BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

FILED
JAN 26 2018
WORKERS' COMPENSATION

MEVLUDIN TURKOVIC, Claimant, vs. WAL–MART STORES, INC., Employer, and AMERICAN HOME ASSURANCE CORPORATION/AIG, Insurance Carrier, Defendants.	File No. 5037110 REVIEW - REOPENING DECISION Head Note Nos.: 1803, 1804, 2905

STATEMENT OF THE CASE

Mevludin Turkovic, claimant, filed a petition in arbitration seeking a review-reopening of his workers' compensation benefits from Wal–Mart Stores, Inc. and its insurer, American Home Assurance Corporation/AIG as a result of an injury he sustained on January 26, 2010 that arose out of and in the course of his employment. This case was heard in Des Moines, Iowa and fully submitted May 22, 2017. The evidence in this case consists of the testimony of claimant, Claimant's Exhibits 1-11 and Defendants' Exhibits A, B, D and E. Defendants' Exhibit C was excluded, as it was not timely disclosed to claimant. Administrative notice was taken of the March 6, 2013 arbitration decision, the September 26, 2013 commissioner's appeal decision and the functional capacity exam (FCE) and independent medical examinations (IMEs) that were referred to in the arbitration decision. The hearing was interpreted.

ISSUES

The parties submitted the following issues for determination:

1. Whether claimant has sustained a change in condition that warrants an increase in the prior industrial disability award, and if so;

2. The extent of claimant's disability.

3. Whether the claimant is entitled to additional healing period benefits.

4. Commencement dates of any additional healing period and permanent partial/total benefits.

5. Whether claimant is entitled to payment of an independent medical examination.

6. Whether claimant is entitled to payment of penalty.

7. Assessment of costs.

STIPULATIONS

The parties filed a hearing report at the commencement of the review-reopening hearing. On the hearing report, the parties entered into various stipulations. All of those stipulations were accepted and are hereby incorporated into this review-reopening decision and no factual or legal issues relative to the parties' stipulations will be raised or discussed in this decision. The parties are now bound by their stipulations.

FINDINGS OF FACT

The deputy workers' compensation commissioner having heard the testimony and considered the evidence in the record finds that:

Claimant, Mevludin Turkovic, filed a petition for review-reopening on July 6, 2016. On July 26, 2016 defendants Wal-Mart Stores, Inc. and American Home Assurance Company/AIG (hereinafter AIG) filed an answer. The answer generally denied claimant's petition as to additional indemnity and medical benefits and also denied that claimant's condition showed a material and substantial change has occurred. (Defendants Answer, July 25, 2016, page 1)

An arbitration decision was issued in this case on March 6, 2013. The decision was affirmed on appeal on September 26, 2013 and in an October 28, 2013 ruling by the commissioner on a request for rehearing.

The arbitration decision held in relevant parts;

> . . . Given the claimant's poor demeanor his actual abilities are difficult to determine. The FCE on January 17, 2012 appears to be the best evidence of the claimant's actual physical activities. The claimant had testimony presented that he is no longer able to work in the competitive work world, but the claimant's restrictions are not such as to prevent him from all work.
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> Considering the claimant's medical impairments, training, education, his current lack of success in finding employment, actual loss of earnings, current and

> permanent restrictions, as well as all other factors of industrial disability, it is found that the claimant has suffered a 50 percent industrial disability.
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> ...
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> Based on the finding that the claimant sustained a 50 percent loss of earning capacity from the January 26, 2010 injury, the claimant has sustained a 50 percent permanent partial industrial disability entitling him to 250 weeks of permanent partial disability pursuant to Iowa Code section 85.34(2)(u).

(Exhibit A, pages 2, 4)

The arbitration decision noted that Robert Rondinelli, M.D. opined that claimant had an 18 percent body as a whole impairment from the work injury and was restricted to sedentary to light work. The arbitration decision noted that John Kuhnlein, D.O. opined that claimant needed no work restrictions if the video purporting to be that of the claimant was the claimant. The arbitration decision also noted that Jacqueline Stoken, D.O. opined claimant had a 13 percent whole body impairment and was limited to light work. (Ex. A, p. 2)

The arbitration decision stated the January 17, 2012 FCE was the best evidence of claimant's actual physical activities. The FCE provided the following recommendations:

1. The client is able to safely perform the following activities on the job:
    - Waist to floor lifting (from 11") – 20 lbs occasionally.
    - Waist to crown lifting – 15 lbs occasionally.
    - Front carry – 15 lbs occasionally.
    - Forward bending – To be completed rarely.
    - Crouching – To be completed rarely with use of external support for transitional movements.
    - Kneeling – To be completed rarely with use of external support for transitional movements.
    - Standing work – To be completed on an occasional basis.
    - Sitting – To be completed on an occasional basis.
    - Walking – To be completed on an occasional basis.

- Stair climbing – To be completed rarely with use of external support.

- Ladder climbing – To be completed rarely.

(Arbitration Decision Exhibit, Ex. 22, p. 6)

There was no finding that claimant had a work-related mental health injury in the arbitration decision.

At the time of the review-reopening hearing claimant was 45 years old. (Transcript, p. 15) Since the arbitration hearing in August 2012 claimant took English classes at a community college. Claimant said that he took the classes over a two-year period to help him read and write English. (Tr. p. 19) The prior arbitration decision found that claimant was able to converse in English. Claimant testified in the review-reopening hearing he has the ability to speak conversationally in English and French as well as Bosnian. (Tr. pp. 40, 41)

Claimant testified that since the arbitration hearing he tried to work driving a truck for a friend four times in four years and was unsuccessful. (Tr. pp. 19. 20, 37) This is the only position he has applied for since 2016. (Ex. B, p. 17; Tr. p. 37) The most he could drive was 2 and ½ hours. Claimant has applied for and was denied Social Security Disability. (Tr. p. 45) In his deposition claimant stated he applied for jobs after September 2013 including a hospital cleaning job. He was interviewed, but did not get the job. (Ex. B, p. 15)

Claimant testified that his condition has gotten worse since the arbitration hearing. (Tr. p. 24; Ex. B, p. 8) He had an unsuccessful trial of a spinal cord stimulator implant. (Tr. p. 23) His treating physician made a referral for psychological counseling for depression and has prescribed depression medications. (Tr. pp.24, 28) Claimant was not receiving mental health treatment before the arbitration hearing. (Tr. p. 2) Now he attends mental health counseling every two weeks. (Tr. p. 28)

The evidence shows that claimant started treating with Al Bollinger, D.O., in November 2013. (Ex. 1A, p. 6) Dr. Bollinger has been claimant's primary physician concerning managing his back pain caused by his work injury. On October 31, 2014 Dr. Bollinger recommended claimant undergo mental health counseling, as the claimant was depressed. (Ex. 1C, p. 2:Ex. E, p. 13) Claimant also received pain management from Mohammad Iqbal, M.D., In September 2014. Dr. Iqbal discussed with claimant at that time trying a spinal cord stimulator. (Ex. 1A, p. 19) On January 29, 2016 a spinal cord stimulator array trial was performed. (Ex. 1C, pp.20, 21) On February 2, 2016 the spinal cord stimulator was removed, as it only provided minimal relief to the claimant. (Ex. 1C, p. 23)

On February 26, 2016 Charles De Pena, M.D. performed an MRI. Dr. De Pena had MRIs of September 2011 and December 2013 for comparison. (Ex. 1E, p. 1)

Dr. De Pena found evidence of degenerative disc disease at the L4-5 level that had progressed since the last examination. (Ex. 1E, p. 1)

On March 31, 2016 Daniel McGuire, M.D., examined claimant. He did not believe that claimant was a surgical candidate. (Ex. 1F, p. 2)

On July 10, 2016 Dr. Bollinger wrote to claimant's counsel. He wrote that he had been treating claimant since June 2014. Dr. Bollinger stated that during the time he has been treating claimant, claimant's functionality has deteriorated and he has progressively become more depressed. (Ex. 1C, p. 51) Dr. Bollinger stated,

> Based upon his latest imaging findings, and my interactions with the patient, I do not believe that the patient is malingering.
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> Based upon the patient's current clinical presentation, he would not be able to meet the requirements of any reasonable employer. Because of his chronic pain, depression, poor sleep, and potential side effects from his medications, which could affect, [sic] concentration, coordination and memory, Mevludin cannot return to work, and it is likely that he will never be able to do so.
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> As per our conversation on 6/24/16, it is my opinion that the patient's depressed state is connected to the chronic pain and debilitation that he suffered from his worker's compensation injury.

(Ex. 1C, p. 51) On February 23, 2017 Dr. Bollinger provided check box responses to a letter from claimant's counsel. Dr. Bollinger was provided the December 20, 2016 FCE. Dr. Bollinger agreed that the FCE accurately reflected claimant's functional abilities and reaffirmed the conclusion of his July 20, 2016 letter that it was his belief that claimant could not work. (Ex. 1C, pp. 52, 53)

An FCE was performed on December 20, 2016. The FCE was deemed valid. The FCE found claimant was limited to sedentary work-up to 10 pounds on an occasional basis for front carry. (Ex 2, p. 3)

Claimant started mental health counseling on August 2, 2016 with Sara Mathiasen, ACSW, LISW. Her diagnostic impression was,

> Major Depressive Disorder, single episode, Moderate, F45.1 Somatic Symptom Disorder with persistent pain, Moderate and Z65.5 Exposure to Disaster, War or Other Hostilities

(Ex. 1C, p. 35) Due to language issues, mental health counseling care was transferred to a counselor who spoke Bosnian. (Ex. 1C, p. 37) On January 6, 2017 Radmila Abram, MA, LMHC, ATR wrote a letter in support of claimant's application for Social Security Disability. Mr. Abram started counseling with claimant in September 2016.

According to Mr. Abram, claimant presents with symptoms of dysthymia due to chronic pain and symptoms of depression, difficulties sleeping, anxiety and inability to perform activities that would make him employable. (Ex. 1D, p. 1) Mr. Abram noted that his condition was chronic and would hinder his ability to seek employment. (Ex. 1D, p. 1) I find claimant's mental health condition is a sequela to his back injury.

Claimant was referred to the University of Iowa Hospitals and Clinics (UIHC). Claimant was seen at the UIHC on November 23, 2013. (Ex. 1B, p. 1) An MRI was performed and was interpreted to show,

> 1. Interval worsening of L4-L5 disc herniation with development of posterior disc extrusion with right paramedian inferior migration. Sable mild narrowing of the spinal canal at this level again noted.
>
> 2. Stable mild disc herniation at L5-S1 level with mild narrowing of the spinal canal.

(Ex. 1B, p. 4) The history taken at that visit noted,

> The pain was constant and remained that way until approximately 2 years ago, when his left leg started developing symptoms. They were also in the posterior aspect of the left leg with pain to all of the foot with pain as well. He developed paresthesias and numbness from the left knee circumferentially down to the foot and into all of the foot.

(Ex. 1B, p. 6) He was referred to the Pain Clinic and to have an EMG given the odd distribution of paresthesias in his lower extremities. (Ex. 1B, p. 7) The EMG was normal. (Ex. 3, p. 8)

On May 23, 2016 claimant was seen by Chandra Reddy, M.D. at the UIHC. Dr. Reddy's plan was,

> At this point, I do not recommend any surgical intervention. It is unfortunately the spinal cord stimulator trial did not help this man. The next step may be an intrathecal pain pump. However, I generally do not like these devices, as narcotics continue to be increased. I recommend the patient's own narcotics be weaned down. I did recommend yoga, aqua therapy, some exercises for his back, and some pain psychologists, as he does have a significant component of depression associated with the pain.

(Ex. 1B, p. 11)

On March 1, 2017 Robin Sassman, M.D. performed an Independent medical examination. Dr. Sassman concluded, "All of the above indicate that Mr. Turkovic has experienced a material change in his overall functionality and medical condition since

his arbitration hearing on August 2, 2012." (Ex 3, p. 16) Dr. Sassman assigned a 16 percent industrial disability. She stated that given his restriction, use of a cane and considering Dr. Bollinger's recommendations and her own examination, Dr. Sassman did not believe claimant could even do sedentary work. (Ex. 3, p. 17)

Phil Davis M.S. issued a vocational analysis of the claimant on March 13, 2017. Mr. Davis stated that claimant's vocational outlook has been further compromised since he issued an opinion in March 2012 and that claimant was unable to obtain or maintain substantial gainful competitive employment. (Ex. 4, p. 5)

I find based upon the reports of Dr. Bollinger, credible testimony of the claimant and other medical and vocational evidence, claimant has a 100 percent loss of earning capacity.

Claimant's last payment of indemnity benefits was for September 4, 2015. (Ex. 6, p.1) He has not received indemnity payments since that date. Claimant has proven a denial, delay in payment, or termination of benefits after the defendants paid the prior award of benefits. There is no evidence in the record that defendants investigated the claim after the claimant filed his petition for review – reopening on July 6, 2016 or after Dr. Bollinger stated that claimant could not work on July 10, 2016. There is no record of defendants communicating with the claimant to inform him as to why the claim was being denied. The answer filed by defendants to the review – reopening does not provide a rationale for the denial of the claim. Claimant's brief acknowledges the IME of Charles Mooney, M.D., does disclose a rationale for denying benefits. This exhibit was excluded form the record. However, as claimant acknowledged this report in his brief concerning the penalty claim, I will acknowledge that Exhibit C, Dr. Mooney's report, provided basis for defendants to deny the claim and was communicated to the claimant. The report was provided to claimant on March 23, 2017. (Tr. p. 9)

Claimant has requested payment of certain costs. (Ex. 11, pp. 1 – 6) He is requesting $1,010.60 for the vocational report of Mr. Davis, $900.00 for the FCE, $3,622.00 for the IME by Dr. Sassman, and $650.00 for Dr. Bollinger's report and file review.

CONCLUSIONS OF LAW

Iowa Code section 86.14(2) governs the filing of a review-reopening proceeding. The sub-section provides:

> 2. In a proceeding to reopen an award for payments or agreement for settlement as provided by section 86.13, inquiry shall be into whether or not the condition of the employee warrants an end to, diminishment of, or increase of compensation so awarded or agreed upon.

The Iowa Supreme Court has held that a claimant does not need to prove that the change in the condition was not contemplated at the time of the original decision(s).

Kohlhaas v. Hog Slat, Inc., 777 N.W.2d 387 (Iowa 2009). However, the party bringing the review-reopening proceeding has the burden of showing that the employee's condition has changed since the original award or settlement was made and that that change in condition relates back to the original injury. The change may be either economic or physical. Blacksmith v. All-American, Inc., 290 N.W.2d 348 (Iowa 1980); Henderson v. Iles, 250 Iowa 787, 96 N.W.2d 321 (1959)

To establish a compensable review-reopening claim, claimant must prove by a preponderance of the evidence that the current condition is causally related to the original work injury. Kohlhaas v. Hog Slat, Inc., 777 N.W.2d 387, 392 (Iowa 2009). The principles of res judicata apply, and the agency should not reevaluate facts and circumstances that were known or knowable at the time of the original action. Id.

A mere difference of opinion of experts as to the percentage of disability is not sufficient to justify a different determination on a petition for review-reopening. The principles of res judicata apply and the agency should not reevaluate facts and circumstances that were known or knowable at the time of the original action. Kohlhaas v. Hog Slat, Inc., 777 N.W.2d 387, 392 (Iowa 2009).

It is the medical and economic conditions at the time of the arbitration hearing found by the agency in the final agency decision that is the baseline to compare to see if claimant's condition warrants an end to, diminishment or increase. It is not the assertions made at the arbitration hearing of the claimant about how disabled he/she is. It is not the assertions made by the defendants about how little the claimant's disability is. It is the findings in the final agency decision which must be evaluated against the claimant's condition at the time of the review-reopening proceeding; those are the proper factors to consider under Iowa Code section 86.42(2).

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).

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, section 4-4. The Supreme Court has stated:

> 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. Where an employee suffers a compensable injury and thereafter returns to work and, as a result thereof, his first injury is aggravated and accelerated so that he is greater disabled than before, the entire disability may be compensated for.

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.

I find the opinions of Dr. Bollinger, Dr. Sassman, Mr. Davis and Mr. Abram to be convincing. Dr. Bollinger has provided treatment since 2014 and is very familiar with claimant's conditions. Dr. Sassman provided a thorough review of claimant's medical history and a current examination. Mr. Davis saw claimant in 2012 as well as 2017. Mr. Abram sees claimant every other week. The December 2016 FCE showed his condition and limitations to be worse. The most recent MRI showed claimant's back condition to be worse, and his mental health condition is worse since the prior award. Claimant has more than met his burden of proof to show a worsening condition.

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.

In assessing an unscheduled, whole-body injury case, the claimant's loss of earning capacity is determined as of the time of the hearing based upon industrial disability factors then existing. The commissioner does not determine permanent disability, or industrial disability, based upon anticipated future developments. Kohlhaas v. Hog Slat, Inc., 777 N.W.2d 387, 392 (Iowa 2009).

The record shows that claimant has not engaged in vigorous job search. He tried to work driving a truck for the friend of his brother. Claimant went on four trips to see if he could handle the work: He could not.

Claimant's current mental health counselor wrote that his mental health condition hinders his ability to seek employment. Dr. Bollinger and Dr. Sassman have concluded that claimant could not perform a job even in the sedentary category of work. Claimant's back condition has gotten progressively worse since the prior award. Given the opinions of Dr. Bollinger, Dr. Sassman, Mr. Abram and Mr. Davis that claimant is not able to work, I do not find his limited job search to be unreasonable.

Claimant has limited education, and his vocational history did not show that he has the ability to engage in sedentary work. Claimant's chronic pain depressive symptoms and functional restrictions are significant barriers to any work. I find that claimant is permanently and totally disabled.

Benefits shall commence as of the date claimant filed his petition for review-reopening. Verizon Business Network Services, Inc. v. McKenzie, 823 N.W.2d 418 (Iowa Ct. App. 2012) (Table).

I find the commencement date for the permanent total disability benefits is July 6, 2016.

Healing period benefits can be interrupted or intermittent. Teel v. McCord, 394 N.W.2d 405 (Iowa 1986). Claimant has argued for healing period benefits due to the fact that claimant was undergoing treatments for his condition after his 50 percent prior award had been paid. Claimant did not provide authority for such a position. While an injured worker may be entitled to intermittent healing period benefits, claimant did not provide evidence of any days he was incapacitated due to his treatment. Arguably, when claimant had the trial spinal cord stimulator placed he might be eligible for intermittent healing period benefit. Claimant did not offer any evidence that he was incapacitated due to this procedure. No healing period benefits are awarded.

Exhibit C was excluded as not being timely disclosed. Even if I had admitted this exhibit it would not have changed my findings of fact or conclusions of law. I do not find the IME performed by Dr. Mooney to be convincing. The convincing evidence included

shows claimant's condition has worsened since his arbitration decision. The claimant's testimony, the records of Dr. Bollinger, from mental health experts, vocational counselors and Dr. Sassman show significant worsening in his condition since his prior arbitration award. Claimant is now seeing a mental health counselor every other week.

The records show that many of claimant's treatments for his back and mental health were through Medicaid, sometimes referred to as Medipass in records. (For example Ex. 1C, p. 23, Ex. E, p. 58) Medipass is a State of Iowa Medicaid program. https://dhs.iowa.gov/ime/members/medicaid-a-to-z/managed-health-care

Under Iowa Code section 249A.6 recipients of Medicaid assign the right to payment of medical care from any third party. Federal Medicaid law requires states operating Medicaid programs to ascertain whether there is third party liability for costs paid for by Medicaid and to seek reimbursement for such costs – as Medicaid is a "secondary payer", so that it pays only where a primary payer does not exist. 42 U.S.C. § 1396a(a)(25)(A) and (B). These "secondary payer" requirements are set forth in greater detail in Medicaid's underlying regulations. 42 CFR § 433.137, § 433.139, § 433.140, and § 433.145. In 1987, the Iowa legislature adopted Iowa Code section 249A.6, which implemented federal law regarding a state's obligation to seek recovery of Medicaid benefits from liable third parties. Defendants have the legal obligation to pay for claimant's reasonable medical expenses. Medicaid should not be identified as a provider in any treatment for claimant's work injuries.

Claimant has requested penalty.

Iowa Code section 86.13(4) provides:

a. If a denial, a delay in payment, or a termination of benefits occurs without reasonable or probable cause or excuse known to the employer or insurance carrier at the time of the denial, delay in payment, or termination of benefits, the workers' compensation commissioner shall award benefits in addition to those benefits payable under this chapter, or chapter 85, 85A, or 85B, up to fifty percent of the amount of benefits that were denied, delayed, or terminated without reasonable or probable cause or excuse.

b. The workers' compensation commissioner shall award benefits under this subsection if the commissioner finds both of the following facts:

(1) The employee has demonstrated a denial, delay in payment, or termination in benefits.

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

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). 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.

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. Claimant has proven denial and delay of payment.

The defendants' answer in this case does not provide sufficient reason or content to comply under Iowa Code section 86.13 that a defendant must give an employee when denying benefits. There is no evidence that defendants investigated the case until a referral was made to Dr. Mooney in February 2017. Penalty is awarded for failure to conduct a reasonable investigation and failure to provide notice to claimant as to why benefits were being denied. I find that defendants shall pay a penalty of 40 percent in this case. I consider that the amount of the penalty should be sufficient to encourage defendants to reasonably investigate claims and provide contemporaneous notice to employees as to why payments are being denied or delayed. Penalty shall be for benefits due from July 25, 2016, date of defendants' answer, through March 23, 2017, date claimant received Dr. Mooney's IME.

Claimant has requested costs in this case.

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).

The Supreme Court in Kohlhaas v. Hog Slat, Inc., 777 N.W.2d 387 (Iowa 2010) said,

> Even though we have not applied Iowa Code section 85.39 to review-reopening petitions, the industrial commissioner has. In Sheriff v. Intercity Express, 34 Iowa Indus. Comm'r Repts. 302 (Oct. 1978), the employee sought reimbursement for a section 85.39 medical evaluation during his second review-reopening proceeding. The employee asserted that the prior evaluation, which the new medical evaluation challenged, was the physician's report during the first review-reopening proceeding. Sheriff, 34 Iowa Indus. Comm'r Rpts. at 303. In denying the claim for reimbursement, the commissioner stated
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>> Claimant's subsequent attempt to obtain an examination pursuant to § 85.39 is either an attempt to get evidence of an evaluation of disability greater than that awarded by the deputy in the first review-reopening proceeding or an attempt to get evidence of a change in condition at the employer's expense. It is

> neither contemplated nor proper that § 85.39 be used for these purposes.
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> Id. Although we do not defer to the commissioner's interpretation of the workers' compensation statute, Larson Mfg. Co. v. Thorson, 763 N.W.2d 842, 850 (Iowa 2009), we find the commissioner's reasoning persuasive here.
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> We agree with the commissioner and the district court that Iowa Code section 85.39 does not expose the employer to liability for reimbursement of the cost of a medical evaluation unless the employer has obtained a rating in the same proceeding with which the claimant disagrees. In 2002, Kohlhaas entered into a settlement agreement establishing his disability. Three years later, he seeks reimbursement for a medical evaluation not to rebut a new impairment rating obtained by the employer in the review-reopening proceeding, but rather to cast doubt on an impairment rating obtained by the employer before the agreement for settlement was reached. If Kohlhaas wanted to challenge Dr. Crane's evaluation at his employer's expense, he should have done so in the original proceeding establishing his disability in 2002, not during the review-reopening proceeding three years later. The review-reopening proceeding in this case is a new and distinct proceeding apart from the original arbitration action, as the claimant had a burden to prove something different than he proved at the arbitration hearing. *See* Iowa Code § 86.14(2). As the employer did not obtain a new evaluation of Kohlhaas' disability in connection with the review-reopening proceeding, Kohlhaas is not entitled to reimbursement for expenses associated with Dr. Kuhnlein's medical evaluation under section 85.39.

Kohlhaas v. Hog Slat, Inc., Id. pp. 394-395

Claimant has requested $3,622.50 for the IME. There is no evidence that defendants obtained a rating of the claimant which claimant thought was too low before Dr. Sassman performed her IME.

The entire cost of the IME is not allowed. The invoice from Dr. Sassman does break down the charges for the exam and the report. (Ex. 11, p. 3) A total of $2,292.50 was incurred for the report. I award this cost to claimant.

Iowa Code section 86.40 states:

> **Costs.** All costs incurred in the hearing before the commissioner shall be taxed in the discretion of the commissioner.

Iowa Administrative Code Rule 876—4.33(86) states:

> **Costs.** Costs taxed by the workers' compensation commissioner or a deputy commissioner shall be (1) attendance of a certified shorthand reporter or presence of mechanical means at hearings and evidential depositions, (2) transcription costs when appropriate, (3) costs of service of the original notice and subpoenas, (4) witness fees and expenses as provided by Iowa Code sections 622.69 and 622.72, (5) the costs of doctors' and practitioners' deposition testimony, provided that said costs do not exceed the amounts provided by Iowa Code sections 622.69 and 622.72, (6) the reasonable costs of obtaining no more than two doctors' or practitioners' reports, (7) filing fees when appropriate, (8) costs of persons reviewing health service disputes. Costs of service of notice and subpoenas shall be paid initially to the serving person or agency by the party utilizing the service. Expenses and fees of witnesses or of obtaining doctors' or practitioners' reports initially shall be paid to the witnesses, doctors or practitioners by the party on whose behalf the witness is called or by whom the report is requested. Witness fees shall be paid in accordance with Iowa Code section 622.74. Proof of payment of any cost shall be filed with the workers' compensation commissioner before it is taxed. The party initially paying the expense shall be reimbursed by the party taxed with the cost. If the expense is unpaid, it shall be paid by the party taxed with the cost. Costs are to be assessed at the discretion of the deputy commissioner or workers' compensation commissioner hearing the case unless otherwise required by the rules of civil procedure governing discovery. This rule is intended to implement Iowa Code section 86.40.

Iowa Administrative Code rule 876—4.17 includes as a practitioner, "persons engaged in physical or vocational rehabilitation or evaluation for rehabilitation." A report or evaluation from a vocational rehabilitation expert constitutes a practitioner report under our administrative rules. Bohr v. Donaldson Company, File No. 5028959 (Arb. November 23, 2010); Muller v. Crouse Transportation, File No. 5026809 (Arb. December 8, 2010) The entire reasonable costs of doctors' and practitioners' reports may be taxed as costs pursuant to 876 IAC 4.33. Caven v. John Deere Dubuque

Claimant has requested $650.00 for the letter of Dr. Bollinger. (Ex. 11. p. 5) I award this cost as a report of a practitioner under 876 IAC 4.33(6). Claimant has requested $1,010.60 for the services and report of Mr. Davis. I award the cost of the report of $575.00.

Claimant has requested $900.00 for the FCE exam and report. (Ex. 11, p. 2) I decline to award this cost. I have awarded two practitioners' reports, and that is the limit under 876 IAC 4.33(6). The exam for the FCE would not be reimbursable, only the report, if I had awarded it. I award claimant the $100.00 filing fee under 876 IAC 4.33(7).

Total costs awarded are $3,617.50 [2,292.50 + 650 + 575 + 100 = $3,617.50].

ORDER

Defendants shall pay claimant permanent total disability benefits at the weekly rate of three hundred ninety-six 94/100 dollars ($396.94) from July 6, 2016, through the date of the arbitration hearing and into the future during the period of claimant's continued disability.

Defendants shall pay all accrued weekly benefits in lump sum with applicable interest pursuant to Iowa Code section 85.30.

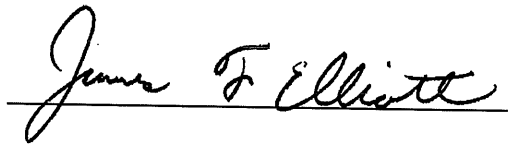
Defendants shall pay penalty as set forth in this decision.

Defendants shall be entitled to credit for any weekly benefits paid to date.

Defendants shall reimburse claimant's costs as noted in the conclusions of law section in the amount of three thousand six hundred seventeen and 50/100 dollars ($3,617.50).

Defendants shall file subsequent reports of injury (SROI) as required by this agency pursuant to rules 876 IAC 3.1(2), and 876 IAC 11.7.

Signed and filed this 26th day of January, 2018.



JAMES F. ELLIOTT
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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JFE/sam

Right to Appeal: This decision shall become final unless you or another interested party appeals within 20 days from the date above, pursuant to rule 876 4.27 (17A, 86) of the Iowa Administrative Code. The notice of appeal must be in writing and received by the commissioner's office within 20 days from the date of the decision. The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday. The notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 1000 E. Grand Avenue, Des Moines, Iowa 50319-0209.