BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

KARLA R. KERN,

Claimant,

vs.

FENCHEL DOSTER & BUCK, P.L.C.,

Employer,

and

PHARMACISTS MUTUAL INSURANCE COMPANY,

Insurance Carrier,
Defendants.

File No. 5062419

ARBITRATION

DECISION

Head Note Nos.: 1402.30; 1802; 1803; 2501; 2907; 4000.2

STATEMENT OF THE CASE

Karla Kern, claimant, filed a petition in arbitration and seeks workers' compensation benefits from defendants, Fenchel, Doster & Buck, P.L.C., as the employer, and Pharmacists Mutual Insurance Company, as the insurance carrier. Hearing was held on August 7, 2017.

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

The evidentiary record includes Joint Exhibit 1, Claimant's Exhibits I and II, and Defendants' Exhibit A. All exhibits were received without objection.

Claimant testified on her own behalf and called her husband, Dean Kern, to testify. No other witnesses were called to testify live.

At the conclusion of the arbitration hearing, counsel for the parties requested the opportunity to file post-hearing briefs. Their request was granted. The parties filed simultaneous post-hearing briefs on August 21, 2017, at which time this case was considered fully submitted to the undersigned.

ISSUES

The parties submitted the following disputed issues for resolution:

1. Whether claimant sustained an injury that arose out of and in the course of her employment on May 9, 2016.

2. Whether the alleged injury caused temporary disability and, if so, the extent of claimant's entitlement to temporary disability, or healing period benefits.

3. Whether defendants are entitled to credit for wages paid in lieu of benefits during claimant's period of absence.

4. Whether the alleged injury caused permanent disability and, if so, the extent of claimant's entitlement to permanent disability benefits.

5. Whether claimant is entitled to reimbursement, payment, or an order requiring defendants to hold her harmless for past medical expenses submitted, including claims for lost wages of her spouse as well as medical mileage and meal reimbursement.

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

7. Whether claimant is entitled to alternate medical care.

8. Whether defendants should be ordered to pay penalty benefits for an alleged unreasonable delay or denial of benefits and, if so, the extent of such penalty award.

9. Whether costs should be assessed against either party.

FINDINGS OF FACT

The undersigned, having considered all of the evidence and testimony in the record, recognizing that there may be competing or contradictory facts within this evidentiary record, finds the following facts:

Karla Kern asserts claims for various cumulative injuries against her employer, Fenchel, Doster & Buck, P.L.C. Ms. Kern began working as a legal secretary for the employer in 2004. She worked as a legal secretary at two prior law firms before working for this employer, Doster.

Ms. Kern worked for the Mark Soldat Law Firm from 1996 through 2003. During her period of employment with the Mark Soldat Law Firm, Ms. Kern developed symptoms consistent with carpal tunnel syndrome in each of her wrists. In 2003, she

reported the injury as a work related injury and received appropriate conservative medical care. She was ultimately released from medical care in 2004 and allowed to return to full-duty work as a legal secretary. Although she testified her symptoms continued, Ms. Kern did not seek any medical treatment between her release in 2004 and 2006.

In 2004, Ms. Kern obtained new employment as a legal secretary at another law firm. However, she only remained employed at that firm for approximately one year. She did not report a work injury or seek additional treatment while working for this law firm.

Claimant then commenced her employment with Fenchel, Doster & Buck, P.L.C., in 2004 and continued to work at the law firm through the date of hearing. While working for this employer in 2006, she had some left thumb symptoms and sought treatment. She was offered a splint but had no significant or invasive treatment for the left thumb at that time.

In 2013, claimant developed worsening symptoms in her wrists and left thumb. Dean Kern, claimant's husband, provided credible testimony that claimant's symptoms worsened mainly during the year before her surgery, which occurred on March 21, 2017. (Dean Kern Testimony; Joint Exhibit, p. 38) Ms. Kern described shooting pains from her right shoulder down to her right hand. She testified that the firm hired another attorney in 2011, which added to her work duties. (Claimant's Testimony)

Ms. Kern also testified that one of the attorneys in the firm took on a new client in 2012 or 2013 and that the firm became involved in a very large lawsuit. This new lawsuit brought with it a significant increase in work and a significant increase in the amount of secretarial work Ms. Kern was required to perform. (Claimant's Testimony)

Ms. Kern candidly conceded that she had always had ongoing symptoms and problems with her hand since 2003. However, she credibly testified that she began experiencing clicking and trigger thumb symptoms in 2014 and sought medical treatment.

Ms. Kern's family medical provider, Mark Davis, PA-C, evaluated her on May 20, 2016, reviewed some x-rays that were performed, and diagnosed her with a trigger thumb of the left hand, CMC arthritic changes. Mr. Davis referred Ms. Kern to an orthopaedic specialist, Rene F. Recinos, M.D., on that date. (Joint Ex., p. 15) Ms. Kern credibly testified that she first realized the seriousness of her problems when she was evaluated by Mr. Davis on May 20, 2016 and learned of the diagnosis and need for an orthopaedic referral. (Claimant's testimony) I accept Ms. Kern's testimony in this regard and find that claimant's bilateral carpal tunnel, left thumb trigger finger, and left CMC joint arthritis, all manifested on May 20, 2016.

Dr. Recinos's physician assistant evaluated claimant on June 2, 2016. She diagnosed claimant with a left thumb trigger finger, issued her a new thumb brace, but advised Dr. Recinos would not perform surgery unless claimant stopped smoking. (Joint Ex., p. 31) Interestingly, the physician's assistant noted that she "discussed the cause of this related to her work." (Joint Ex., p. 31)

When her symptoms increased and after surgery was suggested as an option by Dr. Recinos's office, claimant reported her symptoms and conditions to her employer as work related. Defendants in this case initiated an investigation, which took some time but appears to be reasonable and appropriate in its scope and timeliness. The employer obtained applicable and relevant medical records documenting claimant's prior history of treatment for bilateral carpal tunnel syndrome. The employer explained its delays for claimant in contemporaneous communications.

Ultimately, the employer scheduled claimant to be evaluated by an orthopaedic surgeon, Benjamin S. Paulson, M.D. Dr. Paulson evaluated claimant on August 25, 2016. He diagnosed claimant with trigger fingers of the left and right thumbs. He diagnosed bilateral carpal tunnel syndrome, as well as osteoarthritis of the first carpometacarpal in both of Ms. Kern's hands. With respect to the cause of these conditions, Dr. Paulson concluded:

> With regard to causation, within reasonable medical certainty, her job working as a typist working in a law office for approximately 12 years neither caused nor materially aggravated her diagnosis of carpal tunnel syndrome, thumb osteoarthritis, or bilateral trigger thumbs. I would say she is at baseline from these conditions and she would have had these same conditions whether she worked or not.

(Defendants' Ex. A, p. 3)

After receiving Dr. Paulson's medical causation opinion, the employer denied liability for claimant's injuries and sent her appropriate notice of the denial, including an explanation of the defendants' reliance upon Dr. Paulson's opinions. (Claimant's Ex. II, pp. 31-32) I find that defendants' reliance upon Dr. Paulson's causation opinion was reasonable. I find that the employer contemporaneously conveyed their delay in investigation and ultimately the basis for their denial to claimant.

After the denial of liability, Ms. Kern sought further medical care on her own. Ultimately, she obtained treatment through Dr. Recinos, who performed a surgical release for claimant's left trigger thumb on March 21, 2017. (Joint Ex., pp. 38-39).

Dr. Recinos took claimant off work from March 21, 2017 through April 20, 2017. (Joint Ex., p. 40) Claimant, in fact remained off work during this period of time. (Hearing Report) I find that claimant was not at maximum medical improvement before

April 20, 2017 and that she was not capable of performing substantially similar employment during this period of time.

Nevertheless, the employer did pay Ms. Kern some wages during her period of time off. Specifically, the employer paid Ms. Kern $431.44 for the week ending March 24, 2016 and $539.31 for the week ending March 31, 2016. (Claimant's Ex. II, p. 42) Ms. Kern returned to work for the employer on April 20, 2016. A maximum medical improvement date is not entirely clear in this record, but claimant did not return for further treatment after being released to return to work on April 20, 2016. Therefore, I find that claimant achieved maximum medical improvement on April 20, 2016.

Defendants never obtained a permanent impairment rating for claimant's alleged injuries. Instead, defendants elected to defend this case on causation grounds. Claimant, however, did request and secure permanent impairment ratings for her various conditions. Specifically, claimant obtained an independent medical evaluation performed by Sunil Bansal, M.D., on June 23, 2017.

Dr. Bansal opined that claimant sustained bilateral carpal tunnel syndrome and left thumb trigger finger and CMC arthritis. However, Dr. Bansal did not support claimant's theory that she had a right thumb trigger finger, or right hand CMC arthritis. (Claimant's Ex. I, p. 20) Dr. Bansal offered the following causation analysis:

> In my opinion, the cumulative repetitive keyboarding that she performed chronically at Fenchel, Doster, and Buck led to the development/aggravation of her bilateral carpal tunnel syndrome. This relationship is based on the increases in the median nerve intraneural pressire [sic]."

(Claimant's Ex. I, p. 20) Similarly, with respect to the left thumb CMC arthritis, Dr. Bansal explained:

> In my medical opinion, Ms. Kern developed left carpometacarpal [arthritis] from her cumulative secretarial work at Fenchel, Doster, and Buck. The medical literature from the American Academy of Orthopedic Surgeons (AAOS) supports that secretarial work is a risk factor for CMC arthritis.

(Claimant's Ex. I, p. 21) With respect to the issue of the left trigger thumb, Dr. Bansal opined:

> The mechanism of repetitive gripping such as from handling files, going through letter[s] and unstapling papers is consistent with her trigger thumb.
>
> This is recognized by the Mayo Clinic under their risk factors for trigger thumb.

(Claimant's Ex. I, p. 21)

When I compare the competing causation opinions of the physician assistant, Dr. Bansal, and Dr. Paulson, I note the respective credentials of the physicians as well as the thoroughness of their evaluation of the causation issue. In this instance, I give very little weight to the opinion of the physician assistant because Dr. Bansal and Dr. Paulson clearly have superior training and qualifications to offer causation opinions.

As between Dr. Bansal and Dr. Paulson, they both evaluated claimant one time. Dr. Bansal is an occupational medicine specialist, while Dr. Paulson is an orthopaedic surgeon. Each specialty arguably had advantages in addressing the issue of causation. Certainly, Dr. Paulson is more specifically trained in the mechanics and biology of the hand, thumb, and wrists. Dr. Bansal, by way of contrast, likely has more extensive consideration and training in occupationally related injuries and causation issues.

When I review the explanations and analyses of Dr. Bansal and Dr. Paulson, I find Dr. Bansal's causation opinion to be more thorough and convincing in this case. Dr. Bansal cites specific studies or authoritative entities in support of his causation opinion. Dr. Paulson provides more of a cursory evaluation and analysis. At the end of the analysis, I find Dr. Bansal's causation opinion to be most convincing in this record. Therefore, relying upon Dr. Bansal's opinion, I find that claimant has proven she sustained a material and substantial aggravation of her left thumb trigger finger, left thumb CMC joint arthritis, and bilateral carpal tunnel syndrome.

Dr. Bansal is the only physician that renders a permanent impairment rating. He opines that claimant sustained a four percent permanent impairment of the right upper extremity as a result of right carpal tunnel syndrome symptoms. (Claimant's Ex. I, p. 22) Dr. Bansal similarly assigns a four percent permanent impairment of the left upper extremity as a result of left carpal tunnel syndrome symptoms. (Claimant's Ex. I, p. 22) With respect to the left trigger thumb, Dr. Bansal opines that Ms. Kern sustained a six percent permanent impairment of the left upper extremity. (Claimant's Ex. I, p. 22) Given that they are not rebutted opinions, I accept Dr. Bansal's permanent impairment ratings as accurate.

Chapter 16 of the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, explains the proper means of combining permanent impairment ratings of the upper extremity, or arm. Page 438 states, "multiple regional impairments, such as those of the hand, wrist, elbow, and shoulder, are first expressed individually as upper extremity impairments and then *combined* to determine the total upper extremity impairment. The latter is finally converted to whole person impairment (Table 16-3)." (emphasis in original)

Accordingly, the proper mechanism for combining the left thumb impairment and the left carpal tunnel impairment is to combine each impairment to determine a left upper extremity rating before converting these impairments to the body as a whole. As noted, Dr. Bansal assigned a four percent permanent impairment of the left upper

extremity for the left carpal tunnel syndrome. He assigned six percent permanent impairment of the left upper extremity for the left thumb. Combining these results in a ten percent permanent impairment of the left upper extremity.

As noted, this upper extremity rating should then be converted to a whole person impairment using Table 16-3, found on page 439 of the AMA Guides, Fifth Edition. Table 16-3 indicates that a ten percent impairment of the upper extremity converts to a six percent permanent impairment rating of the whole person.

Similarly, the right carpal tunnel impairment rating must be converted from its four percent rating of the right upper extremity to the whole person. Again, Table 16-3 is utilized for this conversion. According to Table 16-3, a four percent permanent impairment of the upper extremity converts to a two percent impairment of the whole person.

Whole person impairments are combined utilizing the Combined Values Chart located on pages 604-606 of the AMA Guides, Fifth Edition. When the Combined Values Chart is consulted, the six percent whole person impairment for the left thumb and left carpal tunnel combines with the two percent whole person impairment for the right carpal tunnel syndrome to result in a combined permanent impairment rating of eight percent of the whole person.

Claimant urges a finding that Ms. Kern sustained either a 10 percent or 11 percent impairment of the whole person. However, claimant's argument does not follow the proper conversion methods of the AMA Guides, as outlined above. Instead, Dr. Bansal's impairment ratings are accepted, the above conversion is utilized, and it is found that Ms. Kern has proven an eight percent permanent impairment of the whole person.

Ms. Kern has returned to work as a legal secretary. She described how these injuries have changed her work pace and abilities. Dr. Bansal has assigned permanent restrictions as a result of these injuries. Nevertheless, claimant is capable of and continues to perform duties as a legal secretary. Therefore, I find that the eight percent whole person impairment rating outlined by Dr. Bansal and the AMA Guides adequately and accurately describe and estimate claimant's loss of function as a result of her work injuries.

All of the claimed medical expenses are stipulated to be reasonable expenses. Defendants further stipulated that the treating providers would testify that the treatment rendered was reasonable and necessary and defendants offered no contrary evidence. (Hearing Report) In her post-hearing brief, claimant withdrew the claimed expenses listed on Joint Medical Exhibit, pages 61 and 62. Therefore, those expenses will not be awarded.

Having found that Ms. Kern's employment activities as a legal secretary at Fenchel, Doster & Buck, P.L.C., materially and substantially aggravated her underlying conditions such that claimant's cumulative injuries manifested on May 9, 2016, I similarly find that the medical expenses contained in Joint Medical Exhibit, pages 52 through 60 and pages 63 through 71 are causally related to the May 9, 2016 work injury and represent reasonable charges for reasonable and necessary medical treatment.

CONCLUSIONS OF LAW

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).

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.

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).

In this case, I found the causation opinion offered by Dr. Bansal to be most convincing. Relying upon that opinion, I found that claimant proved by a preponderance of the evidence that she sustained a material or substantial aggravation of underlying conditions as a result of her work activities for the employer, resulting in the manifestation of a cumulative work injury on May 9, 2016. Therefore, I conclude that

claimant has proven she sustained bilateral carpal tunnel syndrome, left thumb carpometacarpal arthritis, and left trigger thumb, all arising out of and in the course of her employment with Fenchel, Doster & Buck, P.L.C., on or about May 9, 2016.

Ms. Kern asserts a claim for healing period benefits from March 21, 2017 through April 19, 2017. 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).

Defendants stipulate claimant was off work during this period of time. I found that claimant was not capable of substantially similar employment and not yet at maximum medical improvement from March 21, 2017 through April 19, 2017. Therefore, I conclude that claimant is entitled to an award of healing period benefits from March 21, 2017 through April 19, 2017. Evenson v. Winnebago Industries, Inc., 881 N.W.2d 360, 372 (Iowa 2016).

Having concluded that claimant is entitled to an award of healing period benefits, I must also address defendants' request for a credit against those benefits for wages paid to claimant during the claimed healing period. Claimant was off work, but the employer elected to pay claimant certain wages during the period of absence. Defendants contend that they should receive "credit" for those wages paid against the award of healing period benefits. Specifically, defendants contend that they paid wages and should be entitled to a credit for wages paid for weeks ending March 24, 2017 and March 31, 2017. Claimant contends that no substantive provision of law grants the employer a "credit" for wages paid during a healing period and resists the requested credit.

Iowa Code section 85.34(1) provides that an employee who has sustained a permanent disability is to be compensated "for a healing period, as provided in section 85.37." Iowa Code section 85.37 provides that "[t]otal weekly compensation for any employee shall not exceed eighty percent per week of the employee's weekly spendable earnings." This statutory provision does not limit itself to applicable to weekly benefits. Instead, section 85.37 limits the total weekly compensation payable to the employee.

Compensation is defined as "[t]hat which is necessary to restore an injured party to his former position." Black's Law Dictionary, Abridged Sixth Edition. Payment of wages certainly restores an injured worker to the position she would be in if the injury had not occurred.

Moreover, healing period benefits are commensurate with and equivalent to temporary disability benefits and only differ in name based upon whether the injury results in permanent disability. Bell Bros. Heating and Air Conditioning v. Gwinn, 779 N.W.2d 193, 200 (Iowa 2010). Healing period and temporary disability benefits are payable as prescribed in Iowa Code section 85.33. Id. The purpose of temporary disability, or healing period, benefits is to replace lost wages. Id. Obviously, payment of actual wages results in no loss of wages. The statutory purpose and structure of temporary disability and healing period benefits supports that an employer's payment of wages during a healing period is sufficient to meet its obligations toward an injured worker. Nothing in the scheme or structure of the workers' compensation statutes suggests that an injured worker should get paid wages during a healing period and also receive weekly workers' compensation benefits.

The Iowa Workers' Compensation Commissioner has enacted an administrative rule, 876 IAC 8.4, which interprets and implements Iowa Code sections 85.34 and 85.37. Rule 8.4 provides that, "[t]he excess payment made by an employer in lieu of compensation which exceeds the applicable weekly compensation rate shall not be construed as advance payment with respect to either future temporary disability, healing period, permanent partial disability, permanent total disability or death." This administrative rule clearly assumes and interprets the healing period statute to permit an employer to pay wages in lieu of compensation. The rule implicitly assumes that the employer is given "credit" for wages paid up to the amount of the weekly compensation rate but precludes an employer from paying regular wages and claiming a "credit" above and beyond the weekly compensation rate.

Agency rule 876 IAC 8.4 interprets the applicable statutory sections. The rule documents the understanding and interpretation that an employer may pay wages in lieu of compensation and will receive credit for payment of wages up to the amount of compensation due for temporary disability or healing period. See Boyd v. Ankeny Comm. Schools, File No. 1225693 (Appeal June 2003); Pearl v. Clerical Pros., File No. 1135264 (Appeal August 2000); Moffitt v. Super Value Stores, Inc., File No. 1059425 (Appeal June 1998); Stevens v. Eastern Star Masonic Home, File No. 5049776 (Arbitration August 2016); Borg v. Rhoden Auto Service Center, File Nos. 5046635, 5046636 (Arbitration December 2015); Rivas v. City of Des Moines, File Nos. 5029939, 5029940 (Arbitration October 2010); Hickman v. CDI, L.L.C., File No. 5016759 (Arbitration January 2007).

Defendants' argument is consistent with the overall statutory scheme and structure of Iowa's worker's compensation system, as well as prior precedent of this agency. Claimant's argument seeks to ignore agency rule 876 IAC 8.4, results in a double-recovery, and is neither just nor consistent with the intention of healing period benefits as a mechanism of replacing lost wages. Therefore, I conclude that defendants are entitled to claim a credit for wages paid for the weeks ending March 24, 2017 and March 31, 2017.

However, in week ending March 31, 2017, defendants paid wages that exceed the stipulated weekly rate of compensation. Defendants receive a credit for the amount of healing period benefits ($448.54) owed for that week, but do not receive a credit for wages paid in that week that exceed the weekly rate. 876 IAC 8.4.

Ms. Kern seeks an award of permanent disability for her injuries. Having found that claimant proved she sustained permanent disability as a result of her injuries, I must address her entitlement to permanent disability benefits.

Under the Iowa Workers' Compensation Act, permanent partial disability is compensated either for a loss or loss of use of a scheduled member under Iowa Code section 85.34(2)(a)-(t) or for loss of earning capacity under section 85.34(2)(u). The extent of scheduled member disability benefits to which an injured worker is entitled is determined by using the functional method. Functional disability is "limited to the loss of the physiological capacity of the body or body part." Mortimer v. Fruehauf Corp., 502 N.W.2d 12, 15 (Iowa 1993); Sherman v. Pella Corp., 576 N.W.2d 312 (Iowa 1998). The fact finder must consider both medical and lay evidence relating to the extent of the functional loss in determining permanent disability resulting from an injury to a scheduled member. Terwilliger v. Snap-On Tools Corp., 529 N.W.2d 267, 272-273 (Iowa 1995); Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417, 420 (Iowa 1994).

Benefits for permanent partial disability of two members caused by a single accident is a scheduled benefit under section 85.34(2)(s); the degree of disability must be computed on a functional basis with a maximum benefit entitlement of 500 weeks. Simbro v. DeLong's Sportswear, 332 N.W.2d 886 (Iowa 1983).

In this case, I found that Ms. Kern proved compensable and permanent injuries to both her right and left arms. The Iowa Workers' Compensation Commissioner has adopted the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, as a guide for determining permanent partial disabilities for injuries compensated under Iowa Code section 85.34(2)(s). 876 IAC 2.4.

Using the applicable guidelines and the impairment ratings offered by Dr. Bansal, I found that Ms. Kern proved she sustained ten percent permanent impairment as a combined result of her left carpal tunnel and left thumb injuries. I found that this converts to a six percent permanent impairment of the whole person under the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition.

I also found that Ms. Kern proved she sustained a four percent permanent impairment of the right arm as a result of her right carpal tunnel syndrome. I found that this converts to a two percent permanent impairment of the whole person under the AMA Guides, Fifth Edition. I combined these impairment ratings, utilizing the Combined Values Chart in the AMA Guides, Fifth Edition, and found that claimant has proven an eight percent permanent impairment of the whole person.

Although Ms. Kern testifies that she works slower and she now carries permanent work restrictions outlined by Dr. Bansal, Ms. Kern remains employed by the employer as a legal secretary. There is no evidence that her work product suffers or that her job is in jeopardy as a result of her restrictions or injuries. Therefore, I found that the permanent impairment rating, as delineated above, is fairly accurate and representative of Ms. Kern's actual functional loss as a result of these injuries. Having found that the eight percent permanent impairment rating was fairly representative of Ms. Kern's functional loss, I conclude that Ms. Kern is entitled to 40 weeks of permanent partial disability benefits, which represents eight percent of 500 weeks of benefits. Iowa Code section 85.34(2)(s); Simbro v. DeLong's Sportswear, 332 N.W.2d 886 (Iowa 1983).

Ms. Kern argued for a 10 or 11 percent permanent impairment of the whole person and a corresponding award. However, I conclude that Ms. Kern's analysis and argument misapplies the AMA Guides. Ms. Kern's approach does not convert the upper extremity ratings offered for the bilateral carpal tunnel to body as a whole, but instead, assumes and combines those as if they are already body as a whole, or whole person, ratings. The proper method for combing the ratings would be to combine the two ratings for the left upper extremity (left carpal tunnel syndrome and left thumb) and then convert that rating to the whole person. Next, the Guides would convert the right carpal tunnel to a whole person rating and then combine those two ratings. When the proper conversions and combination is made, the whole person rating is eight percent, as noted above. Therefore, I specifically reject Ms. Kern's calculations and combination of impairment ratings.

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).

Having concluded that Ms. Kern has proven a material aggravation of an underlying condition, I similarly conclude that she has established entitlement to past medical expenses. The parties stipulated that the claimed medical expenses were all related to the disputed medical condition underlying this injury. Having found that the claimant established a compensable injury, I conclude that the past medical expenses claimed in Joint Medical Exhibit, pages 52 through 60 and pages 63 through 71 should be reimbursed to claimant, paid to the medical providers, and that claimant should be held harmless by defendants for those expenses in either event.

Claimant withdrew her claim for expenses related to the August 25, 2016 appointment with Dr. Paulson. Therefore, those expenses, itemized at Joint Medical Exhibit pages 61 and 62 are not awarded.

Ms. Kern asserted a claim for alternate medical care on the hearing report as well. The claim for alternate medical care was not well-defined and was not argued in claimant's post-hearing brief. Presumably, claimant desires future causally related medical treatment. Pursuant to Iowa Code section 85.27, claimant is entitled to any future or ongoing medical treatment that is causally related to the May 9, 2016 work injury. However, a specific order for alternate medical care will not be entered because no such claim has been argued or proven.

Ms. Kern seeks reimbursement for Dr. Bansal's independent medical evaluation charges. 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 case, defendants did not obtain a permanent impairment rating for claimant's condition. Instead, they challenged this claim on whether it was causally related to claimant's employment and whether the injury arose out of and in the course of claimant's employment. Unless a claimant can establish the prerequisites of Iowa Code section 85.39, the defendants are not obligated to pay for the claimant's evaluation. Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839, 843-844 (Iowa 2015). Under the circumstances of this case, claimant is not able to establish the prerequisites of Iowa Code section 85.39 to qualify for an evaluation at defendants' expense. Therefore, I conclude that Ms. Kern's request for reimbursement of Dr. Bansal's evaluation must be denied. Id.

Ms. Kern asserts that defendants unreasonably delayed and/or denied her weekly benefits in this case and that defendants should be ordered to pay penalty benefits pursuant to Iowa Code section 86.13.

Iowa Code section 86.13(4) provides:

> a. If a denial, a delay in payment, or a termination of benefits occurs without reasonable or probable cause or excuse known to the employer or insurance carrier at the time of the denial, delay in payment, or termination of benefits, the workers' compensation commissioner shall award benefits in addition to those benefits payable under this chapter, or

chapter 85, 85A, or 85B, up to fifty percent of the amount of benefits that were denied, delayed, or terminated without reasonable or probable cause or excuse.

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

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

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

In Christensen v. Snap-on Tools Corp., 554 N.W.2d 254 (Iowa 1996), and Robbennolt v. Snap-on Tools Corp., 555 N.W.2d 229 (Iowa 1996), the supreme court said:

Based on the plain language of section 86.13, we hold an employee is entitled to penalty benefits if there has been a delay in payment unless the employer proves a reasonable cause or excuse. A reasonable cause or excuse exists if either (1) the delay was necessary for the insurer to investigate the claim or (2) the employer had a reasonable basis to contest the employee's entitlement to benefits. A "reasonable basis" for denial of the claim exists if the claim is "fairly debatable."

Christensen, 554 N.W.2d at 260.

The supreme court has stated:

(1) If the employer has a reason for the delay and conveys that reason to the employee contemporaneously with the beginning of the delay, no penalty will be imposed if the reason is of such character that a reasonable fact-finder could conclude that it is a "reasonable or probable cause or excuse" under Iowa Code section 86.13. In that case, we will defer to the decision of the commissioner. See Christensen, 554 N.W.2d at 260 (substantial evidence found to support commissioner's finding of legitimate reason for delay pending receipt of medical report); Robbennolt, 555 N.W.2d at 236.

(2) If no reason is given for the delay or if the "reason" is not one that a reasonable fact-finder could accept, we will hold that no such cause or excuse exists and remand to the commissioner for the sole purpose of assessing penalties under section 86.13. See Christensen, 554 N.W.2d at 261.

(3) Reasonable causes or excuses include (a) a delay for the employer to investigate the claim, Christensen, 554 N.W.2d at 260; Kiesecker v. Webster City Meats, Inc., 528 N.W.2d at 109, 111 (Iowa 1995); or (b) the employer had a reasonable basis to contest the claim—the "fairly debatable" basis for delay. See Christensen, 554 N.W.2d at 260 (holding two-month delay to obtain employer's own medical report reasonable under the circumstances).

(4) For the purpose of applying section 86.13, the benefits that are underpaid as well as late-paid benefits are subject to penalties, unless the employer establishes reasonable and probable cause or excuse. Robbennolt, 555 N.W.2d at 237 (underpayment resulting from application of wrong wage base; in absence of excuse, commissioner required to apply penalty).

> If we were to construe [section 86.13] to permit the avoidance of penalty if any amount of compensation benefits are paid, the purpose of the penalty statute would be frustrated. For these reasons, we conclude section 86.13 is applicable when payment of compensation is not timely . . . or when the full amount of compensation is not paid.

Id.

(5) For purposes of determining whether there has been a delay, payments are "made" when (a) the check addressed to a claimant is mailed (Robbennolt, 555 N.W.2d at 236; Kiesecker, 528 N.W.2d at 112), or (b) the check is delivered personally to the claimant by the employer or its workers' compensation insurer. Robbennolt, 555 N.W.2d at 235.

(6) In determining the amount of penalty, the commissioner is to consider factors such as the length of the delay, the number of delays, the information available to the employer regarding the employee's injury and wages, and the employer's past record of penalties. Robbennolt, 555 N.W.2d at 238.

(7) An employer's bare assertion that a claim is "fairly debatable" does not make it so. A fair reading of Christensen and Robbennolt, makes it clear that the employer must assert facts upon which the commissioner could reasonably find that the claim was "fairly debatable." See Christensen, 554 N.W.2d at 260.

Meyers v. Holiday Express Corp., 557 N.W.2d 502 (Iowa 1996).

Weekly compensation payments are due at the end of the compensation week. Robbennolt, 555 N.W.2d 229, 235.

Penalty is not imposed for delayed interest payments. Davidson v. Bruce, 593 N.W.2d 833, 840 (Iowa App. 1999). Schadendorf v. Snap-On Tools Corp., 757 N.W.2d 330, 338 (Iowa 2008).

When an employee's claim for benefits is fairly debatable based on a good faith dispute over the employee's factual or legal entitlement to benefits, an award of penalty benefits is not appropriate under the statute. Whether the issue was fairly debatable turns on whether there was a disputed factual dispute that, if resolved in favor of the employer, would have supported the employer's denial of compensability. Gilbert v. USF Holland, Inc., 637 N.W.2d 194 (Iowa 2001).

In this case, defendants investigated the claim after it was reported. It appears that defendants sought medical records and scheduled an evaluation with a physician to address causation. Claimant contends that the period of the delay for investigation was unreasonable. I found to the contrary and found that defendants' investigation was reasonable and that defendants established they had a reasonable basis for the denial of benefits.

Similarly, I found that defendants contemporaneously conveyed their intentions to investigate and subsequently their basis for denial of benefits. Having found that defendants properly investigated this claim, possessed a reasonable basis for denial of the claim, and contemporaneously conveyed the actual basis for their delays and subsequent denial of benefits, I conclude that penalty benefits are not appropriate in this case. Iowa Code section 86.13(4)(c). Claimant's request for penalty benefits is denied.

Finally, claimant seeks assessment of her costs. Assessment of costs is a discretionary function of the agency. Iowa Code section 86.40.

In this case, claimant seeks reimbursement of her filing fee ($100.00), as well as service costs upon defendants ($15.14). Given that claimant has prevailed on the majority of the issues in this case, I conclude these requested costs are reasonable. I assess the filing and services costs pursuant to 876 IAC 4.33 (3) & (7).

Ms. Kern also seeks assessment of the report fee of Dr. Bansal in the amount of $2,172.00. The cost of a physician drafting a written report in lieu of offering testimony at a workers' compensation hearing can be taxed as a cost. 876 IAC 4.33(6); Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839 (Iowa 2015). However, only the cost of drafting a report is permitted to be assessed as a cost. Id.

In this instance, claimant requested that Dr. Bansal break down his billing charges to reflect the expense of drafting his report. However, Dr. Bansal did not specifically follow these instructions or this request. Instead, Dr. Bansal broke down his charges to reflect the expense of his examination and the separate expense of reviewing medical records and drafting his report.

In reviewing Young, the Iowa Supreme Court made it clear that the only cost that can be taxed is the expense of drafting the medical report. Id. The expense related to reviewing medical records is similar to the expense of performing an examination of the claimant. The medical opinions cannot be formulated without the examination and review of the medical records. However, for purposes of providing testimony or medical opinions for submission at trial, only the report is a taxable cost. The purpose of drafting the report is to avoid the need for testimony at trial. Presumably, the cost of the report is cost-effective.

In this instance, Dr. Bansal did not provide the cost of preparing, or drafting his report, separate of the other tasks necessary to conduct his evaluation and formulate his opinions. Therefore, I conclude that claimant has not established entitlement to assessment of any portion of Dr. Bansal's fees. 876 IAC 4.33(6); Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839, 84 (Iowa 2015).

ORDER

THEREFORE, IT IS ORDERED:

Defendants shall pay claimant healing period benefits from March 21, 2017 through April 19, 2017.

Defendants shall be entitled to a credit against the healing period award for wages paid ($431.44) for week ending March 24, 2017 and for wages paid up to the amount of the weekly rate ($448.54) for week ending March 31, 2017.

Defendants are not entitled to a credit for any excess wages paid above the weekly rate for either of the aforementioned weeks.

Defendants shall pay claimant forty (40) weeks of permanent partial disability benefits commencing on April 20, 2017.

All weekly benefits shall be paid at the rate of four hundred forty-eight and 54/100 dollars ($448.54) per week.

Defendants shall reimburse claimant for any past medical expenses paid directly by claimant to medical providers, shall either pay to claimant or directly to the medical providers any outstanding past medical expenses, and shall hold claimant harmless for any medical expenses outlined in Joint Medical Exhibit pages 52 through 60 and pages 63 through 71.

Claimant shall be entitled to future, causally related medical treatment for this injury pursuant to Iowa Code section 85.27.

Defendants shall reimburse claimant's costs totaling one hundred fifteen and 14/100 dollars ($115.14).

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 18th day of December, 2017.

WILLIAM H. GRELL
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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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.