BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

MUNIRA BAHIC, Claimant, vs. MERCY MEDICAL CENTER d/b/a, BISHOP DRUMM Employer, INDEMNITY INSURANCE COMPANY, OF NORTH AMERICA, Insurance Carrier, Defendants.	File No. 5047101 ARBITRATION DECISION Head Note No: 1803

FILED
JUL 30 2015
WORKERS' COMPENSATION

STATEMENT OF THE CASE

Munira Bahic, claimant, has filed a petition in arbitration and seeks workers' compensation from Mercy Medical Center, employer and Indemnity Insurance Company of North America, insurance carrier, defendants.

This matter came on for hearing before deputy workers' compensation commissioner, Jon E. Heitland, on April 21, 2015 in Des Moines, Iowa. The record in the case consists of claimant's exhibits 1 through 18; defense exhibits A through H; as well as the testimony of the claimant and Natalia Bahic.

ISSUES

The parties presented the following issues for determination:

Whether the alleged injury is a cause of permanent disability.

Whether the claimant is entitled to temporary total disability or healing period benefits during a period of recovery.

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

The commencement date for any permanent partial disability benefits awarded.

Whether the claimant is entitled to payment of medical expenses pursuant to Iowa Code section 85.27.

Whether the claimant is entitled to the costs of an independent medical examination under Iowa Code section 85.39.

Whether claimant is entitled to penalty benefits under Iowa Code section 86.13.

The credit to which defendants are entitled.

Whether claimant is entitled to be reimbursed for the costs of a vocational report and a Functional Capacity Evaluation.

FINDINGS OF FACT

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

Claimant, Munira Bahic, testified she lives in Grimes, Iowa. She is 56 years old. At the time of her injury, she was married.

Her education consists of completing the eighth grade, in Bosnia. That was the extent of education available in her area. Her grades were excellent. Since coming to the U.S., she has taken about two semesters of English as a second language through work. Today she can understand things spoken to her at work, and she was generally able to communicate with co-workers and patients. She could read about five percent of a newspaper in English. She can read road signs. She required a translator at the hearing.

Prior to working at defendant Mercy Medical Center, doing business as Bishop Drumm, she worked a short time in Germany. Otherwise, she stayed home to raise her family. In the U.S., she began working at Mercy January 9, 2001. Her first job was serving food and washing dishes. The heaviest lifting she did was with plastic crates or bins loaded with dishes. She estimates they weighed five to eight pounds. Other than two 15 minute breaks and a 30 minute lunch break, she was on her feet the whole time she worked. There was more lifting once she went from part-time to full time. In her job she lifted boxes of fruits and vegetables, about three feet long and two feet high, in order to prepare meals and snacks.

Exhibit 6 contains photos showing a cart claimant used to take snacks to different areas of the hospital. It was at times fully loaded on all levels. It was heavy to push, as it held food for 160 people for a 24-hour period.

She earned $12.18 per hour, but when she worked second shift, she got an additional $1.00 per hour, and an additional 25 cents per hour for never being late. She had regular performance reviews, and did not receive any negative reviews or reprimands. She enjoyed her job and intended to work there to retirement.

On February 11, 2013, she suffered an injury. She was taking snacks to the first galley and when turning the cart, she felt a sharp pain in her back. She had to lift the cart in order to turn it. It was full as she was going to her first galley. Exhibit 6 shows a wider door than she had to maneuver through. When she tried to lift the cart up, she felt a sharp pain in her back. She reported the injury to the person she was working with in the kitchen, and to her supervisor the next day.

Prior to that date she had not suffered any significant injuries to her back. She had never had a workers' compensation claim prior to this injury. She used some medicated patches and was able to keep working at first. Her supervisor sent her to a doctor but she thought it would go away, so she continued working for the next two months, doing her regular job. She did not require help from co-workers. Her back pain spread to her hip and her leg.

Claimant decided she needed medical attention when she wasn't able to put weight on her foot and was limping. Her supervisor noticed her limp and she was sent for treatment at Mercy Occupational Medicine. She was put on restrictions and she worked in the laundry room. This work was easier on her back but she was unable to stand without pain in her back.

She was sent for an MRI, and then she was referred to Cassim Igram, M.D. He recommended injections. She received three injections from Clinton Harris, M.D., but they did not help. The third one caused a reaction. (Exhibit 1C, pp.2-3) A nurse case manager accompanied her to her appointments. She observed the nurse talking to Dr. Harris. Claimant felt she was influencing the doctor. Dr. Harris then examined her, and claimant states he hurt her during the examination, extending her leg to a painful position. The nurse kept telling claimant to just take deep breaths.

Dr. Igram then referred her to Anthony Stark, M.D., for manipulations. Dr. Stark also gave her an injection, and sent her for physical therapy. She was unable to do the exercises at physical therapy and it was discontinued. (Ex. 1B, pp. 15-17)

Claimant was then sent by defendants to David Boarini, M.D., for an independent medical examination (IME) on February 19, 2014. He only talked to her about 15 or 20 minutes. He conducted some tests, including a balance test and walking across his office, but no range of motion tests. She did not see him again after that one appointment.

Dr. Boarini found pain exaggeration and symptom magnification, and noted degenerative disease. He found only a minimal injury, and found no impairment and no need for restrictions. (Ex. A)

She later saw Adrian Woolley, D.O., on February 27, 2014. Dr. Woolley questioned claimant's prior treatment, including Dr. Boarini's examination. (Ex. 1E, pp. 19-21) She found two bulging discs in claimant's spine, which was causing her pain. She noted L5 nerve root entrapment and radiculopathy. She noted claimant could not

put her full weight on her buttocks when sitting, or on her right leg when walking. She felt the prior physicians were mistaken in the conclusions, and diverged greatly from her findings. She found claimant's symptoms to be consistent with the MRI. She specifically noted that Dr. Boarini's IME report discussed using a tuning fork during his examination, but claimant, and her interpreter who was at the examination, both stated no such device was used. Dr. Woolley found claimant to be compliant with all requested testing, and found that claimant was not drug seeking. (Ex. 1E, pp. 19-20) Because of the great divergence between her findings and the reported findings of prior doctors chosen by the defendants, Dr. Woolley went so far as to recommend claimant undergo further surgery outside of the Des Moines area, as the prior doctors who examined her worked closely together. She gave claimant pain medications, which provided some relief. (Ex. 1E, p. 19) She felt claimant would not get better until she had surgery.

Claimant is still treating with Dr. Woolley, in the form of manual manipulation. This is beneficial in relieving pain in her low back. Claimant would like to continue to treat with Dr. Woolley. Dr. Woolley's bills have not been paid by the insurer. Claimant has told Dr. Woolley's office her treatment was for a work related injury.

Claimant then met with Sergio Mendoza, M.D., at the University of Iowa Hospitals and Clinics on August 6, 2014. He found stenosis at the L4-5 level, based on an MRI. He felt the work injury has aggravated this condition, noting she likely sustained "an exacerbation of a chronic condition considering the stenosis noted on the MRI." (Ex. 1F, p. 4) He offered either an injection or surgery, and since the past injections had not helped, she opted for surgery. She was sent for pool therapy to increase her strength before surgery, but it was cancelled by the insurer after two weeks. Dr. Mendoza has never told her his treatment was not related to a work injury. (Ex. 18, pp. 4-5, 7)

Surprisingly, on September 9, 2014, Dr. Mendoza's notes indicate "to the nearest degree of medical certainty the causation of this injury is not related to work." No explanation of the change was offered. (Ex. 1F, p. 14) However, his records continue to refer to the injury as a workers' compensation injury. Eventually Dr. Mendoza performed a fusion surgery on claimant's low back at L4-5 on October 27, 2014, due to her spinal stenosis. (Ex. 1F, pp. 26, 32-35)

After claimant underwent fusion surgery, her leg pain improved, but not her back pain. When Dr. Mendoza left the University, her care was transferred to Ernest Found, M.D. She is also still treating with Adrian Woolley, M.D. She has work restrictions not to lift over 20 pounds.

At the hearing claimant wore a brace around her waist. It was recommended by someone at the University of Iowa. She has not been told to discontinue wearing it. She wears it anytime she is not lying down. She also uses a cane. She initially had a walker in the hospital. She was told later to use a cane. She agrees it is necessary, for balance issues and dizziness.

Since going to the doctor in April 2013, she has been on work restrictions. She worked at Bishop Drumm on restrictions for a while. Six months later, she was terminated by the employer because she was not done with her medical treatment and they had someone else lined up for her job. Since then she has not looked for another job, due to pain and not being able to do much. She is hopeful she can return to some sort of work in the future if she improves.

She does not feel she could return to Bishop Drumm with her current restrictions. She would like to return if she could do the work, but it involves a lot of bending and heavy lifting which she cannot do. Her current symptoms include back pain, and pain in her right foot. She can only sit 20 or 30 minutes without having to stand to relieve the pain. She has to shift her position after sitting for 15 minutes. She can only walk for 20 minutes, and cannot stand for longer than 15 minutes.

She did receive workers' compensation benefits after her injury. They ended February 19, 2015. She still has unpaid medical bills from the University of Iowa. She pays her medical bills with Medicaid. She has applied for Social Security Disability benefits but has not received a ruling.

Before her injury, she was able to engage in non-work activities such as cooking, cleaning, laundry, shopping, and housework. Now, after her injury, her husband and children, who live nearby, have to help her with these things. She cannot play with her grandchildren as she did before.

She has very limited computer skills, and is only able to turn on a computer and use Skype to talk to relatives. She does not know how to use email or surf the internet. Prior to her injury, she was able to drive herself to work. Since her injury, she has not driven a car. Her husband and children drive her where she needs to go.

On cross examination, claimant was asked about her deposition in July 2014. She stated she was injured when pushing a cart, which then had to be lifted slightly to turn it through a doorway. After reporting the injury, she worked for about two months without any restrictions. She agreed there were no witnesses to the injury.

She agreed Dr. Igram is an orthopedic surgeon. He did not recommend back surgery. He sent her to Dr. Harris, who is a pain specialist. He had claimant undergo an EMG due to the pain going down into her right leg and foot and toes. The EMG showed a normal study with no evidence of right lumbar radiculopathy.

Dr. Harris in turn sent claimant to Dr. Stark. Claimant did not go back to Dr. Igram after that. She did continue to see Dr. Harris for injections. Claimant felt he hurt her during one of those exams. Claimant desired to use a cane because her knee locks up and she was afraid of falling. The nurse case manager discouraged the use of a cane. Claimant agreed both Dr. Harris and the physical therapist were encouraging claimant to walk without a cane, and told her she could walk without it.

In December 2013, Dr. Stark told claimant she could return to light duty work, and later told her she could return to full duty work. Dr. Wooley prescribed a cane for claimant, and also disagreed with the treatment she had received over the previous year.

Claimant agreed she did not look for work. She did not feel anyone would hire her in her condition. She did not feel she was able to work.

Dr. Found has taken over claimant's care. On December 8, 2014, claimant met with him for her six week follow-up after her surgery. She was found to be doing well. He recommended further physical therapy, which claimant still attends. He also recommended lifting restrictions of not over 10 to 15 pounds. He said she could continue to wear her brace, although they would work to wean claimant off of using it. At a second visit on January 15, 2015, he noted claimant denied numbness and tingling in her toes. She agreed it disappeared after surgery, but after therapy, it has returned. He felt she could now lift up to 20 pounds. However, claimant does not feel she can lift that much without pain.

She feels she could still wash dishes at Bishop Drumm, but not other duties. Dr. Found ended her bending and twisting restrictions, but claimant says she cannot do those things without dizziness and losing her balance. She is still in physical therapy.

She has not looked for any jobs within Dr. Found's restrictions, or within Dr. Bansal's restrictions, or within the restrictions outlined by the functional capacity evaluation (FCE) as she does not feel she is able to work right now. She agreed Dr. Found has not told her she cannot work.

Dr. Stark gave her no restrictions and told her to go back to work. Dr. Bansal also indicated claimant was able to work. Claimant stated she wishes she was able to work but cannot.

On re-direct examination, claimant was asked about exhibit 7. This is a handwritten note setting forth her current prescriptions. She was only taking medications for cholesterol and high blood pressure at the time she was injured. The top four listed are for her back pain, the others are for personal conditions.

Her condition did not improve while seeing all of her doctors over a year, even though some of them released her to return to work. In some ways it was made worse. The surgery has improved her leg pain but has not significantly improved her back pain. This was predicted by Dr. Mendoza.

Claimant agrees she needs some restrictions on her ability to bend, lift and twist. She has trouble putting on her socks and shoes, and needs helps from her husband with these tasks. She needs help putting on her underwear.

Natalia Bahic testified she is claimant's daughter-in-law. She has known claimant about eight years. Claimant loved her job, and never wanted to call in sick.

She did not want to miss a day of work. Ms. Bahic has attended medical appointments with claimant, with Dr. Woolley and Dr. Harris.

She has noticed claimant is no longer able to do things around the house. Claimant has trouble walking, trouble going up and down stairs, etc. Her injury has caused her to miss family gatherings as she is not up to it, due to her pain. Prior to her injury claimant would organize family events but now she is not able to. Claimant and her injury are the focus of most family conversations. Claimant has expressed a desire to get back to work if her pain would resolve. Claimant has been compliant with physical therapy. She is not as happy as before. She has lost hope because she has not gotten better.

Dr. Mendoza signed a letter dated November 21, 2014, stating claimant's current medical condition is not related to her work injury on February 11, 2013. Dr. Mendoza checked boxes indicating he agreed with the statements in the letter, which had been drafted by defendants' attorney. (Ex. B)

On December 31, 2014, Dr. Harris stated "the symptoms and conditions she experienced after her injury dated February 11, 2013, were a material aggravation of that incident. " (Ex. 1C, p. 13)

Claimant's Functional Capacity Evaluation (FCE), conducted by Todd Schemper at Work Well Systems, is contained in exhibit 3. The report concluded claimant could work in the sedentary category, lifting up to five pounds on an occasional basis, ten pounds maximum rarely, with limitations in walking, crouching and squatting. (Ex. 3, pp.3-4)

A vocational evaluation of claimant was conducted by Phil Davis, M.S., and is set forth in exhibit 4. He felt claimant's work restrictions prevented her from returning to the work she was doing when injured, and she would only be able to find work in the food service industry. (Ex. 4, p. 6) He concluded her ability to obtain or maintain gainful employment was drastically reduced, if not eliminated. (Id.)

A vocational evaluation for defendants was conducted by Rene Haigh, MS CRC, on March 23, 2015. (Ex. C, p. 1) She found at least 10 positions within claimant's labor market area that were within claimant's restrictions from Dr. Found and Dr. Stark, and could be performed with reasonable accommodation within the restrictions of Dr. Bansal and the FCE. (Ex. C, pp. 7-8)

Mr. Davis felt claimant's difficulty speaking English would adversely affect her employability. Ms. Haigh did not, as claimant had been able to work at Bishop Drumm and communicate when necessary. (Ex. C, p. 8)

Claimant underwent an independent medical examination (IME) by Sunil Bansal, M.D. He found claimant's condition was caused by her work duties of pushing a cart

and lifting and twisting the cart on February 11, 2013. He noted claimant had no complaints of low back pain prior to this incident. (Ex. 2, pp. 11-13)

Claimant currently continues to experience low back pain. Although it is improving, she now has dizziness and balance problems. She wears a back brace, and uses a cane for balance.

Claimant was terminated by the employer on October 23, 2013. She was still on work restrictions at that time. She was told she was fired because she had not been treating for her injury and the employer needed to fill her job. Defendants assert she is eligible for rehire. She currently has a five pound lifting restriction.

CONCLUSIONS OF LAW

The first issue in this case is whether the alleged injury is a cause of permanent disability. Specifically, whether claimant's symptoms after February 27, 2014, are causally related to the February 11, 2013, work injury. If claimant's current condition and the need for surgery are found not to be related to the work injury, defendants assert claimant has reached maximum medical improvement.

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).

While a claimant is not entitled to compensation for the results of a preexisting injury or disease, its mere existence at the time of a subsequent injury is not a defense. Rose v. John Deere Ottumwa Works, 247 Iowa 900, 76 N.W.2d 756 (1956). If the claimant had a preexisting condition or disability that is materially aggravated,

accelerated, worsened or lighted up so that it results in disability, claimant is entitled to recover. Nicks v. Davenport Produce Co., 254 Iowa 130, 115 N.W.2d 812 (1962); Yeager v. Firestone Tire & Rubber Co., 253 Iowa 369, 112 N.W.2d 299 (1961).

Dr. Mendoza originally stated claimant's current condition was causally connected to her work injury. Then he changed his opinion and said it was not. He was asked in his deposition whether claimant's work activities might have aggravated her condition by performing her work duties. He did not feel claimant's work activities could have done so. He described her activities as "pushing a snack cart", and contrasted it with a fall or unloading a truck and concluded "it's not a major mechanical force in the lower back." He also stated he did not feel an employer should be responsible for an exacerbation of an underlying injury during claimant's everyday work duties. (Ex. 13, p.9) This shows a serious misunderstanding of workers' compensation law and principles, and constitutes a legal opinion rather than a medical opinion, and an erroneous one at that.

Dr. Boarini also felt claimant's current condition was not related to her work injury. However, he evaluated her six months before her surgery.

Dr. Woolley found claimant's symptoms to be consistent with the findings of the MRI. She observed claimant to have difficulty putting weight on her buttocks or her right leg, and she felt claimant's symptoms were genuine. She found claimant's current symptoms were caused by her work injury. She acknowledged claimant had osteoarthritic changes in her lumbar spine prior to the incident, but a sudden rupture of a disk led to acute narrowing of the sac and resulting compression of the L5 nerve root. (Ex. 1E, pp. 19-21, 41-44)

Dr. Harris has clearly stated claimant's current condition is a work related aggravation.

Dr. Bansal also found claimant's current back condition to be causally related to her work activities. He noted claimant had no complaints of significant back pain prior to the injury, but severe pain after the injury and the need to obtain medical treatment. (Ex. 2, pp. 11-12)

Both Dr. Mendoza and Dr. Boarini seem to downplay claimant's work activity at the time she was injured. Dr. Mendoza in particular regards pushing a snack cart as an activity unlikely to produce a back injury. Yet claimant credibly testified as to the weight of the loaded cart, and in particular, the need to twist and lift to navigate the cart around an obstacle. This seems not to have been taken into adequate account by either Dr. Mendoza or Dr. Boarini. Dr. Mendoza seems to simply view claimant's activity as pushing a snack cart, and feels since it is not as physically strenuous as unloading a truck, it cannot cause a back injury. This shows a disregard for the actual mechanics of the injury herein, in addition to his misunderstanding of the law and his responsibility to render a medical opinion rather than a legal opinion.

Dr. Woolley explains in great detail her conclusion regarding claimant's work activity and its relation to her injury. Dr. Woolley questions the examinations of Dr. Boarini and Dr. Mendoza, and in particular the reference to the use of a tuning fork when claimant affirms no tuning fork was used calls into question the accuracy of that report. This is an additional reason to give less weight to the reports of Dr. Mendoza and Dr. Boarini.

Dr. Woolley's report is more logical. She notes the consistency between claimant's symptoms and the MRI. Dr. Bansal also thoroughly explains his conclusion there is a causal relationship between work activity and the aggravation of claimant's pre-existing condition. Dr. Harris, although less detailed in his report, agrees with Dr. Woolley and Dr. Bansal.

For these reasons, greater weight will be given to the opinions of Dr. Woolley, Dr. Bansal and Dr. Harris. It is concluded claimant has carried her burden of proof to show by a preponderance of the evidence that her current low back condition, and the need for the fusion surgery, are causally related to her work injury.

The next issue is whether the claimant is entitled to temporary total disability or healing period benefits during a period of recovery.

Although he did not think claimant's condition was related to her work injury, Dr. Mendoza nevertheless did not think claimant was at maximum medical improvement (MMI), and recommended further treatment. Dr. Bansal found claimant to be at maximum medical improvement on February 27, 2015. (Ex. 2, p. 11) Claimant asserts this as the appropriate date of MMI. Defendants assert one year earlier, based on the report of Dr. Boarini. (Ex. A)

However, it is clear from the record claimant was not at MMI when she saw Dr. Boarini. On the contrary, she continued to undergo medical treatment by various physicians. She would later treat with Dr. Woolley, Dr. Mendoza, and others. She was given work restrictions during that time. Dr. Stark referred claimant on for further treatment.

Claimant argues in the alternative that if she is found not to be at MMI yet, she be given an award of running healing period benefits.

The MMI date of Dr. Boarini is rejected as in stark contrast to the rest of the record, which indicates claimant was still undergoing extensive treatment long after that date. Claimant seeks a finding of MMI because she is now six months post-surgery, which occurred on October 24, 2014, and she feels her symptoms have plateaued. However, Dr. Found has not found claimant to be at MMI following her surgery. Claimant is still undergoing physical therapy. Dr. Bansal has found claimant to be at MMI, as of the date of his examination, February 27, 2015.

Claimant agrees with Dr. Bansal. Although claimant is still undergoing physical therapy, there is no contemplated further medical treatment. Claimant states her symptoms have plateaued. The physical therapy is more in the way of maintenance than improvement. Dr. Bansal has examined claimant very recently and concludes she is at MMI. It is concluded claimant has reached maximum medical improvement as of February 27, 2015.

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

Claimant's injury to her back has necessitated a fusion surgery. Dr. Bansal concluded claimant had a 22 percent whole person impairment due to her injury, a very high impairment rating. He recommended work restrictions of not lifting over 5 pounds occasionally, 10 pounds rare or maximum, no frequent bending, squatting, climbing or twisting, and sitting, standing, and walking as tolerated but no more than 30 minutes at once. (Ex. 2, p. 13) He found her to be at maximum medical improvement on February 27, 2015, although he felt she could benefit from pain management. (Ex. 2, p. 11) Dr. Bansal later reviewed the records of Adrian Woolley, M.D., and Ernest Found, M.D., and the FCE. He noted the FCE restrictions were similar to his and re-affirmed his earlier conclusions. (Ex. 2, p. 16)

Dr. Bansal's five pound lifting restriction is extremely limiting. It precludes claimant from returning to her old job, as well as many other jobs for which she would otherwise be qualified. This restriction was independently suggested by the FCE as well. (Ex. 3) Dr. Found did recently raise that restriction to 20 pounds, but this is still a limiting restriction and Dr. Bansal's 5 pound restriction is more in keeping with the rest of the record, including the FCE.

Claimant lost her job due to her work injury and restrictions. The employer did not offer her job back, or offer any accommodations. She has thus suffered a complete loss of earnings.

Claimant is 56 years old. Her education is extremely limited, consisting of attending through the eighth grade. This is very restricting to claimant in terms of non-physical jobs she might be able to perform, where employers commonly look for at least a high school diploma when hiring for most jobs. Both of these factors indicate retraining for a new line of work is unlikely. When coupled with her severe work restrictions and her restriction to sedentary work, she is a very unappealing candidate to any prospective employer.

Because of her injury, she cannot return to her old job. She may be able to do food service work. One vocational report finds her able to do very little if any work, and that she has lost access to 90 percent of all occupations listed in the Dictionary of Occupational Titles. (Ex. 4, p. 6) The other finds some jobs she could do within her restrictions, but others only if accommodated in some cases. That evaluation was heavily based on the restrictions from Dr. Stark, who imposed them prior to claimant's

fusion surgery. Obviously claimant's abilities were later severely restricted further by that operation. Thus, Dr. Stark's restrictions can be given little weight, and so too the vocational evaluation that relied on part on them must be viewed as based on inaccurate information.

Claimant's personal life has also been adversely affected, in that she can no longer do many functions of daily living, such as going shopping, doing laundry or cleaning her home. She cannot care for her grandchildren. She has not driven a car since the injury, and relies on family members to take her to medical appointments. It is difficult to see how she could report to work at a job if she is unable to operate a motor vehicle. Her husband has to help her dress herself and with some of her personal hygiene. Her daughter-in-law's testimony confirms these effects on claimant's personal life, including an adverse effect on her family life.

Significantly, claimant lost her job due to her work injury and resulting restrictions. This has caused her an extreme loss of earnings. She has not found substitute work. It is difficult to imagine a job she could reasonably be expected to obtain or perform.

Based on these and all other appropriate factors of industrial disability, it is concluded claimant, as a result of her work injury, is permanently and totally disabled.

The next issue is the commencement date for any permanent partial disability benefits awarded.

As claimant has been found to be permanently and totally disabled, permanent total disability benefits will commence as of the date of injury, less any days claimant earned wages when she returned to work on a light duty basis.

The next issue is whether the claimant is entitled to payment of medical expenses pursuant to Iowa Code section 85.27.

As claimant has established a work injury, defendants will be responsible for claimant's medical expenses related to her work injury, including the fusion surgery and all treatment after February 27, 2014.

The expenses at the University of Iowa Hospitals and Clinics denied by defendants were for services ordered by Dr. Mendoza, an authorized treating physician. Defendants stopped paying for those services once Dr. Mendoza changed his opinion on causation. Similarly, the expenses of treatment by Dr. Woolley at Des Moines University were upon referral from Dr. Stark, who was also an authorized treating physician. (Ex. 14)

It has been determined claimant's current condition is caused by her work injury, and it is further determined all of the submitted medical expenses, in exhibit 10 and elsewhere, are causally related to the work injury and are the responsibility of

defendants. Defendants shall also pay claimant her submitted medical mileage costs pursuant to Iowa Code section 85.27(1), set forth in exhibit 11.

The next issue is whether the claimant is entitled to the costs of an independent medical examination (IME) under Iowa Code 85.39.

Dr. Boarini assigned no impairment for this injury, and Dr. Mendoza also found no impairment related to the work injury. Claimant was entitled to an independent medical examination to rebut those opinions. Defendants will be ordered to reimburse claimant for the costs of the IME by Dr. Bansal.

The next issue is whether claimant is entitled to penalty benefits under Iowa Code section 86.13.

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.

Claimant seeks penalty benefits based on defendants' termination of temporary benefits on February 19, 2015. Previously, Dr. Mendoza had stated claimant's condition was causally related to her work injury on August 6, 2014. However, on September 3, 2014, he reversed himself without explanation and stated it was not. Dr. Boarini also later stated claimant had no impairment caused by her work injury.

Defendants rely on the opinions of Dr. Mendoza and Dr. Boarini as a reasonable basis to deny benefits, and submit the question of liability was fairly debatable. Claimant argues at the time of the denial, Dr. Woolley, who felt there was a causal connection, was still treating claimant, and defendants should have known claimant's condition was causally related to her work injury and therefore their responsibility.

However questionable the opinions of Dr. Mendoza and Dr. Boarini were, and this decision has rejected those opinions for the reasons set forth above, nevertheless defendants were entitled to rely on the fact two physicians stated claimant's condition was not caused by her work injury. It therefore cannot be said they acted unreasonably in terminating benefits, and penalty benefits are not appropriate.

The next issue is whether claimant is entitled to be reimbursed for the costs of a vocational report and a Functional Capacity Evaluation. Claimant also seeks the costs of the vocational report by Phil Davis. (Ex. 4, p. 8)

Vocational studies such as Functional Capacity Evaluations are costs pursuant to Rose v. Menards, File No. 5024837, Arb. Dec., Feb. 20, 2009. Aff'd App. Oct. 29, 2009. In addition, vocational reports are considered practitioner's reports under 876 IAC 4.17. Defendants shall reimburse claimant for the costs of the FCE and the vocational evaluation report by Phil Davis.

She also seeks assessment of the costs of the filing fee for this action against defendants. That is an appropriate cost and defendants will reimburse claimant that fee as well.

ORDER

THEREFORE, IT IS ORDERED:

Defendants shall pay unto the claimant permanent total disability benefits at the rate of three hundred eighty seven and 32/100 dollars ($387.32) per week commencing February 11, 2013, less any days claimant worked subsequent to her injury, and during the time claimant remains permanently and totally disabled.

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 benefits previously paid.

Defendants shall pay the claimant's prior medical expenses submitted by claimant at the hearing.

Defendants shall pay the future medical expenses of the claimant necessitated by the work injury.

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 30th day of July, 2015.

JON E. HEITLAND
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.