BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

SALLY DOBSON,

Claimant,

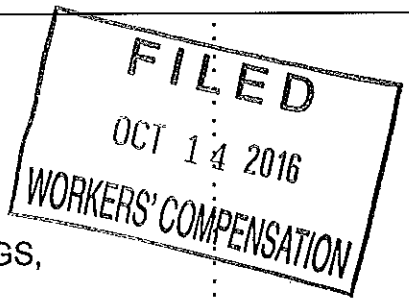
vs.

KEOKUK STEEL CASTINGS,

Employer,

TRAVELERS,

Insurance Carrier,
Defendants.



File Nos. 5047754

ARBITRATION

DECISION

Head Note Nos. 1100; 1108; 1803

STATEMENT OF THE CASE

Sally Dobson filed a petition for arbitration seeking workers' compensation benefits from Keokuk Steel Castings (hereafter, "Keokuk") and Travelers Insurance Company.

The matter came on for hearing on August 21, 2015, before Deputy Workers' Compensation Commissioner Joseph L. Walsh in Des Moines, Iowa. The record in the case consists of claimant's exhibits 1 through 12; defense exhibits A through I; as well the sworn testimony of claimant, Sally Dobson. All exhibits were offered without objection with the exception of Defendant's Exhibit A, pages 9-10, a report from the defense medical expert which was prepared two days before hearing. The objection to the report was overruled, however, the record is held open for up to 30 days to allow the claimant to receive a rebuttal report. Claimant submitted a letter from Dr. Perry dated September 3, 2015, as well as a September 9, 2015, hand-written response to letter from counsel.

The parties briefed this case and the matter was fully submitted on October 14, 2015. The claim is bifurcated. If the defendants are found to be liable for this injury, the issue of permanency shall be addressed later.

ISSUES

Prior to hearing, the issue of permanent partial disability has been bifurcated.

1. Whether the claimant suffered a cumulative injury to her bilateral feet which arose out of and in the course of employment on January 24, 2014.

2. Whether the defendants received timely legal notice of the alleged injury.

3. Whether the claimant is entitled to any healing period, temporary total and/or temporary partial disability. Claimant alleges entitlement to healing period commencing on October 27, 2014. The defendants argue that, while claimant was off work during this period of time, there is no causal connection between her alleged work injury.

4. The claimant alleges that the issue of permanent partial disability is not ripe because the claimant has not fully healed. The defendants contend that, even if there was an injury which arose out of and in the course of employment, the injury was temporary only and there is no permanency.

5. Whether the claimant is entitled to medical expenses as outlined in Claimant's Exhibit 11.

6. Whether the claimant is entitled to penalty for the unreasonable delay or denial of payments.

STIPULATIONS

Through the hearing report, the parties agreed to the following stipulations which are accepted by the agency:

1. The parties had an employer-employee relationship at the time of the alleged injury.

2. If any permanent partial benefits are owed, the parties stipulate that the injury is to the bilateral lower extremities.

3. The parties stipulate that the claimant was off work recuperating from two different surgeries between October 27, 2014, through January 9, 2015, and again from March 19, 2015, through May 12, 2015.

4. Affirmative defenses, other than notice, have been waived.

5. The weekly rate of compensation is $533.56 per week based upon gross wages of $813.30 and being single with five exemptions.

FINDINGS OF FACT

Sally Dobson began working for Keokuk Steel Castings in November 2010. Sally worked primarily as an inspector and she was always required to wear steel toed boots. (Transcript, page 41) In the inspector position, Sally was required to stand most of the time. (Tr., pp. 34, 40) The written job description specified that six to seven hours per day are spent standing, an hour walking and an hour sitting. (Claimant's Exhibit 9) Ms. Dobson testified the only sitting was during breaks because "if we get caught sitting, we got wrote up." (Tr., p. 40)

In the weeks prior to January 24, 2014, Ms. Dobson was working full-time for Keokuk. She worked as few as 32 hours per week and as many as 52 hours. (Def. Ex. E, pp. 8-10) Ms. Dobson also worked part-time for a temporary employment agency called Taske Force. She began this work in October 2013. Through Taske Force, she was placed with Griffin Wheel in Keokuk. The evidence in the record is not entirely clear as to her precise job at Griffin Wheel, however, she did wear steel toed boots and she did a great deal of work on her feet. The evidence in the record suggests her work hours at Griffin Wheel were quite limited between October 2013, through January 2014. She was averaging just over four hours per week.

In the months prior to January 24, 2014, Ms. Dobson began to experience pain and symptoms in her feet, particularly and primarily her left foot. On January 16, 2014, she sought treatment with her family physician, Kiran Khanolkar, M.D. (Cl. Ex. 1) He recorded the following history:

> Location: left foot (heel). There was no radiation. The pain is piercing and sharp. Context: there was no injury. The pain is aggravated by walking and standing. There are no relieving factors. Associated symptoms include limping.

(Cl. Ex. 1, p. 1) He referred Ms. Dobson to a foot specialist, Heather L. Perry, DPM. Ms. Dobson saw Dr. Perry on January 24, 2014.

Dr. Perry recorded the following history.

Clinical Course:

This discomfort developed gradually approximately 3 months ago. It is currently moderate to severe in intensity, has a burning, a sharp and a lancinating quality, and has been progressively worsening. The patient cannot attribute the onset of pain to any specific activity or event. The discomfort interferes with sleep and is present at rest. The pain is aggravated by standing for long periods, walking and work. The patient states the pain is alleviated by warm epsom salt soaks. She also reports lack of mobility and swelling.

Prior Care:

She was seen by the patient's primary care provider one week ago. Evaluation at that time revealed no clear etiology of the pain and the patient was prescribed pain medication, referred here for follow-up, and had xrays completed that came back normal. Following this the patient has not improved. Pt works in factory, wears steel toed boots works long hours standing. . . .

(Cl. Ex. 2, p. 1) Dr. Perry diagnosed plantar fasciitis. (Cl. Ex. 2, p. 2)

Ms. Dobson testified that she informed the safety director, Brian Wellman, about her condition some time shortly after the visit with Dr. Perry. (Tr., p. 27) She further testified Mr. Wellman told her that she needed to see a workers' compensation physician. (Tr., p. 27) Ms. Dobson's attorney wrote a letter to defense counsel on March 27, 2014, wherein he asked for the defendants to "make arrangements for an authorized treating physician to evaluate her injury." (Cl. Ex. 10, p. 1) There is no evidence defendants directly responded to this. That letter is strong evidence that the defendants had actual knowledge of Ms. Dobson's claimed work injury.

Ms. Dobson was then evaluated by Mark Calkins, M.D., on April 9, 2014. (Cl. Ex. 2, p. 4) Dr. Calkins had been treating claimant for an unrelated left leg injury from 2012. At the April 9, 2014, visit, he evaluated both conditions. He confirmed the diagnosis of plantar fasciitis. (Cl. Ex. 2, p. 6) Shortly thereafter, Dr. Calkins confirmed that the diagnosis of plantar fasciitis was not related to the earlier 2012 work injury. (Cl. Ex. 2, p. 8; *see also* Def. Ex. B) He was not asked whether the standing and/or the footwear contributed to her development of the diagnosis.

In May 2014, Ms. Dobson was assigned through Taske Force to a position at Millwright Service. (Tr., p. 51) She also continued to have hours assigned at Griffin Wheel. (Def. Ex. G, p. 9) The record of claimant's work in May through July 2014, is somewhat confusing. In July 2014, Ms. Dobson moved into a different position for Keokuk which required her to work 10 to 12 hours per day. (Tr., pp. 39-41)

Her symptoms unfortunately did not subside. She visited Dr. Perry again in June, 2014. At this point, her right foot had developed significant symptoms. (Cl. Ex. 2, p. 12) She was diagnosed with bilateral plantar fasciitis. (Cl. Ex. 2, p. 14) Dr. Perry provided an injection for the pain. (Cl. Ex. 2, p. 16) Claimant started getting physical therapy thereafter. (Cl. Ex. 2, p. 18) In July 2014, after conferencing with claimant's counsel, Dr. Perry provided an expert opinion. She signed off on the following statement:

> 2. It is my opinion to a reasonable degree of medical certainty that Ms. Dobson's work environment, including standing on her feet on hard surfaces for prolonged periods of time and wearing steel toed boots, caused or aggravated the condition of plantar fasciitis such that treatment became necessary."

(Cl. Ex. 2, p. 21) Dr. Perry agreed that the right foot was a sequela of the original injury. (Cl. Ex. 2, p. 21)

On August 11, 2014, Ms. Dobson saw John Kuhnlein, D.O., for an independent medical evaluation for her unrelated 2012 leg injury. (Cl. Ex. 4) Dr. Kuhnlein agreed with Dr. Calkins that her plantar fasciitis was not related to the 2012 leg injury. (Cl. Ex. 4, p. 8) He stated the bilateral plantar fasciitis "appears to be a new injury related to standing on hard surfaces in the work boots, more likely than not." (Cl. Ex. 4, p. 8) In September 2014, the defendants arranged for Ms. Dobson to see Peter Wirtz, M.D., for

a defense independent medical examination. Dr. Wirtz confirmed the diagnosis of bilateral plantar fasciitis but concluded that the "condition was not caused or materially aggravated by the work duties of standing or the safety shoes." (Def. Ex. A, p. 8) He further stated the following. "Normal daily activities are temporary aggravation conditions such as standing, walking and carrying heavy objects." (Cl. Ex. A, p. 8)

Ms. Dobson had left foot surgery from Dr. Perry on October 29, 2014. (Cl. Ex. 3, p. 4) She was off work as stipulated by the parties, from October 27, 2014, through January 9, 2015, as a result of the surgery. She had right foot surgery on March 19, 2015. (Cl. Ex. 3, p. 11) She was off work for this surgery, as stipulated, from March 19, 2015, through May 12, 2015. In the period from October 2014, through July 2015, she continued treatment with Dr. Perry. On July 2015, Dr. Perry opined that Ms. Dobson had not yet reached maximum medical improvement (MMI). (Cl. Ex. 2, p. 99) She confirmed her earlier opinions regarding medical causation and confirmed that her treatment to date was reasonable and necessary. (Cl. Ex. 2, pp. 100-101)

On the eve of hearing, Dr. Wirtz provided a rebuttal opinion. (Def. Ex. A, pp. 9-10) His opinion was the same as before. By this time, however, he reviewed her time cards and opined that she was not standing as much as she had claimed. He also noted that she was standing at her other jobs through Taske Force.

Dr. Perry responded predictably to Dr. Wirtz's rebuttal report. On September 3, 2015, she agreed with Dr. Wirtz that plantar fasciitis is a degenerative condition but maintained that the condition was aggravated by wearing the steel toed boots and standing on concrete for long hours. (Cl. Ex. 13, p. 1)

CONCLUSIONS OF LAW

The first issue in this case is whether the claimant suffered a cumulative injury which arose out of and in the course of her employment on or about January 24, 2014.

The claimant has the burden of proving by a preponderance of the evidence that the alleged injury actually occurred and that it both arose out of and in the course of the employment. Quaker Oats Co. v. Ciha, 552 N.W.2d 143 (Iowa 1996); Miedema v. Dial Corp., 551 N.W.2d 309 (Iowa 1996). The words "arising out of" referred to the cause or source of the injury. The words "in the course of" refer to the time, place, and circumstances of the injury. 2800 Corp. v. Fernandez, 528 N.W.2d 124 (Iowa 1995). An injury arises out of the employment when a causal relationship exists between the injury and the employment. Miedema, 551 N.W.2d 309. The injury must be a rational consequence of a hazard connected with the employment and not merely incidental to the employment. Koehler Electric v. Wills, 608 N.W.2d 1 (Iowa 2000); Miedema, 551 N.W.2d 309. An injury occurs "in the course of" employment when it happens within a period of employment at a place where the employee reasonably may be when performing employment duties and while the employee is fulfilling those duties or doing an activity incidental to them. Ciha, 552 N.W.2d 143.

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

When the injury develops gradually over time, the cumulative injury rule applies. The date of injury for cumulative injury purposes is the date on which the disability manifests. Manifestation is best characterized as that date on which both the fact of injury and the causal relationship of the injury to the claimant's employment would be plainly apparent to a reasonable person. The date of manifestation inherently is a fact based determination. The fact-finder is entitled to substantial latitude in making this determination and may consider a variety of factors, none of which is necessarily dispositive in establishing a manifestation date. Among others, the factors may include missing work when the condition prevents performing the job, or receiving significant medical care for the condition. For time limitation purposes, the discovery rule then becomes pertinent so the statute of limitations does not begin to run until the employee, as a reasonable person, knows or should know, that the cumulative injury condition is serious enough to have a permanent, adverse impact on his or her employment. Herrera v. IBP, Inc., 633 N.W.2d 284 (Iowa 2001); Oscar Mayer Foods Corp. v. Tasler, 483 N.W.2d 824 (Iowa 1992); McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985).

The finding of an injury is a minimal standard. By a preponderance of evidence, I find that Ms. Dobson suffered an injury to her left foot which manifested on or about January 24, 2014. January 24, 2014, is the date claimant first saw a specialist for her left foot condition. I further find that the claimant later developed symptoms in her right foot as a sequela of her left foot injury. These opinions are based upon the credible medical opinion of claimant's treating surgeon, Dr. Perry, as well as the claimant's testimony. Even the defendants' expert physician, Dr. Wirtz, seems to concede that the claimant's symptoms were temporarily aggravated by the amount of standing she was doing.

The real fighting issue in this case is whether the injury which manifested on January 24, 2014, meets the medical causation standards required for the claimant to be entitled to medical, temporary or healing period benefits.

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).

The expert opinions as to the medical impairment in this case are conflicted. By a preponderance of evidence, I find that the expert opinion of Dr. Perry is more convincing that the expert opinion of Dr. Wirtz. Dr. Perry is the treating podiatrist who performed surgery on the claimant. The expert opinion of Dr. Perry is supported by the opinions of Dr. Calkins and Dr. Kuhnlein, who both opined that the claimant's bilateral plantar fasciitis condition was not related to her 2012 left leg injury. Dr. Kuhnlein, in fact, specifically opined that it was likely a new condition from standing and wearing steel toed boots.

The primary defense of this claim is that the claimant provided an inaccurate medical history to the physicians. It is absolutely correct that if an expert opinion is based upon false assumptions or incorrect facts, it should be rejected by the agency, however, I do not find that the greater weight of evidence supports this conclusion.

At the time her injury manifested in January 2014, the claimant was working full-time hours for the employer. She was working 40 plus hours per week in steel toed boots and she was standing and walking for almost the entire period. She was working minimal additional hours for another employer during this same period, where she also stood and wore steel toed boots. The defendants correctly point out that Ms. Dobson told medical providers that she was working over 60 hours per week, which likely included hours she was working for a temporary employment company, Taske Force. Ms. Dobson was, in fact, working additional hours in the summer of 2014. She worked hours for Taske Force, as well as her new position at Keokuk, where she worked 10 to

12 hour days. The defendants argue that this discrepancy amounts to a significant misunderstanding in the claimant's expert opinions.

I have considered these arguments and reviewed all of the supporting evidence in the record and I disagree with defendants. There is nothing in the opinion of Dr. Perry or Dr. Kuhnlein which suggests that it made a difference whether claimant stood for 40 hours a week or 70 hours a week. The fact is the claimant worked on her feet in steel toed boots, on concrete, for Keokuk for the vast majority of her work days. This is supported by her testimony and the written job description. The fact that she also performed similar duties for another employer for a few hours per week prior to the manifestation of the injury, is immaterial to whether the activities are causally connected to her need for surgery and time off work.

When an injury occurs in the course of employment, the employer is liable for all of the consequences that "naturally and proximately flow from the accident." Iowa Workers' Compensation Law and Practice, Lawyer and Higgs, section 4-4. The Supreme Court has stated the following. "If the employee suffers a compensable injury and thereafter suffers further disability which is the proximate result of the original injury, such further disability is compensable." Oldham v. Scofield & Welch, 222 Iowa 764, 767, 266 N.W. 480, 481 (1936). The Oldham Court opined that a claimant must present sufficient evidence that the disability was naturally and proximately related to the original work injury.

The greater weight of evidence supports that the claimant's right foot condition and need for surgery, developed as a result of a sequela of the left foot condition. (Cl. Ex. 2, p. 101)

For these reasons, I find the claimant has met her burden that her injury is a proximate cause of disability, and, in particular, her need for the two surgeries and her associated time off work.

The next issue is whether the claimant provided proper notice of the injury to the defendants.

Iowa Code section 85.23 requires an employee to give notice of the occurrence of an injury to the employer within 90 days from the date of the occurrence, unless the employer has actual knowledge of the occurrence of the injury.

The purpose of the 90-day notice or actual knowledge requirement is to give the employer an opportunity to timely investigate the facts surrounding the injury. The actual knowledge alternative to notice is met when the employer, as a reasonably conscientious manager, is alerted to the possibility of a potential compensation claim through information which makes the employer aware that the injury occurred and that it may be work related. Dillinger v. City of Sioux City, 368 N.W.2d 176 (Iowa 1985); Robinson v. Department of Transp., 296 N.W.2d 809 (Iowa 1980).

Failure to give notice is an affirmative defense which the employer must prove by a preponderance of the evidence. DeLong v. Highway Commission, 229 Iowa 700, 295 N.W. 91 (1940).

The claimant's left foot injury manifested on January 24, 2014. At that point, claimant had 90 days to provide notice to her employer of the injury.

The notice defense is an affirmative defense and the burden of proof is on the employer. The employer has not met its burden of proof to demonstrate that the claimant failed to provide proper notice.

Ms. Dobson testified under oath that she told the employer's safety director, Brian Wellman, about the injury shortly after her evaluation with Dr. Perry. Correspondence between counsel for the parties confirms that the defendants had actual knowledge of the claimant's injury prior to the 90 day deadline. The defendants, on the other hand, offered no evidence that Ms. Dobson failed to provide notice. There is no testimony or statement from Mr. Wellman contradicting claimant's sworn testimony. Moreover, there is no explanation from defendants regarding the correspondence between the parties which demonstrated the employer's actual knowledge of Ms. Dobson's claimed left foot injury.

The next issue is whether the claimant is entitled to temporary or healing period 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.

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).

The parties have stipulated that the claimant was off work for specified periods of time while recuperating from surgery. She was off work as stipulated by the parties,

from October 27, 2014, through January 9, 2015, as a result of the left foot surgery. She had right foot surgery on March 19, 2015. (Cl. Ex. 3, p. 11) She was off work for this surgery, as stipulated, from March 19, 2015, through May 12, 2015. Since I have found that the cumulative injury substantially caused or aggravated claimant's condition of bilateral plantar fasciitis and the need for surgery, I find that she is owed temporary total or healing period benefits during her period of recovery. Since the issue of permanency is bifurcated and has not been legally established, it is unclear at this time whether the benefits are specifically designated as temporary total disability benefits or healing period benefits. Nevertheless, weekly benefits are owed for the periods of time as set forth above.

The next issue is medical expenses.

The employer shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance and hospital services and supplies for all conditions compensable under the workers' compensation law. The employer shall also allow reasonable and necessary transportation expenses incurred for those services. The employer has the right to choose the provider of care, except where the employer has denied liability for the injury. Iowa Code section 85.27 (2013).

Evidence in administrative proceedings is governed by section 17A.14. The agency's experience, technical competence, and specialized knowledge may be utilized in the evaluation of evidence. The rules of evidence followed in the courts are not controlling. Findings are to be based upon the kind of evidence on which reasonably prudent persons customarily rely in the conduct of serious affairs. Health care is a serious affair.

Prudent persons customarily rely upon their physician's recommendation for medical care without expressly asking the physician if that care is reasonable. Proof of reasonableness and necessity of the treatment can be based on the injured person's testimony. Sister M. Benedict v. St. Mary's Corp., 255 Iowa 847, 124 N.W.2d 548 (1963).

It is said that "actions speak louder than words." When a licensed physician prescribes and actually provides a course of treatment, doing so manifests the physician's opinion that the treatment being provided is reasonable. A physician practices medicine under standards of professional competence and ethics. Knowingly providing unreasonable care would likely violate those standards. Actually providing care is a nonverbal manifestation that the physician considers the care actually provided to be reasonable. A verbal expression of that professional opinion is not legally mandated in a workers' compensation proceeding to support a finding that the care provided was reasonable. The success, or lack thereof, of the care provided is evidence that can be considered when deciding the issue of reasonableness of the care. A treating physician's conduct in actually providing care is a manifestation of the physician's opinion that the care provided is reasonable and creates an inference that can support a finding of reasonableness. Jones v. United Gypsum, File 1254118 (App.

May 2002); Kleinman v. BMS Contract Services, Ltd., File No. 1019099 (App. September 1995); McClellon v. Iowa Southern Utilities, File No. 894090 (App. January 1992). This inference also applies to the reasonableness of the fees actually charged for that treatment.

Again, since I have found medical causation between the claimant's injury and her condition, I find she is owed the reasonable and necessary medical expenses to treat her injury. I have reviewed the expenses set forth in Claimant's Exhibit 11, and further find those bills are causally connected to her work injury. I find the expenses were reasonable and necessary and the charges were reasonable.

Claimant is entitled to an order of reimbursement only if she has paid treatment costs; otherwise, to an order directing the responsible defendants to make payments directly to the provider. See, Krohn v. State, 420 N.W.2d 463 (Iowa 1988). Defendants should also pay any lawful late payment fees imposed by providers. Laughlin v. IBP, Inc., File No. 1020226 (App., February 27, 1995).

The final issue is whether claimant is entitled to penalty.

Claimant's penalty benefit claim is based upon the statutory language contained at Iowa Code section 86.13(4), which provides:

> a. If a denial, a delay in payment, or a termination of benefits occurs without reasonable or probable cause or excuse known to the employer or insurance carrier at the time of the denial, delay in payment, or termination of benefits, the workers' compensation commissioner shall award benefits in addition to those benefits payable under this chapter, or chapter 85, 85A, or 85B, up to fifty percent of the amount of benefits that were denied, delayed, or terminated without reasonable or probable cause or excuse.
>
> b. The workers' compensation commissioner shall award benefits under this subsection if the commissioner finds both of the following facts:
>
> (1) The employee has demonstrated a denial, delay in payment, or termination in benefits.
>
> (2) The employer has failed to prove a reasonable or probable cause or excuse for the denial, delay in payment, or termination of benefits.
>
> c. In order to be considered a reasonable or probable cause or excuse under paragraph "b," an excuse shall satisfy all of the following criteria:
>
> (1) The excuse was preceded by a reasonable investigation and evaluation by the employer or insurance carrier into whether benefits were owed to the employee.

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

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

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).

Under the current statutory framework, the burden is on the claimant to demonstrate when a payment is due and that the payment was not made on time. Once the claimant has proven the delay or denial, the burden shifts to the defendants to provide a reasonable excuse.

I find that the defendants had a reasonable basis for denying the claim at all relevant times. It appears the defendants were reasonably confused early on in this claim due, in part, to the prior, unrelated left leg injury. Once the nature of the new injury became entirely clear to defendants, they sought and obtained an opinion from Dr. Wirtz, who provided a credible adverse opinion on the issue of medical causation. Even though I did not ultimately agree with his opinion, it provided a reasonable basis for denial.

The issue of permanency has been bifurcated. A party may file a new petition for arbitration on the issue of permanency once the claimant has reached maximum medical improvement.

ORDER

THEREFORE IT IS ORDERED:

Defendants shall pay weekly benefits in the amount of five hundred thirty-three and 56/100 ($533.56) from October 27, 2014, through January 9, 2015, and March 19, 2015, through May 12, 2015.

Defendants shall pay accrued weekly benefits in a lump sum.

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

Defendants shall be given credit for under Section 85.38 in the amount of two thousand four hundred seventy-eight and 10/100 dollars ($2,478.10) as stipulated by the parties.

Defendants shall pay the medical expenses as set forth in claimant's exhibit 11 consistent with this decision.

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

Costs are taxed to defendants.

Signed and filed this 14th day of October, 2016.

JOSEPH L. WALSH
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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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.