BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

KEVIN PIERCE, Claimant, vs. FANSTEEL/WELLMAN DYNAMICS, Employer, and COMMERCE & INDUSTRY, Insurance Carrier, Defendants.	FILED SEP 15 2015 WORKERS COMPENSATION	File No. 5029067 REVIEW–REOPENING DECISION Head Note Nos.: 1108; 2905; 2907; 4000; 4000.2

STATEMENT OF THE CASE

Kevin Pierce, claimant, filed a review-reopening petition in arbitration seeking benefits against Fansteel/Wellman Dynamics, employer, and Commerce & Industry, insurance carrier, for an alleged work injury date of September 23, 2005.

This case was heard on June 8, 2015, in Des Moines, Iowa.

The record consists of exhibits 1-20 from the claimant and exhibits A-H from the defendants along with the testimony of Kevin Pierce. The case was deemed fully submitted on June 30, 2015, upon the simultaneous filing of briefs.

ISSUES

Whether claimant is entitled to intermittent temporary disability or healing period benefits;

Whether a July 18, 2014, fall was a sequela injury to a previous work injury occurring on September 23, 2005;

Whether there has been a change of condition since the original arbitration hearing on August 9, 2012, that might entitle claimant to additional permanent partial disability under a review-reopening;

Whether there is a causal connection between claimant's injury and the medical expenses claimed by claimant; and

Whether claimant is entitled to penalty benefits under Iowa Code section 86.13 and, if so, how much.

FINDINGS OF FACT

On September 23, 2005, claimant sustained a crush injury when a steel plate and core box broke loose and fell from a hoist he was operating. As a result of this crush injury claimant developed chronic regional pain syndrome (CRPS). On May 30, 2013, an arbitration decision determined that claimant had sustained a 30 percent industrial disability.

Claimant has a high school diploma with no other formal education. On graduation he entered the United States Army. He was discharged less than honorably and spent seven days in jail.

On or about August 5, 2005, claimant began working for the defendant employer. At the time of his injury he was earning approximately $11.09 per hour. Currently he makes roughly between $20.00 and $21.00 an hour and works an average of 40 hours per week. His shift is Monday through Friday.

On October 28, 2013, claimant filed an arbitration and medical benefits petition seeking additional healing period benefits as well as alleging some type of chronic pain syndrome disability. It should be noted that the petition was not cast as a review-reopening.

The agency rejected the petition on September 30, 2014, instructing the claimant to file a motion to amend the petition. On October 3, 2014, the claimant filed a motion to amend and recast the petition as a review-reopening.

At hearing claimant presented a sequela argument. Claimant believes that he has sustained additional injury as a result of the July 18, 2014 fall, which was allegedly the result of pain and swelling in his feet.

He further alleges that there are several days in which he was entitled to healing period benefits but did not receive payment for them.

The parties agree the case is not currently ripe for a permanency determination.

Claimant is currently employed with the defendants. He is a core maker which requires him to be on his feet regularly. He is not under any formal restrictions although stairs are problematic for him. There are no stairs in his work area but at times if he would want to go to the break room or he has to attend a staff meeting every Friday he has to navigate stairs. He testified that he crawls on his knees up the stairs. Claimant

has stairs in his house and has reported falling on the stairs. He did not indicate that he crawled up the stairs in his own house.

During the hearing claimant continually rubbed his foot across the floor. He testified that moving the feet help to keep some of the pain away. Claimant further testified that his pain progresses during the week, becoming most intense on Friday. During the weekend he primarily rests.

Since September 2005 claimant has continued to receive medical treatment for pain in his ankles and the top of his feet. In February 2007 a pain stimulator was surgically implanted. In 2013 it failed and on October 30, 2013 claimant underwent surgery to replace the pulse generator of the stimulator implant. (Exhibit 1, page 24)

Claimant would drive to Des Moines for pain management visits. He testified that on two different occasions, the safety director informed him that those visits would not be covered by workers' compensation because his case had been settled. Therefore, he used paid time off or vacation to cover those days.

After the October 30, 2013 replacement surgery, claimant was off work until the second week of December. He testified that it took him three and one-half weeks to be paid benefits.

Claimant saw Lynn Nelson, M.D., on November 11, 2013, approximately two weeks after his pain stimulator surgery. He reported knee pain and Dr. Nelson indicated that if he continued to have knee pain he was going to send the claimant to a specialist. (Ex. C, p. 2)

> The patient is wanting to know if he was "dropped or something" in surgery. A return call was placed to the patient and a lengthy discussion ensued. The patient reports the numbness in his feet has entirely resolved. He reports ongoing right knee pain which he locates around the kneecap region. He also reports the knee appears visibly swollen. He states the knee pain initially began the day he was discharged from the hospital. He continues to ulitilze [*sic*] ice and heat without significant relief and continues to elevate his leg. He denies significant lower leg edema, redness nor [*sic*] warmth. The patient was offered reassurance that he was not "dropped" in the operating room the day of surgery. He was informed he may have simply bumped his knee on something while in the hospital which caused an effusion and pain.

(Ex. C, p. 1) He repeated the complaint of intense right knee pain the following day. (Ex. C, p. 2) When asked about this at hearing, claimant denied any recollection of this visit.

Claimant had also complained of serious right knee pain in 2003. (Ex. E, p. 2)

Claimant further testified that he had fallen approximately 20 times since 2012. He reported these falls to Kenneth Pollack, M.D. and to Jon Gehrke, M.D. He also testified that he fell in the workplace and that he reported that both of his safety director and his supervisor and that he filled out an incident report.

Claimant reported extreme pain on September 27, 2012 and was referred to Dr. Gehrke for treatment. (Ex. 2, p. 36)

On September 21, 2012, Dr. Gehrke wrote that claimant has been "falling, feet give way." (Ex. 2, p. 39) On April 23, 2013, claimant alerted Dr. Pollack's office that he had fallen that day and that his ankles gave out. (Ex. 1, p. 11) On August 30, 2012, claimant reported his ankle rolling and then subsequently falling. (Ex. 1, p. 3) Dr. Pollack noted the fall during a subsequent visit on September 9, 2013, but did not make any causal connection between the falls and claimant's chronic foot and ankle conditions. (Ex. F, p. 1)

He would also regularly call Dr. Pollack's office when he was in pain and ask for a work excuse. Dr. Pollack would comply and no vacation time would be credited against the claimant's account. For instance, claimant called on July 12, 2012, and Dr. Pollack authorized claimant to be off work. (Ex. 1, p. 1) Claimant received a work release from Dr. Pollack on November 26, 2012; February 20, 2013; September 27, 2013; and October 10, 2013, due to pain. (Ex. F, pp. 4, 6)

On July 10, 2013, claimant's condition was noted by Dr. Pollack to be no different than before. (Ex. 1, p. 13) Claimant had problems with his hydrocodone intake. He reported a large stash of it stolen at work and wanted it to be replaced. Dr. Pollack's office refused. He also received a four-day prescription of it from a nurse practitioner in Creston in violation of his narcotic contract with Dr. Pollack. (Ex. 1, p. 22)

There are three incident reports identified in Exhibit 11 which report falls on October 2012; April 23, 2013 and May 15, 2015. He testified of hearing there were three other instances that he could recall falling including in the parking lot, and in an aisle, and back in a core section. Later, during cross-examination, claimant asserted that he had reported anywhere from 10 to 12 falls to defendant employer.

Q: Okay. How many falls did you report to Fansteel?

A: I'd probably say anywhere from 10 to 12, ma'am.

(Transcript, p. 64)

Still later he said that he told Thomas Young, D.O. of his falls "I probably told him about a good five or six, ma'am. The ones at work, ma'am." (Trans. p. 66)

On June 11, 2014, claimant was returned to work with no restrictions after his stimulator surgery. (Ex. 1, p. 35)

Claimant testified that he visited with Dr. Young about a fall on July 10, 2014. There is no evidence of any report of fall in the medical record of Dr. Young,. (Ex. 3, p. 41)

On July 18, 2014, claimant reported returning to his home after a long day of work including mandatory overtime. He got something to drink and sat in his recliner. When he rose from his recliner to go to the bathroom he experienced a pain spike and fell down. Immediately after the fall he had pain in his knee.

He visited the Greater Regional Medical Center emergency room. In that visit, he reported a history of "having had a similar problem in the past." (Ex. A, p. 4) Presumably that comment refers to the pattern of claimant's legs swelling frequently causing a subsequent fall. (Ex. A, p. 4) He exhibited moderate knee tenderness and moderate leg tenderness. He was discharged home with a knee immobilizer. X-rays revealed a small avulsion piece of bone which was likely due to an old injury. (Ex. A, p. 5)

He also indicated that he reported the fall to Carey Wimer, D.O. when Dr. Young was out. On his July 21, 2014, visit with Dr. Wimer, claimant reported that "he gets the swelling, gets unsteady on his feet and can't feel them well and this weekend he fell. [T]his occurred [S]aturday night when going to the bathroom." (Ex. A, p. 8) Dr. Wimer suspected a derangement of the knee and suggested an orthpaedic appointment.

A CT scan confirmed a loose body. (Ex. 9, p. 69)

On July 29, 2014, claimant was seen by William M. Ralston, D.O., an orthopaedic specialist. Dr. Ralston was unable to determine whether the bony loose body was from degenerative changes in his patella or from one of the femoral condyles. (Ex. A, p. 13) On the radiographs, claimant's knee alignment appeared fairly normal and there was no evidence of fracture. Dr. Ralston discontinued the use of the immobilizer, told claimant to use crutches to aid in weight bearing if there was pain, and to attend physical therapy. (Ex. A, p. 14)

Claimant returned to Internal Medicine Consultants, P.C., and saw Dr. Young on August 5, 2014. Dr. Young wrote "I do not know what caused his fall. Kevin attributes this to swelling of his feet related to a prior injury. The original injury is not the cause of the knee pain. The fall seems to be the cause of the knee. He does note that he is much more sedentary because of his knee injury." (Ex. A, pp. 10-11)

Claimant includes a transcript of a tape recording that he surreptitiously obtained during a visit with Dr. Young on August 5, 2014. During the visit claimant consulted with Dr. Young about a new knee injury. At some point, the transcript seems to indicate that Dr. Young was aware of prior falls. (Ex. 15, p. 126) However, the transcript does not read as cleanly as the claimant would suggest.

KP: Nope.

TY: Yeah.

[From 16:53 – 17:40 there is some small talk that is inaudible as the speaker to the recording is being covered up and moved around. Transcription will pick-up back at 17:41]

KP: Then he sent me to physical therapy yesterday and they did the, what do you call it? Ultrascan thing?

TY: Ultrasound ah, huh . . .

KP: Yeah and he did that in like a half hour, forty five minutes and then he did the hot cold, hot pack and cold pack thing. (Inaudible) Then I had to go back uh um Thursday. (Silence) Like I've told, I mean, I, I even told you before my feet are getting worse. I, I, I like I said . . .

TY: Well you're basing the – are you just telling – really, really your right one was the worst . . .

KP: Yes[.]

TY: . . . when I saw you the other day but are you saying it's getting worse because of the swelling or are you saying it's getting worse because of the pain?

KP: No, I'm saying it's getting worse because of the falling. (Chuckles)

TY: Well. Alright.

KP: Do you understand what I'm saying? I mean, I mean yeah I've fallen in the past – which you have seen me before where I have fallen.

TY: Yep. Yep.

KP: . . . and I mean it's

TY: What'd you weigh? Did they weigh ya today?

KP: No. I weigh about 278 pounds.

TY: That's what they weighed the last time?

KP: Yes.

TY: You know you gotta be careful. Us old guys kinda . . .

(Ex. 15, p. 126)

It is not obvious what Dr. Young's "Yep. Yep." is acknowledging. He could be agreeing that he was aware of the claimant falling in the past or that he was simply affirming that the claimant was reporting falling. This is not the dispositive, smoking gun evidence that the claimant repeatedly refers to it as. This is not a direct question and answer format, but a dialogue happening between two individuals and dialogue responses lack the preciseness of a formal question and answer scenario. Dr. Young wrote in a letter dated May 20, 2015, that there was nothing in the transcript that changed his opinion regarding the causation of claimant's right knee pain. (Ex. A, p. 27)

The transcript provides little value as to whether Dr. Young knew of the past falls. There are no medical records indicating that claimant has been seen by Dr. Young in the past for falls nor does claimant articulate with any specificity when these falls occurred and when he purportedly reported them to Dr. Young.

This is only important insofar as Dr. Young opined on August 9, 2014, less than 30 days after the reported injury, that claimant had "never complained of knee pain until his fall in July 2014. His pain and discomfort are related to his fall and not his pre-existing diagnosis." (Ex. A, p. 1)

Claimant testified that he tape-recorded Dr. Young on August 5, 2014 because he had problems with Dr. Young not telling the whole truth. Claimant did not give any examples of this and indicated that he had only seen Dr. Young once or twice since 2012.

He further indicated that he had recorded five or six other visits with Dr. Young. The transcripts of those visits are not provided and those recordings had not been provided to the claimant's attorney.

On August 12, 2014, claimant returned to Dr. Young with a request to return to work without restrictions. Dr. Young agreed that he could do so, but reminded him to keep his appointment with his orthopedic surgeon and continue with physical therapy.

Claimant continued to have extreme pain in his right knee along with swelling. Dr. Ralston recommended surgery. It was originally scheduled for September 10, 2014, but the claimant cannot afford to go forward with the surgery on his personal insurance.

Claimant returned to work on August 11, 2014, due to a need to pay the bills. He currently works without restrictions just as he had before. August 21, 2014, was his last medical visit. On August 21, 2014, he saw Dr. Ralston for the last time, who was unsure as to what was the cause of claimant's pain. Due to claimant's pain stimulator, he could not have an MRI to further diagnose the claimant's knee issue.

"I explained to him that he could have a meniscus tear. I also discussed with him, the possibility of loose body or even a condylar defect." (Ex. A, p. 16)

Claimant underwent a medical examination with Sunil Bansal, M.D. on April 19, 2015. (Ex. 136) Dr. Bansal opines that the fall at home on July 18, 2014, was caused by claimant's unsteady footing, which was the result of hypersensitive and painful feet. (Ex. 10, p. 96)

Since the hearing in 2012, claimant reports that his pain in his feet and ankles have really worsened and gotten more severe.

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 Elec. 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).

There are two main issues that were presented at hearing. First was the loss of time (as characterized by the claimant) but known more commonly as healing period or temporary disability entitlement. The second is whether the claimant's right knee injury presents a new injury and/or presents a change in condition under the review-reopening standard.

The claimant pled and tried this case as a sequela injury. In other words, because of a past work related injury, the claimant fell and sustained more pain and suffering relating back to the pre-existing injury. There are only two causation opinions in this case and both are problematic.

The first opinion is that of Dr. Young. Dr. Young is the company doctor and has been for over a decade. He opines that because claimant had no past complaints of falling and no history of falling, then the current fall cannot be associated with the work injury of September 2005. Dr. Young does not provide any basis for this conclusion. Further, there is a history of falls by the claimant. There are at least two instances in which he reported falls to his pain management doctor—Dr. Pollack—and there are three instances recorded where he complained of falls to his employer although only two of them occurred prior to July 2014.

No one asked Dr. Young if there was a recorded history of falls whether it would have changed his opinion. In one medical record, Dr. Young wrote that the knee pain was the result of the fall. (Ex. A, p. 11)

The claimant had the burden of proving that the knee injury was caused by the CRPS in his feet and ankles. The evidence supporting his claim were the self-reported falls—many of which never made it into multiple medical records or incident reports—and the opinion of Dr. Bansal, claimant's medical examination.

Dr. Bansal opined that claimant's fall resulted in his knee injury and that his fall relates back to the September 2005 injury. Dr. Bansal's opinion is only slightly less perfunctory than that of Dr. Young and, like Dr. Young, ignores prior medical history. For instance, Dr. Bansal writes that there is no evidence of impairment or symptom manifestation related to the right knee prior to the July 18, 2014, fall, when claimant was seen by Dr. Nelson for right knee pain in 2013, not even a full year prior to the fall. (Ex. 10, p. 98)

Dr. Bansal's basis for his opinion is because claimant had pain in his feet and ankles, the falls beginning in 2012, nearly seven years after claimant's original injury, are related to that original crush injury. It is essentially a *post hoc, ergo propter hoc* argument. Simply because claimant has swelling in his feet does not automatically mean that falls are associated with the swelling. There is little said of claimant's prior knee pains nor is there any serious consideration of alternative causes such as degeneration or a non-fall related knee injury.

Further, claimant's testimony regarding his falls is viewed by the undersigned with some skepticism. He reports falling upwards near 20 times in 2 years. There are only 3 recorded complaints of these falls to Dr. Pollack, someone that claimant called upon frequently for medication refills and complaints of pain. He also only reported 2 falls prior to his July 18, 2014, incident to his place of work. He claims that he reported at least 6, if not 10 or more. Often, depending on who was questioning claimant, that number would change.

At hearing, claimant stated that he would report a fall only if he was injured, yet in a note by claimant's counsel, it is written that claimant did report the August 31, 2013, fall but " . . . did NOT sustain any significant injury as the result of that fall, other than perhaps some temporary aches and pains. He was able to report for work following the Labor Day holiday without a problem." (Ex. A, p. 21) (Emphasis in the original.)

The actual number of reported falls prior to the July 18, 2014 injury is four:

- August 30, 2012, reported to Dr. Pollack
- September 21, 2012, reported to Dr. Gehrke
- April 23, 2013, reported to Dr. Pollack and employer
- August 31, 2013, reported to Dr. Pollack and employer

The records indicate falls in a far fewer number than claimant testified to at trial. In his April 23, 2013, fall he reported to Dr. Pollack that his ankles gave out and his hips were weak which is a different causal argument than swelling causing instability. Further, claimant has only one reported fall since July 18, 2014. It seems odd that claimant would fall up to 20 times, if not more, in the 2 years preceding the July 18, 2014, injury, yet would report only 1 fall in the year following the July 18, 2014, injury, particularly if claimant's condition was worsening instead of improving.

Neither Dr. Bansal nor Dr. Young's opinions provide much guidance in this case.

Dr. Ralston, the only orthopaedic physician to examine the claimant, was not sure if the bony body within claimant's knee was the result of an old injury, the result of degenerative changes, or a traumatic injury.

In proving a sequelae injury, claimant failed to meet his burden that the 2005 injury which developed into CRPS to claimant's feet and ankles was the cause of his July 18, 2014, injury to his knee.

In turning to the issue of the review-reopening, claimant must show a substantial change in circumstances—either physical or economic.

Upon review-reopening, claimant has the burden to show a change in condition related to the original injury since the original award or settlement was made. The change may be either economic or physical. Blacksmith v. All-American, Inc., 290 N.W.2d 348 (Iowa 1980); Henderson v. Iles, 250 Iowa 787, 96 N.W.2d 321 (1959). A mere difference of opinion of experts as to the percentage of disability arising from an original injury is not sufficient to justify a different determination on a petition for review-reopening. Rather, claimant's condition must have worsened or deteriorated in a manner not contemplated at the time of the initial award or settlement before an award on review-reopening is appropriate. Bousfield v. Sisters of Mercy, 249 Iowa 64, 86 N.W.2d 109 (1957). A failure of a condition to improve to the extent anticipated originally may also constitute a change of condition. Meyers v. Holiday Inn of Cedar Falls, Iowa, 272 N.W.2d 24 (Iowa App. 1978).

Claimant is currently earning more than 100 percent more than he did at the time of his original injury in 2005. There is no negative economic change. The evidence does not support a finding that claimant sustained any substantial physical change. While claimant did testify that his pain is worse and more severe, he still works the same job and mostly the same hours. He had no restrictions at the time of the 2012 hearing and he has no restrictions now.

He argued at the 2012 hearing that he was significantly disabled. In the claimant's post-hearing brief, claimant wrote:

> Mr. Pierce is contending he is entitled to a significant degree of industrial disability, inasmuch as not only is he not able to return to any of the laboring jobs he had performed prior to becoming employed at Fansteel in 2005, he is unable to think of any jobs in the competitive labor market in his community which would accommodate his informal, albeit real, restrictions—Limited walking, limited standing, limited sitting, reliant on high, daily doses of hydrocodone—causally related to his 2005 injury.

(Claimant's Post-Hearing Brief 2012, p. 3)

In sum, the claimant has failed to show, based on a preponderance of the evidence, that he has sustained a substantial change of circumstances not contemplated in the original hearing.

The next issue is whether claimant is entitled to healing period benefits. The exact days were not presented at hearing, but claimant's brief asserts that he is entitled to benefits for September 7, 2013 and September 8, 2013, which was Saturday and Sunday. The claimant's argument is that he was sent off work by Dr. Pollack on September 7, 2013 and a return to work was not provided until September 10, 2013. The weekly compensation benefit rate is based on the earnings "to which an employee would have been entitled had the employee worked the customary hours for the full pay period in which injured as the employer regularly required for the work or employment." Section 85.36.

There is no evidence that claimant was required to work Saturday or Sunday and missed regular pay for those days. (Ex. G) Under claimant's argument, every day that passes during which he is not given a return to work slip entitles him to payment regardless of whether he is entitled to regular pay. While the benefits are calculated on a weekly basis, they are payment for customary hours worked. Claimant did not prove his entitlement to this pay.

The final issue is whether claimant is owed penalty benefits for late payment of temporary benefits for time missed arising out of the replacement of claimant's stimulator.

Claimant seeks additional weekly benefits pursuant to Iowa Code section 86.13(4). This particular provision requires that if a delay in commencement or termination of benefits occurs without reasonable or probable cause or excuse, the workers' compensation commissioner shall award additional weekly benefits in an amount not to exceed 50 percent of the amount of benefits that were unreasonably delayed or denied. Iowa Code section 85.13(4)(b). A reasonable or probable cause or excuse must satisfy the following requirements:

> (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 of the denial, delay in payment, or termination of benefits to the employee at the time of the denial, delay or termination of benefits.

(Iowa Code section 86.13(4)(c)).

Defendants have the burden to show compliance with this statutory provision in order to avoid the mandatory assessment of a penalty. The law requires proof of a prompt investigation and that factual basis be provided to the injured worker at the time of the denial, delay, or termination of benefits. Herein, defendants must show a timely investigation of claimant's report of injury, that the denial of benefits is based on the results of that timely investigation, and that there was a timely communication to claimant of the reasons for the denial.

The claimant was owed benefits for September 6, 2013; September 27, 2013; and October 10, 2013. On October 16, 2013, claimant informed defendants of these missed payments. (Ex. 17) In the record, there was no record of payment of these benefits. (Ex. H) Both claimant and defendants attempt to discuss matters not in evidence and because things such as "Attachment A" to the claimant's post-hearing brief are not part of the record, those will not be considered.

Given that the defendants was apprised of these dates and yet gave no reason for non-payment, a 50 percent penalty of the total amount owed for September 6, 2013; September 27, 2013; and October 10, 2013 is appropriate.

Claimant also asserts a late-paid healing period benefit. From October 30, 2013 to November 14, 2013, claimant was off work due to his stimulator surgery. On November 14, 2013, the defendants issued a check for the 16 days and no justification for late payment was provided. (Ex. 17, pp. 193-194) Claimant is entitled to a $500.00 penalty for the late payment.

Finally claimant asserts a penalty for the delayed investigation. Claimant takes issue with the fact that while the defendants were alerted to the fall on July 23, 2014, by claimant's counsel, an actual investigation did not begin until August 4, 2014, approximately two weeks later. A two-week delay does not qualify as unreasonable delay.

Claimant lists Dr. Bansal's medical examination as a medical expense. (Ex. 18, p. 250) It is not. It is an expert report. If it was a medical expense, it would be deemed not reimbursable as it is not causally related to a workplace injury. A report in lieu of testimony could be assessed as a cost. Des Moines Area Regional Transit Authority v. Young, No. 14-0231 (Iowa, June 5, 2015). However, Exhibit 178, page 251, Dr. Bansal's bill is identified as a medical examination rather than a report. Even if Dr. Bansal's bill was entirely for a report, the costs are within the discretion of the deputy.

Based on the outcome, the costs are not assessed against the defendants; instead each party shall pay their own costs.

ORDER

THEREFORE, IT IS ORDERED:

The claimant's knee pain is not found to be causally related to the September 5, 2004, incident.

The claimant did not prove by a preponderance of the evidence that he sustained a substantial change in his condition.

Defendants are ordered to pay penalty benefits on the late payment of healing period benefits of September 6, 2013; September 27, 2013; and October 10, 2013 in the amount of fifty (50) percent of the total owed for those three (3) days as well as five hundred and 00/100 dollars ($500.00) for the late payment following the October 30, 2013 surgery.

Signed and filed this 15th day of September, 2015.

JENNIFER S. GERRISH-LAMPE
DEPUTY WORKERS'
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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.