BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

DOLORES ROSE HUSSING, Claimant, vs. LOWE'S HOME CENTERS, Employer, Self-Insured, Defendant.	: : : : : : : : : : :	File No. 5059108 ARBITRATION DECISION Head Notes: 1108.50, 1402.40, 1803, 2501, 2907, 4000.2

FILED
AUG 06 2018
WORKERS' COMPENSATION

STATEMENT OF THE CASE

Dolores Hussing, claimant, filed a petition in arbitration seeking workers' compensation benefits from Lowe's Home Centers, self-insured employer as defendant. Hearing was held on June 6, 2018 in Des Moines, Iowa.

Claimant, Dolores Hussing was the only witness to testify live at trial. The evidentiary record also includes joint exhibits JE1-JE16, claimant' s exhibit 1-5, and defendant's exhibits A-H.

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.

The case was fully submitted upon receipt of the parties' post-hearing briefs on July 9, 2018.

ISSUES

The parties submitted the following issues for resolution:

1. Whether claimant sustained any permanent disability as a result of the stipulated June 13, 2015 work injury? If so, the extent of industrial disability claimant is entitled to receive.

2. Whether claimant is entitled to alternate medical care?

3. Whether penalty should be assessed against defendant for denial of treatment?

4. Whether costs should be assessed against defendant?

FINDINGS OF FACT

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

Claimant, Dolores Hussing, was working at Lowe's Home Centers (hereinafter "Lowe's) on June 13, 2015 when she sustained a work injury. The central issue in this case is whether she sustained any permanent disability as a result of that injury.

Ms. Hussing was employed as a lumber associate. Her duties included lifting shingles, concrete, cement blocks, wood, and other materials by hand. She helped advise customers on materials and other supplies for their projects. She also operated a forklift and sidewinder. (Testimony; Def. Ex. F, pp. 19-20)

At the time of the June 13, 2015 injury she was driving a forklift to move topstock from storage outside into the building. With the biggest forklift available at that location she grabbed three bunks of lumber and lifted them. However, the bunks weighed more than usual because they were wet from recent rain. Ms. Hussing backed the forklift up and turned slightly to drop the bunks down so she could drive. As she was dropping the bunks down, the counterweights on the back of the forklift gave out causing the forklift to move forward. Ms. Hussing moved the forks down in an attempt to save the bunks; this caused the forklift to bounce several times. Ms. Hussing testified that immediately after the accident she was observed grabbing her back. She reported the injury to human resources. (Testimony)

Ms. Hussing first received medical treatment on June 17, 2015. She saw Adrian Palar, M.D. at Story County Medical Center. She reported that she was injured at work at Lowe's on June 13, 2015. She was working on a forklift when the front end of the forklift went down due to the heavy load. She tried to drop the load to the ground as quickly as possible, which caused the forklift to bounce 2 times. She experienced low back pain, left hip pain, and left-sided rib pain, which was worse the next day. Ms. Hussing described her low back pain as sharp, like a pinched nerve. The pain was 6.5/10. She also reported 6/10 left hip pain and 3 to 6/10 left side rib pain. Dr. Palar noted that her gait and station were steady and stable. X-rays of the lumbar and thoracic spine were unremarkable. The doctor's assessment was mid and low back pain and left side pain. He referred her to physical therapy. Dr. Palar also prescribed medications. He kept her off of work for the next 7 days. (JE6, pp. 1-6)

Ms. Hussing returned to see Dr. Palar on June 24, 2015. Unfortunately, the physical therapy had not yet been approved by insurance. Her low back pain was 8.5/10. She felt tightness in her back. Her left hip pain was also 8.5/10; she described

the pain as an ache. Ms. Hussing also has some numbness in her back. She reported that her rib pain had resolved. The doctor noted that her gait and station were normal. The assessment included low back pain secondary to injury. The lumbar x-ray suggested a possible pars defect on the right at L4 and possibly L5; left hip pain; mid back pain and rib pain resolved. Dr. Palar's instructions were to continue her current medications. Due to side effects of the medications, she was not to drive or work with machinery. He ordered either a lumbar MRI or CT scan to check for pars defect. Ms. Hussing was kept off work through July 7, 2015. (JE6, pp. 7-8)

By July 1, 2015 Ms. Hussing continued to have low back pain. She also experienced numbness in her back and legs. The doctor noted that she still had not been approved for physical therapy. Ms. Hussing also still had achy left hip pain. Dr. Palar's assessment was persistent low back pain and left hip pain. Dr. Palar scheduled an MRI. He noted that she still had not been approved for physical therapy and he kept her off of work until July 14, 2015. (JE6, pp. 9-10)

Ms. Hussing returned to see Dr. Palar on July 15, 2015. She reported that when she was bending down to pick up her towel in the bathroom she had severe pain. The assessment was low back and left hip pain. The doctor was again going to inquire about physical therapy. He stated she was not able to work until August 14, 2015. (JE6, p. 11)

Ms. Hussing returned to Dr. Palar on July 29, 2015. She reported that she continued to have pain on the left side of her lower back. She had been going to physical therapy for less than 2 weeks. Initially therapy helped her pain, but at the last session her pain was worse. Ms. Hussing had severe back pain yesterday while picking up an object in the laundry room. Dr. Palar noted that she had persistent low back pain secondary to her injury at Lowe's. The MRI of the lumbar spine was unremarkable. He referred Ms. Hussing to a pain clinic and also to an orthopedic clinic. He prescribed medications and advised her to follow-up in 2 weeks. He continued to keep her off of work. (JE6, pp. 12-13)

Dr. Palar saw her again on August 7, 2015, and once again referred her to an orthopedic clinic and a pain clinic. He kept Ms. Hussing off work through August 14, 2015. (JE6, pp. 14-15)

On August 28, 2015, Ms. Hussing reported that she was still having significant low back pain and later posterior hip pain. When she bent forward to pick up an object on the floor she had significant back pain. She did not want to go to a pain clinic because she is afraid of possible side effects of steroid injection, which occurred to a friend. Dr. Palar continued to prescribe her medications. She had an appointment scheduled with Dr. Kaspar for September 15. Dr. Palar referred her for aqua therapy. Ms. Hussing was to remain off work until September 29, 2015. (JE6, pp. 16-18)

Ms. Hussing continued to follow-up with Dr. Palar. Towards the end of September she reported that she sometimes felt a lock-up sensation in her back when

she walked. She also had problems sleeping. Sometimes she experienced shooting sensation in her legs. Dr. Palar felt Ms. Hussing seemed to have nerve deficit on the left foot. Ms. Hussing was to continue the aqua therapy and treatment with Dr. Kaspar. Ms. Hussing was to return to work the next day for 4 hours pursuant to Dr. Kaspar's instructions. (JE6, pp. 19-20)

Ms. Hussing saw Dr. Palar again on October 1, 2015. She reported that she had returned to sedentary work at Lowe's on July 24, 2015; however, she was not able to tolerate the work. She reported that she walked about 6 minutes from the parking lot to get her vest and then she went to her station. She went to the lost and found and when she returned to her station she had a 9/10 back spasm and she almost fell. At the time of the appointment she rated her pain as 7 to 8 out of 10 for her back and hip with burning pain. She also reported that her right foot felt weird and she had a shooting pain in the left leg up to the anterior mid-thigh. She had pain on the right leg shooting all the way down. The doctor noted an absence of sensation to neurofilament on the lateral dorsal distal part of the left foot with uncertain etiology. An EMG was scheduled for the left leg. He also recommended a bone scan of the lumbar and thoracic spine. She was to continue physical therapy and remain off work through October 13. (JE6, pp. 21-22)

Ms. Hussing returned to the clinic on October 13, 2015. She reported that she still felt instability in her back and had low back pain. Additionally, she has a constant ache, pain in the left hip that radiated to the one-third proximal anterior thigh. Her gait and station were steady and stable. The assessment was persistent mid and low back pain. Left hip pain probably related to the back pain, right leg pain, uncertain etiology, but resolved, and absence of sensation on the dorsal distal left foot, uncertain etiology. Dr. Palar noted that he was still waiting on the bone scan study and a neurology consult. He continued to keep her off of work. (JE6, pp. 24-26)

On November 5, 2015, Ms. Hussing reported to Dr. Palar that her back pain remained 5 to 6/10. She reported her hip pain as 7/10. She also reported an icepick-like right leg pain in the last 3 days. She previously had this pain which resolved and had returned. The doctor noted that when she drove, her right leg sometimes gave out on her. She still has tingling sensation in her right foot and sometimes her foot feels heavy. She started having pain in her back or hip after walking for approximately an hour. Dr. Palar noted the MRI of the lumbar spine was unremarkable. He was still waiting for her to have an appointment with Mercy Ruan Neurology Clinic. He continued to keep her off of work. (JE6, pp. 27-31)

On November 19, 2015, Ms. Hussing saw Irving Wolfe, D.O. at Central Iowa Neurology. She reported that she was involved in a work-related accident at Lowe's. The front of the forklift was overweight and tilted the forklift forward. As the front of the forklift was lowered it went backward, causing her to go forward out of her seat and bounce backward. She complained of burning pain in her hips, a shooting pain down the right leg and top of her left leg, numbness from the left knee down the left leg and numbness in parts of her feet. At times the muscles in her lower limbs had spasms.

She also reported back pain. EMG/NCV study of the lower extremities was conducted. Dr. Wolfe's impression was normal EMG/NCV study of the right and left lower limbs including the bilateral lumbosacral paraspinal muscles. There were no electrophysiologic findings to suggest a neuropathy, plexopathy, radiculopathy or myopathy involving her lower limbs. (JE9)

Ms. Hussing returned to Dr. Palar on December 4, 2015. She reported that her posterior hip pain bilaterally was 8/10. She also reported 6/10 buzzing left hip pain and sometimes her leg gave out. Additionally, she complained of 8/10 right leg shooting pain from the right hip to the knee and ankle. She was able to sleep through the night if she took gabapentin. Dr. Palar noted that the bone scan was unremarkable. His assessment was persistent back pain secondary to the work injury at Lowe's. He also noted that she had bilateral hip pain with shooting pain from the right hip to her right knee and ankle, uncertain etiology. Persistent left hip pain, uncertain etiology. Absent sensation of the left fourth and fifth toe without any absence of dorsiflexion and plantar flexion of the toe. According to the neurologist, the EMG of the lower extremity was normal. An MRI of the thoracic spine was scheduled. Dr. Palar continued to keep Ms. Hussing off of work. (JE6, pp. 32-34)

Dr. Palar saw Ms. Hussing again on February 15, 2016. She informed the doctor that she was resigning from Lowe's. She was going to start a desk job for another employer and would like to have a work release. She reported she still had some icepick-like pain on the right groin approximately 2-3 times per week. According to the doctor's note, her "physical therapy has been discontinued by Sedwig [sic]." (JE6, p. 35) Dr. Palar's assessment included: persistent mid and low back pain secondary to injury at Lowe's. MRI of the thoracic and lumbar spines was unremarkable. The bone scan was also unremarkable; right groin pain; left lower leg pain; tingling sensation in right foot; and numbness in the left leg. Dr. Palar released Ms. Hussing to sedentary work. She was not to do any waist bending greater than 90 degrees due to back pain, no lifting greater than 5 pounds and no pushing or pulling of any objects heavier than 15 pounds. She was to return on an as-needed basis. (JE6, pp. 35-37)

On February 25, 2016, Ms. Hussing saw William R. Boulden, M.D. for an independent medical examination (IME) at the request of the defendant. Her chief complaints were mid to low back pain with bilateral buttock pain, and pain starting just above the left patella radiating down the left knee to the ankle in a stocking glove distribution. She also had some right leg shooting pain which sometimes went from the groin to the knee and other times went from the ankle to the knee. Dr. Boulden noted that she was working at Lowe's driving a forklift when the injury occurred. She was moving materials with a forklift when the forklift suddenly started to tip forward. She tried to lower the front end. She bounced three different times. She had her seat belt on but she felt that if she had not she would have gone through the top of the cage on the forklift. Dr. Boulden's diagnoses included subjective mid and low back pain with paresthesias in the left leg, etiology undetermined. He was not able to put an objective diagnosis on her problems. He felt that she was at maximum medical improvement (MMI), other than he felt that she did not have appropriate physical therapy. He had

previously noted that she was never provided the water physical therapy or the TENS unit. Based on his physical and clinical evaluations he doubted that she would get any better with the therapy. He noted she did have some positive Waddell signs that concerned him. Dr. Boulden was concerned that there were nonorganic symptom complexes. He did not place any specific restrictions on her back because there were no pathological processes identified. He stated that he could not rate any impairment because her symptoms were subjective and she had positive Waddell signs. Dr. Boulden did think that an appropriate back exercise program would be appropriate in most cases; however, he was concerned because Ms. Hussing had, in his opinion, nonorganic problems, so he doubted that such a program would be fruitful. (JE12)

On January 25, 2017, Ms. Hussing, at the request of her own attorney, saw Robin L. Sassman, M.D. for an IME. As a result of the January IME, Dr. Sassman issued a report on March 21, 2017. Ms. Hussing provided Dr. Sassman with the history of the injury. She reported that the forklift bounced violently, three times. At the time of the examination Ms. Hussing reported that she had no feeling in her left leg. She had sharp pain in her right leg and lower back. She also reported that her legs gave out. She stated that the left side of her back was constantly tight and it felt like there was a disc out all of the time. She also noted pain in her mid-back, like a disc was out. Below that area was a constant aching and burning sensation. The muscles in her back were always sore. She stated that her hips tended to dislocate. Her right leg had constant shooting pain to her knee or ankle at all times. She also noted cramping in both feet. Her left leg had no feeling for a time, but this was improving. She said she recently obtained a tattoo on her left leg and did not feel it at all. Overall, Ms. Hussing reported that her symptoms were about the same as they were a year ago, six months ago, and three months ago. Dr. Sassman noted a normal gait. Dr. Sassman's diagnoses included thoracic back pain, low back pain with radicular complaints, marked right calf atrophy, and bilateral SI joint pain. Dr. Sassman was very concerned about nerve compression or nerve root irritation due to the right calf atrophy and change in sensation in the left leg. However, she noted that the previous MRI of the lumbar spine and the EMG were normal. Dr. Sassman recommended a repeat MRI of the lumbar spine as well as a repeat EMG of the lower extremities to determine if nerve compression was occurring at the lumbar spine level or further down the leg. For Ms. Hussing's thoracic spine, Dr. Sassman felt it would be prudent to follow the treatment recommendation of the treating physicians; specifically, a TENS unit and aqua therapy. Dr. Sassman felt that she would not be at MMI until the treatment recommendations were completed. However, if those were not done then she would place her at MMI as of June 13, 2016, which is one year after the accident. Dr. Sassman assigned permanent functional impairment as follows: 5 percent impairment of the whole person due to guarding of the thoracic spine; 10 percent impairment of the whole person for the lumbar spine due to radicular signs. The combined value of these two ratings totaled 15 percent of the whole person. Dr. Sassman restricted Ms. Hussing to limit lifting, pushing, pulling, and carrying to 20 pounds occasionally at waist level. Limit lifting, pushing, pulling and carrying to 10 pounds occasionally from floor to waist and above shoulder height. Ms. Hussing was also restricted from using vibratory tools or power tools. (JE14) Defendant took the deposition of Dr. Sassman on May 24, 2018. Dr. Sassman opined

that Ms. Hussing's thoracic back pain, low back pain with radicular complaints, marked calf atrophy, and bilateral SI joint pain all related back to the accident of June of 2015. (JE16)

On March 29, 2017, claimant's counsel requested defendant authorizes the treatment recommended by Dr. Sassman. (Cl. Ex. 2) Defendant refused to authorize any additional treatment. (Testimony)

Dr. Boulden authored a missive dated April 16, 2018 to defendant. He stated that he had reviewed Dr. Wolfe's November 19, 2015 EMG, which was normal. Dr. Boulden then commented on Dr. Sassman's report. He stated that a 2-centimter atrophy was not profound. His opinions regarding MMI, impairment, and restrictions had not changed. Additionally, Dr. Boulden saw no clinical reason for any additional testing. (JE13)

Defendant argues that claimant is not a credible witness. Defendant contends that claimant has been inconsistent in her reporting of the mechanism of injury. For example, she has been inconsistent on the number of times the forklift bounced at the time of the accident. She has reported that it bounced twice, while another time she reported that it bounced three or four times. However, I do not find this argument to be persuasive. I find that overall her testimony regarding how the accident occurred has been generally consistent. Defendant also argues that Ms. Hussing was not forthcoming about her activities at a renaissance fair. Further, defendant suggests that the photos from Facebook of Ms. Hussing demonstrate that she is physically capable of performing more activities than she is willing to admit to. At hearing Ms. Hussing explained that while she did participate in the rock climbing wall, it was a rock wall designed for kids and the workers helped pull her up. She also admitted that she participated in the strength test, but she modified that way she used the rubber mallet. On the way home from the renaissance fair Ms. Hussing was in a lot of pain and they had to make several stops due to her pain. She testified that she basically cried herself to sleep on the way home. While I acknowledge that there are some inconsistencies in the record, overall I found claimant's testimony to be straight-forward and convincing. I find that Ms. Hussing is a credible witness.

I find that Ms. Hussing sustained permanent impairment as a result of the June 13, 2015 work injury. Prior to the work injury Ms. Hussing was able to perform her job at Lowe's without difficulty. She denies having any of her current symptoms prior to the injury in question. The accident was witnessed by her co-worker. I find the opinions of Dr. Sassman to carry greater weight than those of Dr. Boulden. Dr. Sassman's opinions are more consistent with the record as a whole. Ms. Hussing has had ongoing problems since the date of the injury; problems she did not have prior to the injury. Further, Dr. Boulden's opinions did not adequately address Ms. Hussing's calf atrophy or ongoing symptoms. Thus, I find that as a result of the work injury Ms. Hussing sustained 15 percent functional impairment to her body as a whole. I further find that Ms. Hussing has permanent restrictions as set forth by Dr. Sassman. Thus, I find she has permanent restrictions of limit lifting, pushing, pulling, and carrying to 10 pounds

occasionally from floor to waist and above shoulder height. Ms. Hussing is also restricted from using vibratory tools or power tools.

I find that Ms. Hussing has reached MMI. In her report Dr. Sassman stated that if the treatment recommendations were not approved she would place her at MMI as of one year after the date of injury, which would be June 13, 2016. The treatment recommendations were not approved. It has been over three years since the accident. Ms. Hussing has not received any treatment for her injuries since February of 2016. Thus, I conclude Ms. Hussing reached MMI as of June 13, 2016.

At the time of hearing Ms. Hussing was 26 years of age. She graduated from West Harrison High School. After high school she received her Bachelor of Arts Degree from Iowa State University (ISU) in Integrated Studio Arts in 2014. She attended Des Moines Area Community College (DMACC) for a welding program in 2015. She did not receive any type of welding certification. She entered the welding program in anticipation of attending a school in Tennessee for blacksmithing. She testified that she stopped this for a number of reasons including her inability to handle the repetitious hitting of metal and her inability to lift sheet metal. (Testimony)

From 2010 through June of 2014 Ms. Hussing worked as a clerk at the ISU Parks Library Circulation desk. She assisted with patron relations and answering calls. She filed books, collected fines, searched for books, and secured the closing of the circulation desk. After graduating from ISU, Ms. Hussing began working at Lowe's. She began as a seasonal cashier while she was attending DMACC. She moved to lumber cashier and then lumber associate.

Ms. Hussing resigned from Lowe's in early February of 2016. From the date of the injury through the date of her resignation Ms. Hussing did not return to full-duty work at Lowe's. At the time of her resignation she had been in contact with Aerotek. (Testimony)

Aerotek placed her in a temporary job at Lincolnway Energy in parts counter/inventory. She was responsible for working with the maintenance department to help meet their inventory needs and completed purchase orders. She organized the inventory of parts within the warehouse. She also contacted vendors and contractors directly. This was a full-time job with some overtime. She was paid $17.00 per hour. This position ended when the person who previously held that job returned to Aerotek. (Testimony)

Next she was assigned to Nichols Equipment who eventually hired her for a full-time position. She started with Nichols in May of 2016 and was still employed with Nichols Equipment at the time of the arbitration hearing. This is a full-time position with some overtime. She is paid $15.75 per hour, plus some benefits. She works as a heavy equipment rental clerk. She creates the rental contracts, enters information into the computer, and is the point person for rentals. As part of her job she moves some equipment with a dolly and moves some generators that are on wheels. She has the

guys move the heavy equipment. Her employer has instructed her to only do what she is able to do. She is able to perform her job at Nichols. She admitted that some days her pain flares up and makes her want to curl up and cry. (Testimony)

At the time of the hearing Ms. Hussing was planning to move to California in approximately one month. She planned to leave Nichols voluntarily. She has applied for a couple jobs in California but has not secured one yet. (Testimony)

Ms. Hussing testified that her injury has affected the way she has to perform simple tasks. For example, she uses a smaller laundry basket because she cannot handle carrying big baskets full of clothes. Sometimes her friends will carry the baskets for her. Prior to her injury she was physically capable of performing blacksmithing work, which is the occupation she had hoped to pursue. However, since the injury she cannot physically perform this type of work. She also testified that there are some days when people tell her she is walking with a limp. (Testimony)

While Ms. Hussing was employed at Lincolnway Energy she prepared a resume. She listed her metalsmithing skills as design and fabrication, mastery of soldering, riveting, lap joints, scoring, casting, and raising. She noted that she had ceramics skills which included design and fabrication, clay mixing, and pugging. She also indicated she was skilled in Adobe Photoshop and Adobe Illustrator. Ms. Hussing's construction skills include operating heavy equipment, reading blueprints, and welding. (Def. Ex. F, pp. 19-20)

Considering Ms. Hussing's age, educational background, employment history, ability to retrain, motivation to maintain employment, length of healing period, permanent impairment, permanent restrictions, and the other industrial disability factors set forth by the Iowa Supreme Court, I find that she has sustained a 25 percent loss of future earning capacity as a result of her work injury with Lowe's.

There is a dispute regarding the appropriate commencement date for any permanent partial disability benefits. Claimant contends any such benefits should commence on June 13, 2016, the date Dr. Sassman placed her at MMI. Defendant contends the appropriate commencement date is February 26, 2016, the day after Dr. Boulden's IME. I find that Ms. Hussing's healing period ended when she returned to the workforce full-time on February 1, 2016 for Aerotek. (Def. Ex. E) Thus, I conclude that her permanent partial disability benefits should commence on February 2, 2016.

According to the hearing report, Ms. Hussing is also seeking alternate medical care. (Hearing Rpt, p. 2) However, based on claimant's post-hearing brief, it appears what claimant is actually asking for is continued medical care. I found Dr. Sassman's opinions to be persuasive and that claimant's ongoing symptoms are related to the June 13, 2015 injury. As such, I find defendant is responsible for providing reasonable and necessary medical treatment to Ms. Hussing for her work-related injuries.

Claimant is asking for penalty benefits to be awarded in this case. First, claimant seeks penalty based on defendant's failure to make weekly benefits on a regular basis. Claimant was off work continuously from the time of the accident until she requested she be released to sedentary work on February 15, 2016. (Cl. Ex. 4, p. 8; JE6, pp. 6-35) Defendant did not offer any evidence to rebut the timing of the payments listed on claimant's exhibit 4, page 8. I find that there were three payments that were unreasonably delayed. I further find that there is no evidence to show why the payments were delayed or that any basis for the delay was contemporaneously conveyed to the claimant.

Pay From	Pay Thru	Issued Date	Amount
08/15/2015	09/03/2015	09/21/2015	$799.96
06/20/2015	07/13/2015	07/20/2015	$75.17
06/20/2015	06/25/2015	07/02/2015	$239.96

Second, claimant is also seeking penalty benefits based on denial of medical treatment. However, I find that late payment of medical bills or denial or delay of medical treatment is not an appropriate basis for penalty benefits under the Iowa Workers' Compensation Act.

The last issue to address is whether costs should be assessed against the defendant. Costs are to be assessed at the discretion of the deputy hearing the case. I find that claimant was generally successful in her claim and therefore an assessment of costs against the defendant is appropriate.

First, claimant is seeking an assessment for the filing fee in the amount of one hundred and no/100 dollars ($100.00). I find that this is an appropriate cost under 876 IAC 4.33(7).

Second, claimant is seeking the Medix IME bill in the amount of three thousand three hundred ninety-seven and 50/100 dollars ($3,397.50). I find that this is not an appropriate cost. Rather, defendant is responsible for the IME because they approved the IME pursuant to Iowa Code section 85.39. (Cl. Ex. 1)

Thus, defendant is assessed costs totaling one hundred and no/100 dollars ($100.00).

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. 6.14(6)(e).

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).

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.

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.

Based on the above findings of fact, I conclude that claimant sustained permanent disability to her body as a whole as a result of the June 13, 2015 work injury. In this case, I found the medical opinions of Dr. Sassman to be the most convincing. Having reached these findings of fact, I conclude that claimant has proven that she sustained 25 percent industrial disability as a result of the work injury. As noted above, I concluded that Ms. Hussing's healing period ended when she returned to the workforce full-time on February 1, 2016 for Aerotek. (Def. Ex. E) Thus, I concluded that her permanent partial disability benefits should commence on February 2, 2016.

Claimant has requested additional medical treatment. 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).

Based largely on the opinions of Dr. Sassman, I concluded that claimant's ongoing conditions are related to the work injury. Defendant is responsible for providing reasonable and necessary medical treatment to Ms. Hussing for her work-related injuries.

We now turn to the penalty issue. Under Iowa's worker's compensation scheme, penalty benefits may be imposed against an employer pursuant to Iowa Code section 86.13(4) under certain circumstances. 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.

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 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).

Weekly compensation payments are due at the end of the compensation week. Robbennolt, 555 N.W.2d 229, 235.

Penalty is not imposed for delayed interest payments. Davidson v. Bruce, 593 N.W.2d 833, 840 (Iowa App. 1999). Schadendorf v. Snap-On Tools Corp., 757 N.W.2d 330, 338 (Iowa 2008).

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).

Defendant bore the burden to establish a reasonable basis, or excuse, and to prove the contemporaneous conveyance of those bases to the claimant. Iowa Code section 86.13(4)(b)(2). In this case, defendant offered no evidence as to why the payments were delayed. Additionally, defendant failed to offer any evidence to show that any basis for the delay was contemporaneously conveyed to the claimant. I conclude that defendant failed to carry their burden of proof on the penalty issues, and a penalty award is appropriate in some amount. Iowa Code section 86.13.

The purpose of Iowa Code section 86.13 is both punishment for unreasonable conduct but also deterrence for future cases. Id. at 237. In this regard, the Commission is given discretion to determine the amount of the penalty imposed with a maximum penalty of 50 percent of the amount of the delayed, or denied, benefits. Christensen v. Snap-On Tools Corp., 554 N.W.2d 254, 261 (Iowa 1996).

In exercising its discretion, the agency must consider factors such as the length of the delays, 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. Meyers v. Holiday Express Corp., 557 N.W.2d 502, 505 (Iowa 1996). Having considered the relevant factors, the facts of this case, and the purposes of the penalty statute, I conclude that a section 86.13 penalty in the amount of $500.00 is appropriate in this case. Such an amount is appropriate to punish the employer for its failure to convey the bases of its denial and should serve as a deterrent against future conduct. However, the facts of this case are not of such an egregious nature that an additional penalty is warranted.

Claimant is seeking an assessment of costs. Costs are to be assessed at the discretion of the deputy hearing the case. 876 IAC 4.33. As noted above, I exercised

my discretion and awarded costs in the amount of one hundred and no/100 dollars ($100.00).

ORDER

THEREFORE, IT IS ORDERED:

All weekly benefits shall be paid at the stipulated rate of three hundred two and 14/100 dollars ($302.14).

Defendant shall pay one hundred twenty-five (125) weeks of permanent partial disability benefits commencing on February 2, 2016.

Defendant shall pay accrued weekly benefits in a lump sum together with interest at the rate of ten percent for all weekly benefits payable and not paid when due which accrued before July 1, 2017, and all interest on past due weekly compensation benefits accruing on or after July 1, 2017, shall be payable at an annual rate equal to the one-year treasury constant maturity published by the federal reserve in the most recent H15 report settled as of the date of injury, plus two percent. See Deciga Sanchez v. Tyson Fresh Meats, Inc., File No. 5052008 (App. Apr. 23, 2018) (Ruling on Defendants' Motion to Enlarge, Reconsider or Amend Appeal Decision re: Interest Rate Issue).

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

Defendant shall pay penalty benefits in the amount of five hundred and no/100 dollars ($500.00).

Defendant is assessed costs in the amount of one hundred and no/100 dollars ($100.00).

Defendant 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 6th day of August, 2018.

ERIN Q. PALS
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

Copies To:

Andrew J. Zbaracki
Attorney at Law
612 Kellogg Ave.
P.O. Box 847
Ames, IA 50010-0847
Andrew@newbroughlaw.com

Mark A. Woollums
Paul M. Powers
Attorneys at Law
1900 E. 54th St.
Davenport, IA 52807-2708
maw@bettylawfirm.com
pmp@bettylawfirm.com

EQP/sam

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.