BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

PENNY NICHOLS,

Claimant,

vs.

CHILDREN'S CHOICE EARLY LEARNING CENTER,

Employer,

and

FIRST COMP INSURANCE,

Insurance Carrier,
Defendants.

File No. 5048105

ARBITRATION DECISION

Head Note No.: 1803

STATEMENT OF THE CASE

Penny Nichols, claimant, has filed a petition in arbitration and seeks workers' compensation from Children's Choice Early Learning Center, employer and First Comp Insurance, insurance carrier, defendants.

This matter came on for hearing before deputy workers' compensation commissioner, Jon E. Heitland, on December 18, 2014 in Davenport, Iowa. The record in the case consists of claimant's exhibits 1 through 8; defense exhibits A through E; as well as the testimony of the claimant.

ISSUES

The parties presented the following issues for determination:

Whether the claimant sustained an injury arising out of and in the course of employment on November 4, 2013.

Whether the alleged injury is a cause of temporary disability.

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. Defendants stipulate claimant was off work from November 5, 2013 to February 12, 2014.

The extent of the claimant's entitlement to permanent partial disability benefits. Claimant asserts the odd-lot doctrine.

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

Whether the claimant is entitled to an independent medical evaluation under Iowa Code section 85.39.

Whether the claimant is entitled to penalty benefits.

FINDINGS OF FACT

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

Penny Nichols, claimant, testified she lives in Davenport, Iowa. She is 54 years old. On November 4, 2013, she was working at Children's Choice Early Learning Center as a teacher for young children. Her duties included changing diapers, paperwork, pulling wagons, stooping with the kids, taking them outside, etc. She worked full time, 8 hours per day, 5 days per week.

On November 4, 2013, she felt pain in her sciatic nerve, the lower right part of her back and down into her leg, when she bent down to lift a child. The child weighed 35 to 40 pounds. The pain shot down the back part of her leg. She told Karen Blend, the director of the Learning Center, that she had back pain from all of her twisting and turning during the day. Ms. Blend told her to just try doing something different. She was not referred to a doctor, so claimant went to her family doctor, Niral Tilala, M.D. She told him about her pain. The employer's health insurance would not pay for these medical services because it was a work injury. She did not ask the workers' compensation insurer why they did not pay for it. Iowa Medicaid did not pay for the MRI because it was a work injury. She does not know to this day if any of her medical bills have been paid.

She next saw an orthopedic surgeon. An MRI was recommended, but it was not performed because the insurance company never authorized it. Claimant stated her condition today is as bad as it was at the time of injury.

She is no longer working for the employer. Dr. Tilala told her she could no longer do her job. Claimant was called into a meeting while she was out on medical leave. She was still in severe pain. At the meeting, they demanded her keys to the facility. The meeting was about something that happened in the classroom. One meeting was

held, then claimant was called to drive to the facility for a second meeting, even though she was in great pain. The employer expressed concern claimant might act inappropriately and they accused her of being threatening, and her keys were demanded. When she was called to the meeting, she had already filed a workers' compensation claim. Claimant denied being violent in any way with any of the children. No complaint or accusation of abuse has ever been lodged against her.

The date of last medical treatment was January 28, 2014. Claimant has not received any benefits or payment of her medical bills.

Today she is a driver for CarQuest. She was making about $9.00 per hour before her injury, today she makes $8.00 per hour. She is not working full time as only part time work is offered. She works about 25 hours per week, or more if she is asked to as she is a dependable employee. She has no benefits in this job.

Claimant has only a high school diploma. She has learned sign language, but did not get a certificate. She is working on earning an Early Childhood Education certificate someday. She is single and her current part time job is her only source of income.

On cross-examination, claimant agreed she has had prior low back problems. She had a back injury when she previously worked at Comfort Inn. She received medical treatment for her back for that workers' compensation injury. She was treated by Rick Garrels, M.D. (Exhibit B, page 1) For that injury she received a rating of five percent impairment of the body as a whole. She was diagnosed with low back pain with right lumbar radiculitis. (Ex. B, p. 3) Dr. Garrels also diagnosed lumbar disc disease at L5-S1. Claimant was given a permanent lifting restriction of ten pounds.

Claimant later worked at Kindercare, where she performed job duties similar to her duties at Children's Choice. She left there to work at Children's Choice. She was still under her ten pound lifting restriction from the Comfort Inn injury.

In her deposition, she stated she was able to do all of her duties at Children's Choice. She also stated she complied with her doctor's restrictions from the Comfort Inn injury. She began at Children's Choice in October 2012. She floated to different positions, eventually working in the "baby boomers" room with 3 other workers. The children were between 12 and 18 months in age.

Claimant saw Bradley Johnson, M.D., on March 29, 2013, for her annual wellness exam. Back pain was noted at that visit. Dr. Johnson felt this pain was due to claimant's injury at Comfort Inn. (Ex. C, pp. 7-9)

In her deposition, she stated strenuous activities would lead to pain in her low back. She was taking Tylenol and other pain medications at the time of her deposition.

Claimant stated she stayed within her ten pound lifting restriction at Children's Choice, and was able to do all of her work activities.

She agreed there was no particular incident or event causing her pain. It was her day-to-day work, in her opinion. She has pled as a date of injury November 4, 2013. She had taken the Friday afternoon of that week off to help her daughter move, but she did not end up helping her move. She also requested the following Monday off by calling in that day, and she went to the doctor. Claimant told Karen Blend she was going to the doctor. She also told Ms. Blend she did not end up helping her daughter move.

When claimant started her employment at Children's Choice, she was given an employee's handbook that indicated any work injuries were to be treated at Concentra Health. But claimant instead sought treatment from her own physician, because the employer did not send her to Concentra. After she started medical treatment for this injury, she never attempted to return to Children's Choice because she had been fired. She did not ask for a light duty position.

She has worked at CarQuest for eight months. She usually works three or four days per week. She is a delivery driver, delivering car parts and supplies. Her duties include driving, and getting in and out of the car multiple times per day. She loves her job there. She is not looking for additional employment because she likes this job.

Her prior work includes working in the Davenport school system, but she does not feel she could return to that job. She plans to return to school in February 2015, but she has not chosen a school yet. Her hobbies include playing pool on a competitive team one day per week. She rides motorcycles, but has sold her bike.

On September 26, 2003, Dr. Garrels noted low back pain after claimant began doing light duty work sweeping. She did not recall falling and landing on her left hip.

Claimant was sent to Dr. Garrels for this injury for an evaluation. (Ex. B, pp. 5-6) He states her symptoms are essentially the same as when he evaluated her in 2011, and he assigned no permanent impairment or work restrictions for this injury.

She currently takes ibuprofen and medication for asthma. She is on Iowa Cares medical insurance program now, but was on the employer's health insurance at the time of her injury. She filed for unemployment benefits, but after a telephone hearing she was denied benefits.

On re-direct, she stated her pain is worse than when she worked at Children's Choice. Upon questioning by the undersigned, she indicated she avoided lifting children at Children's Choice because of her ten pound lifting restriction from her prior injury, and relied on co-workers to do the heavy lifting.

Claimant was sent to Richard Kreiter, M.D. in Davenport, a board-certified orthopedic surgeon, for an independent medical examination (IME). His findings will be further discussed in the conclusions of law section, below.

CONCLUSIONS OF LAW

It is noted that although the parties requested a briefing schedule at the conclusion of the hearing, claimant's attorney failed to file a post-hearing brief in this case.

The first issue in this case is whether the claimant sustained an injury arising out of and in the course of employment on November 4, 2013. The issue of whether claimant's current low back condition and any temporary or permanent disability is causally related to a work injury will be addressed concurrently.

The party who would suffer loss if an issue were not established has the burden of proving that issue by a preponderance of the evidence. Iowa Rule of Appellate Procedure 6.14(6).

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

The claimant has the burden of proving by a preponderance of the evidence that the injury is a proximate cause of the disability on which the claim is based. A cause is proximate if it is a substantial factor in bringing about the result; it need not be the only cause. A preponderance of the evidence exists when the causal connection is probable rather than merely possible. George A. Hormel & Co. v. Jordan, 569 N.W.2d 148 (Iowa 1997); Frye v. Smith-Doyle Contractors, 569 N.W.2d 154 (Iowa App. 1997); Sanchez v. Blue Bird Midwest, 554 N.W.2d 283 (Iowa App. 1996).

The question of causal connection is essentially within the domain of expert testimony. The expert medical evidence must be considered with all other evidence introduced bearing on the causal connection between the injury and the disability.

Supportive lay testimony may be used to buttress the expert testimony and, therefore, is also relevant and material to the causation question. The weight to be given to an expert opinion is determined by the finder of fact and may be affected by the accuracy of the facts the expert relied upon as well as other surrounding circumstances. The expert opinion may be accepted or rejected, in whole or in part. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); IBP, Inc. v. Harpole, 621 N.W.2d 410 (Iowa 2001); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995). Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417 (Iowa 1994). Unrebutted expert medical testimony cannot be summarily rejected. Poula v. Siouxland Wall & Ceiling, Inc., 516 N.W.2d 910 (Iowa App. 1994).

Claimant had a prior back injury when she worked for Comfort Inn as a housekeeper. She had a slip and fall on September 10, 2003. (Ex. B, p. 1) Claimant complained of left hip pain initially, but by September 26, 2003 reported pain in the right lower back.

Seven years later, claimant sought medical treatment for low back pain radiating into her right buttock in December 2010. (Ex. C, p. 1) She treated with Dr. Tilala. Claimant felt her pain was caused by her work at Comfort Inn.

Claimant also had an IME with Dr. Garrels for that injury. He found claimant to be complaining of low back pain, chest pain, shoulder pain and pain radiating into the back of her leg. (Ex. B, p. 1) Dr. Garrels diagnosed low back pain with right lumber radiculitis and lumbar degenerative disease at L5-S1. (Ex. B, p. 3) He assigned a rating of five percent permanent partial impairment to the body as a whole, and assigned a work restriction not to lift over ten pounds. (Ex. B, p. 4; Ex. A, p. 9) This work restriction meant she could no longer work at Comfort Inn. She then worked at KinderCare, and later, began working for Children's Choice, defendant employer. (Ex. A, p. 9, p. 16)

Claimant then alleges this work injury date of November 4, 2013. Claimant reported to Bradley Johnson, M.D., in March 2013 she was having back pain. This was thought to be from her Comfort Inn injury. (Ex. C, p. 7) Claimant, in her deposition, also stated she believed this back pain was due to her old Comfort Inn injury even though she had worked at Children's Choice for six months. (Ex. A, p. 21) Claimant testified her back pain from her Comfort Inn injury would come and go.

Claimant requested Friday, November 1, and Monday, November 4, 2013, off from work to help her daughter move. However, she testified she did not end up helping her daughter move on Friday. On Monday, she had severe back pain so she went to see her personal doctor, Dr. Tilala. She called in and told her employer she was going to the doctor for back pain, but did not say it was from work activities. She reported low back pain to Dr. Tilala, radiating into her leg to her knee. (Ex. 1, p. 1) She attributed her pain to bending, twisting, and standing at work.

Claimant then was seen by Jacob Steffes, M.D. She reported no specific incident, only that her back pain began October 31, 2013, but her sciatic nerve had been hurting for several months. (Ex. 2, p. 5) Later, in May 2014, Timothy Millea, M.D., noted claimant told him she had an acute injury in early November 2013 when she was lifting a child at work and felt immediate onset of pain in the low back, worse on the right.

Defendants point out claimant has been less than consistent in her descriptions of her injury. At her deposition, she stated there was no specific injury or event. (Ex. A, p. 18) She described an increase in pain over a month's time with her sciatic nerve pain causing back pain. She denied lifting. (Ex. A, p. 15) But at the hearing, claimant testified to lifting a child, apparently on the date of injury, to put the child on the changing table. This resulted in sciatic nerve pain in her lower right back and down into her leg. On cross-examination, she again denied a specific event. She also denied violating her prior 10 pound lifting restriction, relying on co-workers for lifting. She stated the children she lifted could weigh up to 40 pounds, although she told Dr. Kreiter they weighed up to 25 pounds. (Ex. 4, p. 7)

Defendants also assert questions are raised by the fact claimant requested the Friday before her date of injury off so she could help her daughter move. Presumably that would have involved lifting. Claimant testified she did not help her daughter move after all, due to her back pain. When she called her employer regarding taking the following Monday off, she stated she had back pain but did not attribute it to her work.

Finally, defendants remind the undersigned claimant had a prior low back injury. She testified her Comfort Inn injury was to her lower left back, but the medical records indicate it was to her left right back, the same area she now alleges has been injured or aggravated. Claimant did testify she experienced occasional flare-up of her prior back pain. Defendants contend her current lower right back pain is yet another flare-up of her prior injury, not a new injury.

Dr. Kreiter conducted an IME of claimant. He found:

> 1. Ms. Nichols' condition is caused by cumulative activities of significant physical stresses. At Quality Inn in Eldridge, she did aggressive housekeeping, followed by less physical responsibility at KinderCare, which was better tolerated, but then at the Children's Choice Learning Center in Eldridge, pushing carts in the forward flexed position, also leaning forward feeding children, and lifting them over fences, caused a right sciatica with significant increase in pain, and disability. In September 2010, the symptoms started, and then in the fall of 2013, she had a major episode of right sciatica with lifting at the Children's Choice Learning Center, and she had to be taken off work.
>
> . . . .

> 6. Ms. Nichols' condition of ill being is a cumulative injury causing a permanent aggravation of a pre-existing condition, leading to the right sciatica while working at Children's Choice Learning Center. This acute episode required extensive PT, time off from the work place, while healing occurred.

(Ex. 4, p. 1)

Thus, Dr. Kreiter does not mention an acute injury but finds a cumulative injury that aggravated her pre-existing back condition.

Dr. Garrels also conducted an IME. Claimant told Dr. Garrels she experienced an acute injury when lifting a child to a changing table. She felt a burning pain in the right lower back, which radiated into the leg. (Ex. B, p. 5) He felt her symptoms had not changed much from the first time he examined her years before for her Comfort Inn injury. He felt her pain was related to her pre-existing degenerative condition and her prior Comfort Inn injury. He did not feel she had suffered any permanent or even temporary aggravation of that prior injury. He assigned no impairment and no restrictions. (Ex. B, p. 6)

Thus, one doctor, Dr. Garrels, feels claimant's current low back pain is just a symptom of her prior back injury. Dr. Kreiter feels claimant's current back pain is an aggravation of her pre-existing low back condition, caused by her work activities. He appears to attribute her condition to cumulative activities, but also an acute incident in paragraph six of his IME report.

Claimant's plans to help her daughter move does raise some suspicion. But she credibly testified she did not help her daughter move. There is no contrary evidence in the record.

Claimant did have a prior back condition, which resulted in a prior rating of impairment and a lifting restriction. However, Dr. Kreiter was clearly aware of this and specifically found an aggravation of her prior condition.

Although claimant's testimony on how she hurt her back was not well developed by claimant's counsel, taken as a whole and coupled with the medical evidence it shows both a cumulative and traumatic injury that aggravated her prior back condition and resulted in a new work injury. It is concluded claimant has carried her burden of proof to show an injury arising out of and in the course of her employment on November 4, 2013, in the form of both a cumulative injury and a traumatic injury that aggravated a pre-existing condition. It is also concluded claimant had both temporary and permanent disability caused by this work injury.

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

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

Defendants stipulate claimant was off work from November 5, 2013 to February 12, 2014. Defendants will be ordered to pay healing period benefits from November 5, 2013 to February 12, 2014.

The next issue is the extent of the claimant's entitlement to permanent partial disability benefits. Claimant asserts the odd-lot doctrine.

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 Guyton v. Irving Jensen Co., 373 N.W.2d 101 (Iowa 1985), the Iowa court formally adopted the "odd-lot doctrine." Under that doctrine a worker becomes an odd-lot employee when an injury makes the worker incapable of obtaining employment in any well-known branch of the labor market. An odd-lot worker is thus totally disabled if the only services the worker can perform are "so limited in quality, dependability, or quantity that a reasonably stable market for them does not exist." Id., at 105.

Under the odd-lot doctrine, the burden of persuasion on the issue of industrial disability always remains with the worker. Nevertheless, when a worker makes a prima

facie case of total disability by producing substantial evidence that the worker is not employable in the competitive labor market, the burden to produce evidence showing availability of suitable employment shifts to the employer. If the employer fails to produce such evidence and the trier of facts finds the worker does fall in the odd-lot category, the worker is entitled to a finding of total disability. Guyton, 373 N.W.2d at 106. Factors to be considered in determining whether a worker is an odd-lot employee include the worker's reasonable but unsuccessful effort to find steady employment, vocational or other expert evidence demonstrating suitable work is not available for the worker, the extent of the worker's physical impairment, intelligence, education, age, training, and potential for retraining. No factor is necessarily dispositive on the issue. Second Injury Fund of Iowa v. Nelson, 544 N.W.2d 258 (Iowa 1995). Even under the odd-lot doctrine, the trier of fact is free to determine the weight and credibility of evidence in determining whether the worker's burden of persuasion has been carried, and only in an exceptional case would evidence be sufficiently strong as to compel a finding of total disability as a matter of law. Guyton, 373 N.W.2d at 106.

Dr. Kreiter's IME found:

> 2. My physical findings include painful, limited range of motion of the lumbosacral spine, tenderness in the lumbosacral area, in the right sciatic notch overlying the sciatic nerve, and marked hamstring tightness on straight leg raise.
>
> . . . .
>
> 4. Permanent restrictions are required, with only occasional lifting of 10 pounds from floor to waist. Standing, sitting, and walking should alternate, and should be limited. No bending or squatting, and rotating or twisting only very occasionally. A forward flexed position needs to be avoided because it places too much force on the disc and facet joints of the lumbar spine.
>
> 5. Penny does have permanent impairment as a result of the cumulative trauma to her lower back. We will reference the AMA Guides, 5th Edition, Guide to Permanent Impairment. Page 384, table 15-3, DRE of the lumbar category II, would be an 8% impairment of the whole person.

(Ex. 4, p. 1)

Thus, Dr. Kreiter assigns an eight percent permanent partial impairment for this injury, along with a work restriction not to lift over ten pounds. (Ex. 4, p. 1) However, claimant already had a ten pound lifting restriction from her prior injury.

Claimant's termination of employment has not been shown to be related to her work injury, but rather was due to other factors. She has now found other employment,

which pays about a dollar an hour less than her work for this employer. She is therefore clearly not totally disabled, under the odd-lot doctrine or normal disability criteria. She has work skills and abilities with which she can find employment in the future. She is also pursuing further education, to her credit. However, she will be at a disadvantage when competing for future jobs with non-impaired applicants. Her age of 54 will also work against her.

Claimant is not totally disabled, as shown by the fact she is in fact working at a new job. Her new job pays only slightly less than the job she had when injured. There are many other jobs she can do. It is concluded claimant has suffered a work injury and has incurred additional disability, but it must be said her additional disability is not great. She already had a low back condition that was indeed worsened by this injury, but not to a large extent. It is concluded claimant has, as a result of her work injury, an industrial disability of 20 percent.

The next issue is whether the claimant is entitled to payment of medical expenses pursuant to Iowa Code section 85.2.

Claimant submitted her medical expenses in Exhibits 5 through 8. Defendants object to paying for her medical expenses because they were not authorized. Claimant went to her own personal physician instead, without seeking authorization from the employer. The employee handbook directed employees to seek treatment for any work injury from Concentra.

However, defendants denied liability for this injury. They are not entitled to control the medical care while also denying liability for the condition being treated. Lack of authorization is therefore not a defense available to defendants.

Defendants will be ordered to pay the medical expenses submitted by claimant.

The next issue is whether the claimant is entitled to an independent medical evaluation under Iowa Code section 85.39.

Defendants offered the opinion of Dr. Garrels, who concluded claimant had no disability from this injury. Claimant was therefore entitled to an independent medical examination under Iowa Code section 85.39. Defendants will be ordered to reimburse claimant for the costs of Dr. Kreiter's IME.

The next issue is whether the claimant is entitled to penalty 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.

Again, claimant's attorney failed to file a post-hearing brief. There is only a reference to "86.13 penalties" on the hearing report. The undersigned has no way to ascertain what conduct on the part of defendants claimant feels was unreasonable and calls for the imposition of penalty benefits. In addition, the liability of defendants was fairly debatable, given Dr. Garrels' opinions. Claimant has failed to carry her burden of proof to show that penalty benefits are appropriate.

ORDER

THEREFORE IT IS ORDERED:

Defendants shall pay unto the claimant healing period benefits from November 5, 2013 to February 12, 2014, at the rate of two hundred eleven and 84/100 dollars ($211.84) per week.

Defendants shall pay unto the claimant one hundred (100) weeks of permanent partial disability benefits at the rate of two hundred eleven and 84/100 dollars ($211.84) per week from February 13, 2014.

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 27th day of February, 2015.

JON E. HEITLAND
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

Copies To:

Peter M. Soble
Attorney at Law
3026 – 3rd St.
Moline, IL 61265-8723
peter41@earthlink.net

Kent M. Smith
Attorney at Law
1225 Jordan Creek Pkwy., Ste. 108
West Des Moines, IA 50266-0036
ksmith@scheldruplaw.com

JEH/srs

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.