

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

TERRI TRIGGS,
Claimant,

FILED

MAR 21 2019

vs.

WORKERS COMPENSATION File No. 5065492

HOME DEPOT,
Employer,

ARBITRATION DECISION

and

NEW HAMPSHIRE INSURANCE
COMPANY,

Insurance Carrier,
Defendants.

Head Note Nos.: 1801, 3000, 4000.2

STATEMENT OF THE CASE

Terri Triggs, claimant, filed a petition in arbitration seeking workers' compensation benefits from her employer, Home Depot, and their insurance carrier, New Hampshire Ins. Co. The matter proceeded to hearing on September 27, 2018. Defense counsel unexpectedly passed away following the hearing and another attorney from his law firm appeared in the file to write the post-hearing brief, therefore understandably it was necessary to allow additional time for the parties to submit their post-hearing briefs. The parties submitted their post-hearing briefs and the matter was considered fully submitted on December 7, 2018.

The evidentiary record includes: Joint Exhibits JE1 through JE11; Claimant's Exhibits 1 through 5; and Defendants' Exhibits A through L. Claimant provided testimony at hearing.

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.

ISSUES

1. Whether the stipulated work injury was the cause of permanent disability and/or whether claimant is entitled to a running healing period.

2. Rate.
3. Penalty for alleged delayed payments of healing period.
4. Costs.

FINDINGS OF FACT

After a review of the evidence presented, I find as follows:

Terri Triggs, claimant, was 66 years old at the time of the hearing. (Transcript page 9) She graduated from high school in 1970. After high school she obtained a certificate in general accounting. (Tr. p. 10)

Work History

After high school, claimant worked at the Credit Bureau in Des Moines, Iowa. She then worked for the State of Iowa for 10 years as a case manager, assisting people who were receiving government benefits. (Tr. p. 11) Claimant had an injury to her back and neck while she was working for the State and received a workers' compensation settlement. (Exhibit K, pp. 25-26) She also applied for and was awarded Social Security Disability benefits. (Tr. pp. 12-13) Thereafter, she worked part-time as a hotel night auditor for a short time.

Claimant started working for the defendant employer on a part-time basis in April 2014. (Tr. p. 13) She was hired with existing restrictions that the employer accommodated. Claimant worked for the defendant employer for about three years. Her job primarily involved working as a self-check cashier, which allowed her to use a stool and alternate sitting and standing. Her job primarily involved monitoring four self-checkout registers and providing assistance to customers as needed at the self-checkout registers. (Tr. pp. 43-44)

Claimant was fired several months after the injury occurred. (Tr. p. 14)

Pre-Injury Medical Treatment/Condition

When claimant started working for the defendant employer in April 2014, she was already receiving Social Security Disability benefits. (Tr. p. 14) She began receiving Social Security Disability benefits in 2004, which switched to retirement benefits when she reached age 66. (Ex. K, pp. 25, 35) Claimant also had pre-existing permanent restrictions from an injury that occurred while working for the State of Iowa. Those restrictions included lifting no more than 5 pounds, limiting bending, stretching and alternating standing and sitting. (Tr. p. 42) Claimant made the defendant employer aware of these restrictions when she was hired and the employer accommodated her restrictions. (Tr. p. 43) Her prior injury involved her back and neck. (Ex. K, pp. 25-26)

It is well documented that prior to working for the defendant employer, claimant had been diagnosed with and treated for chronic major depression and panic disorder. (Ex. JE1, pp. 1, 3, 6, 7 10, 12, 14, 15, 17, 18, 19, 20, 21-28, & 29-32)

The Injury

On or about May 10, 2017, claimant was not doing her regular job as a cashier. She was placed in the garden department as a fill-in for the day. Claimant was working in a small hut helping a customer when a vendor slid the door of the hut into the left side of claimant's head and face. (Tr. p. 15)

Claimant reported the injury to Danielle in Human Resources and completed an accident report. (Tr. p. 15) She never returned to work after the injury. (Tr. p. 14)

Post-Injury Medical Treatment/Condition

After the work injury, claimant was sent by the employer to Concentra where she was seen by Carlos Moe, D.O., who recommended a CAT scan of her brain. He then referred her to Irving Wolfe, D.O., at Central Iowa Neurology. (Tr. p. 16) Claimant continued to see Dr. Wolfe at the time of the hearing. (Tr. p. 16)

On May 30, 2017, claimant saw Dr. Wolfe for the first time and reported that she had dizziness, nausea, blurred vision, difficulty with cognition, headaches, difficulty with concentration, disequilibrium, vertigo with body position changes, and issues with forming new memories. She reported that she did not have these issues before the May 10, 2017 work injury. (Ex. JE5-104) Dr. Wolfe's impression was: concussion with mild traumatic brain injury; and that claimant "endorses somatic, cognitive, and behavioral symptoms as the result of her work related injury." (Ex. JE5-105) Dr. Wolfe stated that claimant was "Unable to perform any work." (Ex. JE5-106)

I note that it was not until after this work injury that claimant was taken off work by a physician and that she had worked for the defendant for a number of years prior to this work injury.

On June 6, 2017, claimant also noted symptoms of anxiety and panic. (Ex. JE5-107)

Claimant attributed falls that she had after May 10, 2017 to the work injury and reported falling to Dr. Wolfe. (Tr. pp. 21-22) Claimant stated that she injured her right shoulder when she fell. (Tr. p. 22) Her falling has improved with the vestibular/balance therapy. (Tr. p. 22)

Dr. Wolfe recommended: vestibular/balance therapy/rehabilitation; neuropsychological testing; and a psychological evaluation and cognitive behavior therapy. (Ex. JE5-108)

Regarding vestibular/balance therapy, claimant was seen by Matthew Carfrae, M.D., of Iowa Ear Center, Hearing and Balance, Ear and Skull Base Surgery. (Ex. JE9-232) She also had therapy at Fyzical Therapy and Balance Clinic. (Ex. 8) Dr. Carfrae diagnosed claimant with: sensorineural hearing loss, bilateral; abnormal auditory perceptions, left ear; benign paroxysmal vertigo, right ear; labyrinthine dysfunction, right ear; post-concussional syndrome; and nausea. He stated "The etiology of Ms. Trigg[']s symptoms stems from past concussion in May." (Ex. JE9-236) He recommended additional vestibular therapy and bilateral hearing amplification. (Ex. JE9-236)

Claimant was seen by Diann Jenison on June 28, 2017 for a psychological evaluation. (Ex. JE6-151) Ms. Jenison's diagnosis was adjustment disorder with mixed anxiety and depressed mood and unspecified problems related to employment. (Ex. JE6-153) Ms. Jenison agreed with Dr. Wolfe that claimant should undergo neuropsychological testing "to better determine the level of her current cognitive function." (Ex. JE6-153)

On July 17, 2017, claimant was seen for a neuropsychological evaluation with David Demerest, Ph.D., clinical neuropsychologist, at On With Life, Brain Injury Rehabilitation Specialists. (Ex. JE7, pp. 163-172) Dr. Demerest reviewed medical records, interviewed claimant and her granddaughter, who has lived with claimant for a number of years. (Ex. JE7-163) Dr. Demerest stated that claimant had significant memory and cognitive issues and concluded that claimant's "deficits appeared legitimate to me today – I did not note evidence for malingering or less-than-optimal effort, such as inconsistencies, playing up her symptoms, etc." and that claimant; "worked to the best of her abilities on all tests presented, and therefore current testing results are felt to be a valid representation of her level of cognitive functioning at this specific date" (Ex. JE7-168) Claimant's premorbid intellectual/cognitive status is estimated to be in the average range, based on her academic and vocational achievement. (Ex. JE7-168) Dr. Demerest noted claimant presented with severe confusion and memory deficit, severe mood disturbance, very severe depression and anxiety. (Ex. JE7-171) He stated that "Certainly, under all circumstances, she is not able to be gainfully employed at this point in time." (Ex. JE7-171) He also stated that "Sorting out the effects on her cognition of the Postconcussional Disorder/injury in question will not be possible at this time given the confounding and interfering effects of these factors. I would be glad to reassess . . . as these interfering factors are addressed and felt to be in better control." (Ex. JE7-171)

On January 30, 2018, claimant underwent a functional capacity evaluation (FCE) at the request of Dr. Wolfe. However, the FCE was not completed in its entirety because of claimant's preexisting restrictions of "no lifting greater than five pounds, no bending, no twisting, no overhead reaching, and sitting ret [*sic*] periods every two hours." (Ex. JE10-244) The therapist conducting the FCE stated that "In consideration of this it is my conclusion that from a physical standpoint the client is operating at her

prior level of function,” and “No other recommendations can be offered at this time.” (Ex. JE10-244)

On June 7, 2018, Robert Rondinelli, M.D., Ph.D., C.I.M.E., of Pinnacle IME Services, LLC, authored a report following an independent medical examination (IME) of claimant at the request of claimant’s counsel. (Ex. 2) Dr. Rondinelli noted claimant’s pre-injury history of anxiety, depression, and panic attacks, along with chronic neck and back pain, which included treatment at a pain clinic with Mohammad S. Iqbal, M.D., and pre-existing restrictions of alternating sitting/standing, limiting bending and stooping, and no lifting over five pounds. Dr. Rondinelli discussed claimant’s job, the occurrence of the work injury, reviewed medical records and her present complaints, and conducted a physical examination. In his IME report, Dr. Rondinelli diagnosed claimant with: mild traumatic brain injury after the May 10, 2017 work injury; post-concussive syndrome with improving symptoms of constant headaches medicated with gabapentin and symptoms of severe short-term memory deficit and constant tinnitus; probable delirium associated with poly-medications, resolving; and left 5th nerve sensory changes in maxillary and mandibular branch of the 5th cranial nerve. He noted claimant was weaned off of opiates and benzodiazepines and is improving significantly in function at this time. (Ex. 2-20)

Dr. Rondinelli was asked the question: “Are the injuries identified above and disability resulting therefrom caused by her employment at the Home Depot?” (Ex. 2-21) He responded: “Within medical probability, yes. Ms. Triggs suffered a mild traumatic brain injury with some element of neurocognitive and associated behavioral dysfunction which was not present prior to her injury at Home Depot.” (Ex. 2-21) However, he also stated that “Because of the possible overlap and confounding influence of her preexisting comorbidities with a history of anxiety and panic attacks, depression, and ongoing neck and back pain problems, it is difficult to tease out what component of her current symptomatology is, within medical probability, due to mild post-concussive syndrome.” (Ex. 2, pp. 20-21) He stated that “a repeat evaluation and formalized psychological testing by Dr. Demarest would be most helpful in order to get a valid description of her present functional deficits, which are consistent and within medical probability associated with mild TBI.” (Ex. 2-21) Dr. Rondinelli declined to offer any opinion of permanent impairment, stating “I feel any percentage of impairment should be deferred until repeat assessment in this regard can be completed,” referring to repeat testing with Dr. Demarest. (Ex. 2-21) Dr. Rondinelli believed that claimant should not return to work until after the additional evaluation with Dr. Demarest and therapeutic counseling under the guidance of Dr. Wolfe. (Ex. 2-22) He did not believe claimant was at maximum medical improvement (MMI), but that she may be within a few months. (Ex. 2-22)

On August 22, 2018, claimant was reevaluated by Dr. Demarest for a second neuropsychological evaluation. (Ex. JE7. pp. 177-186) Since the previous evaluation, Dr. Demarest noted claimant had improvement in response to speech therapy, and gradual improvement with Dr. Carfrae concerning vestibular therapy. (Ex. JE7-180; Tr.

p. 18) Dr. Demerest also noted that claimant's depression increased in severity since the previous evaluation. (Ex. JE7-183) He evaluated claimant's: general intelligence; language and academic skills; her motor and visual-perceptual skills and mental processing speed; memory skills; and executive cognitive skills and found that claimant was "uniformly better than at 2017 neuropsychological evaluation," but also that "Her depression level at this point is severe, and her anxiety difficulties are improved but moderate in degree still." (Ex. JE7-186) He did not alter his prior statement that claimant cannot return to gainful employment.

On August 30, 2018, claimant was seen by Steven Adelman, D.O., for an independent medical (neurological) evaluation at the request of defense counsel. (Ex. A) Dr. Adelman reviewed medical records, and noted her alleged issues with memory disturbance, emotional issues and balance. (Ex. A-1) Dr. Adelman discussed claimant's job and the occurrence of the injury. He noted claimant's preexisting "5 pound work restriction . . . because of chronic back and neck pain." (Ex. A-1) He also noted claimant's current complaints and conducted an examination. However, I note the examination discussion is brief and does not reveal much in the way of supportive data. For example, Dr. Adelman concluded that claimant "tends to embellish some difficulties with tandem walking," but does not discuss his particular observations or other factors or test results that support this conclusion. (Ex. A-3) Dr. Adelman stated that the work injury was a "rather trivial head trauma on May 10, 2017," noting claimant's normal neurological exam and CT scan. (Ex. A-3) Dr. Adelman stated none of the therapies have resulted in significant relief. However, claimant testified that vestibular therapy has improved her balance and reduced her falls and that her memory has improved, and her treatment with psychologist, Diann Jenison was somewhat helpful. (Tr. pp. 18, 19, 22)

Dr. Adelman opined that claimant had a "mild cerebral concussion at the time of her injury and had some degree of tension-type headache which potentially could aggravate some difficulty in focusing leading to some memory issues." (Ex. A-3) He further stated that "Any issues that she currently is experiencing I believe to be highly unlikely related to her work-related injury of May 10, 2017." (Ex. A-3) Dr. Adelman stated that claimant had preexisting chronic pain for which she was on medication and that "Current neuropsychological testing" shows she has "significant issues with depression and anxiety which may also aggravate her current complaints." (Ex. A-4) I note that this is not a clear statement on the issue of causation, given Dr. Adelman's reference to "current testing," post-injury that show depression and anxiety, and his word choice that these factors "may also aggravate" her current condition. (Ex. A-4)

Dr. Adelman opined that claimant reached MMI in November 2017, six months after the injury date. This is based on an apparent general rule, and not on any stated findings or data involved in this case. (Ex. A-4)

Dr. Adelman does not believe that claimant's work injury caused any permanent impairment or that claimant requires any work restrictions "that did not exist prior to her

injury of May 10, 2017 on her ability to return to work.” (Ex. A-4) Also, he recommends no additional medical care for this injury. (Ex. A-4)

On September 11, 2018, Dr. Adelman added an addendum to his report to include additional opinions that: “within a reasonable degree of medical certainty that the patient’s neck concerns, ‘her neck catches which can be very painful,’ is not related to her work related injury nor is it a sequelae of her work related injury.” (Ex. A-4) He also states that he “did not address the psychiatric issues that the patient may have. It has been well referenced by other providers that depression may be aggravating her work related injury.” (Ex. A-4) He then recommended a psychiatric evaluation based on claimant’s failure to have her symptoms controlled or alleviated following the variety of treatments that she had. (Ex. A-4)

I give less weight to the opinion of Dr. Adelman in light of the conclusory nature of his report with limited discussion of the data used to support his conclusions and his apparent dismissal of her noted improvement through some of the therapies utilized to treat her condition.

On September 10, 2018, Dr. Wolfe wrote a letter to claimant’s counsel after he reviewed Dr. Adelman’s IME report. (Ex. 4) He highlighted claimant’s medical history and opined within a reasonable degree of medical certainty that claimant “suffered a mild traumatic brain injury (concussion) which was directly related to her work injury of May 10, 2017. Ms. Triggs continues to note somatic cognitive and behavioral symptoms as the result of her work-related injury of May 10, 2017.” (Ex. 4-44) He opined that claimant had not yet reached MMI, noting that she was “considering the use of Botox injections,” and was “being evaluated by Dr. Moe for neck issues,” and based on “the result of [her] neuropsychological testing performed by Dr. Demarest, I would recommend that Ms. Triggs be evaluated by a psychiatrist.” (Ex. 4-44) He concluded that “As Ms. Triggs is not yet at maximum medical improvement . . . Ms. Triggs cannot be assigned a permanent impairment rating at [*sic*] it relates to her work-related injury of May 10, 2017.” (Ex. 4-44) He also stated that “I would not recommend that Ms. Triggs return to work as the complexity and interactions of her ongoing symptoms would make it most unlikely that Ms. Triggs could be considered a reliable and dependable employee.” (Ex. 4-44)

I give greater weight to the opinions of Dr. Wolfe, who was claimant’s authorized treating physician, until medical care was terminated by defendants. Dr. Wolfe remains claimant’s primary ongoing medical provider. Dr. Wolfe has the unique perspective of seeing and treating claimant over a longer period of time and is in the better position, based on multiple observations, to identify those symptoms related to her work injury and changes therein. Dr. Wolfe’s opinions concerning causation are generally supported by Dr. Rondinelli and Dr. Demarest as stated above.

I note that the treating and evaluating physicians generally agree that claimant suffered a mild traumatic brain injury with post-concussive symptoms and having found

the opinion of Dr. Wolfe to be the most persuasive, I find that claimant is not yet at MMI, as stated by Dr. Wolfe. (Ex. 4-44) This finding is also supported by the opinions of Dr. Rondinelli and Dr. Demarest. I note that the only physician to find claimant has reached MMI is Dr. Adelman, whose opinion was given little weight by the undersigned as stated above. Also, Dr. Adelman recommends additional psychiatric evaluation, although he does not believe claimant's current condition is related to her work injury. (Ex. A-4)

Dr. Wolfe has not returned claimant to work. This is supported by the conclusions of Dr. Demarest and Dr. Rondinelli.

Additional Findings

Considering rate, I note that claimant makes no argument in her brief nor did she provide any documentary evidence in her exhibits specifically concerning this issue.

Claimant testified that she was a part-time employee of the defendant employer. (Tr. p. 14) Her earnings from May 2, 2016 through the date of injury, divided by 50 equals an average weekly wage of \$243.00. (Ex. H-32) There was no evidence provided of claimant's net spendable income based on her gross wages. Claimant was married at the time of the injury, on May 10, 2017, but had been separated from her husband since 2008. (Tr. p. 32) Claimant testified that she did not produce her 2017 tax returns, because she could not find them. (Tr. p. 33) However, she agreed that she claimed no dependents other than herself in 2017. (Tr. p. 33)

Thirty-five percent of the statewide average weekly wage for 2017 was \$295.00. (Page IV, Iowa Workers' Compensation Manual [Rate Book], Effective July 1, 2016 – June 30, 2017) The weekly benefit amount for a person eligible for an exemption status of married with one exemption (M-1) at the rate of \$295.00 is \$207.01.

In the absence of any evidence of claimant's weekly net spendable income, I accept defendants' rate calculation and find that the applicable rate is \$207.01.

Considering claimant's penalty claim, I note that claimant makes no argument in her brief in support of this claim. She testified generally that she had some weeks that were paid late and stated that she was owed one week of healing period at the time of the hearing on September 27, 2018. (Tr. p. 31) Claimant's Exhibit 1, indicates generally that claimant did not receive a payment or that the payment was delayed for the weeks of February 22, 2018; August 21, 2018; and August 31 through September 20, 2018, which is a total of five weeks. (Ex. 1) There is no specific evidence of the date the payments were actually due or the date that they were eventually received, but rather a general reference was made to the weeks that were deemed to be late.

Defendants provided an itemization of healing period payments, but the document does not indicate the date upon which the weekly benefits were paid. (Ex. I)

I find that defendants conducted a reasonable investigation as indicated by their provision of medical care and payment of healing period benefits. Concerning the alleged delayed payments, I find the evidence lacking as to the date upon which the allegedly late benefits were actually due and the date that the benefits were eventually paid. I cannot find that they were late without this information. I find that claimant's testimony that she was owed just one week of benefits at the time of the hearing is credible. However, I also find that defendants provided weekly benefits in the amount of \$213.78 for a period of 75.286 weeks after the injury date and prior to hearing on September 27, 2018, per the parties' stipulation. (Hearing Report, p. 2) The benefits were paid on a weekly basis and not in a lump sum. (Ex. I, pp. 39-40) I find that there was an overpayment of benefits of \$6.77 per week that would accrue as a credit against the unpaid week claimant testified that she did not receive at the time of the hearing. I find that the overpayment of \$6.77 would amount to one full weekly payment in just 30.578 weeks. Therefore, I find that although claimant may have indeed not received a payment that was due just prior to the hearing, the overpayment worked as a credit against the amount due, such that the payment was prepaid, and was not late.

CONCLUSIONS OF LAW

1) Whether the stipulated work injury was the cause of permanent disability and/or whether claimant is entitled to a running healing period.

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); Dunlavy v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995). Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417 (Iowa 1994). Unrebutted expert medical testimony cannot be summarily rejected. Poula v. Siouxland Wall & Ceiling, Inc., 516 N.W.2d 910 (Iowa App. 1994).

When an expert opinion is based upon an incomplete history, the opinion is not necessarily binding upon the commissioner. The commissioner as trier of fact has the duty to determine the credibility of the witnesses and to weigh the evidence, together with the other disclosed facts and circumstances, and then to accept or reject the opinion. Dunlavy v. Economy Fire & Casualty Co., 526 N.W.2d 845 (Iowa 1995).

Healing period benefits are payable to an employee who has sustained a permanent partial disability "beginning on the first day of disability after the injury, and until the employee has returned to work or it is medically indicated that significant improvement from the injury is not anticipated or until the employee is medically capable of returning to employment substantially similar to the employment in which the employee was engaged at the time of injury, whichever occurs first." Iowa Code section 85.34(1).

I have accepted above the opinions of the treating physician Dr. Wolfe, noting his opportunity to treat claimant over a period of time and several visits. He has utilized through referral, the assistance of experts, such as Diann Jenison, Dr. Demarest and Dr. Carfrae. I note that Dr. Rondinelli's opinions are supportive of Dr. Wolfe, who has opined that claimant has not yet reached MMI.

It is clear that claimant has not returned to work after the injury. Further, Dr. Demarest, Dr. Wolfe and Dr. Rondinelli have all stated that claimant should not yet return to work, and I conclude that she is therefore not medically capable of returning to the type of work that she performed at the time of the injury. Lastly, I have found above that claimant is not yet at MMI. Therefore, none of the three triggers in Iowa Code section 85.34(1) that would stop healing period have occurred. As such, claimant is entitled to a running healing period.

2) Rate.

Iowa Code 85.36 provides that the "basis of compensation shall be the weekly earnings of the injured employee at the time of the injury." The weekly earnings of a part-time employee earning "less than the usual weekly earnings of the regular full-time adult laborer in the line of industry in which the employee is injured in that locality, the weekly earnings shall be one-fiftieth of the total earnings which the employee has earned from all employment during the twelve calendar months immediately preceding the injury." Iowa Code section 85.36(9).

In this case, I have found above that claimant's average weekly wage is \$243.00. Because this is below 35 percent of the statewide average weekly wage, \$295.00, defendants argue that this is a minimum rate case and calculate claimant's rate to be \$207.01 per week, an amount that I have accepted above in the absence of any argument from claimant.

3) Penalty for alleged late payments of healing period.

Iowa Code section 86.13(4) provides that:

(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, of chapter 85, 84A, 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 of 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 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.

If weekly compensation benefits are not fully paid when due, section 86.13 requires that additional benefits be awarded unless the employer shows reasonable cause or excuse for the delay or denial. Weekly compensation payments are due at the end of the compensation week. Robbennolt v. Snap-on Tools Corp., 555 N.W.2d 229, 235 (Iowa 1996).

In this case, I have found the evidence lacking to support a finding that payments were denied or delayed except for one week near the time of the hearing. However, I also found that the overpayment resulted in a prepayment of the week claimant asserted was unpaid and therefore, it was not late.

Claimant has failed to carry her burden of proof and her claim for penalty is denied.

4) Costs.

The final issue is costs. Assessment of costs is a discretionary function of this agency. Iowa Code section 86.40. Costs are to be assessed at the discretion of the deputy commissioner or workers' compensation commissioner hearing the case. 876 IAC 4.33. I conclude that claimant should be reimbursed costs in the amount of \$100.00 for her filing fee.

ORDER

IT IS THEREFORE ORDERED:

Defendants shall pay claimant running healing period benefits until such time that one of the three triggers in Iowa Code section 85.34 (1) occurs.

Weekly benefits shall be paid at the rate of two hundred seven and 01/100 dollars (\$207.01).

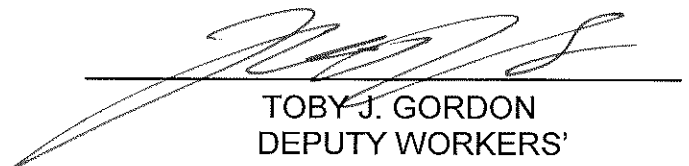
Defendants shall receive credit for all weekly benefits paid to date.

Defendant employer and New Hampshire Insurance Company shall pay accrued weekly benefits, if any, in a lump sum together with interest at the rate of ten percent for all weekly benefits payable and not paid when due which accrued before July 1, 2017, and all interest on past due weekly compensation benefits accruing on or after July 1, 2017, shall be payable at an annual rate equal to the one-year treasury constant maturity published by the federal reserve in the most recent H15 report settled as of the date of injury, plus two percent, see Gamble v. AG Leader Technology File No. 5054686 (App. Apr. 24, 2018).

Defendants shall pay costs of one hundred and 00/100 dollars (\$100.00).

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 21st day of March, 2019.



TOBY J. GORDON
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

Copies to:

Christopher D. Spaulding
Attorney at Law
2423 Ingersoll Ave.
Des Moines, IA 50312-5214
chris.spaulding@sbsattorneys.com

Jeffrey W. Lanz
Attorney at Law
2700 Westown Pkwy., Ste. 170
West Des Moines, IA 50266-1411
jlanz@desmoineslaw.com

TJG/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.