BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

FILED
SEP 18 2015
WORKERS' COMPENSATION

ANGELA HARPER, Claimant, vs. LENSING, LTD d/b/a LENSING FUNERAL HOME, Employer, and UNITED FIRE & CASUALTY COMPANY, Insurance Carrier, Defendants.	File No. 5048496 ARBITRATION DECISION Head Note Nos.: 1802, 1803, 2501 2907, 4000.2

STATEMENT OF THE CASE

Claimant, Angela Harper, filed a petition in arbitration seeking workers' compensation benefits from Lensing, LTD d/b/a Lensing Funeral Home (Lensing) and United Fire & Casualty Company, insurer, both as defendants. This case was heard in Cedar Rapids, Iowa on April 21, 2015 with a final submission date of May 29, 2015.

At hearing defendants objected to Exhibit 3, pages 76-78, and Exhibit 5 as being untimely served. Exhibit 5 was excluded. Exhibit 3, pages 76-78 were allowed pursuant to Schoenfeld v. FDL Foods, Inc., 560 N.W.2d 595 (Iowa 1997). Defendants were given an opportunity, after the taking of testimony, to rebut Exhibit 3, pages 76-78. In an email dated April 24, 2015, defendants declined to file rebuttal. In an email dated April 22, 2015, claimant's counsel submitted a revised Exhibit 25, pages 1-3 to reflect revised unpaid medical claims.

The record in this case consists of claimant's Exhibits 1-4 and 6-26; defendants' Exhibits A through I, and the testimony of claimant, Michael Lensing, Vickie Lensing, and Susan Spilger.

ISSUES

1. The extent of claimant's entitlement to permanent partial disability benefits.

2. The extent of claimant's entitlement to temporary benefits.

3. Whether there is a causal connection between the injury and the claimed medical expenses.

4. Whether defendants are liable for penalty under Iowa Code section 86.13.

5. Costs.

FINDINGS OF FACT

Claimant was 52 years old at the time of hearing. Claimant graduated from high school. Claimant graduated from cosmetology school. She has an Associate's Degree. Claimant also underwent training to become a licensed funeral director. Claimant has worked as a retail clerk and a cosmetologist. She has worked as a manager at a campground/restaurant/store. Claimant also worked as a funeral director. Claimant began employment with Lensing in 2010. (Exhibit 18, pages 3-4; Ex. 20, p. 2)

Claimant's prior medical history is relevant. Claimant testified she had treated, prior to March 23, 2012 for anxiety, depression, fatigue and headaches. Claimant was evaluated for anxiety in 2011. Claimant testified she had "situational depression" due to divorce. She said she did have panic attacks and anxiety when taking exams to become a licensed mortician. She said she had prior treatment for headaches and dizziness. There is no evidence in the record claimant had any permanent impairment or permanent restrictions regarding anxiety, depression, fatigue or headaches. (Ex. A-1, pp. 1-4, 15, 20)

On March 23, 2012 claimant was involved in a motor vehicle accident while working for Lensing. Accident reports indicate claimant stopped behind another vehicle at a stoplight. There were three cars ahead of claimant, and claimant was driver number four in the line at the stoplight. A fifth vehicle hit claimant's van from behind causing a chain reaction of all the other cars waiting at the stoplight. Records indicate the airbag in claimant's vehicle was not deployed. An officer making the accident report estimated damage to all vehicles to be between $500.00 and $1,000.00. (Ex. 24. <u>See also</u> hospital records noting minimal vehicle damage; Ex. 8, p. 5)

Following the accident claimant was taken by an ambulance to an area hospital. Emergency records indicate claimant denied striking her head or loss of consciousness. Claimant complained of neck, back, and shoulder pain. Claimant was told by the emergency room physicians to follow up with her primary care provider in three to five days. (Ex. 8, pp. 1-5)

Claimant testified at hearing she has no recall of what happened after the accident. She said she does not know if she lost consciousness.

The driver who rear-ended claimant's car was named Brenda Falgier. Ms. Falgier could not recall her speed prior to the accident. Her car only had radiator

damage. She testified in deposition the car was repaired and was being driven after the accident. (Ex. C, pp. 3-4, 8)

Photos of the vehicle driven by claimant indicate minimal vehicle damage. Photos suggest minimal damage was done to the bumpers on the vehicle claimant was driving. (Ex. D)

On March 26, 2012 claimant was evaluated by John Banks, M.D. Claimant told Dr. Banks she was in a motor vehicle accident when another car hit her from behind going 50 miles an hour. She indicated she momentarily lost consciousness. Claimant had pain in the back of her head, neck, and felt dizzy. She was assessed as having a major loss of consciousness of unspecified duration and a concussion. (Ex. 2, pp. 1-6)

A CT scan of claimant's head completed on March 26, 2012 was found to show no acute intracranial abnormality. (Ex. A5, p. 4; Ex. 9, p. 2; Ex. A1, p. 26)

Claimant returned to Dr. Banks on March 30, 2012 with complaints of headaches. Claimant was taken off work for one week and recommended to have an MRI. (Ex. 2, pp. 8-14) Claimant again saw Dr. Banks on April 2, 2013 indicating improvement in headaches, but problems with dizziness. Claimant also thought she had short-term memory issues. Claimant was assessed as having a concussion and taken off work until April 9, 2012. (Ex. 2, pp. 15-21)

An MRI of the head done on March 20, 2012 was found unremarkable for claimant's brain age. (Ex. 10, p. 1; Ex. 9, p. 2; Ex. A5, p. 5)

Claimant continued to follow up with Dr. Banks in April and May of 2012 for headaches and dizziness. Claimant was continued off work during that period of time. (Ex. 2, pp. 22-64)

On April 19, 2012 claimant was evaluated by Robert Struthers, M.D. Claimant was referred to Dr. Struthers by Dr. Banks. Dr. Struthers is a neurologist. Claimant had dizziness and indicated difficulties with concentration. Dr. Struthers assessed claimant as having a post-concussive syndrome. Claimant was kept off work for an additional month. A review of the MRI found claimant had a normal MRI of the brain given her age. (Ex. 3, pp. 1-4)

Claimant returned to Dr. Banks on June 5, 2012 with complaints of dizziness, and problems with concentration and focus. She was continued off work and referred for psychiatric evaluation. (Ex. 2, pp. 70-75)

On June 11, 2012 and June 12, 2012 claimant was evaluated by Ellie Snavely, Ph.D., a psychologist. Claimant complained of blurred vision, lack of concentration and problems with short-term memory. Claimant also complained of problems with balance. Testing suggested depression, anxiety and post-traumatic stress disorder (PTSD). Claimant was recommended to see a psychiatrist. (Ex. 6, pp. 1-7)

On June 12, 2012 claimant was evaluated by Sarvenaz Jabbari, M.D. Claimant indicated she was stopped at a light when a car hit her from behind going 45 miles per hour. Claimant complained of problems with balance, dizziness, blurred vision and lack of concentration and retention. Claimant was assessed as having a post-concussive syndrome. Claimant was returned to work at half time. She was recommended to continue to see Dr. Struthers. (Ex. 9, pp. 1-5)

In a June 28, 2012 letter, Dr. Struthers indicated claimant had dizziness. He recommended claimant have continued vestibular rehabilitation and would benefit from psychiatric counseling. (Ex. 3, p. 13)

In a June 28, 2012 letter, claimant's counsel noted defendants had recently attempted to transfer claimant's care from Dr. Banks to Dr. Jabbari. The letter indicated claimant would resist further treatment with Dr. Jabbari and continue treatment with Dr. Banks. (Ex. 21, pp. 1-3)

Claimant continued treatment with Dr. Banks and Dr. Struthers in June 2012 through November 2012. (Ex. 2, pp. 78-91; Ex. 3, pp. 15-33) Claimant was prescribed glasses with a prism to help with issues regarding dizziness and double vision by DeAnn Fitzgerald, O.D. on July 3, 2012. (Ex. 14, p. 1) In a November 5, 2012 note Dr. Struthers noted the need for prism in claimant's glasses and specialized eye care was done due to the work accident. (Ex. 3, p. 34)

Claimant testified she returned to work in approximately October 2012. She says she eventually returned to work at eight hours per day but was unable to work nights.

Michael Lensing testified he is co-owner, with his wife, of Lensing. Mr. Lensing is a licensed mortician. He said claimant eventually returned to work full time, but could not work at a night shift due to medication and dizziness. He said claimant did not do night duties on return to work, but performed all of the duties. He said the plan was to allow claimant to continue to work at Lensing.

Claimant returned to Dr. Banks on April 15, 2013. Claimant was not working night call at Lensing. Claimant indicated she had fallen two to three times at work due to loss of balance. (Ex. 2, pp. 92-95)

In an April 16, 2013 letter Dr. Struthers assessed claimant as having post-concussive syndrome with posttraumatic headaches and vertigo. He opined claimant had yet to reach maximum medical improvement (MMI). (Ex. 3, pp. 47-48)

Claimant returned to Dr. Snavely on July 24, 2013 and August 15, 2013 for followup neuropsychological evaluation. Claimant had returned to work except for night call. Testing suggested deficiencies in speed of processing information, sustained attention and concentration. (Ex. 6, pp. 30-35)

On June 21, 2013 Dr. Struthers found claimant at MMI. Claimant was on amitriptyline, which prevented her from taking night calls for work. (Ex. 3, p, 61)

Claimant testified that on September 9, 2013 she fell at home while carrying laundry. Claimant had walked down a flight of stairs and fell at the bottom of the stairs.

On September 10, 2013 claimant was evaluated by Dr. Banks. Claimant was assessed as having possible fracture of ribs eight, nine, and ten, although x-rays showed no signs of a fracture. (Ex. 2, p. 115) Dr. Struthers opined the March of 2012 motor vehicle accident was, more than likely, a contributing factor to claimant's September 9, 2013 fall at home. (Ex. 3, p. 65)

Claimant was off work from September 10, 2013 through October 6, 2013 due to a fall at home. (Ex. 2, p. 128)

Mr. Lensing testified he was aware of two occasions where claimant fell at work. He testified claimant did not ask to see a doctor after her fall at home.

Dr. Banks opined claimant could return to work on November 19, 2013 with no restrictions. (Ex. 2, p. 132)

In a December 4, 2013 note, Sanjay Shah, M.D., an ophthalmologist, noted he saw claimant for an eye exam and claimant has presbyopia correction due to age. (Ex. 13, p. 1)

In a December 30, 2013 letter, written by claimant's counsel, Dr. Banks agreed with Dr. Struthers' opinion that claimant's March of 2012 motor vehicle accident was more than likely a contributing factor to claimant's September 9, 2013 fall at home. (Ex. 2, pp. 141-143)

From approximately January of 2014 through February of 2014 claimant was off work due to bronchitis and pneumonia. (Ex. A1, pp. 40-58; Ex. F)

In a letter dated March 4, 2014 claimant was terminated from Lensing. Claimant had used all of her sick leave, vacation and personal time. Claimant was paid through March 20, 2014. Defendant-employer indicated they needed a full-time funeral director and needed claimant at work. (Ex. 20, p. 1)

Claimant testified she believed she was terminated by her employer by a phone call. She testified she did not receive the termination letter found at Exhibit 20, page 1. She testified she was told she was terminated as Lensing needed a full-time funeral director.

Mr. Lensing testified claimant was terminated as she had used all of her vacation, sick and personal time. He said claimant was terminated because the company needed a full-time funeral director. He said claimant would not have been let go if she had not taken so much time off work due to pneumonia. He said the plan, prior to the termination, was for claimant to continue to work at Lensing full time. Mr. Lensing testified claimant was a good employee when she was physically at work.

Vickie Lensing testified she is Michael Lensing's spouse and co-owner of the funeral home. She testified claimant would still be working at Lensing had she not missed so much work due to her respiratory ailment.

In a March 5, 2014 report, Robert Jones, Ph.D., from the University of Iowa Hospitals and Clinics (UIHC), gave his opinions of claimant's condition following a neuropsychological evaluation. Claimant indicated she was rear-ended in a motor vehicle accident by a car traveling 45 miles an hour. Claimant had no recall of loss of consciousness and reported headaches. Claimant indicated she had impaired balance. She indicated dizziness. Claimant also reported deficits in short-term memory, attention, concentration, and word finding. (Ex. A5, pp. 1-8)

Dr. Jones opined claimant had no evidence of brain damage or dysfunction from a neuropsychological perspective. He opined claimant's current emotional state was an exacerbation of a preexisting problem. A review of medical records did not suggest a concussion, loss of consciousness or head trauma from the March of 2012 accident. (Ex. A5, p. 9)

In a May 10, 2014 report Nils Varney, Ph.D., gave his opinions of claimant's condition following a neuropsychological assessment. Mr. Varney is a neuropsychologist from South Carolina. Claimant indicated she was involved in a motor vehicle accident when she was hit from behind by a car going 45 miles an hour. Claimant indicated problems with memory, balance and a personality change. Dr. Varney opined claimant had sustained a moderately severe traumatic brain injury from the motor vehicle accident. He found claimant sustained an orbital frontal injury, resulting in general loss of mental efficiency, visual disturbances and problems with light and sound exposure. (Ex. 7)

In an August 19, 2014 report Stanley Mathew, M.D., gave his opinions of claimant's condition following an independent medical evaluation (IME). Claimant indicated she was rear-ended by another vehicle going 45 miles an hour. Claimant indicated she lost consciousness. Claimant indicated that once she regained consciousness she vomited and was nauseous. Claimant indicated she went to the emergency room where she was diagnosed as having a brain injury and a mild concussion. At the time of the exam, claimant complained of memory loss, balance issues, difficulty with comprehension, dizziness, ringing in her ear and sensitivity to light colors. (Ex. 1, pp. 11-13)

Dr. Mathew opined the March of 2012 motor vehicle accident is a substantial contributing factor to her condition. He found claimant at MMI as of August 13, 2014. He opined claimant had a 40 percent permanent impairment based on the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, Tables 13-6, 13-8 and 13-15. He opined that given her limitations claimant would have difficulty finding any kind of employment. He recommended she avoid stressful situations, heavy lifting, prolonged walking, heights, and ladders. He found claimant would benefit from speech therapy, followup psychiatric counseling, and with a chronic pain specialist. (Ex. 1, pp. 13-14)

In a September 4, 2014 letter, written by defense counsel, Dr. Struthers indicated claimant had reached MMI as of March 6, 2013. He said he would defer to a reviewing physician regarding whether claimant had a permanent impairment. He believed claimant had permanent restrictions regarding taking night calls. He opined claimant would continue to take amitriptyline for future care, but he did not anticipate claimant would need other future care. (Ex. 3, pp. 69-71)

In an October 18, 2014 report, William Orrison, M.D., gave his opinions of claimant's CT and MRI scans. Dr. Orrison is a radiologist with IMGEN in Las Vegas, Nevada. He opined the findings of claimant's MRI were consistent with chronic traumatic encephalopathy (CTE). (Ex. 4)

In a December 16, 2014 report, Robert Broghammer, M.D. gave his opinions of claimant's condition following an IME. Claimant indicated that in March 2012 she was rear-ended by another vehicle traveling 45 miles an hour. Claimant's vehicle experienced damage around $8,000.00. Claimant complained of daily headaches. She reported dizziness. She reported occasional vertigo. She indicated poor memory and difficulty comprehending reading material. (Ex. A7, pp. 1-18)

Dr. Broghammer disagreed with Dr. Orrison's diagnosis of CTE, as literature opined CTE can only be definitively diagnosed post-mortem on direct exam with a microscope on brain tissue. He also opined evidence of CTE would not show up on an MRI taken seven days after the alleged brain injury. He noted airbags commonly deploy at speeds of 8-14 miles per hour in frontal collisions. He noted the police officer reported minimal damage on the vehicles and no deployment of airbags on claimant's vehicle. (Ex. A7, pp. 19-20)

Dr. Broghammer found claimant's fall was idiopathic in nature and not related to the March of 2012 accident. He opined claimant's ongoing mental health treatment was due to a preexisting condition of chronic anxiety and panic attacks. He found claimant had no permanent restrictions. He opined claimant had zero percent permanent impairment. He did not believe claimant required any further care for the March of 2012 accident. (Ex. A7, pp. 21-24)

In a December 12, 2014 letter from the Social Security Determination Services, claimant was found to be disabled under the rules of the Social Security Act. Claimant was found to be disabled as of March 4, 2014. (Ex. 23)

Claimant testified she was receiving Social Security Disability for issues with her hips.

In a December 24, 2014 note Dr. Broghammer indicated he had reviewed claimant's deposition taken December 11, 2014. This additional record did not change his opinions restated in his December 16, 2014 IME report. (Ex. A7, p. 25)

In a February 12, 2015 note, Dr. Mathew indicated he had reviewed Dr. Orrison's report and agreed with the opinion. Dr. Mathew reiterated his opinion that claimant had a traumatic brain injury. (Ex. 1, p. 18)

In a February 27, 2015 letter, written by claimant's counsel, Sundara Munagala, M.D. noted he began seeing claimant in June of 2012 for major depressive disorder, generalized anxiety and PTSD. He assessed claimant as having major depressive disorder, generalized anxiety disorder and PTSD. He opined the March 23, 2012 motor vehicle accident was a substantial contributing factor in producing her mental health condition. He opined claimant would continue to need psychiatric care and would continue to have chronic difficulties with certain employment. (Ex. 6, pp. 50-54)

In a March 19, 2015 letter, written by claimant's counsel, Dr. Struthers opined claimant's March of 2012 motor vehicle accident was a substantial contributing factor for her post-concussive syndrome. He indicated claimant could not return to work on night call while taking amitriptyline. The letter from claimant's counsel also indicates claimant was fired from Lensing due to her restrictions, which allegedly prevented her from performing her full duties. (Ex. 3, p. 76-78)

In a March 19, 2014 report Amanda Ruhland, MA, CRC, gave her opinions of claimant's employability. Using opinions given by Drs. Banks and Broghammer, Ms. Ruhland opined claimant could return to work as a funeral director. She also opined claimant would have access to jobs in the general labor market and would have no loss of earning capacity. If restrictions from Dr. Struthers were applied, claimant would be allowed to return to work as a funeral director. She opined that applying Dr. Struthers' restrictions, claimant could find work in her geographic area but would incur a 25 percent loss of earning capacity. Given restrictions by Dr. Mathew, it would be difficult for claimant to locate work. (Ex. I)

Claimant testified she continues to have problems with memory and concentration. She testified she does not believe she could return to work to any of her prior jobs. Claimant testified she would eventually like to return to work in a clerical office setting and believes that she could do this type of work.

At the time of hearing claimant was still on Social Security Disability. She testified it was her goal to get off of Social Security Disability, once her hips improved, and return to work.

Claimant testified she believed the charges, detailed in Exhibit 25, were due to her motor vehicle accident. Claimant testified she believes the bills should be paid by the workers' compensation carrier.

Between March of 2014 and September of 2015 claimant applied for approximately 100 jobs as part of her requirement for receiving unemployment insurance benefits. (Ex. 22, pp. 4-12)

CONCLUSIONS OF LAW

The first issue to be determined is the extent of claimant's entitlement to permanent partial disability benefits.

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

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).

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.

Claimant contends she sustained a substantial permanent partial disability caused by the March 23, 2012 accident. Defendants suggest claimant's permanent partial disability is minimal.

As detailed above, claimant was involved in a motor vehicle accident when she was rear-ended by another vehicle. This caused claimant's car to hit the car in front of her, resulting in a chain reaction accident involving five vehicles. (Ex. 24)

Emergency room notes indicate claimant did not strike her head. Emergency room notes indicate claimant did not lose consciousness. There is no report of nausea or of claimant vomiting in the emergency room records. (Ex. 8)

The vehicle that struck claimant only sustained radiator damage. (Ex. C, pp. 3-4, 8) The airbag in claimant's car did not deploy. (Ex. 8) The record suggests airbags deploy in a frontal impact accident at speeds greater than 8-14 miles per hour. (Ex. A7, p. 15) Photos of claimant's vehicle taken after the accident suggest some damage to the front and rear bumper, and minimal damage. (Ex. D) The officer who investigated the accident estimated damage to each vehicle to be in the $500.00 to $1,000.00 range. (Ex. E)

Claimant testified at hearing she did not recall if she lost consciousness at the time of the accident.

Claimant told a number of healthcare providers the accident was caused by a rear-end from another vehicle at speeds of 45-50 miles per hour. She also told a number of healthcare providers she lost consciousness as a result of this accident. (Ex. 1, p. 11; Ex. 2, p. 1; Ex. 7, p. 1; Ex. 9, p. 1; Ex. 15, p. 1; Ex. A5, p. 1; Ex. A7, p. 12)

A number of experts have opined regarding the diagnosis and impairment caused by claimant's accident.

Dr. Mathew evaluated claimant on one occasion for an IME. As noted, Dr. Mathew's records indicate claimant told him she was rear-ended by a vehicle going 45 miles per hour. Dr. Mathew was also told claimant lost consciousness. His report indicates after claimant regained consciousness she was nauseous and vomited. The report also indicates claimant was assessed in the emergency room as having a concussion and a brain injury. (Ex. 1, p. 11)

According to the police report and emergency room exhibits, none of this is true. (Ex. 8; Ex. 24)

Dr. Mathew did minimal testing on claimant. From his report it appears Dr. Mathew performed a basic physical and took claimant's vitals.

Dr. Mathew's opinions regarding permanent impairment are based on false assumptions regarding claimant's accident. Claimant was not hit by a vehicle going 45 miles an hour. She did not hit her head. She did not lose consciousness. She did not vomit after the accident. She was not assessed at the emergency room as having a concussion and a brain injury. There is a paucity of testing in his evaluation. Based on this, it is found Dr. Mathew's opinions regarding permanent impairment and causation of claimant's condition are found not convincing.

Claimant's MRI and CT scans were evaluated by Dr. Orrison. Dr. Orrison is a radiologist who practices in Las Vegas, Nevada. He believed claimant suffered from a CTE. Prior review of the MRI and CT scans by other physicians suggests diagnostic testing was normal. (Ex. 9, p. 2; Ex. 10, p. 1; Ex. A5, p. 5; Ex. 9, p. 2; Ex. A1, p. 26; Ex. A5, p. 4)

Dr. Broghammer indicated it is impossible to find CTE, from an MRI or brain scan, that was caused by an injury occurring seven days prior to the scan. He also indicated CTE is only definitely diagnosed post-mortem.

Other physicians who reviewed the MRI and CT scans found they were normal, except for Dr. Orrison. Claimant offered no rebuttal for the questions raised by Dr. Broghammer concerning Dr. Orrison's diagnosis of CTE. Based on these discrepancies, it is found Dr. Orrison's opinions are not convincing.

Claimant also reported to Drs. Banks, Varney, and staff at Cedar Rapids Vision that she was rear-ended by a vehicle going 45-50 miles per hour. She also reported loss of consciousness. (Ex. 2, p. 1, Ex. 7, p. 1; Ex. 15, p. 1) As noted, emergency room records and police reports indicate this is not true. For this reason, the opinions of these providers regarding impairment and causation are also found not convincing.

Dr. Mathew's opinions regarding permanent impairment and causation are found not convincing. Dr. Varney's diagnosis of CTE is found not convincing. The opinions of Drs. Banks, Varney and CR Vision regarding impairment and causation are found not convincing. The records indicate claimant was not hit by another vehicle going 45-50 miles per hour. The record indicates claimant did not lose consciousness as a result of the accident. The record suggests claimant did not strike her head as a result of the accident. The record indicates claimant returned to work at Lensing from October of 2012 through March of 2014 full time as a funeral director. Claimant did not work nights due to taking amitriptyline. Claimant was terminated from her position due to extended leave caused by a respiratory ailment. Claimant suggests she was terminated due to her condition from her March of 2012 accident, but there is scant evidence to support this position. Based on these facts, and the others detailed above, claimant has failed to carry her burden of proof she sustained a loss of earning capacity, or is entitled to additional permanent partial disability benefits, greater than that already paid by the defendants.

The next issue to be determined is the extent of claimant's entitlement to temporary benefits. Claimant contends she is due temporary benefits from September 10, 2013 through October 6, 2013 related to her fall at home. Defendants contend claimant is not due additional temporary benefits.

Three experts have offered opinions regarding the causal connection between the work injury and the fall at home. Dr. Struthers, a neurologist, treated claimant for an extended period of time. He opined claimant's fall at home was due to her accident of March 2012. Dr. Banks agreed with Dr. Struthers. (Ex. 2, pp. 115, 142; Ex. 3, p. 65) Dr. Broghammer evaluated claimant on one occasion for an IME. He found claimant's fall at home was not related to the March of 2012 accident. As Dr. Struthers has a far greater experience with claimant's history and medical presentation, it is found his opinions regarding causation of claimant's fall at home is more convincing than the opinions of Dr. Broghammer. Claimant is entitled to temporary benefits from September 10, 2013 through October 6, 2013.

The next issue to be determined is if there is a causal connection between the injury and the claimed medical expenses.

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

Under Iowa Code section 85.27, the employer has the right to choose medical care as long as it is offered promptly and is reasonably suited to treat the injury without undue inconvenience to the employee. An employer is not responsible for the costs of medical care not authorized by section 85.27. Claimant can seek payment of unauthorized medical care by a preponderance of the evidence the care was reasonable and beneficial. Bell Bros. Heating v. Gwinn, 779 N.W.2d 193, 206 (Iowa 2010). To be beneficial the medical care must provide a more favorable medical outcome than would likely have been achieved by the care authorized by the employer. Id. at 206. The claimant has a significant burden to prove the care was reasonable and beneficial. Id. at 206.

Following her visit to the emergency room, claimant was advised to seek followup care with her personal physician. (Ex. 8, p. 7) Claimant sought followup care with her family doctor, Dr. Banks. The record suggests defendant-employer knew claimant was treating with Dr. Banks for a work accident, for a short time and did not attempt to have claimant treat with an authorized physician chosen by defendants. (Ex. 2, pp. 21, 29, 35, 63)

On June 12, 2012 claimant was evaluated by Dr. Jabbari, the physician chosen by defendants to treat claimant. (Ex. 9, pp. 1-5) In a letter dated June 28, 2012, defendants' counsel protested against defendants' attempt to control care and have claimant treated by Dr. Jabbari. (Ex. 21, pp. 1-3) Defendants indicate they authorized the care given by Dr. Struthers, but not the care given by Dr. Banks and other non-authorized physicians. (Defendants' post-hearing brief, p. 12)

Claimant contends that once Dr. Banks began to care for claimant, defendants could only transfer care if there was a rational, justifiable reason for the transfer. (Claimant's post-hearing brief, p. 28)

There is no record in evidence indicating defendants authorized Dr. Banks to treat claimant after June 28, 2012. The record indicates when defendants attempted to have claimant treat with an authorized physician in late June 2012, claimant resisted that change of care. The record indicates on or about June 28, 2012 claimant knew defendants were trying to direct claimant's care to Dr. Jabbari. Defendants are liable for charges incurred for medical care with Dr. Banks, and doctors that were authorized by Dr. Banks, up to June 28, 2012. Defendants are not liable for charges incurred with Dr.Banks, or any other provider referred to by Dr. Banks, after June 28, 2012. Defendants are liable for charges incurred by Dr. Struthers, and physicians referred to by Dr. Struthers.

The next issue to be determined is whether or not defendants are liable for a penalty.

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."
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> Christensen, 554 N.W.2d at 260.
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> The supreme court has stated:
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> (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).

Claimant seeks penalty against defendants for two different reasons. First, claimant contends defendants are liable for underpayment of industrial disability. As noted above, claimant has failed to prove she is due any additional permanent partial disability benefits other than that already paid by the defendants. As such, a penalty is not appropriate for the alleged underpayment of industrial disability.

Claimant also seeks a penalty for nonpayment of intermittent healing period benefits. As noted, claimant sought intermittent healing period benefits for an injury occurring at home. Because the injury occurred at home, and because Dr. Broghammer felt claimant's fall at home was not work related, a penalty is not appropriate for defendants' failure to pay healing period benefits for the period of time from September 9, 2013 through October 6, 2013.

The final issue to be determined is costs. Defendants disputed that they are liable for costs associated with Mark Mittauer, M.D.'s reports. Dr. Mittauer's reports were excluded from the record, as they were untimely served. As such, defendants are not liable for costs associated with Dr. Mittauer's reports.

ORDER

THEREFORE IT IS ORDERED:

That defendants shall pay claimant healing period benefits from September 9, 2013 through October 6, 2013 at the rate of $529.10 per week.

That defendants shall pay accrued benefits in a lump sum.

That defendants shall pay interest on unpaid weekly benefits as ordered above as set forth in Iowa Code section 85.30.

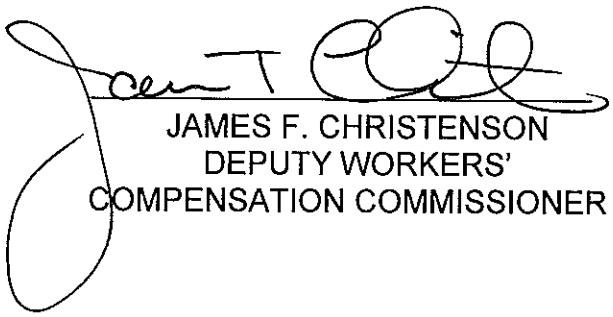
That defendants shall receive a credit for benefits previously paid.

That defendants shall pay claimant's medical bills as detailed above.

That defendants shall file subsequent reports of injury as required under rule 876 IAC 3.1(2).

That defendants shall pay the costs of this matter, excluding costs associated with the report from Dr. Mittauer.

Signed and filed this 18th day of September, 2015.



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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.