BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

TU HA,

Claimant,

vs.

CMP TACTICAL LAZER TAG,

Employer,
Defendant.

File No. 5051121

ARBITRATION

DECISION

Head Note Nos.: 1802; 1803; 2910

STATEMENT OF THE CASE

Claimant, Tu Ha, filed a petition in arbitration and seeks workers' compensation benefits from CMP Tactical Lazer Tag (CMP), employer, as defendant, as a result of an alleged injury sustained on January 19, 2014. Claimant filed an amended petition naming CMP as defendant-employer February 3, 2015. Claimant filed a proof of service indicating the petition was received by CMP via certified mail on February 4, 2015. On March 30, 2015, claimant filed a motion for default judgment, after properly serving CMP with notice of intent to do so. As defendant failed to file any appearance, motion, answer, or other response, the undersigned entered a default against defendant on April 30, 2015.

By the order of April 30, 2015, the undersigned also set the matter for telephonic hearing on June 24, 2015 at 1:00 p.m. The matter proceeded to hearing before Deputy Workers' Compensation Commissioner, Erica J. Fitch, as scheduled on June 24, 2015. Defendant failed to appear and participate in hearing. Defendant did not file an appearance, motion, answer, or other pleading with the agency. The record consists of claimant's exhibits 1 through 7 and the testimony of the claimant. The matter was recorded by means of digital audio recorder.

ISSUES

The following issues were submitted for determination:

1. Whether the January 19, 2014 injury is a cause of temporary disability;
2. Claimant's entitlement to temporary disability benefits from January 19, 2014 through January 29, 2014;
3. Whether the January 19, 2014 injury is a cause of permanent disability;
4. Extent of claimant's entitlement to permanent disability benefits;

5. Whether claimant's disability is a scheduled member disability or an unscheduled disability;
6. The proper commencement date for permanent disability benefits;
7. The proper rate of compensation;
8. Whether claimant is entitled to payment of various medical expenses;
9. Whether claimant is entitled to reimbursement for an independent medical evaluation pursuant to Iowa Code section 85.39;
10. Whether claimant is entitled to an award of alternate care pursuant to Iowa Code section 85.27 so as to allow her control over future medical care;
11. Whether claimant is entitled to penalty benefits pursuant to Iowa Code section 86.13 and, if so, how much; and
12. Specific taxation of costs.

As an entry of default has been entered against defendant, the issues of existence of an employer-employee relationship and whether claimant sustained an injury on January 19, 2014 that arose out of and in the course of employment will not be discussed.

FINDINGS OF FACT

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

Claimant's testimony was consistent as compared to the evidentiary record. Her vocal presentation during evidentiary hearing was clear and gave the undersigned no reason to doubt claimant's veracity. Claimant is found credible.

Claimant was 21 years of age at the time of hearing. She is single with no dependents. Claimant has resided in the Des Moines area most of her life. She attended high school but did not obtain her diploma; claimant did obtain a GED. For the past year, claimant has pursued criminal justice courses at DMACC. Claimant testified she is currently on academic probation, earning under a C grade average. She explained she currently experiences difficulty focusing on her coursework. (Claimant's testimony)

Claimant began work at age 13. She possesses experience as a sales associate, hostess, receptionist, and nail technician. The majority of her work experience falls within the service industry, with typical earnings around minimum wage or based upon commission for the number of customers served as a nail technician. The highest wage of claimant's working life was $10.00 per hour as a receptionist. (Claimant's testimony)

At the time of the work injury on January 19, 2014, claimant worked as a referee for defendant, a lazer tag facility. Claimant's duties involved instruction of patrons in the use of weapons and the facility rules. She was also required to patrol the course and ensure the rules and procedures were followed. In performing her duties, claimant was

required to physically climb objects and carry the lazer tag weapons. Claimant worked full time, approximately 47 hours per week, from Wednesday through Sunday. She earned $9.00 per hour. (Claimant's testimony)

Late on the night of January 18, 2014, claimant was performing her referee duties in a dark area of defendant's lazer tag course. When startled by claimant's presence, a patron struck claimant in the right eye with a lazer tag gun. Claimant felt an immediate ringing sensation near her eye and then fell unconscious. She awoke on her back in the arena. She was assisted out of the arena to the front of the building, where claimant threw up. Claimant's boyfriend picked claimant up and drove her to the emergency department at Mercy Medical Center (Mercy). (Claimant's testimony)

Records from the emergency department at Mercy indicate claimant arrived at 11:40 p.m. on January 18, 2014. She was evaluated by Myles Kawamura, D.O. for complaints of eye, neck and head pain, double vision, nausea, vomiting, and headaches. Dr. Kawamura noted claimant's right eye appeared bruised and swollen. (Ex. 1, p. 1) Claimant underwent CT scans of her head, facial sinus region, and cervical spine, all with normal results. (Ex. 1, pp. 4-7) Dr. Kawamura assessed contusion of the right eye and concussion with loss of consciousness for less than one hour. (Ex. 1, pp. 2, 4) He admitted claimant to the trauma service in the early morning hours of January 19, 2014. (Ex. 1, p. 4) The trauma service physicians, William Nechtow, D.O. and Praveen Prasad, M.D., admitted claimant for observation and ophthalmology consultation. (Ex. 1, p. 10) Intravenous sodium chloride and fentanyl were also ordered. (Ex. 1, p. 9)

On January 20, 2014, ophthalmologist, James Lawler, M.D., evaluated claimant. At the time of evaluation, claimant complained of swelling, blurry vision, and an "orangish-reddish tint" in her right eye. (Ex. 1, p. 12) Dr. Lawler observed significant periorbital ecchymosis and edema. Following examination and review of claimant's radiology records, Dr. Lawler assessed blunt ocular trauma to the right eye, with traumatic iritis and commotio retinae. He provided claimant a topical steroid to use four times per day and a topical nonsteroidal drop to use twice per day. Dr. Lawler advised claimant to follow up in one week. (Ex. 1, p. 13)

Following Dr. Lawler's evaluation, Dr. Prasad discharged claimant from the trauma service on January 20, 2014. Dr. Prasad noted a diagnosis of right eye scleroderma and discharged claimant with a prescription for Vicodin and the medications provided by Dr. Lawler. Dr. Prasad restricted claimant from driving while taking pain medication and advised claimant to follow up with Dr. Lawler on January 23, 2014 and with the trauma service as needed. (Ex. 1, pp. 17-18)

Claimant testified she was off work for approximately two weeks following the work injury, until January 29, 2014. (Claimant's testimony)

On February 5, 2014, claimant returned to the Mercy trauma service and was evaluated by Jennifer Platz, ARNP. Ms. Platz indicated claimant was doing "great." Claimant expressed continued complaints of occasional headaches and although she slept well, she had experienced very strange/vivid dreams. Ms. Platz noted an improved conjunctival hemorrhage, with claimant denying visual problems. (Ex. 1, p. 16)

Claimant voluntarily left employment at defendant in April 2014 due to long work hours. (Ex. 2, p. 21)

At the arranging of claimant's attorney, on April 30, 2015, claimant presented for independent medical evaluation (IME) with board certified physical medicine and rehabilitation physician, Jacqueline Stoken, D.O. Claimant reported continued pain, headaches, nausea, vomiting, vision problems, dizziness, depression, anxiety, and irritability. (Ex. 2, pp. 19-21) Headaches occurred an average of once or twice per week and worsened with noise, concentration, and stress. Head pain was described as aching, throbbing, exhausting, tiring and nagging. Her head pain level averaged a level 4 on a 10-point scale, but could range from a level 0 to level 8. The pain in claimant's head worsened with concentration, noisiness, and standing. The pain also interfered with daily activities, mood, ability to stand and sleep, personal relationships and concentration, and resulted in anxiety, depression, and irritability. She self-treated with Advil or Tylenol an estimated two or three days per week. Claimant also reported sporadic nausea and vomiting, decreased memory, concentration, and focus, with claimant feeling as if she speaks in fragments. (Ex. 2, p. 21)

As part of claimant's interview, claimant answered questions for Dr. Stoken's headache questionnaire, the Beck Depression Inventory, and Hamilton Anxiety Rating Scale. Dr. Stoken opined claimant's answers to the headache questionnaire indicated features of tension headaches, migraine headaches, sinus headaches, and rebound headaches. (Ex. 2, pp. 22, 35) Dr. Stoken opined claimant scored a 52 on the Beck Depression Inventory, falling into the severe category. She explained a score of 17 or higher indicated a need for psychiatric care. (Ex. 2, pp. 22, 36-37) Dr. Stoken opined claimant score a 30 on the Hamilton Anxiety Rating Scale, placing her in the moderate to severe category of anxiety. (Ex. 2, pp. 22, 38)

Following records review, interview, and examination, Dr. Stoken assessed status post work injury with right eye contusion and concussion, and post-concussive syndrome with headaches, anxiety and depression, nausea and vomiting, and executive function deficits with decompensation under stress. (Ex. 2, p. 22) She related claimant's diagnoses to the work injury on January 19, 2014. Dr. Stoken opined claimant reached maximum medical improvement (MMI) as of January 20, 2015. Despite reaching MMI, Dr. Stoken opined reasonable further medical treatment would include management for the post-concussive syndrome, anxiety and depression, headaches, irritability, and executive function deficits. Dr. Stoken opined this care may include psychiatric evaluation, medication management, and counseling. (Ex. 2, p. 23)

Dr. Stoken opined claimant sustained permanent impairment as a result of the work injury of January 19, 2014. For the post-concussive headaches, Dr. Stoken opined claimant sustained a permanent impairment of 3 percent whole person for the pain syndrome without significant, identifiable organ dysfunction. For the post-concussive disorder, Dr. Stoken opined claimant sustained a permanent impairment of 14 percent whole person due to loss of interest, interrupted sleep-wake cycle, agitation, learning difficulties, impulsivity, anxiety and depression. Dr. Stoken opined no specific percentage impairment for claimant's depression, but opined the condition significantly impeded useful functioning. In total, Dr. Stoken opined a combined impairment of 17 percent whole person. Dr. Stoken also recommended work restrictions of avoidance of stressful conditions, prolonged working on a computer, or tasks requiring prolonged attention and concentration. (Ex. 2, pp. 23-24)

Claimant testified she feels Dr. Stoken's recommended restrictions are appropriate. However, she indicated if she follows these restrictions, she does not earn as much in her current employment as a nail technician. (Claimant's testimony)

Claimant is currently employed as a nail technician. She works full time, 9:00 a.m. to 8:00 p.m., five days per week. Her earnings are based on commission, depending upon the number of customers served. She estimated her weekly earnings at $600.00 to $700.00 per week. Claimant testified she believes she could earn more money as a nail technician if she did not suffer with mood issues which can make it difficult to please customers. (Claimant's testimony)

Claimant testified she continues to suffer with symptoms she relates to the work injury. Claimant described symptoms of depression, high anxiety, difficulty focusing, nausea and vomiting, headaches, irritability, lack of energy, and agitation. Vomiting generally occurs when claimant either works or moves about too much. Claimant continues to complain of blurry vision and difficulty focusing, particularly on fast moving objects. These vision impediments often result in a headache. Headaches result in a sharp and pulsating pain; they occur an average of once or twice per week. Claimant also complained of difficulty sleeping, noting she often forces herself to sleep in order to obtain relief of other symptoms. (Claimant's testimony)

Claimant desires to undergo further medical treatment, as she is concerned about the long-term impact of her symptoms. She would like an evaluation of her eye due to ongoing complaints. She would also like medical treatment for her continued nausea and vomiting, as well as to evaluate her mood changes and aggressive, hostile, and angry dreams. (Claimant's testimony)

CONCLUSIONS OF LAW

The first issue for determination is whether the January 19, 2014 injury is a cause of temporary disability. The next issue for determination is claimant's entitlement to temporary disability benefits from January 19, 2014 through January 29, 2014.

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).

Section 85.34(1) provides that healing period benefits are payable to an injured worker who has suffered permanent partial disability until (1) the worker has returned to work; (2) the worker is medically capable of returning to substantially similar employment; or (3) the worker has achieved maximum medical recovery. The healing period can be considered the period during which there is a reasonable expectation of improvement of the disabling condition. See Armstrong Tire & Rubber Co. v. Kubli, 312N.W.2d 60 (Iowa App. 1981). Healing period benefits can be interrupted or intermittent. Teel v. McCord, 394 N.W.2d 405 (Iowa 1986).

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

Following the work injury during the late night hours of January 18, 2014, claimant was hospitalized and not released until January 20, 2014. At the time of her discharge, Dr. Prasad placed claimant on pain medication and directed claimant not to drive while on this medication. Additionally, claimant was directed to use the topical medications provided by Dr. Lawler. Claimant testified she remained off work through January 29, 2014.

While the record lacks evidence claimant was removed from work during this period by a medical professional and further lacks testimony indicating defendant refused to bring claimant back to work until after that date, it is clear claimant suffered a significant trauma with ongoing physical effects and a need for medication which affected her ability to function. Defendant failed to participate in hearing and provide any evidence which could rebut claimant's claim to a temporary healing period. As claimant missed work as a result of the work injury and there is no evidence claimant returned to work prior to January 29, 2014 or was offered work she failed to accept, it is determined the work injury was a cause of temporary disability from January 19, 2014 through January 29, 2014. Claimant is entitled to temporary disability benefits for this period pursuant to Iowa Code section 85.33(1) or section 85.34(1), whichever should prove applicable.

The next issue for determination is whether the January 19, 2014 injury is a cause of permanent impairment. The next issue is the extent of claimant's permanent disability, including whether the disability is a scheduled member or unscheduled disability. The next issue for determination is the commencement date for claimant's permanent partial disability benefits. These issues will be considered together.

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).

Claimant testified to ongoing symptoms related to her work injury of January 19, 2014. Only one medical provider has opined as to a causal relationship between these symptoms and claimant's work injury, Dr. Stoken. Dr. Stoken assessed status post work injury with right eye contusion and concussion, and post-concussive syndrome with headaches, anxiety and depression, nausea and vomiting, and executive function deficits with decompensation under stress. She specifically related claimant's diagnoses to the work injury. As Dr. Stoken's opinion is unrebutted, it is determined the work injury was a cause of permanent disability.

Under the Iowa Workers' Compensation Act, permanent partial disability is compensated either for a loss or loss of use of a scheduled member under Iowa Code section 85.34(2)(a)-(t) or for loss of earning capacity under section 85.34(2)(u). As claimant continues to suffer with symptoms related to post-concussive syndrome, the resultant disability is an unscheduled loss, evaluated for industrial disability.

Since claimant has an impairment to the body as a whole, an industrial disability has been sustained. Industrial disability was defined in Diederich v. Tri-City R. Co., 219 Iowa 587, 258 N.W. 899 (1935) as follows: "It is therefore plain that the legislature

intended the term 'disability' to mean 'industrial disability' or loss of earning capacity and not a mere 'functional disability' to be computed in the terms of percentages of the total physical and mental ability of a normal man."

Functional impairment is an element to be considered in determining industrial disability which is the reduction of earning capacity, but consideration must also be given to the injured employee's age, education, qualifications, experience, motivation, loss of earnings, severity and situs of the injury, work restrictions, inability to engage in employment for which the employee is fitted and the employer's offer of work or failure to so offer. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963); Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961).

Compensation for permanent partial disability shall begin at the termination of the healing period. Compensation shall be paid in relation to 500 weeks as the disability bears to the body as a whole. Section 85.34.

Claimant was 21 years of age on the date of hearing. Her formal education consists of a GED and approximately one year of criminal justice coursework at a community college. Despite her enrollment in a criminal justice college program, claimant is currently on academic probation. She attributes this position to after-effects of the work injury and its impact upon her ability to concentrate, focus, and otherwise participate in classes. Claimant's work history lies primarily in unskilled or semi-skilled service industry work, none of which required other than on-the-job training.

As a result of a traumatic work injury, claimant sustained a contusion and blunt ocular trauma to the right eye, concussion with loss of consciousness, and subsequently developed post-concussive syndrome with headaches, anxiety and depression, nausea and vomiting, and executive function deficits with decompensation under stress. As a result of these continued symptoms, claimant seeks and Dr. Stoken recommended future medical care. Additionally, Dr. Stoken opined claimant sustained a permanent impairment of 17 percent whole person, a rating unrebutted in the evidentiary record. Also unrebutted are Dr. Stoken's recommended permanent restrictions of avoidance of stressful conditions, prolonged working on a computer, or tasks requiring prolonged attention and concentration. Claimant expressed agreement with the restrictions recommended by Dr. Stoken. As Dr. Stoken's recommended restrictions are unrebutted and consistent with claimant's testimony, the undersigned hereby adopts Dr. Stoken's permanent restrictions.

Following the work injury, claimant returned to work at defendant. She maintained her pre-injury position from late January to April 2014. When she voluntarily left employment at defendant, she did so as she was unhappy with the long hours required. There is no evidence the after-effects of the work injury precluded claimant's continued employment at defendant.

Despite leaving defendant, claimant has demonstrated commitment to continued employment. At the time of evidentiary hearing, claimant worked full time, in addition to attending college. Although claimant has maintained employment following the work injury, she testified she believes she could earn more in her position as a nail technician if she did not have mental health and mood symptoms, as these symptoms impact her ability to please customers. Claimant further testified if she rigidly followed Dr. Stoken's physical work restrictions, she found she earned less than she currently averages. However, claimant testified she earns $600.00 to $700.00 per week as a nail technician, whereas she only earned $423.00 per week at defendant.

Claimant's entire work history is limited to unskilled or semi-skilled service industry positions. Claimant possesses no training or education which would qualify her for employment beyond this type of unskilled or semi-skilled work. Permanent work restrictions include avoidance of stressful conditions. This restriction would impact claimant's ability to work in service industry positions, as workers primarily deal with customers directly and these interactions can be stressful due to the nature of the interaction and business of the employer. The restriction requiring avoidance of prolonged attention and concentration also impacts claimant's ability to work in unskilled or semi-skilled positions, as such work often requires repetition of a given process or task. The final restriction requiring avoidance of prolonged work on a computer may also disqualify claimant from unskilled or semi-skilled office positions.

Additionally, restrictions on computer usage, stressful situations, and the ability to concentrate and pay attention to detail, all directly and negatively impact claimant's ability to perform her college coursework, a fact testified to by claimant. If claimant is unable to successfully educate herself to open a new field of occupations due to the permanent impacts of the work injury, this is yet another way the work injury negatively impacted claimant's earning capacity.

Upon consideration of the above and all other relevant factors of industrial disability, it is determined claimant sustained a 25 percent industrial disability as a result of the work-related injury of January 19, 2014. Such an award entitles claimant to 125 weeks of permanent partial disability benefits (25 percent x 500 weeks = 125 weeks). These benefits shall commence on January 30, 2014, the date following completion of claimant's healing period as found *supra*.

The next issue for determination is the proper rate of compensation. Claimant testified she worked 47 hours per week and earned $9.00 per hour. This testimony is the only evidence in the evidentiary record regarding claimant's earnings for defendant. As the testimony is unrebutted, the undersigned will utilize this information in computing claimant's rate of compensation. Based upon claimant's testimony, claimant's gross average weekly wage was $423.00 (47 hours per week x $9.00 per hour). Claimant testified at the time of the work injury, she was single with no dependents. She is therefore entitled to only one exemption. Given claimant's gross weekly earnings were $423.00 and she was single and entitled to one exemption, the proper rate of compensation is $271.29.

The next issue for determination is whether claimant is entitled to payment of various 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).

When dealing with unauthorized care, to be entitled to payment, claimant must establish the care was rendered on a compensable claim. That being established, claimant must establish that the care provided on the compensable claim was both reasonable and the outcome more beneficial than the care offered by the defendants. Bell Bros. Heating v. Gwinn, 779 N.W.2d 193, 206 (Iowa 2010).

The work injury occurred at defendant's facility, yet defendant did not refer claimant for medical treatment despite her loss of consciousness and vomiting, two clear indicators of a concussion. Claimant's boyfriend transported her to Mercy for care, leading claimant to incur medical expenses in treatment of her injuries. The undersigned found claimant sustained a compensable injury by the order of default of April 30, 2015 and this decision. The care claimant received was necessary to evaluate the severity of her injuries, reasonable under the circumstances, and more beneficial than the complete lack of care offered by defendant, insofar as claimant received evaluation and conservative treatment which resolved some symptoms. Claimant is therefore entitled to payment of the medical expenses submitted at hearing and delineated at exhibits 5 through 7.

The next issue for determination is whether claimant is entitled to reimbursement for an independent medical evaluation pursuant to Iowa Code section 85.39.

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).

Claimant seeks reimbursement for Dr. Stoken's IME in the amount of $2,000.00. (Ex. 3, p. 42) At the time of Dr. Stoken's IME, no employer-retained physician had offered an opinion regarding the extent of claimant's permanent impairment, nor offered an opinion which would otherwise trigger claimant's right to a section 85.39 IME. Therefore, claimant has not met the prerequisite steps for reimbursement of an IME pursuant to section 85.39 and accordingly, is not entitled to reimbursement for Dr. Stoken's IME.

The next issue for determination is whether claimant is entitled to an award of alternate care pursuant to Iowa Code section 85.27 so as to allow her control over future medical care.

Iowa Code section 85.27(4) provides, in relevant part:

> For purposes of this section, the employer is obliged to furnish reasonable services and supplies to treat an injured employee, and has the right to choose the care. . . . The treatment must be offered promptly and be reasonably suited to treat the injury without undue inconvenience to the employee. If the employee has reason to be dissatisfied with the care offered, the employee should communicate the basis of such dissatisfaction to the employer, in writing if requested, following which the employer and the employee may agree to alternate care reasonably suited to treat the injury. If the employer and employee cannot agree on such alternate care, the commissioner may, upon application and reasonable proofs of the necessity therefor, allow and order other care.

An application for alternate medical care is not automatically sustained because claimant is dissatisfied with the care he has been receiving. Mere dissatisfaction with the medical care is not ample grounds for granting an application for alternate medical care. Rather, the claimant must show that the care was not offered promptly, was not reasonably suited to treat the injury, or that the care was unduly inconvenient for the claimant. Long v. Roberts Dairy Co., 528 N.W.2d 122 (Iowa 1995).

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 1975).

"Determining what care is reasonable under the statute is a question of fact." Long v. Roberts Dairy Co., 528 N.W.2d 122, 123 (Iowa 1995).

By my review of the agency file and evidentiary record, defendant has played virtually no role in the pendency of claimant's claim. The injury occurred at defendant's facility, yet defendant did not refer claimant for medical treatment. It was claimant's boyfriend who transported her to Mercy for care. There is no evidence defendant ever designated an authorized physician or referred claimant for treatment after her initial hospitalization. Defendant failed to appear at hearing and provide any evidence which could support a finding defendant provided reasonable care. It appears defendant has offered no care, despite claimant's ongoing complaints and Dr. Stoken's recommendation for further care. It is therefore determined claimant has proven entitlement to an award of alternate care pursuant to section 85.27. Claimant is free to select medical providers to treat her ongoing symptoms causally related to the work injury.

The next issue is whether claimant is entitled to penalty benefits pursuant to Iowa Code section 86.13 and, if so, how much.

If weekly compensation benefits are not fully paid when due, section 86.13 requires that additional benefits be awarded unless the employer shows reasonable cause or excuse for the delay or denial. Robbennolt v. Snap-on Tools Corp., 555 N.W.2d 229 (Iowa 1996).

Delay attributable to the time required to perform a reasonable investigation is not unreasonable. Kiesecker v. Webster City Meats, Inc., 528 N.W.2d 109 (Iowa 1995).

It also is not unreasonable to deny a claim when a good faith issue of law or fact makes the employer's liability fairly debatable. An issue of law is fairly debatable if viable arguments exist in favor of each party. Covia v. Robinson, 507 N.W.2d 411 (Iowa 1993). An issue of fact is fairly debatable if substantial evidence exists which would support a finding favorable to the employer. Gilbert v. USF Holland, Inc., 637 N.W.2d 194 (Iowa 2001).

An employer's bare assertion that a claim is fairly debatable is insufficient to avoid imposition of a penalty. The employer must assert facts upon which the commissioner could reasonably find that the claim was "fairly debatable." Meyers v. Holiday Express Corp., 557 N.W.2d 502 (Iowa 1996).

If the employer fails to show reasonable cause or excuse for the delay or denial, the commissioner shall impose a penalty in an amount up to 50 percent of the amount unreasonably delayed or denied. Christensen v. Snap-on Tools Corp., 554 N.W.2d 254 (Iowa 1996). The factors to be considered in determining the amount of the penalty include the length of the delay, the number of delays, the information available to the employer and the employer's past record of penalties. Robbennolt, 555 N.W.2d at 238.

Iowa Code 86.13, as amended effective July 1, 2009, states:

4. 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 of benefits.

(2) The employer has failed to prove a reasonable or probable cause or excuse for the denial, delay in payment, or termination of benefits.

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

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

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

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

Defendant paid neither temporary disability nor permanent disability benefits in this matter. Claimant has proven entitlement to both and the undersigned has awarded claimant a period of healing period benefits and permanent partial disability benefits. Defendant has paid no indemnity benefits, thus establishing a denial or delay in payment of benefits. The burden then shifts to defendant to prove a reasonable or probable cause or excuse for the denial or delay. Section 86.13(4)(c) sets forth specific requirements for defendant to fulfill in order to establish a reasonable or probable cause or excuse. Defendant failed to present any evidence to fulfill the requirements and thus establish a reasonable or probable cause or excuse. As defendant has failed to do so, claimant is entitled to an award of penalty benefits.

The undersigned awarded claimant healing period benefits from January 19, 2014 through January 29, 2014, a period of 1 week and 4 days. This award entitles claimant to $426.20 in healing period benefits (1.571 weeks x $271.29 = $426.20). The undersigned also awarded claimant 125 weeks of permanent partial disability benefits, worth $33,911.25 (125 weeks x $271.29 = $33,911.25). Defendant has played virtually no role in claimant's claim, her medical treatment, her disability, or defense of this claim. This type of disregard for its own employee and the litigation process warrants an award of the maximum penalty, 50 percent. Claimant is therefore entitled to penalty benefits in the amount of $213.10 for nonpayment of healing period benefits and $16,955.62 for nonpayment of permanent disability benefits, for a total penalty award of $17,168.72.

The final issue for determination is a specific taxation of costs pursuant to Iowa Code section 86.40 and rule 876 IAC 4.33. Claimant requests taxation of the costs of $100.00 filing fee and the $2,000.00 IME of Dr. Stoken, should the evaluation not be ordered reimbursed pursuant to Iowa Code section 85.39. The cost of $100.00 filing fee is an allowable cost and is taxed to defendant. Claimant is not permitted to receive reimbursement for the full cost of Dr. Stoken's IME as a practitioner's report. Rather, the Iowa Supreme Court has ruled only the portion of the IME expense incurred in preparation of the written report can be taxed. Des Moines Regional Transit Authority v. Young, No. 14-0231 (Iowa June 5, 2015); See also Reinsbach v. Great Lakes Cooperative, No. 14-0467 (Ct. of App. July 9, 2015). Dr. Stoken's bill itemization indicates she charged $800.00 for report preparation. (Ex. 3, p. 42) Defendant is accordingly taxed with $800.00 of the cost of Dr. Stoken's IME.

ORDER

THEREFORE, IT IS ORDERED:

Defendant shall pay unto claimant healing period benefits at the weekly rate of two hundred seventy-one and 29/100 dollars ($271.29) for the period of January 19, 2014 through January 29, 2014.

Defendant shall pay unto claimant one hundred twenty-five (125) weeks of permanent partial disability benefits commencing January 30, 2014 at the weekly rate of two hundred seventy-one and 29/100 dollars ($271.29).

Defendant shall pay claimant's prior medical expenses submitted by claimant at the hearing as set forth in the decision.

Defendant shall pay penalty benefits in the amount of seventeen thousand one hundred sixty-eight and 72/100 dollars ($17,168.72).

Defendant shall pay interest on the penalty benefits from the date of this decision. See Schadendorf v. Snap On Tools, 757 N.W.2d 330, 339 (Iowa 2008).

Defendant shall pay accrued weekly benefits in a lump sum.

Defendant shall pay interest on unpaid weekly benefits awarded herein as set forth in Iowa Code section 85.30.

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

Costs of nine hundred and no/100 dollars ($900.00) are taxed to defendant pursuant to 876 IAC 4.33 as set forth in the decision.

Signed and filed this 13th day of August, 2015.

ERICA J. FITCH
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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EJF/kjw

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.