BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

KAREN HIGHT,

Claimant,

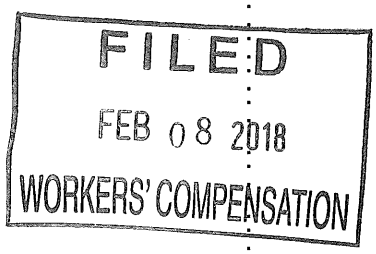
vs.

ENVOY AIR,

Employer,

UNKNOWN,

Insurance Carrier,
Defendants.




File No. 5059508

ARBITRATION

DECISION

Head Note Nos.: 1402.30, 1802, 1803, 2209, 2501, 2502, 2907, 2701, 3002, 4000.2

STATEMENT OF THE CASE

Karen Hight, claimant, filed a petition in arbitration and seeks workers' compensation benefits from defendant, Envoy Air, as the employer. The applicable insurance carrier, if any, is not alleged or known.

Claimant filed her original notice and petition in this case on August 30, 2017. She demonstrated service upon the employer on September 8, 2017. However, the employer never filed an appearance or answer in these proceedings.

On November 28, 2017, claimant filed a motion for default. Claimant demonstrated compliance with the Iowa Rules of Civil Procedure. Defendants made no attempt to respond to the motion for default.

On December 14, 2017, the undersigned entered a ruling on claimant's motion for default. It was noted that no appearance or answer was on file by defendant. It was noted that defendant filed no resistance to the motion for default. Default was entered against Envoy Air and this case was scheduled for a default hearing to occur on January 26, 2018. All further activity on behalf of defendant was closed.

The undersigned gave claimant the option of submitting exhibits and having this case decided on a written record, if she chose to waive the telephonic default hearing. On January 24, 2018, counsel for claimant filed exhibits in lieu of attending the default hearing. Claimant has waived the right to a live or telephonic hearing and has requested that this case be submitted upon and decided upon the written evidence she has submitted. Claimant's request is reasonable under the circumstances. This case is considered fully submitted as of the date of the scheduled default hearing, January 26, 2018.

Claimant submitted exhibits 1 through 7. Those exhibits are received. The evidentiary record is closed.

## ISSUES

1. The extent of claimant's entitlement to temporary disability, or healing period, benefits.

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

3. Claimant's entitlement to past medical expenses contained in Exhibit 4.

4. Whether claimant is entitled to reimbursement for her independent medical evaluation pursuant to Iowa Code section 85.39.

5. Whether claimant is entitled to an order for alternate medical care.

6. Whether penalty benefits should be imposed against defendant for unreasonable delay or denial of weekly benefits through the date of hearing.

7. Whether claimant's costs should be assessed against defendant.

## FINDINGS OF FACT

Having considered all of the evidence and testimony in the record, I find the following facts:

Karen Hight is a 58-year-old woman. She was single and entitled to only one exemption in June 2017. Ms. Hight is highly educated, having obtained a high school diploma, an associate in arts degree, a bachelor's of science degree, and a masters in science degree. She also has additional graduate school studies in history and holds a Master Educator license in the State of Iowa. She has previously worked as a teacher in the Des Moines Public Schools. (Exhibit 1)

However, in 2015, Ms. Hight quit working as a school teacher and took a position part-time for Envoy Air at the Des Moines Airport. Ms. Hight began her employment with Envoy Air expecting to serve as a counter representative checking passengers into their flights. However, she trained in multiple areas of the organization and was ultimately placed working on the ramp and working outside loading and unloading airplanes. (Exhibit 1)

Ms. Hight was required to assist planes in their docking and undocking procedures, which required lifting heavy equipment and hooks. She was required to lift and transport passenger luggage on and off planes. (Exhibit 1)

During a plane loading procedure, Ms. Hight injured her left knee. (Exhibit 1) Ms. Hight has a history of a left knee injury approximately 15 years ago. She required extensive physical therapy for that left knee injury. However, her knee healed and claimant had no further problems with the left knee before commencing her employment at Envoy Air. (Ex. 2, p. 5)

As a result of her repetitive lifting duties, Ms. Hight developed bilateral elbow epicondylitis. She describes the initial pain in her elbows developing within weeks of being placed to work on the ramp. She also developed a back injury as a result of her repetitive lifting work and this injury became known to her in June 2017. (Exhibit 1)

Ms. Hight continues to experience low back pain. She has been told that she probably sustained a herniated disc in her low back. She attempted physical therapy with little benefit. She continues to have symptoms and has reduced her activities since June 2017. (Exhibit 1)

Claimant worked five or six days a week for Envoy Air and worked a five hour shift per day and testified via affidavit that she averaged working 25 hours per week. She earned $9.50 per hour. I find that claimant has proven she earned $237.50 per week working for Envoy Air. (Exhibit 1)

Ms. Hight also works part-time in her boyfriend's restaurant. However, she has cut back on the number of hours she works in the restaurant since June 2017 because of her symptoms. She is not able to lift anything significant according to her affidavit. (Exhibit 1)

Claimant states that she is unable to lift anything without pain. She limps since the injuries and now requires the use of a cane. She has difficulties sleeping and experiences shooting pains down her leg occasionally, as well as leg spasms. She describes lack of arm strength since the injuries and difficulties bending over. She concurs with the recitation of symptoms and the imposition of permanent restrictions outlined by her independent medical evaluator, Sunil Bansal, M.D. (Exhibit 1)

Claimant has considered alternate employment opportunities. However, she does not believe she can return to education because she could not handle the physical demands of that job in her current condition. She has been applying for office type jobs, though she does not believe she is qualified for those positions. She now relies upon her IPERS pension benefit and alimony payments for income. (Exhibit 1)

Beginning in April 2016, claimant sought medical care for her elbows and knees. The initial medical records describe the development of symptoms in her elbows and left knee after commencing her employment activities at Envoy Air. Bilateral medial epicondylitis was diagnosed and claimant was provided a right elbow injection as well as physical therapy and tennis elbow straps for her symptoms. An MRI of her left knee was also ordered. (Ex. 2, pp. 1-2) The knee MRI demonstrated a lateral meniscus tear,

but no medial meniscus tear, as well as a loose body in the knee joint and degenerative changes. (Ex. 2, p. 3; Ex. 3)

The injection in her right elbow helped her symptoms until she bumped the elbow again. Ultimately, she was not recommended for surgery on her elbows or left knee and physical therapy continued. However, by June 2017, her low back symptoms worsened and she developed radiating pain to her right foot. (Ex. 2, p. 2; Ex. 3) An MRI was recommended and performed, which demonstrated disc desiccation at the L2 through S1 levels. The MRI demonstrated a probable synovial cyst as well as possible nerve root irritation or impingement and potential annular fissures. (Ex. 2, p. 3) A right-sided L5-S1 epidural steroid injection was performed for her low back pain in late June 2017. (Ex. 2, p. 4; Ex. 3)

Ms. Hight was also evaluated by a neurosurgeon, David Boarini, M.D. Dr. Boarini recommended and offered to perform low back surgery. However, claimant had no health insurance and could not afford the surgical charges. She has not had the recommended back surgery. (Ex. 2, p. 6)

Claimant continues to experience pain in both of her elbows, including constant aching. She develops sharp, shooting pains if she moves her arms in a specific manner. Occasionally, she develops numbness and tingling of her bilateral arms, including her hands and all of her fingers. (Ex. 2, p. 6)

Ms. Hight has constant back pain that varies in intensity depending on her activities. She has radiating pain into her right hip, down her right leg and into her toes. She also experiences numbness and tingling in her toes. (Ex. 2, p. 6)

With respect to her left knee, claimant continues to have occasional left knee pain, as well as swelling and weakness. Dr. Bansal describes that her knee has given way and that claimant falls occasionally. Claimant has also experienced her left knee locking up a couple of times as well as popping and clicking in the knee. (Ex. 2, p. 6)

Dr. Bansal diagnosed claimant with bilateral medial epicondylitis in her elbows. He diagnosed a left lateral meniscus tear in claimant's left knee as well as an L5-S1 disc extrusion in claimant's low back. (Ex. 2, p. 9) Dr. Bansal causally connects each of these diagnoses to claimant's repetitive work activities at Envoy Air. (Ex. 2, pp. 10-11)

Dr. Bansal declared claimant to be at maximum medical improvement for her elbows as well as for her left knee. However, he recommended ongoing treatment with medications and a home exercise program for the elbows. For the left knee, Dr. Bansal recommended claimant be re-evaluated for potential surgical repair of the lateral meniscus tear. (Ex. 2, pp. 11-12)

With respect to her low back, Dr. Bansal opined that claimant requires additional treatment, including evaluation with a spine surgeon, potential medication management of symptoms, epidural injections, and treatment through a pain specialist. (Ex. 2, p. 11) However, at this point in time, claimant has not elected to proceed with surgery and her conditions are not likely to improve without surgical or other medical intervention. Therefore, I conclude that it is proper to assess her permanent disability related to all three injuries.

Dr. Bansal assigns a two percent permanent impairment of the whole person as a result of claimant's right elbow injury. He assigns a ten percent permanent impairment of the whole person as a result of claimant's low back injury. He also assigns a one percent permanent impairment of the whole person as a result of claimant's left knee injury. Perhaps more importantly, Dr. Bansal recommends permanent work restrictions that include no lifting over 10 pounds occasionally with the right arm. Dr. Bansal imposes a similar 10-pound occasional lifting limitation on claimant's left arm. He opines that claimant cannot perform frequent bending or twisting, cannot walk more than 60 minutes at a time with her cane and he recommends she avoid multiple steps, stairs, or ladders. (Ex. 2, p. 13)

Dr. Bansal's medical causation, treatment recommendations, restrictions and impairment ratings are unrebutted opinions. They are accepted as accurate. I find that claimant has proven she sustained injuries to her left elbow, right elbow, left knee, and low back as a result of her work activities and arising out of and in the course of her employment with Envoy Air. I find that the cumulative work injuries manifested on or about June 29, 2017.

I find that claimant has sustained permanent injuries to each of her injured body parts. I find that she has sustained permanent impairment as opined by Dr. Bansal and that she requires the permanent work restrictions imposed by Dr. Bansal. Claimant is not capable of physically returning to work at Envoy Air or a similar employment. She is likely precluded from a number of positions, potentially including her prior position as a school teacher.

Ms. Hight was off work, was not capable of substantially similar employment, and was not at maximum medical improvement between June 29, 2017 and January 14, 2018. Although she may require future medical treatment, including a potential surgery on her left knee and/or low back, she is currently at maximum medical improvement pending any further medical evaluations. In this sense, I accept Dr. Bansal's opinions that claimant is at maximum medical improvement unless and until surgical intervention is obtained on her low back.

Considering claimant's age, restrictions, permanent impairment, the situs and severity of her injuries, her educational background, employment background, inability to return to work at Envoy Air or similar jobs, as well as her motivation level, ability to retrain, her ability to perform some employment at a restaurant, and all other industrial

disability factors outlined by the Iowa Supreme Court, I find that Ms. Hight has proven she sustained a 60 percent loss of future earning capacity as a result of her work related injuries at Envoy Air.

As a result of the injuries sustained while employed at Envoy Air, Ms. Hight has also incurred medical expenses contained at Exhibit 4. The medical expenses from The Iowa Clinic, P.C. (including a Blue Cross/Blue Shield Explanation of Benefits and statement from The Iowa Clinic), contained in Exhibit 4, appear to be related to treatment of claimant's low back symptoms on June 22, 2017 and June 29, 2017. These are causally related to the work injuries. Similarly, the emergency room charges contained on a statement from Mercy Medical Center and for physician charges noted on a statement from Des Moines River Physicians, L.L.C., for treatment on June 12, 2017 are causally related to the work injuries. I find that all of the foregoing medical care and expenses were reasonable and necessary.

However, Exhibit 4 contains a medical billing statement from Mercy Clinics and Physicians for treatment on June 2, 2017. Those charges appear to include an office visit and an x-ray of claimant's foot. There is no evidence that claimant sustained a foot injury or required a foot x-ray as a result of her work injuries. The medical billing statement totaling an amount due of $373.80 is found not to be related to claimant's work injuries at Envoy Air.

The total medical expenses incurred by claimant that are proven to be causally related to the work injuries through the date of this default hearing are $12,481.21. (Ex. 4)

Defendant has not offered claimant any medical care in this case. Defendant's conduct in this regard is not reasonable and reasonable care has not been offered. Defendant has abandoned claimant's medical care.

Claimant seeks future medical care for her work injuries. Her request is reasonable.

Ms. Hight seeks award of an independent medical evaluation fee from Dr. Bansal. I find that Dr. Bansal's fee is reasonable. However, I find that defendant did not obtain an evaluation of permanent impairment in this case.

Ms. Hight also seeks an award of penalty benefits. I find that defendant has not demonstrated payment of any weekly benefits to date. Claimant has established a delay in benefits. Defendant offers no excuse, explanation, or basis for the delay or denial of benefits. Defendant's delay or denial of benefits is found to be unreasonable.

Claimant was not paid any weekly benefits between June 29, 2017 and the date of the scheduled default hearing on January 26, 2018. This is a period of 30 weeks and 2 days. Therefore, I find that 30 weeks of benefits accrued but were not paid between

June 29, 2017 and January 24, 2018. At the weekly rate of $197.92, I find that a total of $5,937.60 in weekly benefits have been unreasonably denied by defendants.

## CONCLUSIONS OF LAW

Claimant asserts she sustained injuries to her left elbow, right elbow, left knee, and low back on June 29, 2017. A personal injury contemplated by the workers' compensation law means an injury, the impairment of health or a disease resulting from an injury which comes about, not through the natural building up and tearing down of the human body, but because of trauma. The injury must be something that acts extraneously to the natural processes of nature and thereby impairs the health, interrupts or otherwise destroys or damages a part or all of the body. Although many injuries have a traumatic onset, there is no requirement for a special incident or an unusual occurrence. Injuries which result from cumulative trauma are compensable. Increased disability from a prior injury, even if brought about by further work, does not constitute a new injury, however. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); Ellingson v. Fleetguard, Inc., 599 N.W.2d 440 (Iowa 1999); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995); McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985). An occupational disease covered by chapter 85A is specifically excluded from the definition of personal injury. Iowa Code section 85.61(4) (b); Iowa Code section 85A.8; Iowa Code section 85A.14.

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

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

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

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

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).

Having found that claimant proved by a preponderance of the evidence that she sustained a right elbow injury, a left elbow injury, a left knee injury, and a back injury as a result of her work activities and that the injuries manifested themselves on or about June 29, 2017, I conclude that claimant has proven compensable work injuries.

Having found that these injuries are work related and concluded that they are compensable, I must consider claimant's claim for healing period benefits. On the hearing report, claimant asserts a request for healing period benefits from June 29, 2017 through January 14, 2018.

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, 312N.W.2d 60 (Iowa App. 1981). Healing period benefits can be interrupted or intermittent. Teel v. McCord, 394 N.W.2d 405 (Iowa 1986).

In this case, I found that Ms. Hight was not at maximum medical improvement, was not capable of substantially similar work, and did not work between June 29, 2017 and January 14, 2018. Therefore, she is entitled to healing period benefits during this period of time. Iowa Code section 85.34(1).

Ms. Hight asserts that permanent disability benefits should commence on January 15, 2018. Having accepted Dr. Bansal's opinion and found that claimant is at maximum medical improvement unless and until she obtains a surgical consultation and future surgery on her low back, I conclude that it is appropriate to determine and award permanent disability at this time.

Claimant's injury includes an injury to her low back as well as scheduled member injuries to her arms and left leg. The low back injury is an unscheduled injury compensated pursuant to Iowa Code section 85.34(2)(u).

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.

Having considered the relevant industrial disability factors outlined by the Iowa Supreme Court, I found that Ms. Hight has proven she sustained a 60 percent loss of future earning capacity as a result of her work related injuries. A 60 percent loss of future earning capacity entitles claimant to a 60 percent industrial disability award. Therefore, I conclude that claimant is entitled to an award of 300 weeks of permanent partial disability benefits as a result of her work injuries at Envoy Air. Iowa Code section 85.34(2)(u).

Ms. Hight contends that the permanent disability benefits should commence on January 15, 2018. I concur with her assertion. Permanent disability benefits will be ordered to commence on January 15, 2018. Iowa Code section 85.34(1).

Claimant asserts that she is entitled to a compensation rate of $201.69 per week. I disagree with this assertion.

The weekly benefit amount payable to an employee shall be based upon 80 percent of the employee's weekly spendable earnings, but shall not exceed an amount, rounded to the nearest dollar, equal to 66-2/3 percent of the statewide average weekly wage paid employees as determined by the Department of Workforce Development. Iowa Code section 85.37.

The weekly benefit amount is determined under the above Code section by referring to the Iowa Workers' Compensation Manual in effect on the applicable injury date. Having found that claimant was single, entitled to one exemption, had a gross average weekly wage of $237.50, and using the Iowa Workers' Compensation Manual (p. 99) with effective dates of July 1, 2016 through June 30, 2017, I determine that the applicable weekly rate for both temporary total disability (healing period) and permanent partial disability benefits is $197.92. Iowa Code section 85.36(6); Iowa Code section 85.37. This weekly rate is the spendable weekly earnings according to the applicable manual. It also represents the minimum weekly rate at which permanent disability benefits are payable pursuant to Iowa Code section 85.37.

Ms. Hight seeks an award for past medical expenses. The employer shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance, and hospital services and supplies for all conditions compensable under the workers' compensation law. The employer shall also allow reasonable and necessary transportation expenses incurred for those services. The employer has the right to choose the provider of care, except where the employer has denied liability for the injury. Section 85.27. Holbert v. Townsend Engineering Co., Thirty-second Biennial Report of the Industrial Commissioner 78 (Review-Reopening October 1975).

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

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

It is said that "actions speak louder than words." When a licensed physician prescribes and actually provides a course of treatment, doing so manifests the physician's opinion that the treatment being provided is reasonable. A physician practices medicine under standards of professional competence and ethics. Knowingly providing unreasonable care would likely violate those standards. Actually providing care is a nonverbal manifestation that the physician considers the care actually provided to be reasonable. A verbal expression of that professional opinion is not legally mandated in a workers' compensation proceeding to support a finding that the care provided was reasonable. The success, or lack thereof, of the care provided is evidence that can be considered when deciding the issue of reasonableness of the care. A treating physician's conduct in actually providing care is a manifestation of the physician's opinion that the care provided is reasonable and creates an inference that can support a finding of reasonableness. Jones v. United Gypsum, File 1254118 (App. May 2002); Kleinman v. BMS Contract Services, Ltd., File No. 1019099 (App. September 1995); McClellon v. Iowa Southern Utilities, File No. 894090 (App. January 1992). This inference also applies to the reasonableness of the fees actually charged for that treatment.

Having concluded that claimant has proven compensable work injuries, I further conclude that defendant is responsible for providing claimant's medical care, including payment of past medical expenses. Iowa Code section 85.27. I found that the medical expenses incurred on June 2, 2017, including an office visit and foot x-ray at Mercy Clinics and Physicians was not proven to be related to claimant's work injuries. Therefore, those medical expenses will not be ordered paid by defendant.

Having found that the remainder of the medical expenses contained in Exhibit 4 are causally related to claimant's work injuries and that those medical expenses were reasonable and necessary, I conclude that defendant should be ordered to reimburse claimant for any out-of-pocket expenses, reimburse any third-party payor that has paid medical expenses on behalf of claimant, and should be ordered to pay claimant or the medical providers for any outstanding medical expenses. Therefore, I will order the above and generally order that defendant hold claimant harmless for those medical

expenses contained in Exhibit 4 with the exception of the June 2, 2017 medical expenses incurred at Mercy Clinics and Physicians.

Ms. Hight also seeks alternate medical care given that defendant has not authorized or provided any medical care to date for her work injuries. As noted above, defendant is obligated to provide claimant with medical care for her injuries.

An application for alternate medical care is not automatically sustained because claimant is dissatisfied with the care he has been receiving. Mere dissatisfaction with the medical care is not ample grounds for granting an application for alternate medical care. Rather, the claimant must show that the care was not offered promptly, was not reasonably suited to treat the injury, or that the care was unduly inconvenient for the claimant. Long v. Roberts Dairy Co., 528 N.W.2d 122 (Iowa 1995).

The employer has the right to choose the provider of care, except where the employer has denied liability for the injury. Section 85.27; Holbert v. Townsend Engineering Co., Thirty-second Biennial Report of the Industrial Commissioner, 78 (Review-Reopening 1975).

"Determining what care is reasonable under the statute is a question of fact." Long v. Roberts Dairy Co., 528 N.W.2d 122, 123 (Iowa 1995).

In this case, defendant has not provided any medical care for claimant's work injuries. Claimant has identified additional medical care that should be pursued. Specifically, claimant has identified surgical consultation for the left knee, surgical consultation for the low back, potential injections for the low back, medication management for the elbows, all as future medical care that may be needed. Defendant's lack of care is not reasonable nor compliant with Iowa Code section 85.27. Claimant's request for alternate medical care will be granted and defendant will be ordered to provide and pay for causally related future medical care, including but not limited to surgical consultations for the left knee and low back, medication management and ongoing evaluation and care of the elbows, as well as other potential medical management of the low back and left knee as warranted after surgical evaluation.

Given that defendant has provided no medical care for these injuries to date, I found that defendant abandoned claimant's medical care and needs. Defendant has forfeited any right to direct claimant's medical care. Claimant will be ordered to be permitted to select and direct her own medical care moving forward.

Ms. Hight also requests award of her independent medical evaluation charges with Dr. Bansal pursuant to Iowa Code section 85.39. 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).

In this instance, defendant has not authorized any medical treatment, has not chosen any of the medical providers, and has not obtained a permanent impairment through a physician of its choosing. Claimant has not established the pre-requisites of Iowa Code section 85.39 to qualify for reimbursement of Dr. Bansal's independent medical evaluation charges. Therefore, claimant's request for reimbursement of Dr. Bansal's charges pursuant to Iowa Code section 85.39 must be denied. Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839 (Iowa 2015).

Ms. Hight also asserts a claim for penalty benefits on the hearing report. 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.

In this case, claimant has established that a delay in benefits has occurred. Defendant offers no evidence that it has paid claimant any weekly benefits. Defendant offers no evidence to establish that the basis for its delay or denial of weekly benefits was based upon any type of investigation, that the basis was reasonable, or that the basis was conveyed to claimant. Iowa Code section 86.13(4). Defendant has failed to establish its delay or denial is reasonable in any manner.

I conclude that claimant is entitled to an award of penalty benefits. Having introduced no justification for its delay or denial of benefits, I conclude that a penalty award of $2,968.80 is justified and warranted under the circumstances of this case. Iowa Code section 86.13(4).

Finally, claimant also seeks assessment of her costs. Assessment of costs is a discretionary function of the agency. Iowa Code section 86.40. In this instance, defendant failed to appear for any of the proceedings. Claimant was forced to file a petition with this agency and incur costs related to this case to establish liability. I conclude that it is proper to assess claimant's costs to the extent permitted.

Claimant seeks the cost of her filing fee ($100.00). This is reasonable and is assessed pursuant to 876 IAC 4.33(7).

Ms. Hight also seeks assessment of the cost of her independent medical evaluation. Having denied this expense as an independent medical evaluation pursuant to Iowa Code section 85.39, it is appropriate to consider it as a cost pursuant to 876 IAC 4.33(6).

In Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839 (Iowa 2015), the Iowa Supreme Court concluded that the expense of obtaining a medical report in lieu of testimony by a medical expert is a taxable cost pursuant to Iowa Code section 86.40 and 876 IAC 4.33(6). However, the Court held that only the expense of obtaining the written report is taxable and that the expense related to obtaining the medical examination is not a taxable cost.

In this case, Dr. Bansal has provided a breakdown of his expenses related to the physical examination and the expense of drafting the report. Dr. Bansal charged $2,359.00 for his services in drafting the medical report. I conclude that it is proper to tax $2,359.00 as a cost pursuant to 876 IAC 4.33(6).

However, I conclude that the expense of Dr. Bansal's medical examination is not a taxable cost. Therefore, I decline to tax the remainder of Dr. Bansal's charges.

## ORDER

THEREFORE, IT IS ORDERED:

Defendant shall pay claimant healing period benefits from June 29, 2017 through January 14, 2018.

Defendant shall pay claimant three hundred (300) weeks of permanent partial disability benefits commencing on January 15, 2018.

All weekly benefits shall be paid at the rate of one hundred ninety-seven and 92/100 dollars ($197.92) per week.

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

Defendant shall reimburse claimant for all out-of-pocket medical expenses, reimburse any third-party payor for past medical expenses paid on behalf of claimant, and satisfy any outstanding past medical expenses by either paying those funds directly to claimant or to the medical providers, but in all events shall hold claimant harmless for the past medical expenses detailed in Exhibit 4 totaling twelve thousand four hundred eighty-one and 21/100 dollars ($12,481.21).

Defendant is not responsible for payment, reimbursement, or satisfaction of the medical expenses incurred at Mercy Clinics and Physicians on June 2, 2017 and those charges are not included in the amount noted above.

Defendant shall provide and pay for causally connected future medical care for claimant's left elbow, right elbow, left knee and low back.

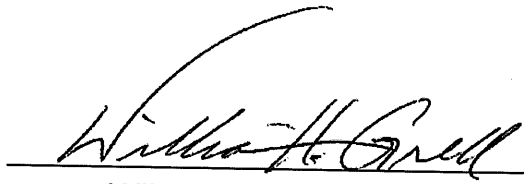
Claimant is permitted to direct her own medical care given defendant's abandonment of its responsibilities and right to direct care.

Defendant shall pay penalty benefits in the amount of two thousand nine hundred sixty-eight and 80/100 dollars ($2,968.80) for benefits delayed or denied before the January 26, 2018 default hearing.

Defendant shall reimburse claimant's costs totaling two thousand four hundred fifty-nine and 00/100 dollars ($2,459.00).

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

Signed and filed this 8th day of February, 2018.



WILLIAM H. GRELL
DEPUTY WORKERS'
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WHG/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.