BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

DIANA ARTER, Claimant, vs. ABCM CORPORATION (HARMONY HOUSE), Employer, and SAFETY NATIONAL CASUALTY CORPORATION, Insurance Carrier, Defendants.	FILED APR 18 2017 WORKERS COMPENSATION	File No. 5054309 ARBITRATION DECISION Head Note Nos.: 1108.50, 1402.30, 1403.30, 1802, 2801

STATEMENT OF THE CASE

Diana Arter, claimant, filed a petition in arbitration seeking workers' compensation benefits from ABCM Corporation d/b/a Harmony House, employer and Safety National Casualty Corporation, insurance carrier, both as defendants. Hearing was held on February 2, 2017 in Waterloo, Iowa.

Diana Arter and Tiffany Adams both testified live at trial. The evidentiary record also includes Claimant's Exhibits 1-12 and Defendants' Exhibits A-H. It should be noted that some of the defendants' exhibits contain duplicates of claimant's exhibits. Citation will only be made to one set of the duplicate exhibits. Exhibit G is a first report of injury and was admitted for the limited purposes allowed under Iowa Code section 86.11.

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 parties submitted post-hearing briefs on February 23, 2017.

ISSUES

The parties submitted the following issues for resolution:

1. Whether claimant sustained an injury on February 12, 2015 which arose out of and in the course of employment?

2. Whether the alleged injury was the cause of permanent disability? If so, the extent of disability claimant is entitled to receive.

3. Whether the alleged injury was the cause of temporary disability?

4. Whether claimant's claim is barred by lack of timely notice under Iowa Code section 85.23?

5. Whether claimant is entitled to past medical benefits?

6. Whether penalty should be assessed against the defendant?

7. Assessment of costs.

FINDINGS OF FACT

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

Claimant, Diana Arter, alleges she sustained an injury to her right knee on February 12, 2015, which arose out of and in the course of her employment with ABCM Corporation (d/b/a Harmony House). Defendants deny that claimant sustained a compensable injury and further contend that any such claim is barred by Iowa Code section 85.23 for failure to give timely notice of the injury to the defendants. I find claimant did sustain an injury arising out of and in the course of her employment and said injury is not barred by operation of Iowa Code section 85.23.

Ms. Arter has worked at Harmony House since 1983. At the time of the alleged injury she was working as a dietary aide or part-time cook. Ms. Arter was required to stand all day; she was only allowed to sit during her breaks. She was required to squat on occasion. Her job also involved daily carrying and lifting of items, including big heavy roasts.

On the morning of the alleged injury, Arter was moving a cart into the cooler. The cooler was not on ground level; there was a step that was approximately six inches high. In order to get the cart into the cooler, Ms. Arter and another worker, Toria Jensen, more or less had to carry or lift the cart up the step. Ms. Arter testified that after they put the cart into the cooler, she turned to leave the cooler and as she was in the process of leaving the cooler her right leg gave out. At hearing she testified, "One foot

was still in the cooler, and this one was on the floor. Well, and then I kind of fell, and I hit – grabbed the trash can, and Toria grabbed me." (Transcript pages 22-23) She testified that if she had not grabbed the trash can and if Toria had not grabbed her, she would have hit the floor. (Testimony)

Ms. Arter immediately felt excruciating pain down both sides of her right leg. She described the pain as if her leg was on fire. She said her leg was half bent and she was unable to straighten or bend it; it was stuck. Toria yelled for someone to get Lynette, Ms. Arter's boss. While Toria yelled she stood there and held Arter. Lynette came over with a wheelchair for Ms. Arter. Lynette put Ms. Arter in the wheelchair and wheeled her to the nurses' station. (Testimony)

Robin Smith, the assistant director of nursing (DON) was at the nurses' station. Robin had her back turned to Ms. Arter and Ms. Arter could not really hear what Robin said. Ms. Arter just wanted to go home. Ms. Arter was not asked to fill out any forms at that time. Ms. Arter was at the nurses' station for approximately ten minutes and then Lynette pushed her back into the kitchen hallway because Ms. Arter did not want everyone to see her crying. Ms. Arter then called her brother and sister-in-law to come get her because she was not able to get into her truck. They came to get her and Lynette helped Ms. Arter into their car. Ms. Arter testified that she was scheduled to work until 2:30 p.m. The incident occurred sometime around 10:00 or 10:30; she was unable to finish her shift. (Testimony)

Ms. Arter was taken to the urgent care clinic at United Medical Park. The note indicates she was seen for right leg pain onset three weeks. She reported that her leg gave out today and she was unable to walk on the leg. The assessment was leg pain, posterior. She was prescribed Tramadol. (Exhibit 5, pp. 37-38; Ex. 6, pp. 39-42)

Ms. Arter was seen at the Iowa Adult Medical Clinic on February 13, 2015. She wanted to be released to return back to work. The note indicates that her right knee pain was of seven day duration and there was no injury. Ms. Arter reported that her pain medications were not helping. It was recommended that Ms. Arter remain on crutches due to instability. She was not released to return back to work. It was noted that she likely needed an MRI and an ortho evaluation but she did not have any insurance. (Ex. 4, pp. 26-29)

Ms. Arter was seen again at the Iowa Adult Medical Clinic on February 19, 2015, with continued right knee pain. The assessment included likely internal derangement with medical meniscus injury. Ms. Arter was referred to an orthopedic doctor and kept off of work. (Ex. 4, pp. 29a-31)

On March 11, 2015, Ms. Arter saw Richard W. Naylor, D.O., an orthopedic surgeon. Dr. Naylor noted she was there for follow up of her right knee instability; her knee gave out while she was at work in February. Ms. Arter told Dr. Naylor that she hurt her knee when she was carrying something into a freezer area and twisted her

knee. Dr. Naylor opined, "[w]ithin a degree of medical certainty, I think even if she had preexisting knee problems this problem is related to her work." (Ex. 7, p. 45) He scheduled her for an MRI. (Ex. 7, pp. 43-49)

Ms. Arter saw Dr. Naylor again on March 17, 2015. She continued to have knee pain. Dr. Naylor reviewed the MRI findings and felt the findings were consistent with a tear of the meniscus posteriorly. He also noted moderate knee joint effusion. (Ex. 7, pp. 50-58) She continued to treat with Dr. Naylor's office. He did not recommend a knee scope. On April 14, 2015, she underwent injection therapy for her right knee. (Ex. 7, pp. 52-54)

On October 1, 2015, Dr. Naylor operated on Ms. Arter's right knee. The procedures included partial medial meniscectomy, partial lateral meniscectomy and excision of medical-based plica and debridement of hypertrophic fat pad. (Ex. 7, pp. 59-60; Ex. 7, p. 63)

There are two expert opinions in this case regarding causation. Claimant relies on the opinions of Dr. Naylor, while defendants rely on the opinions of Dr. Broghammer.

On January 29, 2016, claimant's counsel sent a letter to Dr. Naylor seeking his expert opinion. In that letter, claimant's counsel set forth what he described as a causation timeline. In that timeline he stated that as Ms. Arter "was in the process of stepping off of this step her knee gave way and she fell into a garbage can and into the arms of her co-worker." (Ex. 7, p. 62) Dr. Naylor responded to this letter on February 24, 2016. With regard to causation Dr. Naylor stated that to the best of his knowledge, unless new information was presented to him, he felt within a degree of medical certainty that the right knee was due to the incident at Harmony House in February of 2015. (Ex. 7, pp. 63-64) He also stated that the incident at Harmony House exacerbated her underlying degenerative arthritis. (Ex. 7, p. 63) Dr. Naylor assigned two percent impairment to the right lower extremity. He noted that she had no permanent restrictions. (Ex. 7, p. 65)

Defendants argue that Dr. Naylor's opinions cannot be relied upon because the history provided in the letter to Dr. Naylor on January 29, 2016 is inaccurate. Specifically, the letters states that Ms. Arter fell into a garbage can and into the arms of her coworker. Defendants contend this is not consistent with claimant's account of what occurred. At hearing claimant testified that she kind of fell and grabbed the garbage can and then her coworker grabbed her. I find that the history set forth in the January 29, 2016 letter is not inconsistent with claimant's testimony. The history provided by claimant's counsel in his letter does not state that Ms. Arter fell to the ground, nor does it state that she whacked her knee on the garbage can or anything else, as defendants suggested on cross-examination of the claimant. Furthermore, Dr. Naylor treated Arter and took a history from her directly. On March 11, 2015, prior to receiving claimant's counsel's letter, Dr. Naylor opined, "[w]ithin a degree of medical

certainty, I think even if she had preexisting knee problems this problem is related to her work." (Ex. 7, p. 45) I find the opinions of Dr. Naylor to be persuasive.

Defendants rely on the expert opinion of Dr. Broghammer who conducted an IME at the request of the defendants. With regard to the issue of causation, Dr. Broghammer's focus seemed to be on whether the incident even occurred. He states, "[o]ther than Dr. Naylor's report, there is no evidence in the medical record of any injury that occurred to Ms. Arter's bilateral knees." (Ex. 8, p. 77) He notes that she did have preexisting knee pain. Dr. Broghammer then stated, "Finally, Ms. Arter herself reports no actual injury to her right or left knees. She was not doing anything germane to her job when her right knee gave way for no particular reason. At the time, Ms. Arter reports she was simply beginning to walk. Walking is an activity of daily living and does not cause injury." (Ex. 8, p. 78) He ultimately concludes that the reported injury was actually not an injury but an activity of daily living. It appears that Dr. Broghammer's opinion does not take into account the step involved that Arter had to traverse to exit the cooler. It also appears he did not take into consideration the fact that claimant had to twist or turn to exit the cooler or the fact that she was unable to stand or walk without assistance following the injury. I find that Dr. Broghammer's opinions are based on an incomplete or inaccurate history. Thus, I do not find the opinions of Dr. Broghammer to carry as much weight as those of Dr. Naylor.

Ms. Arter credibly testified about her work injury on February 12, 2015. It should be noted that Ms. Arter is not a highly complex individual. She testified that she did graduate from high school but she was placed in all special education classes. During her testimony on cross-examination it was not always clear if she understood the questions that were being asked of her.

I find that Ms. Arter did sustain a compensable injury to her right lower extremity on February 12, 2015. While she did have right knee pain in the days, months, and years leading up to the work incident she was still able to perform her job on February 12, 2015, until the injury in the cooler area. (Testimony; Ex. 4, pp. 21-25) However, immediately following the injury, she was in excruciating pain, required assistance to even stand, and her supervisor brought a wheelchair over to her in order to transport Ms. Arter to the nurses' station. Ms. Arter could not finish her shift and had to call family to drive her home.

Defendants contend that there was no injury because in the clinical treatment notes there are several references to no injury. However, this argument is not terribly persuasive because the injury on February 12, 2015 was witnessed by a coworker and Ms. Arter required assistance immediately following the injury. Even the defendants' witness (as noted below) confirmed the incident occurred. Clearly, there was an incident that occurred at work.

After consideration of the record in its entirety, I find that Ms. Arter sustained an injury to her right lower extremity on February 12, 2015. Because I find the opinions of

Dr. Naylor to be more persuasive than those of Dr. Broghammer, I find that Ms. Arter sustained an injury to her right lower extremity on February 12, 2015, which arose out of and in the course of her employment.

Ms. Arter testified that she continues to experience problems with her right knee. She has swelling and pain. Her right knee has given out on her on several occasions since the work injury. She also testified that her pain affects her sleep. She has difficulty carrying laundry up or down stairs. She also has problems standing for long periods of time. (Testimony) As previously noted, I find Dr. Naylor's opinions to be persuasive in this case. He assigned two percent functional impairment. I find that Ms. Arter is entitled to four point four (4.4) weeks of permanent partial disability benefits as a result of the February 12, 2015 work injury.

Claimant contends the commencement date for the PPD benefits should be December 27, 2016; the date that Dr. Naylor assigned the impairment rating. Defendants contend that benefits should commence on April 4, 2015; the date she last received treatment for her right knee.

Under Iowa law, an injured worker who is recovering from an injury which produces permanent impairment may be entitled to healing period benefits. Claimant is seeking an award of healing period benefits from the date of the injury through the date of Dr. Naylor's impairment rating (February 12, 2015-December 27, 2016). On the hearing report defendants assert that the commencement date for permanency should be the last date of treatment, which was April 4, 2015. Healing period benefits begin on the first calendar day after the date of the injury and continues until the first of the following occurs: the claimant returns to work, has recovered as much as anticipated from the injury, or is medically capable of returning to the same kind of work she was performing at the time of the injury. Ms. Arter never returned to work at Harmony House. (Testimony) On March 11, 2015 Dr. Naylor stated that Ms. Arter could return to work performing desk work and could stand for 10 minute of every hour. However, there is a hand-written note indicating that Ms. Arter could not work with any restrictions. (Ex. 7, p. 48) There is a lack of evidence to demonstrate that Ms. Arter was medically capable of returning to the same kind of employment she was performing at the time of the injury. Therefore, it is necessary to determine the date claimant reached maximum medical improvement (MMI). In February of 2016, Dr. Naylor indicated that Ms. Arter had not yet reached MMI. On December 27, 2016, Dr. Naylor assigned permanent impairment which indicates that he felt her medical condition was static and well stabilized or in other words at MMI. I find that Ms. Arter's healing period ended when she reached MMI. Based on the evidence in the record, I find that she reached MMI on December 27, 2016. Thus, claimant is entitled to healing period benefits from February 12, 2015 through December 26, 2016.

The next issue to be addressed is the affirmative defense of notice. Defendants contend that Ms. Arter failed to give the employer notice of the injury within 90 days of the occurrence of the injury. I do not find defendants' argument to be persuasive. The

injury was witnessed by a coworker who immediately called for help. Ms. Arter had to be held up by the coworker until a supervisor came to help Ms. Arter with a wheelchair. The supervisor then wheeled claimant to the nurses station. I find that the employer had actual knowledge of the occurrence of the injury on February 12, 2015. Additionally, on March 4, 2015, and on March 11, 2015 and on two more occasions in April, Ms. Arter talked to the HR Coordinator of Harmony House to inquire about getting workers' compensation benefits. (Ex. E, pp. 1-3) This discussion took place well within the 90-day timeframe required under Iowa law. I find defendants have failed to carry their burden of proof to demonstrate by a preponderance of the evidence that claimant's claim is barred by operation of Iowa Code section 85.23.

Claimant is seeking penalty benefits for defendants' denial of benefits. As of the time of the hearing, defendants had not paid any workers' compensation benefits to Ms. Arter. Defendants failed to provide an argument in their post-hearing brief regarding why a penalty should not be imposed.

Tiffany Adams testified at the arbitration hearing. Ms. Adams is the director of human resources at Harmony House; she was the human resources coordinator the time of the February 12, 2015 injury. She first became aware that Ms. Arter was having problems in February of 2015 when she saw an absence report that came through on the 12th of February. The report was completed by Robin, the nurse who assessed Ms. Arter after the injury. The report stated that there was pain at home and no accident to cause the knee to give out. Ms. Adams did not seek out Robin Smith, DON, to speak with her about this at that time. (Testimony) The undersigned notes that this report fails to note the activities the employee was engaged in at the time the knee gave out, fails to mention that once claimant's knee gave out she was unable to walk and required the use of a wheelchair, and that she was immediately in excruciating pain. (Ex. D)

Ms. Adams testified about conversations she had with Ms. Arter. Her documentation of those conversations is contained in Exhibit E. This exhibit also contains documentation from other employees, including Chris Ames, the workers' compensation coordinator at Harmony House. The documentation states that Ms. Arter indicated that her knee had hurt prior to coming to work and thus she did not think it was a work injury. (Testimony; Ex. E)

Ms. Adams testified that she did not make the ultimate determination to deny Ms. Arter's claim. However, it was her understanding that Ms. Arter's workers' compensation claim was denied because the nurse working at Harmony House at the time of the injury stated it was not work related so no incident report was completed. The denial was also based on Ms. Arter initially stating it was not work-related. Ms. Adams does not deny that the incident as described by Ms. Arter occurred. Ms. Adams agreed that the supervisory people at Harmony House knew right away that Ms. Arter was in severe pain, was crying, had to be put in a wheelchair, and could not finish her shift. However, initially Ms. Arter said she did not have a work injury.

Ms. Adams did admit that by at least March 5, 2015, Ms. Arter was making a claim for workers' compensation benefits. (Testimony; Ex. E)

Ms. Adams testified that she did speak with Ms. Arter's coworker, Toria, and confirmed what Diana had stated about her knee giving out. Ms. Adams also recalled receiving a letter from claimant's counsel dated July 8, 2015 which included Dr. Naylor's notes stating the problem was related to her work. (Testimony) This appears to be the extent of any investigation into Ms. Arter's workers' compensation claim.

Based on the records in evidence it appears that the denial of benefits was due to Ms. Arter not completing an incident report with the information required by the carrier in order for Harmony House to report the claim. On March 5, 2015, Ms. Arter was told in a telephone conversation with Harmony House that her right knee would not be covered by workers' compensation because Ms. Arter could not recall any injury while working and because her knee had been hurting before she came to work on February 12, 2015. (Ex. E, p. 5)

On April 23, 2015, Harmony House told Ms. Arter she needed to complete an incident report within 24 hours of the injury in order for her workers' compensation claim to be processed. (Ex. 2, p. 16) Obviously, this conversation took place much later than within 24 hours of the incident.

On July 8, 2015, defendants sent a letter to claimant's counsel advising that Ms. Arter had not filled out an incident report with the information required by the carrier in order for them to report the claim. (Ex. 2, p. 16)

Defense counsel sent another letter to claimant's counsel on July 29, 2015. In that letter defense counsel stated, "it does not appear that Ms. Arter's claimed injury arose out of or in the course of her employment with Harmony House/ABCM Corporation. In light of the foregoing, please be advised that the employer has elected to deny this claim as a non-work related injury." (Ex. 9, p. 82)

A portion of defendants' answers to interrogatories are in evidence. The date of the answers to interrogatories is not indicated. However, we know it had to have been sometime after the lawsuit was filed which was on December 17, 2015. In their answers to interrogatories defendants state that the first notice they received of an alleged injury was on July 20, 2015. (Ex. 2, pp. 4) This is contrary to the documentation from Harmony House which clearly states Ms. Arter inquired about workers' compensation benefits numerous times in March and April of 2015. (Ex. E) Defendants' answers also state: "[d]efendants denied the claim for late reporting/failure to report the claim to her employer. As Claimant never reported any 'injury' Defendants are unable to confirm whether such arose out of or in the course of employment." (Ex. 2, p. 6)

Claimant has established that no workers' compensation payments have been made to her as of the time of the hearing. (Testimony; Ex. 2, p. 7) I find that there has been a denial of benefits.

I find that defendants' stated reason for the denial of workers' compensation benefits is not reasonable. There is no dispute that the July 12, 2015 incident, as described by Ms. Arter, occurred. The preponderance of the evidence demonstrates that by at least March 5, 2015, Ms. Arter inquired as to whether she could receive workers' compensation benefits for her injury; clearly the employer was on notice that she was making a claim for workers' compensation benefits. On July 29, 2015, defendants stated, "it does not appear that Ms. Arter's claimed injury arose out of or in the course of her employment with Harmony House/ABCM Corporation. In light of the foregoing, please be advised that the employer has elected to deny this claim as a non-work related injury." (Ex. 9, p. 82) Yet, at least six months later defendants stated that they denied the claim for "late reporting/failure to report the claim to her employer. As Claimant never reported any 'injury' Defendants are unable to confirm whether such arose out of or in the course of employment." (Ex. 2, p. 6) Defendants stated bases for the denial are not even consistent with one another. In July defendants made a blanket statement that her injury did not arise out of or in the course of her employment. Yet, six months later they claim that Ms. Arter never reported an injury and therefore defendants were unable to confirm whether the injury arose out of and in the course of her employment.

First, defendants stated the claim was denied because the injury did not arise out of or in the course of her employment. Defendants failed to offer evidence that they conducted a reasonable investigation into Ms. Arter's workers' compensation claim prior to their denial. No one contacted Ms. Arter to take a recorded statement. The employer did contact Ms. Arter's coworker who confirmed that the incident, as described by Ms. Arter, did in fact occur. The employer representative admitted at hearing that she was unaware if anyone from the defendants contacted Dr. Naylor to inquire about causation; this was even after the employer was provided medical records from Dr. Naylor stating the injury was work-related. I find that this is not a reasonable basis or excuse for denial of the benefits.

Next, defendants stated the claim was denied because claimant failed to report the injury. I further find that this stated basis for the denial is not reasonable. By the defendants' own documentation, it is clear that claimant was seeking workers" compensation benefits in March and April of 2015. However, they advised her that the report had to have been completed within 24 hours of the incident. Defendants did advise her to come in and complete the paperwork. However, failure of an injured worker to come in to complete paperwork is not an appropriate basis for denial of a claim. Iowa law does not require completion of particular paperwork by a claimant. I find that defendants' stated basis for denial of benefits is not reasonable.

Thus, I find that penalty benefits are appropriate for failure to contemporaneously convey a reasonable basis for denial of benefits.

Claimant is also seeking payment for past medical expenses as set forth in the attachment to the hearing report. Having found that claimant sustained an injury arising out of and in the course of her employment I find that claimant is entitled to these medical benefits pursuant to Iowa Code section 85.27. Defendants offer no argument as to why these benefits should not be paid. I find defendants are responsible for the medical expenses set forth in the attachment to the hearing report.

Finally, claimant is seeking an assessment of costs. Costs are to be assessed at the discretion of the deputy hearing the case. I find that the filing fee of $100.00 is an appropriate cost under 876 IAC 4.33(7). Claimant is seeking payment for two medical reports from Dr. Naylor in the amount of $1,300.00. I find that two Dr. Naylor reports claimant is seeking payment for are appropriate under 876 IAC 4.33(6). Thus, defendants are assessed costs in the amount of $1,400.00.

CONCLUSIONS OF LAW

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

The claimant has the burden of proving by a preponderance of the evidence that the alleged injury actually occurred and that it both arose out of and in the course of the employment. Quaker Oats Co. v. Ciha, 552 N.W.2d 143 (Iowa 1996); Miedema v. Dial Corp., 551 N.W.2d 309 (Iowa 1996). The words "arising out of" referred to the cause or source of the injury. The words "in the course of" refer to the time, place, and circumstances of the injury. 2800 Corp. v. Fernandez, 528 N.W.2d 124 (Iowa 1995). An injury arises out of the employment when a causal relationship exists between the injury and the employment. Miedema, 551 N.W.2d 309. The injury must be a rational consequence of a hazard connected with the employment and not merely incidental to the employment. Koehler 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.

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).

An injury to a scheduled member may, because of after effects or compensatory change, result in permanent impairment of the body as a whole. Such impairment may in turn be the basis for a rating of industrial disability. It is the anatomical situs of the

permanent injury or impairment which determines whether the schedules in section 85.34(2)(a) - (t) are applied. Lauhoff Grain v. McIntosh, 395 N.W.2d 834 (Iowa 1986); Blacksmith v. All-American, Inc., 290 N.W.2d 348 (Iowa 1980); Dailey v. Pooley Lumber Co., 233 Iowa 758, 10 N.W.2d 569 (1943). Soukup v. Shores Co., 222 Iowa 272, 268 N.W. 598 (1936).

Based on the above findings of fact, I concluded Ms. Arter sustained two percent functional impairment of her right lower extremity. Therefore, I conclude Ms. Arter is entitled to four point four (4.4) weeks of permanent partial disability benefits as a result of the February 12, 2015 work injury. I further concluded that these benefits shall commence on December 27, 2016.

Claimant is also seeking payment of healing period benefits. 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, 312 N.W.2d 60 (Iowa App. 1981). Healing period benefits can be interrupted or intermittent. Teel v. McCord, 394 N.W.2d 405 (Iowa 1986).

Specifically, claimant is seeking an award of healing period benefits from the date of the injury through the date of Dr. Naylor's impairment rating (February 12, 2015-December 27, 2016). I concluded that Ms. Arter's healing period ended when she reached MMI on December 27, 2016. Thus, claimant is entitled to healing period benefits from February 12, 2015 through December 26, 2016.

Defendants have asserted that claimant's claim is barred by operation of Iowa Code section 85.23. The Iowa Workers' Compensation Act imposes time limits on injured employees both as to when they must notify their employers of injuries and as to when injury claims must be filed. Iowa Code section 85.23 requires an employee to give notice of the occurrence of an injury to the employer within 90 days from the date of the occurrence, unless the employer has actual knowledge of the occurrence of the injury.

The purpose of the 90-day notice or actual knowledge requirement is to give the employer an opportunity to timely investigate the facts surrounding the injury. The actual knowledge alternative to notice is met when the employer, as a reasonably conscientious manager, is alerted to the possibility of a potential compensation claim through information which makes the employer aware that the injury occurred and that it may be work related. Dillinger v. City of Sioux City, 368 N.W.2d 176 (Iowa 1985); Robinson v. Department of Transp., 296 N.W.2d 809 (Iowa 1980).

Failure to give notice is an affirmative defense which the employer must prove by a preponderance of the evidence. DeLong v. Highway Commission, 229 Iowa 700, 295 N.W. 91 (1940).

Based on the above findings of fact, I concluded that the employer had actual knowledge of the injury within 90 days of the injury. I further concluded that by March 5, 2015, claimant had asked the employer about whether she could receive workers' compensation benefits and therefore, found that the claimant had provided notice to the employer of an injury. Thus, the employer was given notice and an opportunity to timely investigate the facts surrounding the injury. Therefore, I concluded defendants failed to prove by a preponderance of the evidence that claimant's claim is barred by operation of Iowa Code section 85.23.

Claimant is seeking payment of medical expenses. Iowa Code states that 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 found that claimant sustained an injury arising out of and in the course of her employment I concluded that claimant is entitled to these medical benefits pursuant to Iowa Code section 85.27. Defendants are responsible for the medical expenses set forth in the attachment to the hearing report.

Claimant also seeks an award of 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.

c. In order to be considered a reasonable or probable cause or excuse under paragraph "b," an excuse shall satisfy all of the following criteria:

(1) The excuse was preceded by a reasonable investigation and evaluation by the employer or insurance carrier into whether benefits were owed to the employee.

(2) The results of the reasonable investigation and evaluation were the actual basis upon which the employer or insurance carrier contemporaneously relied to deny, delay payment of, or terminate benefits.

(3) The employer or insurance carrier contemporaneously conveyed the basis for the denial, delay in payment, or termination of benefits to the employee at the time of the denial, delay, or termination of benefits.

In this case, I found that defendants failed to contemporaneously convey a reasonable basis for the denial of benefits. In the present case, claimant initially denied that she sustained an injury at work. However, she then asked defendants about workers' compensation benefits within a few weeks of the injury. Defendants possessed knowledge that would lead a reasonable employer to conduct an investigation into the claim. Ultimately, by the time this matter was brought to hearing Dr. Broghammer's report provided some evidence to dispute the alleged work injury. However, Iowa Code section 86.13(4) requires that the bases for denial actually be relied upon by the employer or carrier, after completion of a reasonable investigation. No evidence was submitted at hearing to establish that either the employer or the insurance carrier conducted a thorough investigation or that the actual bases for denial was based on Dr. Broghammer's report. Iowa Code section 86.13(4)(c)(2).

Similarly, there is no evidence in this record to establish that the defendants contemporaneously conveyed a reasonable basis(es) for their denial to the claimant. Iowa Code section 86.13(4)(c)(3). For the reasons set forth above, I found that the stated basis(es) for the denial were not reasonable. Accordingly, Iowa Code section 86.13(4) directs that this agency "shall award" penalty benefits in some amount. As noted above, I concluded that claimant is entitled to an award of penalty benefits.

Having determined that penalty benefits are due for the employer's denial of weekly benefits, I must consider the extent of the penalty to be imposed. The purpose of Iowa Code section 86.13 is both punishment for unreasonable conduct but also deterrence for future cases. Id. at 237. In this regard, the Commission is given discretion to determine the amount of the penalty imposed with a maximum penalty of 50 percent of the amount of the delayed, or denied, benefits. Christensen v. Snap-On Tools Corp., 554 N.W.2d 254, 261 (Iowa 1996). In exercising its discretion, the agency must consider factors such as the length of the delays, 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. Meyers v. Holiday Express Corp., 557 N.W.2d 502, 505 (Iowa 1996).

No evidence is contained within the evidentiary record to establish any past record of penalty benefits against this employer or carrier. The conduct of the employer was shown to be unreasonable. This penalty is imposed because defendants failed to conduct a reasonable investigation prior to the denial of the claim. Certainly, the agency desires and expects defendants to comply with the statutory requirements of Iowa Code section 86.13(4). Therefore, a penalty in an amount sufficient to deter future conduct is appropriate. I conclude that a penalty in the amount of six thousand and no/100 dollars ($6,000.00) is sufficient in this case to accomplish the goals and purposes of Iowa Code section 86.13(4).

Costs are to be assessed as the discretion of the deputy commissioner hearing the case. 876 IAC 4.33. I exercised my discretion as set forth above and assess costs against defendants in the amount of one thousand four hundred and no/100 dollars ($1,400.00).

ORDER

THEREFORE, IT IS ORDERED:

All weekly benefits shall be paid at the rate of four hundred thirty-one and 80/100 dollars ($431.80).

Defendants shall pay healing period benefits from February 12, 2015 through December 26, 2016.

Defendants shall pay four point four (4.4) weeks of permanent partial disability benefits commencing on December 27, 2016.

All past due weekly benefits shall be paid in lump sum with applicable interest pursuant to Iowa Code section 85.30.

Defendants shall be responsible for the medical expenses set forth in the attachment to the hearing report.

Defendants shall pay a penalty in the amount of six thousand and no/100 dollars ($6,000.00).

Defendants shall reimburse claimant's costs in the amount of one thousand four hundred and no/100 dollars ($1,400.00).

Defendants 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 April, 2017.

ERIN Q. PALS
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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EQP/srs

Right to Appeal: This decision shall become final unless you or another interested party appeals within 20 days from the date above, pursuant to rule 876 4.27 (17A, 86) of the Iowa Administrative Code. The notice of appeal must be in writing and received by the commissioner's office within 20 days from the date of the decision. The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday. The notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 1000 E. Grand Avenue, Des Moines, Iowa 50319-0209.