

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JANEL KENNEDY,

Claimant,

vs.

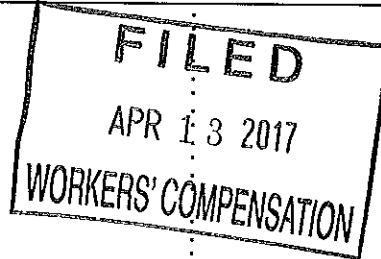
AEROTEK,

Employer,

and

INDEMNITY INSURANCE COMPANY
OF NORTH AMERICA,

Insurance Carrier,
Defendants.



File No. 5055080

ARBITRATION
DECISION

Head Note Nos.: 1802, 1803, 4000

STATEMENT OF THE CASE

Janel Kennedy, claimant, filed a petition in arbitration seeking workers' compensation benefits from defendants Aerotek, the employer and Indemnity Insurance Company of North America, the insurance carrier. The arbitration hearing was held on November 16, 2016. The parties submitted post-hearing briefs on December 19, 2016. The matter was considered fully submitted on that date.

The evidentiary record includes Claimant's Exhibits 1 through 24, which were admitted without objection. Defendant's offered Exhibits A through F, which were admitted over claimant's objections to Exhibits A, page 1 and Exhibit D for the reasons stated on the record. Claimant was the only witness to testify at the 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

The parties submitted the following disputed issues for resolution:

1. Whether claimant is entitled to healing period benefits from July 2, 2014 through October 15, 2014.

2. The extent of permanent partial disability benefits.
3. The commencement date of permanent partial disability benefits.
4. The extent of credit applicable to any award of permanent partial disability award.
5. Whether claimant is entitled to penalty benefits.

FINDINGS OF FACT

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

Claimant was 43 years old at the time of the hearing. (Transcript page 17) She obtained a G.E.D. in approximately 1999 or 2000. (Exhibit E, p. 5) She had some formal training in the medical field including obtaining a CNA certificate and some college nursing courses, but did not obtain a degree. (Ex. E, pp. 5-6; Ex. 23, p. 6; Tr. p. 17)

Claimant began working for the defendant employer, a temporary employment agency, in approximately January 2013, and she was placed at Hach Chemical. (Tr. pp. 18-19, 24) It is noted by her occupational therapist that she "was unable to continue working and was laid-off after the injury." (Ex. 19, p. 1)

On July 2, 2013, while working as a Material Handler I, at Hach Chemical, claimant sustained an injury to her right hand and index finger that occurred while she was taking boxes off a pallet when she hit her right hand against a pole. (Ex. 1, p. 1; Ex. 2, p. 1; Ex. 23, p. 2; Tr. p. 20)

On the day of the injury, claimant received treatment from the nurse on site. The nurse wrapped the injured area and sent her back to work, where she finished her regular shift. (Tr. pp. 20-21)

On July 15, 2013, claimant was seen by Kurt Klise, M.D., who noted that she had swelling and pain in the distal metacarpals of the index and middle fingers, as well as decreased range of motion. (Ex. 8, p. 3) At that time, claimant was still working without restrictions, but it is noted that she had been "using ibuprofen and modifying her work accordingly." (Id.) She was given work restrictions, Meloxicam, Tramadol, and referred for occupational therapy, and told to follow-up in two weeks. (Ex. 8, p. 4)

On August 2, 2013, claimant followed-up with Dr. Klise and noted "definite improvement" and she was returned to regular work duty. (Ex. 9, pp. 1-2)

On September 27, 2013, claimant returned to see Dr. Klise complaining of continued pain and swelling in her right hand. (Ex. 10, p. 1) Claimant was referred to a hand surgeon. (Ex. 10, p. 2)

On November 4, 2013, claimant was seen by Gregory Yanish, M.D., of Capital Orthopaedics. (Ex. 11, p. 1) Claimant described her symptoms as "numbness or tingling in the index, middle and ring fingers at times." (Id.) Suspecting an injury to the ulnar collateral ligament, Dr. Yanish requested an MRI, which was obtained on November 20, 2013. (Ex. 11, p. 1; Ex. 13, p. 1)

Claimant returned to see Dr. Yanish on December 16, 2013, and described continued significant discomfort "pointing to the ulnar aspect of the MCP joint," of the right index finger. (Ex. 14, p. 1) It was also noted that she "denies having any symptoms of numbness or tingling in the right hand or any other upper extremity concerns at this time." (Id.) Claimant was diagnosed with a right index finger ulnar ligament rupture at the metacarpophalangeal joint. (Ex. 16, p. 1) The plan was to move forward with surgery. (Ex. 14, p. 2)

On February 20, 2014, she underwent surgery with Dr. Yanish for repair of the damaged ligament. (Ex. 16, p. 1)

Claimant had follow-up care with Dr. Yanish. On March 21, 2014, Dr. Yanish noted that claimant "denies having any symptoms of numbness or tingling in the right hand and states her pain is well controlled. The patient is quite pleased with the surgical outcome thus far and denies having any additional upper extremity concerns to report at this time." (Ex. 18, p. 1) She was referred for occupational therapy. (Ex. 18, p. 3)

Claimant had her last visit with Dr. Yanish on May 2, 2014, at which time she was 10 weeks post-surgery and was compliant with hand therapy. It is again noted that "she denies having any symptoms of numbness or tingling in the right hand and is quite pleased with range of motion progression thus far. There are no additional upper extremity concerns to report at this time." (Ex. 20, p. 1) She was to return to physical therapy for four weeks and then see Dr. Yanish again when therapy was completed. (Ex. 20, pp. 2-3) Also on May 2, 2014, she was also placed on a 10-pound lifting restriction for one month. (Ex. 20, p. 5) Claimant's job with the defendant required lifting up to 50 pounds. (Tr. p. 19)

Claimant did not complete the four weeks of physical therapy and did not return to see Dr. Yanish. (Tr. pp. 29, 35, 44, 46) Claimant agreed that she missed about three physical therapy appointments. (Tr. p. 54) She also agreed that she did not return to see Dr. Yanish and did not seek any other medical care at that time from any other provider. (Tr. p. 55)

Claimant testified that she was unable to complete the physical therapy and unable to return to see Dr. Yanish because her car broke down and she was unable to secure alternate transportation. (Tr. pp. 29-30) Claimant lived in Collins, Iowa, about a 45 to 50 minute drive, one way, to the Clive/West Des Moines area where she attended physical therapy and where Dr. Yanish's office was located. (Tr. p. 40) She testified that she notified the insurance adjuster when her car broke down. (Tr. p. 29) Claimant

stated that she was told to reschedule the appointment. She initially anticipated that the car would be fixed within a matter of days. However, she called the adjuster back to reschedule again because her car did not get fixed. (Tr. pp. 49-50) It was at this time that claimant stated that she was advised by the insurance adjuster, that her case was going to be closed. (Tr. pp. 50, 61) She testified that this conversation occurred before July 1, 2014, when her weekly healing period benefits were terminated. (Id.) Claimant stated that she understood this to mean that when the case was closed, there was no way to reopen it, and it was done. (Tr. p. 32) She stated that at that time she did not seek any additional care, due to a lack of health insurance and a lack of financial resources, combined with her understanding that her case was closed. (Tr. pp. 55, 61-62)

Claimant testified that defendants never offered to provide any transportation during the period of time that her car was not working. (Tr. pp. 30-31) Defendants offered no evidence to contradict this statement.

The defendants provided notes from the insurance adjuster, which reference communications between the adjuster and claimant. (Ex. D)

The first adjuster note is dated June 2, 2014, and references a letter that was sent to claimant on the same date to her post office box in Collins, Iowa stating that she missed her appointment with Dr. Yanish on May 30, 2014 and no future appointment had been scheduled. (Ex. D. p. 22) The letter notified claimant that "we will discontinue temporary total benefits in 30 days from the date of this notice, on July 1, 2014." (Id.) The letter does not indicate defendants' belief or position that claimant had returned to work or was medically capable of returning to work that was substantially similar to the job that she was engaged in when she was injured, nor was there assertion that claimant had reached maximum medical improvement (MMI). Claimant denied ever receiving this letter. (Tr. p. 48)

An appointment was scheduled with Dr. Yanish on June 23, 2014 and claimant did not show for that appointment. (Ex. D, p. 26) Claimant testified that she did not believe she had an appointment with Dr. Yanish on June 23, 2014, and if it was scheduled, no one told her about it. (Tr. pp. 48-49)

On June 27, 2014, the adjuster noted a phone conversation with claimant wherein claimant advised that her car was broken down and that she had to get it fixed before she could return to see Dr. Yanish. (Ex. D, p. 24) The note indicates that claimant was made aware that defendants' were providing weekly benefits through July 1, 2014, at which time the benefits would cease and not restart until claimant rescheduled and attended an appointment with Dr. Yanish, and he stated that claimant could not work. (Id.) There is no mention of defendant offering to provide alternate transportation or pay for alternative transportation for claimant to attend the appointment with Dr. Yanish.

An adjuster note from July 9, 2014 states that claimant advised on that date that her car was repaired and she will be making an appointment with Dr. Yanish within the next week. (Ex. D, p. 25) However, claimant testified that she never advised the insurance carrier that her car had been fixed. (Tr. pp. 31-32) She stated that "I never once stated I got my car repaired." (Tr. p. 50)

The adjuster notes indicate that a message was left for claimant on July 22, 2014, asking whether claimant intended to seek follow-up care or treatment. (Ex. D, p. 26) On July 24, 2014, a letter was sent to claimant at her Collins, Iowa Post Office box asking her to contact the adjuster to advise whether or not claimant intended to seek a final medical evaluation. (Id.)

On July 28, 2014, the adjuster notes state that claimant called and advised that she scheduled an appointment for July 30, 2014 with Dr. Yanish. (Ex. D, p. 28) On July 30, 2014, claimant is noted to have rescheduled the appointment to August 13, 2014. (Id.) The adjuster was advised by Dr. Yanish's office that claimant called prior to her appointment on July 30, 2014 and stated that she would need to reschedule the appointment because she had been called into work. She also indicated that she could not reschedule the appointment until August 13, 2014 due to her work schedule. (Ex. D, p. 29) The adjuster left a voice mail message and sent a letter on August 8, 2014, stating that it was imperative that claimant attend the August 13, 2014 appointment with Dr. Yanish. (Ex. D, p. 30) On August 18, 2014, the adjuster was advised by Dr. Yanish's office that claimant did not show for the August 13, 2014 appointment. (Ex. D, p. 31)

The claimant confirmed that the insurance carrier had her correct mailing address and phone number. (Tr. pp. 47-48) However, she denied receiving any letters notifying her that the insurance carrier was closing the case or terminating benefits. (Tr. pp. 32-33)

Claimant received temporary total disability benefits through July 1, 2014. (Ex. 5, p. 2; Ex. D, p. 22) The employer stopped paying temporary benefits "due to Claimant's failure to attend medical appointments." (Ex. F, p. 40)

On September 5, 2014, Dr. Yanish drafted a response to a letter from the insurance carrier in which he stated that claimant's last appointment with him was May 2, 2014 and she missed three subsequent appointments thereafter. He then assigned impairment of zero percent to the right index finger under the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition (AMA Guides). (Ex. A, p. 1) This opinion is given without the benefit of an additional evaluation and does not provide any discussion or reference to any facts or portions of the AMA Guides relied upon to support his conclusion of a zero percent impairment.

About 21 months later, on June 10, 2016, claimant was seen by Ze-Hui Han, M.D., of Iowa Ortho, after Dr. Yanish refused to see claimant. After a physical examination, Dr. Han found that claimant was about two years and four months post-

surgery and that she had had full range of motion of her bilateral wrists and elbows. Concerning the right hand, her "index finger MP joint ulnar collateral ligament is stable." (Ex. B, p. 11) He found claimant had some stiffness on the right index finger, especially the MP joint. He then assessed range of motion of the right index finger at the MP, DIP and PIP joints and noted that "[a]ll fingers are neurologically intact." (Ex. D, p. 11) He stated that "I believe the patient has already reached the maximal medical improvement and the patient stated that she can continue doing the regular work activities, so, I agree that the patient can continue her regular work activity without any restrictions . . ." (Ex. B, p. 11) On October 13, 2016, Dr. Han responded to a letter from defense counsel with a handwritten response citing figures 16-21 and 16-25 (the range of motion figures from the AMA Guides) and based on his measurements described in his prior report, he assigned 15 percent impairment to the index finger due to the loss of range of motion, which he converted to 2 percent of the right hand. (Ex. B, p. 12) He again confirmed that no restrictions were needed. (Id.) The undersigned notes that Dr. Han's impairment rating is based on loss of range of motion only to the finger, and does not involve impairments to the wrist, hand, or arm.

On July 11, 2016, Farid Manshadi, M.D., authored a report following an independent medical evaluation (IME) that occurred on June 28, 2016. (Ex. 21, p. 1) Dr. Manshadi reviewed medical records and conducted a physical examination. Claimant reported that she had pain ranging from 4/10 to 7/10, as well as numbness that interferes with sleep and daily activities, at times. Dr. Manshadi evaluated range of motion of the right index finger and noted that claimant had full extension and abduction, but weak adduction at 3/5. (Ex. 21, p. 3) He further noted reduced sensation of the finger. Although he found tenderness over the dorsal aspect of the right wrist, he noted full range of motion of the wrist and that the "right hand dorsally was intact to light touch and pinprick." (Id.) Therefore, although claimant reported to Dr. Manshadi, pain in the hand and even to the right dorsal forearm, the only measurable and objectively identifiable loss of function found by Dr. Manshadi involved the right index finger. Dr. Manshadi opines, with no particular discussion, that claimant reached MMI on June 10, 2016, the date of her appointment with Dr. Han. (Ex. 21, p. 4) Dr. Manshadi then opined that claimant sustained 39 percent impairment to the index finger based on pages 461 through 464 of the AMA Guides due to loss of range of motion as determined by his measurements on examination, although he also noted claimant had full passive range of motion. (Ex. 21, p. 4) He also assigned 25 percent impairment to the right index finger based on Table 16-7, page 448 of the AMA Guides due to reduced sensation. He then combined these ratings, and arrived at 54 percent impairment for the right index finger. (Id.) He then converted that rating to 11 percent of the hand and then to 10 percent of the right upper extremity. (Id.) The undersigned notes that the rating is based only on the lost function to the index finger. There is no loss of function noted that is assignable to the wrist, hand or arm.

On November 9, 2016, Dr. Yanish provided a letter to defense counsel in which he endorses Dr. Han's assessment of impairment and criticizes Dr. Manshadi's opinion of impairment as "quite exaggerated." (Ex. A, p. 8) He also agrees with Dr. Han, that no restrictions are required. (Id.) Concerning MMI, Dr. Yanish states that when a

patient abandons medical care, that MMI should be deemed to have occurred on the date of the last visit. In this case, claimant's last appointment with Dr. Yanish was May 2, 2014. (Ex. A, p. 7) He then states that he would ordinarily expect that for this type of injury, an average date of MMI would be three to four months after surgery. (Id.) Claimant's surgery occurred on February 20, 2014. This would place an average patient in claimant's position at MMI between May 20, 2014 and June 20, 2014, which is beyond the last visit date of May 2, 2014. The approach to establishing MMI described by Dr. Yanish regarding a patient abandoning care, presupposes that medical care was abandoned with a thoughtful and reasoned choice of the patient, and not due to matters outside her control. However, in this case, claimant had transportation problems that defendant was aware of, but did not seek to remedy.

On November 12, 2016, Dr. Manshadi responded to a letter from defense counsel adding that claimant should have permanent restrictions of avoiding repetitious gripping, grasping, pushing and pulling with the right hand. (Ex. 24, p. 2) He again refers to range of motion issues only with the index finger, not the wrist, hand, or arm. (Id.)

The date that claimant was terminated from her employment with this defendant employer is unknown. Claimant did not recall the date of her separation when she was asked at hearing. (Tr. p. 24) She stated in her deposition that the last time she worked at Hach Chemical was in late 2013 or early 2014. (Ex. D, p. 34) Claimant stated that while she was working at Hach Chemical, she also was working a few days a week at Olde Main Brewing, Company. (Id.) When she was terminated from Hach Chemical, she increased her hours at Olde Main Brewing Company and did not have any time off in between the two jobs. (Id.) Her answers to interrogatories indicate that she worked at Olde Main Brewing Company from 2012 through 2013, and worked at Hach Chemical in 2013. (Ex. 23, p. 13) Therefore, I find that claimant's employment at Hach Chemical/Aerotek ended in 2013.

Claimant testified in her deposition that she worked at Olde Main Brewing Company until about Valentine's Day. (Ex. D, p. 35) This is understood by the undersigned to be Valentine's Day of 2014. Based on claimant's testimony and her answers to interrogatories I find that claimant's employment at Olde Main Brewing Company ended prior to her surgery with Dr. Yanish on February 20, 2014.

Therefore, I find that at the time of claimant's surgery on February 20, 2014, she was not employed.

Claimant's answers to interrogatories indicate that her next job after Hach Chemical was in October, 2014, at the Alibi Bar in Collins, Iowa, where she reported working from October through December 2014. (Ex. 23, p. 13) She testified to the same chronology of employment at her deposition. (Ex. D, p. 35) She also testified at the hearing that she returned to work after the surgery performed by Dr. Yanish at the Alibi bar in October of 2014. (Tr. pp. 33-34) She affirmatively stated that she did not work between the time of her surgery and October 2014. (Tr. pp. 34-35) However, in

contradiction to this evidence, the adjuster's note from July 30, 2014, indicates that she received information from Dr. Yanish's office that claimant needed to reschedule her July 30, 2014, appointment because of her work schedule and she could not reschedule until August 13, 2014, because of her work schedule. (Ex. D, p. 29) This note contains multiple levels of hearsay and although admissible, will not be afforded the same weight as live testimony at hearing that was subject to cross examination and was consistent with prior deposition testimony and answers to interrogatories.

I find that claimant was off-work from the time of her surgery on February 20, 2014 through September 30, 2014. The evidence supports a determination that claimant returned to work in October 2014, but the record lacks any basis to find any particular day in October was her return to work date. Therefore, I find that claimant has proven that she was off work until October 2014, but has failed to establish her specific return to work date on any particular day in October, 2014. I therefore find that claimant returned to work on October 1, 2014.

The parties are in agreement that defendants stopped paying weekly benefits to claimant after July 1, 2014.

Claimant had her last visit with Dr. Yanish on May 2, 2014, at which time she was placed on a 10-pound lifting restriction for one month. (Ex. 20, p. 5) This time period of one month was in anticipation of claimant returning to see him for follow-up after completing physical therapy and re-evaluation, which did not occur. The next opinion from Dr. Yanish was a letter dated September 5, 2014, at which time, he stated that claimant sustained zero percent impairment under the AMA Guides, Fifth Edition. Although not overtly stated, it is understood under chapter 2.4, page 19 of the AMA Guides that assigning impairment under the AMA Guides occurs only when an individual has reached MMI. Also, September 5, 2014, is well after the last date that Dr. Yanish would have expected claimant to have reached MMI. (Ex. A, p. 7)

Dr. Manshadi opined that claimant reached MMI on June 10, 2016, the date of her appointment with Dr. Han. There is no particular justification given for the selection of this date. (Ex. 21, p. 4)

I find that the appropriate date of MMI is September 5, 2014, the date that the treating surgeon, Dr. Yanish, assigned a zero percent impairment rating to the work injury, based on the AMA Guides. Dr. Yanish's opinion that claimant would have reached MMI in three to four months after surgery goes beyond the date of her last visit with him on May 2, 2014. (Ex. A, p. 7; Ex. 20, p. 1) Also, on May 2, 2014, Dr. Yanish prescribed an additional month of physical therapy, which indicates his expectation for some continued improvement in her condition over the next 30 days. In addition, he maintained claimant on work restrictions on May 2, 2014, but later lifted those restrictions. (Ex. 20, p.5) These circumstances indicate that May 2, 2014, is premature for a finding of MMI. Also, the appointment with Dr. Han over two years after her last visit with Dr. Yanish is likewise unreasonable as a date of MMI, especially when Dr. Han stated in his note that claimant had "already reached the maximum medical

improvement . . .” (Ex. B, p. 11) I find that claimant reached MMI on September 5, 2014.

Having found that claimant was off work from the date of her surgery through October 1, 2014, and that defendant stopped paying weekly temporary total disability benefits after July 1, 2014, and that claimant reached MMI on September 5, 2014, I now find that claimant is entitled to temporary total disability benefits from July 2, 2014 through September 5, 2014.

In consideration of the situs of the injury before considering permanent impairment, I note that every assessment of permanent impairment is based on an assessment of the loss to the index finger and no functional impairment is attributed to the wrist, hand or arm. I find that claimant sustained an injury to her right index finger.

Considering loss of function to the right index finger, I find that Dr. Yanish initially assigned zero percent, but later agreed with the rating assigned by Dr. Han. (Ex. A, p. 8) Dr. Han’s assessment of impairment described above was a 15 percent impairment to the index finger. (Ex. B, p. 12) Dr. Manshadi assigned 54 percent impairment to the index finger. (Ex. 21, p. 4) Dr. Yanish, the treating surgeon, when comparing these ratings found Dr. Han’s assessment of impairment to be more consistent with his own findings during his treatment of the claimant. Dr. Yanish was critical of Dr. Manshadi’s assessment of sensory loss stating that “I do not feel the inclusion of sensory deficits in this particular case is accurate or fair.” (Ex. A, p. 8) He goes on to state that Dr. Manshadi’s notation of sensory changes compared to the incision location “do not make any anatomical sense.” (Id.) Based on the opinions of Dr. Yanish and Dr. Han, I find that the rating assigned by Dr. Han of 15 percent to the index finger is appropriate and more consistent with the whole of claimant’s treatment history. I therefore find that Dr. Han’s rating of 15 percent impairment to the index finger is most persuasive.

CONCLUSIONS OF LAW

The first issue is whether claimant is entitled to additional healing period benefits.

The parties have stipulated in the Hearing Report that claimant’s injury is a cause of both temporary and permanent disability. (Hearing Report, p. 1)

Healing period benefits describe temporary workers’ compensation weekly benefits that precede an allowance of permanent partial disability benefits. Ellingson v. Fleetguard, Inc., 599 N.W.2d 440 (Iowa 1999).

Healing period benefits are payable to an employee who has sustained a permanent partial disability.

[B]eginning 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)

Maximum medical recovery is achieved when healing is complete and the extent of permanent disability can be determined. Armstrong Tire & Rubber Co. v. Kubli, Iowa App., 312 N.W.2d 60 (Iowa 1981). Neither maintenance medical care nor an employee's continuing to have pain or other symptoms necessarily prolongs the healing period.

In this case, claimant was last seen by the authorized treating physician, Dr. Yanish on May 2, 2014. At that time, Dr. Yanish prescribed additional physical therapy and a follow-up appointment was to occur on May 30, 2014. Claimant was unable to secure reliable transportation to complete physical therapy, missing three appointments and missing the May 30, 2014 appointment with Dr. Yanish.

Defendants were aware of claimant's car troubles and would have also been aware of claimant's address and the location of the physical therapy services being provided, and knew or should have known that this required 45 to 50 minutes of travel, one way, by car. Yet, knowing this, defendants did not offer any transportation alternative to claimant, but stated that her weekly benefits would end on July 1, 2014, because of claimant's "missed appointment on 5/30/14 and the fact there is not a future scheduled appointment." (Ex. D, p. 22; Ex. F, p. 40)

I conclude that the basis relied upon by defendant for the termination of temporary benefits, ending on July 1, 2014, is not one of the three triggers for the stopping benefits described in Iowa Code section 85.34(1).

I have found above that claimant reached MMI, when Dr. Yanish addressed permanent impairment on September 5, 2014. In support of this conclusion, I noted that impairment is not addressed until MMI is reached under chapter 2.4 of the AMA Guides. Further, I found that this date is after the date that Dr. Yanish would have expected an ordinary person in claimant's position to reach MMI, which he stated would be three to four months after surgery.

I have found that claimant was off work from the date of her surgery on February 20, 2014 to October, 2014.

I conclude that the first of the three triggers for the termination of temporary benefits described in Iowa Code section 85.34(1) occurred when claimant reached MMI on September 5, 2014.

I therefore conclude that claimant is entitled to healing period benefits from July 2, 2014 through September 5, 2014.

The second issue is the extent of permanent partial 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).

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).

Considering the anatomical situs of the injury from which the permanent impairment is found, I conclude that both Dr. Han's assessment and Dr. Manshadi's assessment of permanent impairment relate only to deficits in the right index finger and not in the wrist, hand, or arm. I conclude that claimant sustained a permanent injury to her right index finger.

I have concluded above for the reasons there stated that Dr. Han's assessment of impairment is most persuasive and I have accepted the same. I therefore conclude that claimant sustained 15 percent impairment to the right index finger. Iowa Code section 85.34(2)(b) provides that the index finger has a maximum value of 35 weeks. Fifteen percent of 35 weeks is 5.25 weeks. Therefore, defendants are obligated to pay claimant 5.25 weeks of permanent partial disability benefits.

The third issue is the commencement date of permanency partial disability benefits.

The Iowa Code provides in section 85.34(2) that: "[c]ompensation for permanent partial disability shall begin at the termination of the healing period provided in subsection 1." Healing period is discussed in Iowa Code section 85.34(1) and terminates when one of three triggers occurs: the employee returns to work; the employee reaches MMI; or the employee is medically capable of returning to substantially similar employment that he/she was engaged in at the time of the injury.

I have found above that claimant continued to work after seeing the onsite nurse on the date of the injury on July 2, 2013. She continued to work regular duty through

July 15, 2013, when she saw Dr. Klise for the first time and he assigned work restrictions.

The Iowa Supreme Court in Evenson v. Winnebago Industries, Inc., 881 N.W.2d 360 (Iowa 2016) concluded that the claimant's return to work established the commencement of permanent partial disability benefits, which was not precluded by the fact that claimant was later entitled to additional temporary benefits when he was assigned restrictions that prevented claimant from working his regular hours. The Court found that "the commencement of Winnebago's obligation to pay permanent partial disability benefits cannot be delayed until after the temporary partial disability benefits subsequently terminated on the plain meaning of section 85.34." Evenson v. Winnebago Industries, Inc., 881 N.W.2d 360 (Iowa 2016).

Therefore, under Evenson I must conclude that the appropriate commencement date for permanency benefits is July 3, 2013, the day after the stipulated date of injury, when claimant returned to work, and thus triggered commencement of permanent partial disability.

The fourth issue for determination is the extent of credit applicable to any award of permanent partial disability.

Defendants argue that claimant attained MMI on May 2, 2014, and based on this assertion, they further argue that they are entitled to a credit against permanent partial disability as a result of having overpaid temporary benefits through July 1, 2014. It is not necessary for the undersigned to determine whether such a credit would apply against permanent partial disability, because as stated above, I have found that claimant reached MMI on September 5, 2014, and that temporary benefits were due through that date. Therefore defendants owe additional healing period benefits and have not overpaid temporary benefits. Defendant's argument has been rendered moot as a result of the undersigned's determination of healing period benefits that are owed.

The final issue is whether claimant is entitled to penalty benefits.

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, 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 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).

Delay attributable to the time required to perform a reasonable investigation is not unreasonable. Kiesecker v. Webster City Meats, Inc., 528 N.W.2d 109 (Iowa 1995).

It is not unreasonable to deny a claim when a good faith issue of law or fact makes the employer's liability fairly debatable. An issue of law is fairly debatable if viable arguments exist in favor of each party. Covia v. Robinson, 507 N.W.2d 411 (Iowa 1993). An issue of fact is fairly debatable if substantial evidence exists which would support a finding favorable to the employer. Gilbert v. USF Holland, Inc., 637 N.W.2d 194 (Iowa 2001).

An employer's bare assertion that a claim is fairly debatable is insufficient to avoid imposition of a penalty. The employer must assert facts upon which the commissioner could reasonably find that the claim was "fairly debatable." Meyers v. Holiday Express Corp., 557 N.W.2d 502 (Iowa 1996).

If the employer fails to show reasonable cause or excuse for the delay or denial, the commission must impose a penalty in an amount up to 50 percent of the amount unreasonably delayed or denied. Christensen v. Snap-on Tools Corp., 554 N.W.2d 254

(Iowa 1996). The factors to be considered in determining the amount of the penalty include the length of the delay, the number of delays, the information available to the employer and the employer's past record of penalties. Robbenolt, 555 N.W.2d at 238.

Claimant argues that defendants prematurely terminated healing period benefits and failed to pay any permanent partial disability benefits, despite defendant's request for, and receipt of, Dr. Han's opinion of a 15 percent permanent impairment to claimant's index finger.

Defendants argue that the termination of temporary benefits on July 1, 2014, was proper under Iowa Code section 85.39, based on claimant's failure to attend the May 30, 2014 appointment with Dr. Yanish. The undersigned has determined above that cessation of temporary benefits on July 1, 2014 was not correct and that additional healing period benefits are owed.

I further conclude that the May 30, 2014 appointment with Dr. Yanish was a continuation of medical care provided under Iowa Code section 85.27 and not an examination contemplated under Iowa Code section 85.39, and defendants' argument is therefore misplaced.

However, assuming for argument sake that Iowa Code section 85.39 does apply, I note that Iowa Code section 85.39 provides in pertinent part that a claimant:

[S]hall submit for examination at some reasonable time and place . . . without cost to the employee . . . and the employee shall be furnished transportation to and from the place of examination, or the employer may elect to pay the employee the reasonable cost of the transportation. The refusal of the employee to submit to the examination shall suspend the employee's right to any compensation for the period of refusal. Compensation shall not be payable for the period of suspension.

Defendants were aware of claimant's transportation difficulty and the distance required for her to travel to attend an appointment with Dr. Yanish and yet failed to provide transportation or pay the cost of reasonable alternate transportation. I would conclude that defendants' failure to provide transportation as required under the code, prevents a suspension of benefits.

However, even if one assumes that section 85.39 applies and defendants are not at fault for failure to provide transportation, I consider the effect of a suspension of benefits.

The Iowa Supreme Court has analyzed this statutory language and held that benefits are suspended but not forfeited during a period of refusal to attend an examination requested by the employer pursuant to Iowa Code section 85.39. McCormick v. North Star Foods, Inc., 533 N.W.2d 196, 198-199 (Iowa 1995).

In this case, if I found that section 85.39 applies, (which I do not), I would also conclude that any benefits that might have been suspended, were not forfeited, and were due when claimant complied with defendant's request to see Dr. Han, who provided opinions on permanency, when Dr. Yanish would no longer see claimant.

I therefore, confirm that healing period benefits found due above, were not properly terminated under Iowa Code section 85.39. I further find that because healing period benefits were improperly terminated after July 1, 2014, that claimant has established a denial/delay of healing period benefits.

I conclude that defendants have failed to show a reasonable or probable cause or excuse for the denial/delay of healing period benefits and that penalty is required.

Considering the issue of penalty applicable to permanency benefits, I first note that Dr. Yanish on September 5, 2014, assigned zero percent permanent impairment. However, he later modified his opinion and endorsed the opinion of Dr. Han, who assigned 15 percent impairment to the index finger. Yet, defendants did not pay permanency benefits at that time.

As stated above, the parties stipulated that claimant sustained permanent impairment in the Hearing Report. (Hearing Report, p. 1). Therefore, defendants do not deny that claimant sustained permanent disability, but rely on their prior argument of an overpayment of healing period benefits to compensate for their lack of payment of permanency benefits. This argument has been rejected. Defendants have not offered any other evidence for their refusal to pay the impairment rating assigned by Dr. Han.

I conclude that claimant has shown a delay/denial in payment of permanency benefits as a result of defendant's failure to pay permanent partial disability benefits after Dr. Han assigned 15 percent impairment to the index finger.

I conclude that defendants have not shown evidence of an investigation following Dr. Han's issuance of the permanent impairment rating, upon which they based their denial.

I determine that based on the circumstances of this case, that a penalty in the range of 40 percent is appropriate. This takes into consideration, not only the length of the delay but the lack of evidence presented of defendant's history of penalties before this agency, along with other appropriate factors.

The denied temporary benefits from July 2, 2014 through September 5, 2014, total 9 weeks and 3 days, or 9.426 weeks. The 15 percent impairment to the index finger is 5.25 weeks. The total denial/delay is 14.676 weeks, multiplied by the stipulated rate of \$294.88 is \$4,327.66. Penalty in the range of 40 percent is \$1,730.00.

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 was successful in this claim and therefore exercise my discretion and assess costs against the defendants in this matter.

ORDER

THEREFORE, IT IS ORDERED:

Defendants shall pay claimant healing period benefits for the period of July 2, 2014 through, and including, September 5, 2014.

Defendants shall pay claimant permanent partial disability benefits of five and one quarter weeks (5.25), beginning on September 6, 2014, until all benefits are paid in full.

All weekly benefits shall be paid at the stipulated rate of two hundred ninety four and 88/100 dollars (\$294.88) per week.

All accrued benefits shall be paid in a lump sum.

Defendants shall pay interest on any accrued weekly benefits pursuant to Iowa Code section 85.30

Defendants shall pay penalty benefits in the amount of one thousand seven hundred thirty and 00/100 dollars (\$1,730.00).

Defendants shall pay costs.

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 13th day of April, 2017.



TOBY J. GORDON
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

Copies to:

Katrina M. Phillip
Stephen D. Lombardi
Attorneys at Law
5000 Westown Pkwy. Ste. 440
West Des Moines, IA 50266
katrina.phillip8@gmail.com
sd lombardi@aol.com

Michael J. Miller
Julie C. Gray
Attorneys at Law
505 5th Ave, Ste. 729
Des Moines, IA 50309
mmiller@pattersonfirm.com
jgray@pattersonfirm.com

TJG/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.