RUQ) and various tests were ordered. (Cl. Ex. 2, p. 60) A negative right upper quadrant ultrasound was documented. (Cl. Ex. 2, p. 61) Ms. Clay returned on June 14, 2013. She also had other symptoms, including shortness of breath and chest pains. The stomach problems seemed to take a back seat to some of her other issues.

On October 25, 2013, she was working in Department 412 "Compounding". She lifted a 50 pound bag and felt a twinge in her stomach. She testified in detail regarding the circumstances of this. (Transcript, page 26) She reported the injury immediately to her supervisor, Rob McClinton. No injury report was immediately filled out as Ms. Clay did not believe the injury to be significant. She testified approximately one week later she sought medical treatment for symptoms in her stomach which she believed was a "female problem." (Tr., pp. 27-28) The medical records show that she returned to Mercy East in November 15, 2013. "Pt states that she has lower abd pain and mid epigastric pain – Pt saw gyne yesterday and everything was 'normal'- has pelvic u/s scheduled for next Tuesday." (Cl. Ex. 2, p. 66) It is documented in this record that her issues from May and June 2013 had "started to improve" and that she was doing well "until about 10 days ago." (Cl. Ex. 2, p. 66) On November 17, 2013, she presented to Iowa Lutheran emergency department with a great deal of pain. (Cl. Ex. 2, p. 71) On November 20, 2013, her primary care clinic took her off work until November 25, 2013. (Cl. Ex. 2, p. 77)

Ms. Clay saw company physician, Todd Troll, M.D., on November 25, 2013, in order to obtain a return to work slip. "Allison comes in for a nonfactory return to work slip. The patient was off work due to gastritis and possible ulcer. She has been treated with medication and is feeling much better. She denies any bowel or bladder discomfort now." (Cl. Ex. 1, p. 10) Ms. Clay testified that co-workers helped her with lifting activities during this period of time. (Tr., p. 34) She returned to the medical department at Bridgestone on December 13, 2013, with abdominal pain. (Cl. Ex. 1, p. 14) Ms. Clay had an abdominal CT on December 27, 2013, which showed right near midline omental centered slightly greater inflammatory change without abscess, still most likely an omental infarct, primary peritoneal tumor was thought to be unlikely. (Cl. Ex. 4, p. 120) She was hospitalized at Mercy on December 30, 2013, for pain control and released on January 1, 2014. (Tr., p. 35; Cl. Ex. 4, pp. 121, 137)

On January 6, 2014, Ryan Roe, D.O., performed surgery described as an omentectomy and lysis of adhesions. (Cl. Ex. 4, p. 144-45) Ms. Clay was discharged from the hospital on January 9, 2014. (Cl. Ex. 4, p. 139) She remained off work due to

complications until March 2, 2014. (Cl. Ex. 2, p. 82) Claimant was placed on accident and sick leave for her time off work. (Cl. Ex. 19, p. 27) She returned to work on March 3, 2014, full-duty. (Cl. Ex. 1, p. 10)

Two experts have provided medical causation opinions. Dr. Roe, the treating surgeon, opined that the claimant's condition is causally connected to her described work injury. "Final pathology on her omentum revealed chronic inflammation, abscess formation, and fat necrosis. She allegedly had experienced some blunt abdominal trauma at work 3-4 months prior to that which is/was the most logical explanation for this condition." (Cl. Ex. 5, p. 170) Dr. Roe, however, opined it was merely a temporary aggravation from which she fully recovered with no permanency. (Cl. Ex. 5, p. 170)

Sunil Bansal, M.D., performed an independent medical evaluation on March 4, 2016. (Cl. Ex. 11) He reviewed all of the relevant medical records and examined the claimant. He concluded her diagnosis was omental infarction, umbilical hernia and incisional hernia. (Cl. Ex. 11, p. 268) He opined that the accident on October 25, 2013, was a substantial contributing factor to her disability. He also included her hernia as a sequela of this injury and provided a 5 percent permanent impairment rating. (Cl. Ex. 11, pp. 269-70)

The most convincing opinion in the record related to the abdominal injury is the opinion of Dr. Roe, the treating surgeon. I find that the claimant's medical bills and time off work are causally connected to her work injury. By a preponderance of evidence, I cannot relate any permanent functional impairment to the work injury.

After returning to work from the abdominal injury, Ms. Clay suffered another injury, this time to her lower back. On June 27, 2014, Ms. Clay was back to work in Department 412. She stepped down from a high step and immediately felt an onset of pain in her right lower back. "I was stepping down out of my jeep and something popped in my right lower back it felt like I was being squeezed. I could hardly move." (Cl. Ex. 12, p. 284) She reported to Bridgestone medical that same day and reported significant pain. She was provided ice and given FlexAll cream. (Cl. Ex. 1, p. 17) The next day, Ms. Clay returned to medical. She was instructed to work at her own pace and return to medical every few hours for medications. (Cl. Ex. 1, p. 18)

On June 30, 2014, claimant was evaluated by Todd Troll, M.D. His exam revealed back spasms and tightness. He opined that since the plant would be shut down for some time, she should use that time to recover. (Cl. Ex. 1, p. 19) The next day, claimant visited her own family physician due to severe pain. (Cl. Ex. 2, pp. 85-87) The clinic documented that she was having some radiating pain in both her legs. She was provided additional medications and told to stay as active as possible. (Cl. Ex. 2, p. 86) On July 3, 2014, her symptoms worsened. She was in excruciating pain and had difficulty getting out of bed. (Tr., p. 40) Bridgestone gave permission to go to the emergency room. (Cl. Ex. 3, pp. 113-116) She was provided with more medications and eventually released once the pain was under control.

On July 14, 2014, she returned to Dr. Troll who prescribed physical therapy and hydrocodone. (Cl. Ex. 1, p. 19) On July 16, 2014, Dr. Troll took her off work. (Cl. Ex. 1, p. 22) On July 21, 2014, he ordered an MRI. Ms. Clay underwent a lengthy bout of physical therapy and significant light-duty. This continued throughout August, September and October. (Cl. Ex. 1, pp. 25-26, 40-41) In early September 2014, she transferred from the mixing department (Department 412) to the receiving department (Department 401). In so doing, she took a significant pay cut. (Tr., p. 44; Cl. Ex. 19, p. 34) She testified that she knew she could not perform the work in Department 412, and feared she would be terminated.

In October 2014, defendants referred claimant to an orthopedist after claimant sought alternate medical care through the expedited hearing procedure. She was seen by David Boarini, M.D., on October 29, 2014. (Cl. Ex. 6, p. 181) He diagnosed sacroiliac pain with disc bulges, but denied she was a surgical candidate. (Cl. Ex. 6, p. 182) He opined claimant's main difficulty is her weight and recommended aggressive weight loss. (Cl. Ex. 6, p. 182)

Ms. Clay testified that since her back injury, she has gained a fairly significant amount of weight, nearly 50 pounds. This is supported in the medical notes.

On November 11, 2014, Dr. Troll removed all of claimant's restrictions and told her that her condition is likely chronic. (Cl. Ex. 1, pp. 45-46) After this visit, Ms. Clay essentially avoided Dr. Troll. She testified that she became concerned she could lose her job. (Tr., p. 46)

Claimant visited her primary care provider on January 6, 2015, and reported ongoing pain. She returned again in February. (Cl. Ex. 2, p. 98) Mercy was apparently working with her employer in an effort to get care authorized. In March 2015, claimant went, on her own, to another physician, Andrea Mitchell, M.D. (Cl. Ex. 8, pp. 188-89) Dr. Mitchell sought authorization to treat Ms. Clay, which was denied. (Cl. Ex. 8, p. 190)

In April 2015, Ms. Clay returned to Dr. Troll who authorized her to see a pain management specialist. (Cl. Ex. 1, p. 46) Dr. Ledet, began providing pain management care for Ms. Clay on May 12, 2015. He diagnosed lumbar radiculopathy, lumbar disc displacement without myelopathy, and lumbosacral spondylosis w/o myelopathy. (Cl. Ex. 9, pp. 193-94) He performed an epidural steroid injection (ESI) on that date. (Cl. Ex. 9, p. 194) She was taken off work for several days after the shot. (Cl. Ex. 9, p. 197) Claimant followed up on May 27, 2015, and acknowledged some pain relief. (Cl. Ex. 9, p. 198) Dr. Ledet continued to treat the claimant from May 2015, through March 31, 2016. He attempted a number of treatments including medications, such as Gabapentin, Lyrica, Tramadol and Cymbalta, numerous ESIs and nerve blocks, and light duty. On March 31, 2016, Dr. Ledet returned Ms. Clay to work without any restrictions and stated the following. "The employer is encouraged to engage the Occupational Medicine physician that works for the company to find duty station that will meet the injured workers desire to return to full time employment." (Cl. Ex. 9, p. 248l)

The claimant testified that she has gone to significant lengths to stay working. She testified that her boyfriend drives her to and from work. (Tr., p. 87) She has a handicap parking sticker which allows her to park near the employer's entrance. (Tr., p. 54) When she gets in the plant, a co-worker picks her up with a buggy and delivers her to work area. (Tr., p. 55) As a forklift driver, she is able to stay off of her feet for most of the day. (Tr., p. 53) At the end of her shift, another person drives her to the time clock. (Tr., 55) The claimant testified she does not feel secure in her job.

CONCLUSIONS OF LAW

File No. 5051700:

The first question is whether the claimant sustained an injury which arose out of and in the course of employment on October 25, 2013. By a preponderance of evidence, I find she did.

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.

A personal injury contemplated by the workers' compensation law means an injury, the impairment of health or a disease resulting from an injury which comes about, not through the natural building up and tearing down of the human body, but because of trauma. The injury must be something that acts extraneously to the natural processes of nature and thereby impairs the health, interrupts or otherwise destroys or damages a part or all of the body. Although many injuries have a traumatic onset, there is no requirement for a special incident or an unusual occurrence. Injuries which result from cumulative trauma are compensable. Increased disability from a prior injury, even if brought about by further work, does not constitute a new injury, however. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); Ellingson v. Fleetguard, Inc., 599 N.W.2d 440 (Iowa 1999); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995); McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985). An occupational disease covered by chapter 85A is specifically excluded from the definition of personal injury. Iowa Code section 85.61(4) (b); Iowa Code section 85A.8; Iowa Code section 85A.14.

Under Iowa law, even the most minor incident which causes pain is considered an injury. The claimant testified credibly that she suffered an injury at work on October 25, 2013.

> Well, I started my shift, and I went upstairs to empty pigments, and I was emptying the pigments into the chute, and when I lifted the 50-pound bag, I turned around, and I let it slip, and I pulled it towards my stomach hard, and – and I dumped the pigments, and I hurt my – I had a twinge in my stomach, and I went and told my supervisor.

(Tr., p. 26) While there are legitimate disputes about the causal connection, there is really no dispute that this incident occurred.

The defendants argue that the claimant had abdominal pain in May 2013, prior to the work accident. This is true, however, it really goes to the medical causation issue and is essentially irrelevant as to whether the incident the claimant testified to occurred. The defendants also argue that this incident was so insignificant, an injury report was not even required. Again, this is probably true, nevertheless, it did happen as described by the claimant and it is an "injury" under Iowa law.

The next issue is whether the described injury is a cause of temporary or permanent disability, and if so, the nature and extent of such disability. By a preponderance of the evidence, I find that the October 25, 2013, work injury is a proximate cause of temporary disability in the claimant's abdomen. I find that the claimant has failed to meet her burden of proof that the injury caused any 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).

There are two expert opinions in this case: Dr. Roe and Dr. Bansal. Dr. Roe opined that the claimant's work injury "is/was the most logical explanation for this condition." (Cl. Ex. 5, p. 170; *see also* Cl. Ex. 5, pp. 161, 164-65) Dr. Roe, however, opined that the claimant suffered only a temporary disability and that she fully recovered. (Cl. Ex. 5, p. 170) Dr. Bansal agreed that the injury caused the need for the surgery, but further opined that the injury resulted in permanent impairment and the additional medical diagnoses. I give greater weight to Dr. Roe's opinions. Based upon this record, the claimant has not met her burden that she has suffered any permanent functional impairment or disability from the incident of injury on October 25, 2013. She has, however, proven that she sustained an injury which caused her to need surgery and time off work.

For these reasons, I find the claimant has met his burden that her injury is a proximate cause of temporary disability. As such, she is entitled to reasonable medical expenses and time off work associated with this condition.

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).

The claimant has submitted a medical bill summary, and supporting documentation, in claimant's exhibit 20 pages 453 to 472. It is noted that some of these bills appear to be related to the lower back condition. For the bills which are related to the abdominal condition, the defendants dispute these bills solely on the basis of medical causation.[1] I find that the bills which are related to the abdominal condition are owed under File No. 5051700.

When an injured worker has been unable to work during a period of recuperation from an injury that did not produce permanent disability, the worker is entitled to temporary total disability benefits during the time the worker is disabled by the injury. Those benefits are payable until the employee has returned to work, or is medically capable of returning to work substantially similar to the work performed at the time of injury. Section 85.33(1).

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[1] It is noted that defendants listed "authorization" as a defense, however, since the claim was denied, authorization is not a proper defense.

The parties have stipulated that claimant was off work for her abdominal condition from November 15, 2013, through March 2, 2014. I find this is the claimant's period of temporary total disability and she is entitled to benefits during this period of time. The claimant was paid for this time off under the defendant employer's Accident and Sickness policy. I find that the employer has proven its entitlement to a credit of $3,303.37 under Section 85.38(2) (2015). (Def. Ex. B, pp. 1-7; *see also* Cl. Ex. 19)

File No. 5051104:

The first question is whether the claimant has proven that her stipulated work injury is a cause of permanent disability, and, if so, the nature and extent of such 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).

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Dr. Ledet and Dr. Bansal both indicated that the claimant's work injury is a cause of her ongoing lower back impairment and disability. Dr. Boarini opined that the claimant's primary problem is obesity. I find the opinions of Dr. Ledet and Dr. Bansal to be more persuasive. The claimant has met her burden of proof that the work injury is a cause of both temporary and permanent disability.

The next issue is healing period. The claimant alleges entitlement to healing period benefits for July 1, 2014, through July 13, 2014, during a plant shutdown, July 16, 2014, through July 20, 2014, and May 12, 2015, through May 14, 2015, right after her first ESI.

Healing period compensation describes temporary workers' compensation weekly benefits that precede an allowance of permanent partial disability benefits. Ellingson v. Fleetguard, Inc., 599 N.W.2d 440 (Iowa 1999). Section 85.34(1) provides that healing period benefits are payable to an injured worker who has suffered permanent partial disability until the first to occur of three events. These are: (1) the worker has returned to work; (2) the worker medically is capable of returning to substantially similar employment; or (3) the worker has achieved maximum medical recovery. Maximum medical recovery is achieved when healing is complete and the extent of permanent disability can be determined. Armstrong Tire & Rubber Co. v. Kubli, Iowa App., 312 N.W.2d 60 (Iowa 1981). Neither maintenance medical care nor an employee's continuing to have pain or other symptoms necessarily prolongs the healing period.

I find that Ms. Clay reached maximum medical improvement for her low back on February 5, 2016. (Cl. Ex. 11, p. 271; see also Cl. Ex. 11, pp. 273a-c) For most of the time period between the date of injury through the date of maximum medical improvement, the claimant worked sometimes on light-duty, sometimes not. There were a few periods where she was off work altogether because of the injury.

Dr. Troll documented the following on June 30, 2014. "The patient was instructed to use over-the-counter analgesics and ice. . . . She has the next two weeks off [for shutdown] and she will be instructed to do those exercises while she is off as well as some walking." (Cl. Ex. 1, p. 19) During those two weeks, there is no question claimant was not capable of working. (Cl. Ex. 3, pp. 113-116) When she returned to Dr. Troll, he actually took her off work for a couple of days. (Cl. Ex. 1, p. 22) Dr. Ledet also took her off work for a few days following her first ESI in May 2015, as well. (Cl. Ex. 9, p. 197) She is entitled to healing period benefits during these time periods.

Claimant also argues she is entitled to temporary partial disability benefits prior to reaching maximum medical improvement.

An employee is entitled to appropriate temporary partial disability benefits during those periods in which the employee is temporarily, partially disabled. An employee is temporarily, partially disabled when the employee is not capable medically of returning to employment substantially similar to the employment in which the employee was engaged at the time of the injury, but is able to perform other work consistent with the employee's disability. Temporary partial benefits are not payable upon termination of temporary disability, healing period, or permanent partial disability simply because the employee is not able to secure work paying weekly earnings equal to the employee's weekly earnings at the time of the injury. Section 85.33(2).

I find that the claimant is not entitled to temporary partial disability for the period of time in question. The claimant sought lighter work with the employer in September 2014. (Tr., p. 44) She did this while she was receiving conservative medical care from the Bridgestone Medical Department and Dr. Troll. (Cl. Ex. 1, pp. 25-26, 40-41) She took a $6.41 per hour pay cut in order to obtain work with less lifting, standing and

walking. Claimant now argues that she is entitled to temporary partial disability for the periods of time she was on light-duty until she reached maximum medical improvement.

The claimant has presented a novel and creative argument for temporary partial benefits. I find, however, that the claimant has failed to meet her burden of proof that she is entitled to temporary partial disability benefits. The statute is not intended to compensate injured workers who bid into lower paying jobs, regardless of whether they subjectively felt like they had to do so in order to maintain employment. That type of loss is compensated through industrial disability.

The next issue is the extent of claimant's industrial disability.

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 the 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.

The claimant has suffered a 35 percent loss of earning capacity as a result of her work injury. Ms. Clay is only 49 years old at the time of hearing. She was born in Greenock, Scotland and she is a high school graduate. She is bright and presented well at hearing. She also received training as a CNA in Scotland. Ms. Clay has a thick, albeit lovely, Scottish accent, however, I do not find that this is a general barrier to employment. Her thick accent, however, may limit her from performing some types of customer service work she could potentially perform, such as telemarketing. She is able to use a computer for basic functions. In the past, she has worked as a sales clerk, an assembler, a cook, in a laundry and as a care provider. Her job for Bridgestone is likely the best employment she has held from a pay and benefits standpoint.

Her low back diagnoses are as follows: (1) radiculopathy, lumbosacral region, (2) intervertebral disc disorders with radiculopathy, lumbar region, (3) radiculopathy,

thoracolumbar region, (4) chronic pain due to trauma, and (5) lumbosacral spondylosis without myelopathy. (Cl. Ex. 9, p. 248l) Dr. Ledet has not placed her under any formal restrictions, however, the claimant goes to significant lengths to stay employed in a factory setting. She testified that her boyfriend drives her to and from work. (Tr., p. 87) She has a handicap parking sticker which allows her to park near the employer's entrance. (Tr., p. 54) When she gets in the plant, a co-worker picks her up with a buggy and delivers her to her work area. (Tr., p. 55) As a forklift driver, she is able to stay off of her feet for most of the day. (Tr., p. 53) At the end of her shift, another person drives her to the time clock. (Tr., 55) Despite all this, the claimant does not feel particularly secure in her employment. It seems unlikely that claimant will be able to maintain work in a factory setting for the remainder of her career, however, she is appropriately employed at this time.

Ms. Clay bid into a significantly lower paying job in order to maintain her employment. This represents a fairly significant loss of actual wages. While actual wage loss is not imperative in proving industrial disability, it is a significant factor. In retrospect, this appears to have been a wise decision which has allowed claimant to maintain employment with Bridgestone. It is not likely she could have continued performing work which required her to lift and stand regularly. This move has served to reduce her loss of earning capacity.

The claimant has also undergone a long and difficult period of healing marked by periods of receiving no medical treatment.

When considering all of the factors of industrial disability, I find by a preponderance of evidence that her loss of earning capacity is 35 percent. This entitles claimant to 175 weeks of permanent partial disability benefits commencing on the date that her healing period ended.

The next issue is 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 1975).

The claimant has submitted a medical bill summary, including medical mileage, and supporting documentation, in claimant's exhibit 20 pages 453 to 472. It is noted that some of these bills are related to claimant's abdominal condition and were awarded under another file. For those bills related to claimant's low back, the defendants challenge them based upon medical causation and authorization. I have thoroughly reviewed claimant's exhibit 20 and find all of the expenses therein to be related to her

lower back condition which is work-connected. I do not find the employer's authorization defense for any of these bills to be valid. As such, defendants are responsible for all expenses set forth in claimant's exhibit 20.

The next issue is the claimant's independent medical evaluation.

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).

I find that the defendants are responsible for the IME expenses set forth in claimant's exhibit 21.

The final issue is penalty. Claimant seeks a penalty for failing to investigate her entitlement to benefits.

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

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

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

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

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

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

The defendants rely upon the medical opinions of Dr. Troll, Dr. Boarini and Dr. Ledet in their decision to not pay the claimant any industrial disability benefits. Dr. Boarini declined to find a causal connection between claimant's work injury and her disability. Dr. Ledet has not placed the claimant at maximum medical improvement. While I did not ultimately adopt the opinions of these physicians or otherwise find in favor of defendants, their position was plausible. Their position was not unreasonable. I therefore find that the defendants had a reasonable basis for not paying benefits.

ORDER

THEREFORE IT IS ORDERED:

File No. 5051700:

All benefits shall be paid at the weekly rate of five hundred and eighty-six and 24/100 ($586.24) per week.

Defendants shall pay healing period benefits from November 15, 2013, through March 2, 2014.

Defendants shall receive a credit for short term disability payments made as set forth in defendants' exhibit B.

Defendants shall pay the medical expenses associated with the abdominal injury as set forth in claimant's exhibit 20.

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

For File No. 5051104:

All benefits shall be paid at the weekly rate of five hundred and eighty-six and 24/100 ($586.24) per week.

Defendants shall pay healing period benefits from July 1, 2013, through July 13, 2013; July 16, 2013 through July 20, 2013; and May 12, 2015, through May 14, 2015.

Defendants shall pay the claimant one hundred and seventy-five (175) weeks of permanent partial disability benefits commencing February 5, 2016.

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.

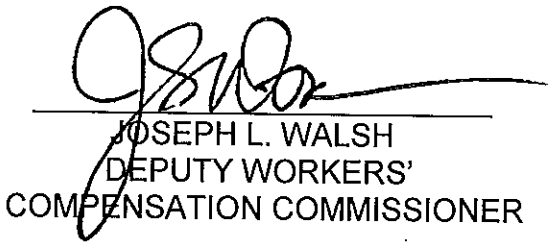
Defendants shall pay the medical expenses associated with the abdominal injury as set forth in claimant's exhibit 20.

Defendants shall pay the IME expenses as set forth in claimant's exhibit 21.

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

Costs are taxed to defendant.

Signed and filed this 25th day of April, 2017.



JOSEPH L. WALSH
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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 in writing and received by the commissioner's office 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 a legal holiday. The notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 1000 E. Grand Avenue, Des Moines, Iowa 50319-0209.