BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

FILED
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WORKERS' COMPENSATION

ALFREDO RODRIGUEZ, Claimant, vs. TITAN TIRE CORPORATION, Employer, and ZURICH AMERICAN INSURANCE COMPANY, Insurance Carrier, Defendants.	File No. 5052006 ARBITRATION DECISION Head Note Nos.: 1402.30, 1701, 1802, 1803, 2501, 2907, 4000.2

STATEMENT OF THE CASE

Claimant, Alfredo Rodriguez, filed a petition in arbitration seeking workers' compensation benefits from Titan Tire Corporation (Titan), employer, and Zurich American Insurance Company, insurer, both as defendants. This case was heard in Des Moines, Iowa on November 30, 2015 with a final submission date of December 23, 2015.

At hearing, claimant objected to defendants' Exhibits H and I. Claimant contends Exhibits H and I were not served on claimant until the morning of the hearing. Exhibits H and I concern amounts claimant was paid in disability benefits. No good reason was given why Exhibits H and I were served just hours before hearing. Claimant contends services of Exhibits H and I, hours before hearing, prejudiced his ability to contest amounts that were received in disability payments. No good reason was given why Exhibits H and I were untimely served. Based on the record, Exhibits H and I were excluded from the record.

The record in this case consists of claimant's Exhibits 1 through 19, defendants' Exhibits A through G and J through K, and the testimony of claimant and Luis Rodriguez, claimant's son.

ISSUES

1. Whether claimant's back condition arose out of and in the course of employment.

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

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

4. Credit.

5. Whether defendants are liable for penalty.

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

7. Costs.

8. Whether claimant is due vocational benefits under Iowa Code section 85.7.

FINDINGS OF FACT

Claimant was 56 years old at the time of hearing. Claimant attended second grade in Mexico but did not complete the second grade. He migrated to the United States in 1980. Claimant has picked fruit and vegetables. He has driven a truck and worked in a factory making windows. (Exhibit 19, pages 138-139) Claimant began employment with Titan in 1999.

Claimant's main language is Spanish. Claimant says he cannot read English.

Claimant said that, on December 12, 2013, he was working on an 800-pound tractor tire. Claimant said the tire was attached to a hoist. Claimant was moving the tire, when it came off the hoist. Claimant said he bent forward to try to avoid the tire. He said he was hit by the tire and believes he lost consciousness. Claimant said when he regained consciousness, the tire was on his foot. Claimant says he was eventually put on a cart and was taken by a taxi to an emergency room. (Ex. G)

Claimant was taken to the emergency room at Mercy in Des Moines, Iowa. He was assessed as having an ankle sprain, a fractured ankle and a foot fracture. Claimant was treated with medication and discharged with crutches. (Ex. 1)

Claimant testified he told the doctor at the emergency room his back also hurt. Claimant said there was no translator in the emergency room.

Luis Rodriguez testified at hearing. Luis is claimant's son. He said he went to the hospital to interpret for his father. He said at the hospital his dad told him his foot and whole body hurt. He said his father did not identify injuries other than the fractured ankle. (Transcript pages 63-64) Mr. Rodriguez testified in weeks after the initial injury, claimant identified his back and middle of the stomach as being injured. (Tr. p. 64)

Claimant testified he told hospital staff his back, arm, and foot were injured and he had a burning sensation in his stomach. (Tr. p. 23)

On December 16, 2013 claimant was seen at Iowa Orthopedics. Claimant was assessed as having a right ankle fracture and kept off work. (Ex. 2, p. 10)

On January 15, 2014 claimant was evaluated by Dennis Whitmer, D.O. for a groin injury. Claimant was assessed as having a right inguinal hernia. Surgery was recommended. (Ex. 3, p. 34)

On January 16, 2014 claimant underwent a right inguinal hernia repair performed by Dr. Whitmer. (Ex. 3, pp. 37-39) In a January 29, 2014 note, Dr. Whitmer took claimant off of work following his surgery. (Ex. 3, p. 40)

Claimant was evaluated by Bryan Trout, DPM on February 20, 2014. Claimant was continued off work due to a fractured ankle. (Ex. 2, p. 11)

On February 28, 2014 claimant was evaluated by Stephen Ash, M.D. Claimant had complaints of pain in the left knee, leg and thigh. Claimant had an interpreter. He was assessed as having left knee and hip problems. An MRI was recommended. (Ex. 2, pp. 11-14)

Claimant underwent an MRI of the left hip and knee on March 3, 2014. Claimant's left hip showed a labral tear and some arthritis. Claimant indicated his left hip did not have significant pain. Claimant was assessed as having left knee pain and prescribed physical therapy. (Ex. 2, pp. 16-17; Ex. 4)

Claimant returned to Dr. Ash on March 28, 2014 with continued complaints of left knee pain. Claimant had not seen a physical therapist. Claimant was again prescribed physical therapy. Claimant was given a 25-pound lifting restriction. (Ex. 3, pp. 19-22)

On April 21, 2014 claimant returned in followup with Dr. Trout. Claimant had continued pain regarding a right ankle fracture. He was told to follow up in one month's time. (Ex. 2, pp. 23-26)

On April 25, 2014 claimant was evaluated by Dr. Ash. Claimant had some continued pain in the left leg and thigh. Claimant also had ". . . some back and neck pain at times." Claimant was told to continue exercises for the left leg and knee. He was found to be at maximum medical improvement (MMI) for the left leg. Dr. Ash indicated claimant needed to see a spine specialist. (Ex. 2, pp. 27-29)

On May 9, 2014 claimant was evaluated by Cassim Igram, M.D., an orthopedic surgeon. Claimant complained of upper and lower back pain. Claimant indicated back pain since the December 12, 2013 injury. Dr. Igram reviewed treatment notes from December 16, 2013 to present and found no mention of back pain until late April of 2013 through the records of Dr. Ash. Given the chronology, Dr. Igram had a difficult time connecting claimant's complaints of back pain to the December of 2013 injury at work. Claimant's back pain symptoms were myofascial. (Ex. C)

On July 24, 2014 claimant saw Dr. Trout in followup for the right ankle. Claimant's ankle was aggravated by walking and standing. Claimant was found to be at MMI. He was returned to work with no restrictions. (Ex. 2, pp. 31-33)

Claimant was seen by Stacey Neu, M.D. on August 22, 2014 for left foot pain. Claimant was assessed as having left foot pain, suspicious for gout. Claimant also had neck pain. He was prescribed prednisone. He was told to use heat for his neck. (Ex. 5, pp. 50-52)

In a September 21, 2014 report, Daniel Miller, D.O. gave his opinions of claimant's condition following an independent medical evaluation (IME). Claimant had had neck pain and discomfort in the right inguinal area. Claimant indicated he was able to do all activities. As Dr. Igram found claimant's back injury was not work related, no permanent impairment rating was given for the back. Dr. Miller found claimant had no permanent impairment for the left hip and knee and that there was full range of motion and strength. He also found claimant had no permanent impairment to the right ankle. Claimant was found to have a 2 percent permanent impairment to the body as a whole for the hernia. (Ex. B)

In an October 1, 2014 note Amber Augustine, DPT, indicated she treated claimant for 80 physical therapy visits for the fracture to his right lower extremity. Claimant had shown improvement in function in the right lower extremity. Claimant had severe flexibility deficits in both lower extremities. He had a stiff lumbar spine. He was discharged from physical therapy. (Ex. 7, p. 61)

In an October 3, 2014 letter, defendants indicated it was paying claimant permanent partial disability benefits based on the 2 percent rating given by Dr. Miller. (Ex. J)

In a November 3, 2014 note Jennifer Knobbe, DC, indicated she evaluated claimant on October 9, 2014. She found claimant had loss of range of motion in the cervical, thoracic, and lumbar spine. Dr. Knobbe placed claimant on a treatment plan of chiropractic care and acupuncture three times a week. (Ex. 8, p. 62)

In a November 25, 2014 report, Sunil Bansal, M.D. gave his opinions of claimant's condition following an IME. Claimant indicated his injury occurred after an 800-pound truck tire fell off a hoist and onto him. Claimant believed he lost consciousness. Claimant said when he went to the emergency room, his whole body

was painful. Claimant was told doctors could only focus on his right foot and ankle, as it was the most severely injured. (Ex. 10, pp. 1-10)

Claimant had continued pain in the area of the hernia, radiating down to the right leg into his foot. Claimant had pain in the lumbar spine radiating down from the left leg to the foot. Claimant had pain in the right ankle and numbness in the toes on the right. Claimant could lift 70 pounds occasionally and 40-50 pounds frequently. Claimant indicated if he walked 30-40 minutes, he was in severe pain. Claimant was still employed at Titan at the time of the IME. (Ex. 10, pp. 10-11)

Dr. Bansal found claimant had a 17 percent permanent impairment to the right ankle and a 3 percent permanent impairment to the body as a whole for the hernia. Based on claimant's symptoms and exam, Dr. Bansal found claimant had a 3 percent permanent impairment for his back condition. He found claimant had a 5 percent permanent impairment to the left knee. He limited claimant to lifting up to 70 pounds occasionally and 40 pounds frequently. He found claimant had reached MMI as of July 24, 2014 for the right ankle and on March 26, 2014 for the hernia. He found claimant at MMI for his back on May 8, 2014. He found claimant had reached MMI for the left leg on April 25, 2014. (Ex. 10, pp. 11-18)

In an August 26, 2015 letter, written by claimant's counsel, Dr. Knobbe indicated her care of claimant was reasonable and necessary to treat his work injury. She opined claimant's work condition would benefit from continued chiropractic care. (Ex. 8, pp. 66-67)

In a September 15, 2015 note, Dr. Whitmer indicated claimant had no permanent impairment regarding his hernia repair and that on March 10, 2014 claimant was returned to work at normal activities. (Ex. 3, p. 46)

Claimant was evaluated by Allen Eckhoff, M.D. on September 18, 2015 for lower back pain that radiated into the left leg. Claimant indicated difficulty with walking. Claimant indicated his pain began on December 12, 2013 when an 800-pound tire fell on him. Claimant was assessed as having lumbar radiculopathy. He was prescribed medication. (Ex. 9, pp. 68-69)

In an October 16, 2015 report Lana Sellner, MS, CRC, gave her opinions of claimant's vocational opportunities. She found, based on Dr. Bansal's restrictions, claimant could work in the heavy physical demand category. She found claimant continued to be employable. She found claimant could become more employable if he took ESL classes and improved his English skills. (Ex. 12)

In an October 27, 2014 letter, Dr. Miller noted he saw claimant a second time on October 26, 2015. Claimant continued to complain of hernia pain. He opined claimant's continued pain was causally related to the December of 2013 work injury. He recommended claimant see a pain specialist for pain. (Ex. 11)

On November 19, 2015 claimant underwent an MRI of the lumbar spine. It showed spondylosis changes without nerve root compression. (Ex. E)

Claimant testified he has not returned to Titan since his injury. He said he tried to return to work at Titan. He said he was told by Titan the company was laying workers off. He said he was told he would be called back when Titan was ready to return employees to work. He said he has not received any calls from Titan. He testified he believes he is on a recall list at Titan.

Claimant testified he has applied for approximately 20 jobs listed in Exhibit 14. He says he has not received any job offers for any position he has applied for. Claimant testified he tells perspective employers about the pains he has in his waist area.

At the time of hearing, claimant said he has problems with walking and standing. He said he has pain in the arch and heel of his foot. He says his back and waist hurt. He testified he did not believe he could return to work at any of his prior jobs he held at Titan.

Luis Rodriguez testified he moved in with his father to help him pay bills after his father was injured. At the time of hearing, he no longer lived with his father, but still helps his dad with chores.

CONCLUSIONS OF LAW

The first issue to be determined is if claimant had an injury to his back that arose out of and in the course of employment.

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 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.

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).

As noted above, after his injury at Titan, claimant was taken to an emergency room for treatment for his injuries. Claimant testified at hearing he told hospital staff, through an interpreter, his back was hurt. (Tr. p. 23)

Claimant's son, Luis Rodriguez, testified his father did not specifically complain of back pain when he interpreted for his father at the hospital. (Tr. pp. 63-64)

There is no reference in the medical records from the emergency room visit regarding a back injury. (Ex. 1)

On December 16, 2013 claimant was seen at Iowa Orthopedics for a fractured right ankle. There is no reference in this record of any complaints of back pain or back injury. (Ex. 2, p. 10)

Claimant testified he did tell a doctor he had back pain. Claimant testified the doctor told him the back was not his area of expertise and the doctor was going to concentrate on his foot and ankle. (Tr. pp. 23-24)

For approximately the next four months, from December 12, 2013 through April 21, 2014, claimant treated with approximately four different physicians. During that period of time, there is no reference in any of the medical records that claimant was experiencing back pain or had problems with a back condition. (Ex. 2, pp. 11-14, 16-17, 23-26; Ex. 3, pp. 19-21, 34, 37-46; Ex. 4)

On April 25, 2014, over four months after the date of injury, the records note claimant also had ". . . some back and neck pain at times." (Ex. 2, p. 27)

An MRI of claimant's lumbar spine taken in 2015 showed no nerve root impingement. (Ex. E) There is no indication that changes shown on the MRI in Exhibit E were a result of the December of 2013 work injury.

Claimant was referred to Dr. Igram. Dr. Igram opined claimant's back condition was not due to the December of 2013 work injury due to the absence of any reference in the medical records to a back problem for over four months. (Ex. C)

Only one expert in this case, Dr. Bansal, opined claimant's back problems were the result of his December 12, 2013 work injury. However, Dr. Bansal offers no explanation, why he believes claimant's back condition was caused by the December of 2013 work incident, when there is no reference to a back injury in the medical records for over four months. Given this discrepancy, Dr. Bansal's opinions regarding causation of the back condition are found not convincing.

Claimant testified he told emergency room staff he had back pain the day of his injury. The testimony of claimant's son contradicts this testimony. Claimant received routine treatment for approximately four months with four different physicians for the December of 2013 injury. There is no record, until April 25, 2014, of any back problems. Dr. Igram found claimant's back complaints were not caused by his December of 2013 work injury. The opinions of Dr. Bansal, regarding causation of the back condition, are found not convincing. Given this record, claimant has failed to carry his burden of proof he sustained a back injury on December 12, 2013 that arose out of and in the course of employment.

As claimant has failed to carry his burden of proof that his back condition arose out of and in the course of employment, all other issues related to the back condition are considered moot.

The next issue to be determined is the extent of claimant's entitlement to temporary benefits.

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.

Defendants contend claimant's healing period benefits should be terminated as of April 21, 2014. (Defendants' post-hearing brief, p. 7)

Notes indicate claimant had no restrictions regarding the right ankle fracture, but claimant still had right ankle pain. Records also indicate claimant was not allowed to return to work. (Ex. 2, pp. 24-26) Defendants contend claimant was not able to return to work for personal conditions. This is not entirely clear from the record. (Ex. 2, pp. 23-26)

On July 24, 2014 claimant was seen by Dr. Trout for followup of the right ankle fracture. Dr. Trout returned claimant to work without restrictions on July 24, 2014. (Ex. 2, pp. 31-33) Based on this record, claimant is due healing period benefits from December 13, 2013 to July 24, 2014.

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

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.

Several physicians have opined regarding the extent of claimant's functional disability. Dr. Miller found claimant had a 2 percent permanent impairment to the body as a whole due to the hernia injury. (Ex. B) Dr. Bansal found claimant had a 3 percent permanent impairment to the body as a whole due to the hernia. (Ex. 11, p. 86) As there is little difference in the ratings between Dr. Bansal and Dr. Miller for the hernia, I found it unnecessary to make a finding of fact regarding which rating is more convincing. Claimant is found to have between a 2-3 percent permanent impairment regarding the hernia injury.

Regarding the right ankle injury, claimant injured his ankle on December 12, 2013. He was not returned to work by Dr. Trout until July 24, 2014, approximately seven months after the date of injury. Claimant had approximately 80 physical therapy sessions for his right ankle fracture. (Ex. 7, p. 61) Records from claimant's physical therapist suggest claimant still has difficulty with his right lower extremity as of October of 2014 due to the right ankle fracture. Dr. Bansal evaluated claimant closer to the date of injury, than did Dr. Miller, and his evaluation is a more accurate picture of claimant's condition of the right ankle at the time of hearing.

Claimant was off work for his right ankle injury for approximately seven months. He underwent approximately 80 physical therapy sessions for the right ankle. Dr. Bansal's opinions regarding functional impairment are found to be more convincing than those of Dr. Miller. Given this record, it is found claimant has a 17 percent permanent impairment to the right lower extremity due to the fractured ankle. According to the AMA Guides to the Evaluation of Permanent Impairment, Table 17-3, page 527, Fifth Edition, a 17 percent permanent impairment to the right lower extremity converts to a 7 percent permanent impairment to the body as a whole.

Regarding the left knee, Dr. Miller found claimant had no permanent impairment regarding the left knee. Dr. Bansal opined, in part, that claimant had a permanent impairment to the left knee based upon left knee pain. (Ex. 10, p. 85)

Dr. Miller found claimant had full range of motion and no permanent impairment to the left knee. It is found Dr. Miller's opinions regarding permanency to the left knee are more convincing than those of Dr. Bansal. Given this record, claimant has failed to carry his burden of proof he sustained any permanent impairment to the left knee from his December of 2013 injury.

Ms. Sellner opined claimant was still employable in the heavy physical demand category based upon permanent restrictions given by Dr. Bansal. She opined claimant continues to be employable. (Ex. 12)

Claimant has looked for approximately 20 jobs. None of the employers claimant contacted have offered claimant a job. There is evidence in the record suggesting claimant may be undermining his opportunities at finding work, as he tells potential employers about problems he has with his waist. (Tr. p. 50)

The record suggests claimant has attempted to return to work at Titan, but has not been brought back to Titan due to layoffs.

Claimant has a 2-3 percent permanent impairment due to his hernia condition. He has a 7 percent permanent impairment to the body as a whole due to his right ankle fracture. The language claimant uses is Spanish. All of claimant's work has been in the manual labor category. Ms. Sellner's largely unrebutted opinion is claimant can return to work in the heavy physical demand level. When all relevant factors are considered, it is found claimant has a 20 percent loss of earning capacity or industrial disability.

The next issue to be determined is did defendants establish the elements required to show entitlement to credit under Iowa Code section 85.38(2).

In order to prove entitlement to a credit, defendants must prove the following:

1) That benefits were received under a group plan;

2) Contribution to that plan was made by the employer;

3) The benefits should not have been paid if workers' compensation benefits were received; and

4) The amounts to be credited or deducted from the payments made or owed under chapter 85. Greenlee v. Cedar Falls Community Schools, File No. 934910 (App., December 27, 1993); McKernan v. Morningside College, File No. 955069 (App., February 22, 1993).

Defendant's burden to prove entitlement to a credit under section 85.38(2) was affirmed in SKW Biosystems/Degussa Health and Nutrition v. Wolf, No. 5-973/05-1214 (Iowa Ct. App. June 28, 2006) (unpublished 723 N.W. 448)(table). In that case, the court held that SKW did not present the short or long-term disability policies and failed to present sufficient evidence to show that it was entitled to a credit. See also Albertsen v. Benco Manufacturing, File No. 5010764 (App., July 27, 2007); Damiano v. Universal Gym, File No. 1071309 (App., January 17, 2008); Miller v. Maintainer Corp., File No. 5020192 (App., December 2, 2009).

There is little evidence in the record to show claimant received benefits under a group plan. There is no evidence in the record to show contribution of that plan was made by the employer. Defendants presented no evidence claimant would not have been entitled to disability benefits had he been compensated through the workers' compensation system. For the reasons detailed above, defendants have failed to prove entitlement to a credit under Iowa Code section 85.38(2). Miller v. Maintainer, File No. 5020192 (App., December 2, 2009).

The next issue to be determined is whether defendants are liable for penalty under Iowa Code section 86.13.

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.
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> (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.
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> (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 contends defendants are liable for a penalty, as they allegedly unreasonably denied benefits for claimant's back condition. (Claimant's post-hearing brief, p. 11) As detailed above, claimant has failed to carry his burden of proof his back condition arose out of and in the course of employment. As claimant has failed to carry his burden of proof his back condition was caused or resulted from his work injury, a penalty is not appropriate in this case.

The next issue to be determined is if there is a causal connection between the injury and the claimed medical expenses. As detailed above, claimant has failed to carry his burden of proof his back condition was causally related to his work injury. Based on this, defendants are not liable for any medical costs associated with claimant's back care or back condition.

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 cost of medical care that is not authorized by section 85.27. R.R. Donnelly & Sons v. Barnett, 670 N.W.2d 190 (Iowa 2003). A claimant can seek payment of unauthorized medical care if there is a preponderance of the evidence the care was reasonable and beneficial. Bell Bros. Heating v. Gwinn, 779 N.W.2d 193 (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. In an emergency situation when the employer cannot be contacted, the employee may choose the care at the employer's expense. Franco v. Concrete Pipe Mach., I-3 Iowa Industrial Comm'r 591 (1985).

Claimant has failed to carry his burden of proof, under Gwinn, that any of the unauthorized care provided a more favorable outcome than care that was authorized by the defendants. For this reason, defendants are only liable for medical care which was authorized for claimant's hernia and treatment of the claimant's lower extremities.

The next issue to be determined is whether claimant is entitled to reimbursement for an IME.

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).

The employer-retained physician, Dr. Miller, gave his opinions of claimant's impairment in a September 21, 2014 report. The employee-retained physician, Dr. Bansal, gave his opinions of claimant's impairment in a

November 25, 2014 report. Given this chronology, claimant has proven entitlement to reimbursement for the IME.

The next issue to be determined is if claimant is due reimbursement for Ms. Sellner's vocational report.

The cost associated with a vocational experts report is a reimbursable costs under rule 876 IAC 4.33(6). White v. Gelita USA, File No. 5039944 (App. Dec. December 9, 2015). Claimant is due reimbursement for the vocational report as a cost under rule 876 IAC 4.33.

The final issue to be determined is if claimant is entitled to vocational benefits under Iowa Code section 85.70.

Iowa Code section 85.70 provides:

> An employee who has sustained an injury resulting in permanent partial or permanent total disability, for which compensation is payable under this chapter, and who cannot return to gainful employment because of such disability, shall upon application to and approval by the workers' compensation commissioner be entitled to a one hundred dollar weekly payment from the employer in addition to any other benefit payments, during each full week in which the employee is actively participating in a vocational rehabilitation program recognized by the vocational rehabilitation services division of the department of education. The workers' compensation commissioner's approval of such application for payment may be given only after a careful evaluation of available facts, and after consultation with the employer or the employer's representative. Judicial review of the decision of the workers' compensation commissioner may be obtained in accordance with the terms of the Iowa administrative procedure Act, chapter 17A, and in section 86.26. Such additional benefit payment shall be paid for a period not to exceed thirteen consecutive weeks except that the workers' compensation commissioner may extend the period of payment not to exceed an additional thirteen weeks if the circumstances indicate that a continuation of training will in fact accomplish rehabilitation.

A claimant is not entitled to vocational rehabilitation benefits unless there is a showing of a permanent disability. Higgins v. Kiewiet Tiling, File No. 1049634 (App. August 29, 1996). A claim for permanent disability benefits is not ripe until maximum medical improvement has been achieved. Bell Bros. Heating v. Gwinn, 779 N.W.2d 193, 201 (Iowa 2010).

Claimant has demonstrated he is at maximum medical improvement and is permanently disabled. He is due up to 13 weeks of benefits, under Iowa Code section 85.70, for every week he participated in a vocational rehabilitation program.

ORDER

THEREFORE IT IS ORDERED:

That defendants shall pay claimant healing period benefits from December 13, 2013 through July 24, 2014 at the rate of seven hundred fifty-seven and 14/100 dollars ($757.14) per week.

That defendants shall pay claimant one hundred (100) weeks of permanent partial disability benefits at the rate of seven hundred fifty-seven and 14/100 dollars ($757.14) per week commencing on July 25, 2014.

That defendants shall pay accrued weekly benefits in a lump sum.

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

That defendants shall receive a credit for benefits previously paid.

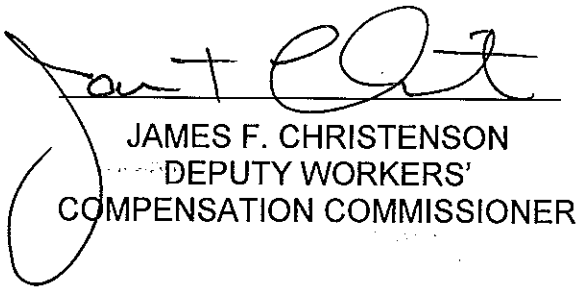
That defendants shall pay costs as detailed above.

That defendants shall pay vocational benefits as detailed above.

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

That defendants shall pay the costs of this matter as required under rule 876 IAC 4.33.

Signed and filed this 18th day of March, 2016.



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DEPUTY WORKERS'
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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.