BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

FILED
MAY 17 2016
WORKERS' COMPENSATION

CAROLYN MARCINE JENSON, Claimant, vs. CUMMINS FILTRATION-LAKE MILLS, a/k/a CUMMINS, INC., f/k/a, FLEETGUARD, INC., Self-Insured, Employer, Defendants.	File No. 5032402 ARBITRATION DECISION Head Note Nos.: 2905, 1804, 2701

STATEMENT OF THE CASE

Claimant, Carolyn Marcine Jenson, filed a petition for arbitration seeking workers' compensation benefits from Cummins Filtration-Lake Mills, a/k/a Cummins, Inc., f/k/a Fleetguard, Inc. Claimant seeks to reopen an arbitration decision filed April 20, 2011.

The matter came on for hearing on March 9, 2015, before deputy workers' compensation commissioner Joseph L. Walsh in Des Moines, Iowa. The record in the case consists of claimant's exhibits V through VII and defense exhibits A through E. The parties briefed this case and the matter was fully submitted on April 27, 2015. At hearing, claimant moved for the agency to take official notice of certain documents. That motion is granted.

ISSUES

The parties submitted the following issues for determination:

1. Whether the claimant's disabilities are causally connected to her work injuries.

2. Whether the claimant is entitled to healing period benefits from January 7, 2011, through December 12, 2011.

3. What is the commencement date for permanency benefits?

4. Whether the claimant is permanently and totally disabled or whether the claimant is entitled to permanent partial disability benefits.

5. Whether the claimant is entitled to medical mileage as outlined in the hearing report.

6. Whether the claimant is entitled to reimbursement for the 85.39 medical evaluation.

7. What is the appropriate credit for past benefits paid?

8. Whether the claimant is entitled to penalty benefits.

9. Assessment of costs.

STIPULATIONS

A number of issues are no longer in dispute, either having been decided in a prior arbitration decision or stipulated in the hearing report:

1. The parties had an employer-employee relationship.

2. The parties agree to the claimant's gross earnings, her marital status and number of exemptions to which she was entitled as of the date of injury and believes her weekly rate of compensation is $521.88.

3. Affirmative defenses have been waived.

4. Claimant's disability, if any, is industrial.

5. The parties agree the medical expenses attached to the hearing report were fair and reasonable, causally connected to the work injury and authorized by the defendants.

FINDINGS OF FACT

As set forth above, official notice has been taken of the prior proceedings. The agency findings of fact in the April 20, 2011, arbitration decision is preclusive and is hereby considered the law of the case. That decision was modified and affirmed by the Commissioner on September 25, 2012. The decision was ultimately affirmed in the District Court and Iowa Court of Appeals. The factual determinations in said final decision shall not be re-litigated, nor recited specifically in this decision. It serves as snapshot of the claimant's condition as of January 7, 2011, the date of her first hearing. It was determined in that hearing that Ms. Jenson had, in fact, sustained an injury to her low back which arose out of and in the course of her employment with Cummins Filtration. That injury manifested on December 8, 2009. At the time of hearing in January 2011, the claimant had not reached maximum medical improvement. At the time of the first hearing, claimant was in a healing period which was causally-related to her work injury.

The following findings of fact (as of January 2011) on pages 2 through 6 of the arbitration decision are incorporated herein:

- Claimant, Carolyn Jenson, was 61 years of age at the time of hearing.
- Her educational background includes a high school diploma.
- Claimant worked as a clerk and sales person before joining defendant employer in February of 1987.
- She has worked primarily as an assembler since her hire date. In 2009, claimant began complaining of back and knee pain.
- In January of 2009, claimant reported back and neck pain which caused her discomfort at times. (Exhibit III, page 2)
- The complaints of back pain continued up through the end of 2009. (Ex. III)
- In an April 2009 visit, the nurse's notes record "back is tight and still uncomfortable. Legs are achy". (Ex. III, p. 4)
- The following month, claimant had complaints of "low back and legs are achey. . . . mid back is stiff." (Ex. III, p. 8)
- The complaints of leg stiffness and low back continue throughout the year. (Ex. III)
- An MRI of the lumbar spine showed mild degenerative changes and signs of a possible medial meniscal tear. (Ex. III, p. 27)
- The December 8, 2009, medical records show that claimant was diagnosed with radiculopathy of the right lower extremity "exacerbated in the last 24 hours." (Ex. III, p. 48)
- Later in 2010, claimant told a physical therapist that her low back pain and pelvic pain began in October 2009. (Ex. III, p. 179)
- The December 2009 MRI showed a "large free fragment extending downward slightly to the right of midline and most likely compressing right S1 and S2 nerve roots." (Ex. III, p. 51)
- Claimant sought treatment from The Institute for Low Back and Neck Care at the referral of her attorney. (Ex. III, pp. 58, 64)
- An injection was ordered and administered on January 11, 2010. (Ex. III, p. 72)

- Due to ongoing and increasing pain, a second MRI was ordered and completed on February 22, 2010. (Ex. III, p. 90)

- The second MRI "demonstrates an extruded herniated nucleus pulposus at L5-S1 to the right side as well as right greater than left moderate foraminal stenosis at this level." (Ex. III, p. 90)

- Following another set of radiographic studies, a nerve block was administered on March 1, 2010. (Ex. III, p. 95)

- After the nerve block, claimant reported a 75 percent relief of pain symptoms. (Ex. III, p. 96)

- Low back pain persisted even though claimant did have relief and Dr. Strothman recommended she undergo a right L5-S1 discectomy. (Ex. III, p. 104)

- Back surgery was then delayed, in part, because claimant began to experience a relief of her symptoms; and due to questions about whether the surgery would be covered under the employer's workers' compensation plan. (Ex. III, pp. 165, 186)

- According to Dr. Strothman, claimant's back pain symptoms in September of 2010 were different than they were previously, intimating that the previous symptoms were an aggravation that then subsided and now new symptoms exist.

- A new MRI was ordered which displayed more degeneration of her spine.

- In November, Dr. Strothman wrote:

> PLAN: I had a long discussion today with Ms. Jenson and her husband, regarding her possible treatment options. I think that she has three different things causing her pain, symptomatic disc degeneration, facet arthropathy and stenosis. We discussed that the surgical treatments remove the disc fragment and decompress the bilateral S1 nerve roots and will give her relief, similar to what she feels right now with the injections, but will not help with pain related to sitting and pain relating to bending over and lifting, that may be related to either facet arthropathy and/or symptomatic disc degeneration. The treatment for that would require a fusion procedure. However, in the end that procedure would have only about 7/10 chance of giving her 50% relief of her overall symptoms. Consequently, I think that beginning with a smaller procedure is advantageous to the patient. Consequently, we discussed, in detail again today, the risks

> and benefits of a bilateral L5-S1 decompression, by a minimally invasive technique, as well as a left L5-S1 discectomy.

(Ex. III, p. 187)

- Dr. Strothman concluded:

> In regards to Workers' Compensation, it does sound as if her previous employment has been related to the onset of her symptoms and acceleration of her degeneration, as well as is related to her current disc herniation.

(Ex. III, p. 187)

- John D. Kuhnlein, D.O., performed an examination on behalf of claimant. (Ex. III, p. 191)

- In 1993 and 1996 she developed back problems for which she received treatment.

- In 1993, x-rays showed mild bulge at the L5-5 region with some compression of the left S2, possibly S2 nerves. (Ex. I, p. 19)

- There were also signs of degenerative disease.

- Because of her back pain, she had difficulty bending, sitting, prolonged standing, walking, and simply enduring the day. (Ex. I, p. 29)

- She achieved maximum medical improvement about two months after she first received treatment. (Ex. I, p. 30)

- In 1996 claimant was seen in the Albert Lea Clinic for increasing pain in the low back. (Ex. I, p. 47) According to the diagnostic studies, claimant had a mild interval increase in the disc space narrowing at the L5, S1 level. (Ex. I, p. 48)

- In both 1993 and 1996, claimant was treated by Frederick R. Smith, D.O., who opined in a letter to claimant's lawyer in 1996 that claimant's degenerative back changes and herniated disc were the result of her work activities with the defendant employer.

- Dr. Smith assessed a 7 percent impairment rating for the lumbar spine.

- Claimant also received regular and ongoing adjustments to her back from Robert J. Jensen, D.C. Dr. Jensen, like Dr. Smith, attributed claimant's worsening back condition to her work. Dr. Jensen wrote "Certainly we would not expect such deterioration and degeneration as is evident on the CT scans to be found in a normal 47-year-old female in this country who did not engage in work activities or, in fact, had experienced some substantial trauma."

  (Ex. I, p. 67)

- Claimant brought a workers' compensation claim for both the 1993 and the 1996 back injuries. Deputy Walshire assessed a 10 percent impairment rating. Jenson v. Fleetguard, File Nos. 1169339, 1138300 (Arb. October 20, 1997).

- Claimant was not provided any more treatment from Dr. Smith. She did, however, continue to receive treatment from her chiropractor, Dr. Jensen and his successor, Dr. Lillis, approximately once a month.

- Claimant testified that she missed no work time due to symptoms related to her lower back. However, in more than one medical record, she was noted to be absent from work as a result of back pain. (Ex. I, p. 18) ("the best treatment plan would be complete bed rest at home."); (Ex. I, p. 50) ("Pt works at Fleetguard and is not working at this time due to pain").

- Her performance reviews were always commendable or met expectations. She received an attendance award in January 2009.

- Throughout claimant's career at defendant employer, she worked primarily on line 22, the middle of the line, assembling filters.

- There are six to seven positions in the middle of the line.

- She would rotate between these positions every half hour or every hour. The positions require bending, twisting, and some stretching.

- Most of the work performed occurs between the shoulder and waist.

- The twisting occurs when a part does not come down far enough on the assembly belt and claimant twisted to reach out and pull the part in front of her station.

- Bending occurred less frequent and when claimant had to pull a part down the assembly belt.

- December 8, 2010 was her last day of work.

The following specific conclusions were reached with regard to the questions of injury and medical causation.

> Claimant has had a long history of back pain with the earliest reported complaints beginning prior to 1993. The back pain was attributed to claimant's work activities. The greater weight of the evidence supports a finding that claimant's current back symptoms arise out of the same work that caused the back pain nearly twenty years ago. Claimant received regular adjustments from a chiropractor for her back pain.
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> Dr. Boulden's report recounts that the back symptoms are not new, but a worsening of the symptoms. (Ex. D) Dr. Boulden attributes the back pains to a 'continuous degenerative process that occurs in the spine once it gets started.' (Ex. D)
>
> Dr. Boulden does not believe that work is the 'sole problem' with her back but neither does he rule it out. (Ex. D) Dr. Strothman, claimant's treating physician and back surgeon, attributes claimant's problems to her work.
>
> The greater weight of the evidence is that claimant's back problems started prior to 1993 and continually have gotten worse. According to the doctors who treated claimant in the 90s, claimant's back condition was the result of her work activities. According to Dr. Strothman, the work is associated with the onset of claimant's symptoms and acceleration of her degeneration. Dr. Strothman's opinions are consistent with the treating physicians' reports pertaining to the 1993 and 1996 injuries.

(Arbitration Decision, April 20, 2011, pages 8-9) With regard to the extent of her disability, the following conclusions were reached.

> Claimant's back condition has worsened since her original work injuries in 1993 and 1996. No permanent rating can be given for claimant at this time as she is not yet at maximum medical improvement. Dr. Kuhnlein reported that claimant needs medical care not the chiropractic care she is currently receiving. (Ex. III, p. 201) Dr. Boulden indicated that claimant needed to undergo aggressive rehabilitation rather than chiropractic care. (Ex. D) Claimant underwent surgery shortly before hearing and the outcome of that surgery is unknown. A running award is appropriate.

(Arbitration Decision, April 20, 2011, p. 9). Therefore, Ms. Jenson was deemed to be in a healing period, from the date of her injury through January 7, 2011.

These conclusions were affirmed upon intra-agency appeal and eventually became a final decision in January 2015. (Cl. Ex. VI, pp. 30, 53, 87)

Ms. Jenson provided sworn testimony for this case by deposition on February 3, 2015, a little more than a month before her hearing date. (Def. Ex. E) At that time, she was receiving Social Security Disability benefits in the amount of $1,067 per month, as well as long-term disability payments through her employer's group policy. (Def. Ex. E, pp. 6-7; Cl. Ex. VI, p. 7) She was 65 years old at that time.

As noted in the 2011 decision, Ms. Jenson had surgery for her low back in December 2010. She testified the surgery was a success. Prior to the surgery, she could barely walk and she had severe pain going down both of her legs. The surgery alleviated those acute symptoms. (Def. Ex. E, p. 15) She followed up with David Strothman, M.D., in February 2011, who diagnosed symptomatic disc degeneration. (Cl. Ex. V, p. 1) On February 4, 2011, Cummins terminated Ms. Jenson as part of a mass layoff. (Cl. Ex. VI, p. 6) Ms. Jenson continued to follow up with both Dr. Strothman and her chiropractor through the Spring and Summer of 2011. (Cl. Ex. V, pp. 3-4)

She saw Dr. Strothman on July 1, 2011, at which time he noted that she had completed a physical therapy program. "She continues to have low back pain. This is primarily worse with jarring activities. Also, is painful with bending forward and trying to straighten up overall and with lifting." (Cl. Ex. V, p. 4) He went on to note how difficult it is for her to receive treatment. He recommended that she continue her exercise program, an active lifestyle, as well as her chiropractic care. He released her on an as needed basis. She did not return to him until March 2014. She does continue to see her chiropractor who provides maintenance treatment which helps her symptoms. (Cl. Ex. V, pp. 5-6, 11, 13-15, 20, 31-33)

I find that July 1, 2011 was the point that Ms. Jenson reached maximum medical improvement.

On March 14, 2014, she returned to Dr. Strothman. "Overall her pain seems to be worse with walking and is relieved by sitting initially, but then it gets worse as she sits. She has a walking tolerance of about 100 yard or to her mailbox and sitting tolerance of 30 minutes to an hour. She has a standing tolerance of less than 10 minutes before she wants to sit down." (Cl. Ex. V, p. 48) He noted she had developed a "right lower extremity foot drop" which he did not feel was related to her "lumbar spine." (Cl. Ex. V, p. 49) He recommended a new MRI.

She did have a new MRI which showed degenerative disc disease at L5-S1 with interspace narrowing, disc desiccation and spurring. (Cl. Ex. V, p. 57) "There is broad-based central disc protrusion with bilateral foraminal encroachment." (Cl. Ex. V, p. 58)

Dr. Kuhnlein performed a thorough and extensive examination and review of the records in February 2014. He produced a report from this evaluation in June 2014. (Cl. Ex. V, p. 103) He provided an expert medical opinion that the following diagnoses were lit up by her December 10, 2009, work-related low back injury: degenerative disc disease, disc herniation, facet arthroplasty and stenosis. (Cl. Ex. V, p. 109) He provided a 13 percent whole body impairment rating. (Cl. Ex. V, pp. 110-111) He assigned lifting restrictions of 10 to 20 pounds and alternating standing and sitting. (Cl. Ex. V, p. 111) He recommended a host of other nonmaterial handling restrictions, advising her to rarely kneel and crawl and to avoid ladders altogether. He opined she is likely not employable.

In July 2014, Stephanie Lillis, D.C., provided an expert opinion as the claimant's treating chiropractor. (Cl. Ex. V, p. 117) Dr. Lillis responded thoroughly to the questions of claimant's counsel. She opined that Ms. Jenson suffered impairment and lost a third of her bodily function from her low back work injury. (Cl. Ex. V, pp. 118-119) She distinguished clearly and convincingly between her earlier 1996 injury and her current low back disability. "She was stable and in remission from her low back pain from the first injury in 1996, but the records clearly show she was permanently weakened. The 12/8/09 injury was so severe it required surgery." (Cl. Ex. V, p. 118) She strongly advised against the claimant attempting to perform work at Cummins, or other types of full-time employment. (Cl. Ex. V, p. 119)

In December 2014, the defendants retained Joshua Kimmelman, D.O., for an expert opinion. He diagnosed "chronic left S1 radiculopathy, that her symptoms are characteristic for spinal stenosis." (Def. Ex. A, p. 2) He opined that "Ms. Jenson's work was not a causative factor in her development of degenerative disk disease and spinal stenosis." (Def. Ex. A, p. 3) He never provided any opinion as to whether her conditions were lit up or materially aggravated by her work activities. He did assign a 7 percent impairment rating and seemed to relate the rating to the work injury, although the question and answer are somewhat confusing. (Def. Ex. A, p. 3) He recommended sedentary to light work with lifting between 10 and 15 pounds.

Ms. Jenson was re-evaluated by Dr. Kuhnlein in December 2014. In February 2015, Dr. Kuhnlein reiterated and justified his earlier opinions. (Cl. Ex. V, pp. 143-151)

Defendants obtained an expert vocational report from Julie Svec, MA, CRC, in February 2015. (Def. Ex. C) Ms. Svec opined that Ms. Jenson could still work in several sedentary unskilled occupations including order clerk, addresser, surveillance monitor and assembler. (Def. Ex. C, p. 3) Ms. Svec, however, agreed "Ms. Jenson is no longer able to perform her regular occupation as a production assembler." (Def. Ex. C, p. 3)

Ms. Jenson's symptoms have never fully subsided. All of the experts agreed Ms. Jenson is not a great historian although I believe she testified honestly in her deposition. She simply remembers very few specifics for timeline purposes and she testified in

generalities. I find she only has occasional leg pain and it is not anywhere nearly as severe as it was before surgery. (Def. Ex. E, pp. 16-22) She uses a back brace when she is doing anything active, including walking for distances. (Def. Ex. E, pp. 23-24)

Ms. Jenson has not looked for work. (Def. Ex. E, p. 14) There is very little information in the record to determine the precise reason she has not looked for work. At the time of hearing, she was 65 years old and she had not worked for the employer since December 2010. There is no evidence in this record her employer has offered her any work.

Ms. Jenson also has a myriad of other non-work related health conditions which she has continued to treat to some degree, including diabetes mellitus, hypertension, hearing loss and knee pain.

When viewing the entire record as a whole, I enter the following specific factual findings:

1. Ms. Jenson suffered an injury to her low back which arose out of and in the course of her employment on December 8, 2009.

2. The December 8, 2009, work injury was a substantial cause of her healing period from December 8, 2009, through July 1, 2011, the date she reached maximum medical improvement.

3. The December 8, 2009, work injury was a substantial aggravating factor and lit up the degenerative conditions treated by Dr. Strothman and outlined by Dr. Kuhnlein.

4. The claimant has permanent functional disability from the diagnoses set forth above which is causally related to the work injury.

5. Given Ms. Jenson's age, education, work history and skills, permanent medical restrictions and limitations (and all other factors of industrial disability), I find that she is not suited for any permanent full-time work in the competitive job market.

CONCLUSIONS OF LAW

The first question is whether the admitted March 15, 2010 injury is a cause of permanent disability, and if so, the extent of such disability. By a preponderance of evidence, I find that the March 15, 2010 injury is a proximate cause of disability in the claimant's back and head.

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. I find the opinion of Dr. Kuhnlein to be more persuasive than the opinion of Dr. Kimmelman. The opinion of Dr. Kuhnlein is supported and bolstered by the findings in the April 2011, arbitration decision, the lay evidence, the expert medical opinion of Dr. Strothman and the expert chiropractic opinions of Dr. Lillis.

The major deficit in the opinion of Dr. Kimmelman is that his opinion does not address the appropriate legal standard of medical causation. Rather, Dr. Kimmelman simply provided an opinion that Ms. Jenson's underlying medical conditions were degenerative and, therefore, not caused by work activities. He did not even answer the question as to whether the work activities substantially aggravated or "lit up" the conditions. (Def. Ex. A)

Moreover, his opinion seems to ignore the law of the case, namely that it had been determined in the prior arbitration decision that, in fact, her conditions which caused her temporary disability, were work-related. In other words, it was already administratively-established in the earlier arbitration decision that claimant had proven medical causation for temporary disability benefits. It is implausible that the conditions which caused Ms. Jenson to need surgery and be off work from December 2009 through July 2011, would result in no permanent functional disability whatsoever.

Ms. Jenson's primary symptomatic conditions are facet arthritis and disc degeneration. (Cl. Ex. V, p. 4) I find that these conditions were permanently lit up and/or materially aggravated by her work activities. When viewing all of the evidence, I find that Ms. Jenson has met her burden of proof regarding medical causation.

The next issue is the nature and extent of her disability which encompasses issues 2 through 4. The claimant alleges permanent total disability while the defendants contend that if the claimant has suffered any permanency, the extent is minimal. The

parties also dispute the date of maximum medical improvement and commencement date for permanency.

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.

Total disability does not mean a state of absolute helplessness. Permanent total disability occurs where the injury wholly disables the employee from performing work that the employee's experience, training, education, intelligence, and physical capacities would otherwise permit the employee to perform. See McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Diederich v. Tri-City R. Co., 219 Iowa 587, 258 N.W. 899 (1935). A finding that claimant could perform some work despite claimant's physical and educational limitations, does not foreclose a finding of permanent total disability, however. See Chamberlin v. Ralston Purina, File No. 661698 (App. October 1987); Eastman v. Westway Trading Corp., II Iowa Industrial Comm'r. Report 134 (App. May 1982).

Although claimant is close to a normal retirement age, proximity to retirement cannot be considered in assessing the extent of industrial disability. Second Injury Fund of Iowa v. Nelson, 544 N.W. 2d 258 (Iowa 1995). However, this agency does consider voluntary retirement or withdrawal from the work force unrelated to the injury. Copeland v. Boones Book and Bible Store, File No. 1059319, (App. November 6, 1997). Loss of earning capacity due to voluntary choice or lack of motivation is not compensable. Id.

I find the greater weight of evidence supports a finding of permanent total disability. In close cases, this agency will often closely examine the evidence regarding the claimant's motivation to work. It is often difficult for an injured worker to really know whether she can return to work until she gives it an honest try. In this case, Ms. Jenson

was not motivated to return to work. She was off work from the date of her injury (December 8, 2009) through her date of maximum medical improvement (July 1, 2011). There is no evidence in this record that she attempted to return to the employer, nor that the employer sought to have her return to work. Instead, she filed for, and received, Social Security Disability and a long-term disability policy through Cummins. At the point she was released in July 2011, Dr. Strothman did not even mention permanent restrictions or return to work options. After discussing her difficulties completing meaningful physical therapy, he recommended that she attempt to exercise and "maintain as active lifestyle as possible." (Cl. Ex. V, p. 4) Based upon the record before me, it was clear at this point in time that returning to work for the employer was not an option. This is the only job she held since 1987. In fact, the employer's vocational expert reached this conclusion as well. (Def. Ex. C, p. 3) I conclude that Ms. Jenson was not motivated to return to work because she reasonably believed that there was no chance that she could return to any meaningful, gainful employment.

Ms. Jenson's primary ongoing conditions are work aggravated facet arthritis and disc degeneration. I find Dr. Kuhnlein's impairment rating and restrictions to be compelling. The conditions have resulted in an impairment of 13 percent of her whole body. He assigned lifting restrictions of 10 to 20 pounds and alternating standing and sitting. (Cl. Ex. V, p. 111) He recommended a host of other nonmaterial handling restrictions, advising her to rarely kneel and crawl and to avoid ladders altogether. He opined she is likely not employable. (Cl. Ex. V, p. 111) This opinion is echoed and supported by the opinion of her longtime treating chiropractor. (Cl. Ex. V, p. 119)

The reality is, at the time of hearing, Ms. Jenson cannot stand or walk for more than 10 minutes at a time. Her pain limits her from doing anything active for an extended period of time. I do not find the report of Ms. Svec to be compelling. The report itself is contradictory. The greater weight of evidence demonstrates that Ms. Jenson is permanently and totally disabled. She is entitled to permanent total disability benefits commencing from December 8, 2009 through the present and continuing. The defendants shall receive a credit for benefits previously paid.

Having found that the claimant is permanently and totally disabled, it is unnecessary to determine her entitlement to healing period benefits or the commencement date for permanent partial disability.

The next issue is the claimant's entitlement to medical expenses. Ms. Jenson seeks the expenses outlined in an attachment to the hearing report. The only actual medical treatment expense which is unpaid is the mileage.

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. Iowa Code section 85.27 (2013). For all claimed medical expenses, the claimant is entitled to an order of reimbursement only if he has paid treatment costs; otherwise, to an order directing the responsible defendants to make payments directly

to the provider. 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 defendants do not contest the medical mileage. Claimant is entitled to mileage based upon the calculations set forth in the hearing report. The amount owed is $644.05.

The claimant also seeks payment for an independent medical evaluation. Dr. Kuhnlein evaluated Ms. Jenson on February 12, 2014.

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).

Dr. Kuhnlein evaluated Ms. Jenson on two separate occasions and prepared reports. The first evaluation (February 12, 2014) amounted to $2,741.50. (Cl. Ex. V, p. 115) This was the claimant's independent medical evaluation under Iowa Code section 85.39. Claimant's counsel argues that the defendants stipulated to the reasonableness of the fees, the causal connection and the authorization of these bills. The defendants did not brief the issue at all. Nevertheless, I disagree with the claimant's characterization of the stipulation. The stipulation as written only applies to the payment of "medical expenses", not the independent medical evaluation or other medical reports or costs. (See Hearing Report, p. 2)

Based upon the limited record before me, I find that the defendants owe for the February 12, 2014, evaluation in the amount of $2,741.50. I further find that the second evaluation by Dr. Kuhnlein was not an 85.39 evaluation, but rather a cost. The defendants do not owe for the second evaluation as an 85.39 IME. See Larson Manufacturing Co. v. Thorson, 763 N.W.2d 842, 861-62 (Iowa 2009).

The next issue is the credit. The defendants claim entitlement to a credit for past workers' compensation payments made as well as a credit for long-term disability payments made under Iowa Code section 85.38(2). The claimant concedes some

entitlement and has provided a detailed set of calculations to prove the extent of the credit to which the defendants are entitled.

Under Iowa Code section 85.38(2)(a) where the employee has received "any benefits" under a qualified non-occupational plan, the amounts so paid to the employee "shall be credited to or against" any compensation payments made or to be made under the Iowa Workers' Compensation Act. In short, the credit for non-occupational disability benefits applies to any workers' compensation benefits that may be deemed payable. After applying the credit, only the remaining workers' compensation benefits awarded are payable. White v. Donaldson Co., File No. 5041853 (App. February 2015).

The burden of proving entitlement to a credit rests upon the employer who seeks the credit. Albertsen v. Benco Manufacturing, File No. 5010674 (App. July 27, 2007); Greenlee v. Cedar Falls Community Schools, File No. 934910 (App. December 27, 1993); McKernan v. Morningside College, File No. 955069 (App. February 22, 1993). In order to prove entitlement to the credit the defendants must prove the following: 1) that benefits were received under a group plan, 2) contribution to that plan was made by the employer, 3) the benefits should not have been paid if workers' compensation benefits were received, and 4) the amounts to be credited or deducted from payments made or owed under Chapter 85. Id.; Iowa Code section 85.38(2). See also Miller v. Maintainer Corporation of Iowa, Inc., File No. 5020192 (App. February 2, 2009).

The prior appeal decision specified that the "credit and interest calculations of claimant set forth the [sic] hearing report for this file shows the unpaid amount totaling nineteen thousand five hundred eighty-two and 69/100 dollars, ($19,582.69), as of the date of hearing." (Cl. Ex. VI, p. 33) After January 7, 2011, the date of the first hearing, the defendants made workers' compensation payments to the claimant on various occasions beginning on about March 8, 2013. (Cl. Ex. VII, p. 30) It appears, the March 8, 2013, check in the amount of $80,211.13, was intended to bring the claimant up to date in all of her payments from December 8, 2009, through February 14, 2013.

Ms. Jenson was paid long-term disability payments through Unum under a non-occupational group plan. The dispute centers around whether the defendants have paid all of the benefits owed, including the non-occupational disability payments, between January 7, 2011, and March 9, 2015, the date of hearing. The claimant alleges she has been shorted $3,618.33. The defendants claim she has been paid up to date.

It should be noted, the claimant has conceded that the employer has made payments pursuant to a non-occupational group plan and that the payments qualify under section 85.38(2). The payments were made through Unum. The claimant has presented evidence as to the exact extent to the payments made. The claimant has also presented evidence as to the exact extent of the workers' compensation payments made. (See Cl. Ex. VII, pp. 1-176) I have reviewed this exhibit in its entirety along with the claimant's calculations as set forth in the attachment to the Hearing Report. I have also reviewed all of the evidence presented by claimant regarding the long-term disability benefits paid by Unum. (Cl. Ex. VI, pp. 7-15; 34-43; 45-52; 71-73; 76-79) The payments were complicated significantly by two overpayments made by Unum due to

offsets for workers' compensation and Social Security Disability payments. On top of all of this, the claimant has provided detailed interest calculations applying the United States Rule as articulated in Christiansen v. Snap-On Tools Corp., 554 N.W.2d 254, 261-62 (Iowa 1996).

By a preponderance of evidence, I adopt the claimant's payment calculations as set forth in the attachment to the hearing report. The defendants' arguments challenging these calculations are not persuasive. (See Def. Brief, pp. 15-16) The defendants argued that the calculation "includes amounts for repayment of LTD overpayment" that are unexplained. (Def. Brief, p. 15) The defendants, however, did not prove their own calculations. It is their burden.

The next issue is penalty. Ms. Jenson alleges that virtually all of her benefits have been late. The defendants contend they have made timely weekly payments since the appeal became final.

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.

The employer in this case is behind in payments as set forth above. The defendants made a payment on March 8, 2013, by check in the amount of $80,211.13. This payment was intended to bring the claimant up to date in all benefits owed (less long-term disability payments) from December 8, 2009, through February 14, 2013. The employer then began making weekly payments thereafter which were, generally speaking, timely. (See generally, Cl. Ex. VII, p. 30 et seq.)

The defendants became late on payments as a result of mathematical errors for the reasons set forth in the previous issue. In fairness, the mathematics of the matter is quite complicated, especially in applying the credit for the group disability payments and

overpayments and calculating interest pursuant to the United States Rule. The problem is, once the defendants became "behind" on their payments, all of the subsequent payments are deemed to be late by operation of law. Since I find the payments are late, I must determine whether there was a reasonable excuse. I find there is not. A mistake or oversight is not a reasonable excuse. Elvarado v. John Morrell & Co., File No. 5007823 (App. September 5, 2008). The defendants must articulate a contemporaneous basis for the delay or denial. Since this has not been provided, penalty is mandatory.

There is little evidence in the file to determine the extent of the penalty. The claimant requests a full 50 percent penalty on all benefits, contending the full principle is $141,703.05. 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.

In this case, defense counsel wrote to claimant's counsel on October 11, 2013, and stated the following:

> My client hasn't decided yet whether they are going to appeal the court's ruling on judicial review. Per the court's ruling, I calculate that my client owes $9791.34 for the penalty and interest on the penalty from January 7, 2011 (the date of the arbitration decision) to October 18, 2013 which is $2722.80. The total of the penalty and interest is $12,514.14. Is there anything else owed at this time?

(Cl. Ex. VI, p. 69) Claimant's counsel responded on October 15, 2013, listing a number of other expenses he contended were still owed. At the end, he added the following. "As to doing the credit/interest computations since 1/07/11, I am still in the process of preparing them." (Cl. Ex. VI, p. 70) The record as a whole contains a good deal of correspondence between the parties. There is no evidence in the record; however, that claimant's counsel provided his credit/interest calculations to the defendants at any time prior to the attachment to the Hearing Report.

Of course, the burden is on the defendants to calculate the amounts owed to the claimant and pay her correctly. I have already found the defendants failed to do this. In assessing the extent of the penalty, however, I do note that it appears that the claimant did not calculate her claim for the underpayment until the date of the hearing. The reality is the mathematical computations are quite complex in light of the credit issues and, in particular, the overpayments of group disability payments, as well as the interest computations. The defendants calculated the payments owed and attempted to pay the claimant up to date in March 2013, and then specifically asked claimant's counsel if any further payments owed in October 2013. The claimant did not make a specific claim for the underpayment until the date of hearing in 2015.

I would be more likely to award a significant penalty had the claimant alerted the defendants to this claim for underpayment prior to the date of hearing. As it stands, utilizing the appropriate factors for assessing the extent of penalty, I find that a minimal

penalty is owed. I assess a penalty of $3,000.00 in an effort to deter the defendants from making late payments in the future and to encourage appropriate calculation of credits and interest owed.

The final issue is taxation of costs. "All costs incurred in the hearing before the commissioner shall be taxed in the discretion of the commissioner." Iowa Code section 86.40 (2013); see also, 876 IAC section 4.33.

Claimant has the following claimed expenses:

- $100 Filing Fee
- $6.11 Certified Mail (Service)
- $100 Filing Fee
- $6.48 Certified Mail (Service)
- $2,741.50 Dr. Kuhnlein report
- $1,200.00 Dr. Lillis report

In addition, since I denied the second IME of Dr. Kuhnlein in the amount of $1,607.50, such shall be evaluated as a cost. (Cl. Ex. V, p. 152)

Using the discretion set forth under Iowa Code section 85.40, I award the claimant the filing fees and costs of service, as well as the report of Dr. Lillis and a portion of the second report of Dr. Kuhnlein. Dr. Kuhnlein's first report was awarded as an 85.39 IME.

In Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839, 845 (Iowa 2015), the Iowa Supreme Court held that only the cost of drafting a report in lieu of testimony by a physician is taxable as a cost in a worker's compensation case. In other words, claimant cannot recover the cost of Dr. Kuhnlein's examination but may recover the cost of having the physician draft a report following that examination. Id. In assessing Dr. Kuhnlein's bill, I conclude that it is appropriate to assess $907.50 pursuant to 876 IAC 4.33(6) and Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839 (Iowa 2015). The report of Dr. Lillis appears to be for the report only. (Cl. Ex. V, p. 123)

Therefore the total costs owed by the defendants amount to $2,320.09.

ORDER

THEREFORE IT IS ORDERED:

The defendants shall pay claimant permanent total disability benefits at the stipulated and adjudicated rate of five-hundred twenty-one and 88/100 dollars ($521.88) commencing the date of injury.

Defendants shall receive credit for workers' compensation benefits and non-occupational disability benefits (section 85.38(2)) paid through the date of hearing as

set forth in the decision for benefits paid between the date of injury and the date of the hearing, March 9, 2015. As of that date, defendants owed three thousand six hundred eighteen and 33/100 dollars ($3,618.33).

Defendants shall pay medical mileage expenses in the amount of six hundred forty-four and 05/100 dollars ($644.05).

Defendants shall pay a penalty in the amount of three thousand and no/100 dollars ($3,000.00).

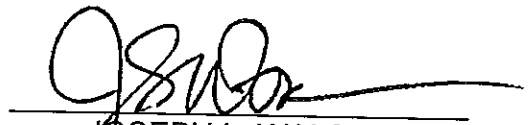
Defendants shall pay the reasonable costs of this action in the amount of two thousand three hundred twenty and 09/100 dollars ($2,320.09).

Defendants shall pay any past due amounts in a lump sum with interest.

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

Costs are taxed to defendant.

Signed and filed this 17th day of May, 2016.



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JLW/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.