BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

RENEA LISK, Claimant, vs. UNIVERSITY OF IOWA HOSPITALS AND CLINICS, STATE OF IOWA, Self-Insured, Employer, Defendant.	FILED JUL 19 2018 WORKERS COMPENSATION	File No. 5055588 ARBITRATION DECISION

STATEMENT OF THE CASE

Renae Lisk, claimant, filed a petition in arbitration seeking workers' compensation benefits from University of Iowa Hospitals and Clinics (UIHC) and State of Iowa, as a result of an injury she sustained on June 22, 2015 that arose out of and in the course of her employment. This case was heard in Des Moines, Iowa, and fully submitted on November 6, 2017. The evidence in this case consists of the testimony of claimant, Joint Exhibits 1 – 5, Claimant's Exhibits1 -12 and Defendant's Exhibits A – F. Both parties submitted briefs.

ISSUES

Whether the alleged injury is a cause of temporary disability and, if so, the extent;

Whether the alleged injury is a cause of permanent disability and, if so;

The extent of claimant's disability.

The commencement date of permanent partial disability benefits.

Whether claimant is entitled to payment of medical expenses.

Whether penalty benefits should be assessed.

Assessment of costs.

STIPULATIONS

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.

FINDINGS OF FACT

The deputy workers' compensation commissioner, having heard the testimony and considered the evidence in the record, finds that:

Renae Lisk, claimant, was 43 years old at the time of the hearing. Claimant obtained an associate's degree in nursing in 2008. Claimant has taken some classes after her associate's degree toward a bachelor's of nursing. (Transcript, page 11) Claimant began working as a certified nurse's assistant (CNA) in 2006. As a CNA claimant was required to perform lifting and manual labor. (Tr. p. 17) Claimant's first position as a nurse was as a charge nurse at a nursing home. This position required charting and occasionally performing CNA duties. (Tr. p. 18) Claimant then worked as a nurse for the VA hospital in Iowa City, Iowa for about three years. Claimant then took a position in Ottumwa as a nurse case manager. That position was much less physical than her prior nursing positions. (Tr. p. 21) The nurse case manager position was primarily administrative work. (Tr. p. 22) Much of claimant's work history is set forth in Exhibit B, pages 6 and 7. Claimant said she could perform the types of desk work she did before she got into nursing. (Exhibit C, p. 11)

In November 2014 claimant started to work as a floor nurse at UIHC. On June 22, 2015, claimant was assisting in turning a patient in bed multiple times when she felt a burning sensation in her lower back. (Tr. p. 27) Claimant reported her back injury to her employer and was seen on June 23, 2015 by Traci Abbott, ARNP. (Tr. p. 29) Claimant testified she told ARNP Abbott about pain in her right leg. (Tr. pp. 30, 32) Claimant was referred to Joseph Chen, M.D. at the UIHC, who recommended exercises. Dr. Chen did not recommend surgery. (Tr. p. 31) Claimant testified she told Dr. Chen that she had radicular symptoms when she saw him in October and November of 2015. (Tr. pp. 31, 32; Ex. C, p. 15) Claimant saw Dr. Chen on November 30, 2015, who informed claimant that he would release claimant to return to work in a week. Claimant was released on December 7, 2015. (Tr. pp. 46, 47, 54) Claimant testified that she did not engage in any work for UIHC after November 30, 2015. (Tr. 56) Claimant saw Dr. Chen for the last time on February 15, 2016. Claimant said that Dr. Chen did not examine her on that date. (Tr. p. 36)

Claimant resigned her position with the UIHC on December 7, 2015. (Ex. D, p. 25) She accepted a position with WellCare starting December 21, 2015. Claimant was initially hired to perform patient assessments. The job claimant was hired to

perform at WellCare was changed shortly after her hire due to the loss of a contract. Claimant was able to work from home and handle phone calls and perform data entry for WellCare. (Tr. p. 49) Claimant interviewed and was offered a position with UIHC after her resignation, but declined as she was offered more money at WellCare. (Tr. p. 63; Ex. C, p. 13) Claimant was offered a job at UIHC after she had resigned. Claimant testified she had the physical ability to perform that job but was offered more money at WellCare and took the WellCare postilion. (Ex. C, p. 13)

Based on claimant's credible testimony I find the last day she worked at the UIHC was November 30, 2015 and she started work for WellCare on December 21, 2015. Claimant was off work from January 23, 2016 through March 8, 2017. (Ex. 10, p. 1)

Claimant reported an acute increase in pain after sleeping in a family member's bed on December 31, 2015. (Tr. p. 57; Joint Exhibit 3, p. 4) On January 23, 2016, claimant was at a family member's home with her 3-year-old son. Claimant bent forward to grab some pajamas and felt a burning sensation in her lower back and down her leg. (Tr. p. 33) Claimant said the pain in her back after the January 23, 2016 incident was much more severe than just prior to this injury. (Tr. p. 60) Claimant went to the emergency department of the Jefferson County Hospital for treatment and received medications. (Tr. p. 34) Claimant was no longer employed at the UIHC at the time of this incident. (Tr. p. 57)

Claimant went to the UIHC the next day. An MRI showed an acute disk herniation and claimant had surgery. (Tr. p. 35) Claimant was at the UIHC for about six days. Claimant missed about six weeks of work from WellCare. Claimant was released to return to work in March 2016. (Tr. p. 62) She did not have health insurance at the time of her surgery. (Tr. p. 50) Claimant testified her income is higher while she is working for WellCare than it was when she was working at UIHC and that her health insurance co-payments are higher at WellCare. (Tr. pp. 52, 62)

Claimant testified that she currently has spasms in her lower back and cramps that start in her foot and calf and progress to her upper thigh. (Tr. p. 40) Claimant said that the spasms make it tough to perform household chores and be on her feet for long periods of time. (Tr. p. 41) Claimant testified that she did not have the spasm in her legs until after her surgery. (Tr. p. 64)

ARNP Abbot noted on January 23, 2015, claimant sustained a lumbar sacral strain when claimant was working with a patient at UIHC on January 22, 2015. Claimant was provided medication and modified work duties. (JEx. 1, p. 2) On July 20, 2015, ARNP Abbott noted that claimant was complaining of low back pain, right greater than left. Claimant had occasional "burning" discomfort in her right thigh, which was worse with physical therapy. (JEx. 1, p. 7)

On July 31, 2015, Dr. Chen examined claimant. Dr. Chen wrote, "Her pain is diffuse and spread across her lower back, right side worse than left usually. Felt as a tightness, burning. Occasionally she will get burning feeling down her right buttock and posterior thigh, but rarely below the knee." (JEx. 4, p. 1) Dr. Chen read an MRI and wrote, "She had a lumbar MRI performed on 7/23 which reports reads [*sic*] a grade 1 L5-S1 anterolisthesis due to bilateral L5 pars defects, with severe narrowing of bilateral L5-S1 neural foramina. Also mild degenerative disc disease at T10-11, T11-12, L4-5." (JEx. 4, p. 1) Dr. Chen's impression was, "Renae E. Lisk is a 40 y.o. woman who has acute low back pain. She does have a grade 1 spondylolisthesis at L5-S1 with neural foraminal narrowing, but no evidence of a lumbosacral radiculopathy." (JEx. 4, p. 4) Dr. Chen recommended physical therapy and increased her lifting restrictions to 25 pounds. Claimant was referred to the Spine Rehabilitation Program at UIHC on September 22, 2015 and attended from October 12, 2015 through October 23, 2015. (JEx. 4, pp.14, 22; Ex. 1, p. 5) On November 30, 2015, Dr. Chen saw the claimant. Claimant reported that her back was worse. (JEx. 4, p. 50) Dr. Chen provided an additional prescription due to a spike in back pain and released her to return to work as of December 7, 2015. He placed her at MMI as of December 7, 2015 and provided an eight percent industrial disability. (JEx. 4, p. 52)

On January 4, 2016, claimant saw ARNP Abbott with increased pain and increased lower extremity symptoms. ARNP Abbott noted clamant had not seen Dr. Chen since November 30, 2015 when claimant was experiencing a flare in low back pain with an anticipated MMI date of December 7, 2015. (JEx. 1, p. 10) ARNP Abbott noted, "Today, the patient states that she has continued with right low back pain with radiating pain into her right leg. She has had ongoing paresthesias into her right leg describing from the knee through her foot." (JEx. 1, p. 10) ARNP Abbott wrote claimant noted increased low back pain on December 31, 2015. The assessment was, "Increased chronic right low back pain/right lower extremity paresthesias." (JEx. 1, p. 11)

On January 8, 2016, physical therapy notes stated,

> Presently, she [claimant] reports no known MOI [mechanism of injury]. She states she did have her pain shortly after she slept on a family member's bed that was uncomfortable. She describes her symptoms as a throbbing feeling with shooting pains down her R LE. She reports she always gets this feeling like "novocaine" that travels from her knee to her feet.

(JEx. 3, p. 4)

Claimant went to the emergency department at the Jefferson County Health Center on January 23, 2016 due to back pain. The history taken stated, "[I]ncreaseing [*sic*] back pain since january [*sic*], worse today." (JEx. 5, p. 1) She was provided medication and discharged with a diagnosis of low back pain, pain in lower right leg and

spondylosis. (JEx. E, p. 3) On January 24, 2016, claimant went to the emergency department at the UIHC for back pain. An MRI showed significant herniation. (JEx. 4, p. 57) She was admitted into the hospital. The preoperative note stated claimant was ". . . a 41 y.o. female with chronic back pain who had an acute exacerbation found to have L4-5 disc extrusion and L5-S1 spondylolisthesis with bilateral foraminal stenosis." (JEx. 4, p. 60) On January 25, 2016, Matthew Howard, M.D., performed a spinal fusion. (JEx. 4, pp. 65 - 68) Dr. Howell retuned claimant to work on March 7, 2016. (Ex. 7, p. 1) I find that March 7, 2017 is the date claimant was at MMI.

On February 15, 2016, Dr. Chen met with claimant. His notes state that the incident on January 24, 2016 and resulting surgery was due to her work injury of June 2015 and did not occur due to her participation in the Spine Rehabilitation Clinic Program. (JEx. 4, pp. 69 – 72) On March 2016, Dr. Chen wrote defendant that claimant's temporary restrictions were no longer medically necessary. Dr. Chen wrote,

> It is common practice for temporary restrictions to include stipulations to improve comfort or minimize acute pain. There is no risk of ongoing spine damage with prolonged sitting activities or other static postures. While these activities may increase chronic pain, she has been taught not to be fearful that ongoing pain or "hurt" represents "harm" or actual damage to her spine. If she chooses to return to pursuing her usual nursing duties, she does not exhibit a medical need for permanent work restrictions.

(Ex. A, p. 1) On February 24, 2017, Dr. Chen wrote defendant. Dr. Chen reviewed Mark Taylor, M.D.'s independent medical examination (IME). Dr. Chen said that claimant's January injury was associated with a "pop" and different symptoms that led to right leg pain and a fusion surgery. Dr. Chen's medical opinion was claimant would more likely than not have developed a right lumbar radiculopathy at some point in the future due to her pre-existing degenerative spondylolisthesis. Dr. Chen stated claimant did not have clinically significant right lumbar radiculopathy from November until late January 2016. (Ex. A, p. 5)

On August 2, 2016, claimant was seen at UIHC due to persistence of right leg symptoms. Claimant was complaining of cramping and paresthesia of her right leg. (JEx. 4, p. 76) On February 27, 2017, Dr. Howard determined there was nothing surgical he could offer claimant for her right leg symptoms. (JEx. 4, p. 88)

Claimant was seen at the pain clinic at the UIHC on August 11, 2017. She was prescribed a number of medications, was advised to have physical therapy and some discussion of a spinal cord stimulator occurred. (JEx. pp. 92, 93) The encounter diagnoses were:

1. Other chronic pain

2. Back pain

3. Failed back surgical syndrome

4. Neuropathic pain

(JEx. 4, p. 98)

On November 29, 2016, Dr. Taylor issued his independent medical examination report. (Ex. 1, pp. 3 – 14) Dr. Taylor concluded that the June 22, 2015 work injury represented a significant contributing factor to claimant's need for lumbar spinal surgery. In analyzing the condition he wrote,

> If Ms. Lisk had undergone treatment and the symptoms resolved and she was doing well prior to the incident in January 2016, then the issue of causation, in my opinion, would have been more complicated. However, in her circumstance, her symptoms started worsening in the fall of 2015. This may not have occurred specifically due to the Spine Rehab Program but rather she simply recalled that the symptoms were worsening around that timeframe, meaning October, November and December 2015. When she returned to Dr. Chen at the end of November, she was clearly more symptomatic and was having symptoms into the right leg and he prescribed additional medication. The symptoms were also significant enough that she did not return to her nursing duties but rather identified a sedentary job.
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> The symptoms persisted which then necessitated follow-up with Ms. Abbott as well as physical therapy and this was described above. The therapist also noted a positive straight leg raise as well as weakness in the right leg and pain, numbness and tingling associated with the right leg. These issues were documented as occurring right up to January 21, 2016, and then she had the increased symptoms on January 23, 2016.
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> Therefore, Ms. Lisk's back pain and right lower extremity symptoms were occurring prior to the limited incident on January 23, 2016, and were well documented. She was essentially leaning forward around 5 degrees or so and was not holding onto anything and therefore that particular incident was not the least bit physically demanding, and based on her description of what occurred, it appears that she developed spasms and spasms were specifically noted by the emergency room doctor. While I agree that no one can state with 100% certainty when the herniation may have occurred, the medical records clearly reflect radicular-type symptoms prior to the January 23, 2016 incident.

(Ex. 1, pp. 10, 11) Dr. Taylor provided a 23 percent industrial disability rating and that claimant was at MMI as of March 7, 2016. He recommended a number of restrictions including lifting of 45 pounds rarely and 30 to 35 on an occasional basis. He also recommended squatting and bending on a rare to occasional basis and she be able to alternate sitting, standing and walking as needed. (Ex. 1, pp. 11, 12) I find that all of the restrictions in Dr. Taylor's IME are claimant's restrictions.

On May 17, 2017, Dr. Howard was sent a letter from claimant's attorney about claimant's medical condition and causation of her back injury. Dr. Howard signed off on the letter indicating he agreed with the following four statements.

> 1. You believe it is more likely than not that Ms. Lisk's back injury of June 22, 2015 was a substantial factor in her need for the L4-S1 transforaminal lumber [*sic*] interbody fusion you preformed [*sic*] on January 24, 2016.
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> 2. While Ms. Lisk's degenerative spondylolisthesis may have predisposed her to lumbar radiculopathy and disc herniation at some point in the future, you believe it is more likely than not that the June 22, 2015 work injury accelerated her need for surgery.
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> 3. The absence of low back symptoms before the work injury and the progressive worsening of Ms. Lisk's low back and right leg symptoms after the injury indicate that the work injury was, more likely than not, a significant factor in her need for surgery.
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> 4. The emergency room treatment, surgery, and post-surgical follow up Ms. Lisk received at the University of Iowa Hospitals and Clinics were reasonable and necessary to treat her work-related injury.

(Ex. 2, pp. 1, 2)

Claimant submitted medical expenses of $143,031.98 for medical care she received for her back and right leg when the defendant denied the workers' compensation claim. (Ex. 9, pp. 1 – 3) Claimant also submitted a claim for medical mileage in the amount of $478.66. (Ex. 11, p. 2) I find that these costs are all associated with the claimant's back and right lower extremity conditions.

On March 17, 2016, defendant informed claimant that it was going to pay claimant 40 weeks of permanency benefits based upon the 8 percent rating that Dr. Chen provided on November 30, 2015. (Ex. E, p. 29) Claimant received permanency benefits on March 21, 2016. (Ex. 8, p. 2)

I find claimant's gross weekly income at the time of the injury was $1,169.00 and she was single and entitled to 3 exemptions. Based upon the Iowa Workers'

Compensation tables in effect at the time of the injury I find claimant's weekly workers' compensation rate to be $704.16

Claimant requested costs in the amount of $373.40.

RATIONALE AND CONCLUSIONS OF LAW

Defendant has admitted clamant had an injury that arose out of and in the course of her employment at UIHC on June 22, 2015. Defendant disputes claimant's treatment after November 30, 2015 and her spine surgery was related to her June 22, 2015 injury.

The claimant has the burden of proving by a preponderance of the evidence that the alleged injury actually occurred and that it both arose out of and in the course of the employment. Quaker Oats Co. v. Ciha, 552 N.W.2d 143 (Iowa 1996); Miedema v. Dial Corp., 551 N.W.2d 309 (Iowa 1996). The words "arising out of" referred to the cause or source of the injury. The words "in the course of" refer to the time, place, and circumstances of the injury. 2800 Corp. v. Fernandez, 528 N.W.2d 124 (Iowa 1995). An injury arises out of the employment when a causal relationship exists between the injury and the employment. Miedema, 551 N.W.2d 309. The injury must be a rational consequence of a hazard connected with the employment and not merely incidental to the employment. Koehler Electric v. Wills, 608 N.W.2d 1 (Iowa 2000); Miedema, 551 N.W.2d 309. An injury occurs "in the course of" employment when it happens within a period of employment at a place where the employee reasonably may be when performing employment duties and while the employee is fulfilling those duties or doing an activity incidental to them. Ciha, 552 N.W.2d 143.

The claimant has the burden of proving by a preponderance of the evidence that the injury is a proximate cause of the disability on which the claim is based. A cause is proximate if it is a substantial factor in bringing about the result; it need not be the only cause. A preponderance of the evidence exists when the causal connection is probable rather than merely possible. George A. Hormel & Co. v. Jordan, 569 N.W.2d 148 (Iowa 1997); Frye v. Smith-Doyle Contractors, 569 N.W.2d 154 (Iowa App. 1997); Sanchez v. Blue Bird Midwest, 554 N.W.2d 283 (Iowa App. 1996).

The question of causal connection is essentially within the domain of expert testimony. The expert medical evidence must be considered with all other evidence introduced bearing on the causal connection between the injury and the disability. Supportive lay testimony may be used to buttress the expert testimony and, therefore, is also relevant and material to the causation question. The weight to be given to an expert opinion is determined by the finder of fact and may be affected by the accuracy of the facts the expert relied upon as well as other surrounding circumstances. The expert opinion may be accepted or rejected, in whole or in part. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); IBP, Inc. v. Harpole, 621 N.W.2d 410 (Iowa 2001); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995). Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417 (Iowa 1994). Unrebutted expert medical

testimony cannot be summarily rejected. Poula v. Siouxland Wall & Ceiling, Inc., 516 N.W.2d 910 (Iowa App. 1994).

While a claimant is not entitled to compensation for the results of a preexisting injury or disease, its mere existence at the time of a subsequent injury is not a defense. Rose v. John Deere Ottumwa Works, 247 Iowa 900, 76 N.W.2d 756 (1956). If the claimant had a preexisting condition or disability that is materially aggravated, accelerated, worsened or lighted up so that it results in disability, claimant is entitled to recover. Nicks v. Davenport Produce Co., 254 Iowa 130, 115 N.W.2d 812 (1962); Yeager v. Firestone Tire & Rubber Co., 253 Iowa 369, 112 N.W.2d 299 (1961).

There are three opinions as to causation in this case.

Dr. Chen, who found that claimant's pain she experienced in January 2016 and resulting surgery was not related to her June 2015 work injury. He opined that claimant had a pre-existing condition and that manifested as a result of a degenerative process and not related to a work injury at UIHC.

Dr. Taylor found that the June 22, 2015 injury lighted up claimant's underlying condition. That claimant's spinal surgery was related to her June 22, 2015 work injury.

Dr. Howell found the surgery that he performed on claimant was substantially related to her work injury of June 22, 2015.

I find the opinions of Dr. Taylor and Dr. Howell convincing as to causation. I do not find Dr. Chen's opinions on causation convincing.

The record shows that claimant was experiencing an increase in pain when Dr. Chen saw her on November 30, 2015. Dr. Chen extended her restrictions and provided additional medications. As noted by Dr. Taylor, claimant was more symptomatic at the end of November 2015. I do not find the fact that claimant slept in a different bed or the slight bend she performed to help with pajamas was significant. The record shows claimant's back condition was lighted up by her June 22, 2015 injury.

I found Dr. Taylor's analysis of claimant's condition in his IME to be more thorough than that of Dr. Chen and thus is entitled to more weight.

I also give significant weight to Dr. Howell. As the surgeon who operated on claimant he had an ability to examine and see the injury.

I do not find that Dr. Howell's and Dr. Taylor's reports should be given less weight due to the "pop" claimant experienced in her back. Dr. Taylor thoroughly discussed claimant's symptoms and the increasing symptoms that claimant was having before Dr. Chen found her at MMI. Claimant's slight bend forward on January 23, 2016 which caused a "pop" would not have been significant without the June 2015 injury.

Claimant has met her burden of proof that her June 22, 2015 injury was the cause of her back symptoms that resulted in her back surgery.

Claimant is entitled to healing period benefits, permanent partial disability benefits, medical expenses and cost as a result of the June 22, 2015 injury.

PERMANENT PARTIAL BENEFITS

Since claimant has an impairment to the body as a whole, an industrial disability has been sustained. Industrial disability was defined in Diederich v. Tri-City R. Co., 219 Iowa 587, 258 N.W. 899 (1935) as follows: "It is therefore plain that the legislature intended the term 'disability' to mean 'industrial disability' or loss of earning capacity and not a mere 'functional disability' to be computed in the terms of percentages of the total physical and mental ability of a normal man."

Functional impairment is an element to be considered in determining industrial disability which is the reduction of earning capacity, but consideration must also be given to the injured employee's age, education, qualifications, experience, motivation, loss of earnings, severity and situs of the injury, work restrictions, inability to engage in employment for which the employee is fitted and the employer's offer of work or failure to so offer. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963); Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961).

Compensation for permanent partial disability shall begin at the termination of the healing period. Compensation shall be paid in relation to 500 weeks as the disability bears to the body as a whole. Section 85.34.

In assessing an unscheduled, whole-body injury case, the claimant's loss of earning capacity is determined as of the time of the hearing based upon industrial disability factors then existing. The commissioner does not determine permanent disability, or industrial disability, based upon anticipated future developments. Kohlhaas v. Hog Slat, Inc., 777 N.W.2d 387, 392 (Iowa 2009).

Claimant has had a fusion of her lower spine. She now has restrictions that limit her to light or sedentary work with the provision that she should be able to adjust as needed standing, sitting and walking.

Claimant was attending college to obtain a bachelor's in nursing at the time of the hearing. Claimant was earning more income at the time of the hearing than she earned at UIHC. Claimant is currently working from her home. Claimant has found work within her restrictions and stated she could do other work such as utilization review. Claimant is motivated to work, intelligent and has the ability to obtain significant work. It is also clear that a significant portion of the nursing profession is precluded to her.

Considering all the factors of industrial disability I find claimant has a 25 percent loss of earning capacity. I find claimant has a 25 percent industrial disability.

HEALING PERIOD BENEFITS

Section 85.34(1) provides that healing period benefits are payable to an injured worker who has suffered permanent partial disability until (1) the worker has returned to work; (2) the worker is medically capable of returning to substantially similar employment; or (3) the worker has achieved maximum medical recovery. The healing period can be considered the period during which there is a reasonable expectation of improvement of the disabling condition. See Armstrong Tire & Rubber Co. v. Kubli, 312 N.W.2d 60 (Iowa App. 1981). Healing period benefits can be interrupted or intermittent. Teel v. McCord, 394 N.W.2d 405 (Iowa 1986).

Claimant was off work from November 30, 2015 through December 20, 2015. I find claimant was unable to return to her work or substantially similar work during that time. I also find that claimant was entitled to healing period benefits from the day she went to the Jefferson County Health Center; January 23, 2016, through the time Dr. Howell released her to return to work, March 7, 2016.

PENALTY

Under Iowa's workers' compensation scheme, penalty benefits may be imposed against an employer pursuant to Iowa Code section 86.13(4) under certain circumstances. Iowa Code section 86.13(4) provides:

> a. If a denial, a delay in payment, or a termination of benefits occurs without reasonable or probable cause or excuse known to the employer or insurance carrier at the time of the denial, delay in payment, or termination of benefits, the workers' compensation commissioner shall award benefits in addition to those benefits payable under this chapter, or chapter 85, 85A, or 85B, up to fifty percent of the amount of benefits that were denied, delayed, or terminated without reasonable or probable cause or excuse.
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> b. The workers' compensation commissioner shall award benefits under this subsection if the commissioner finds both of the following facts:
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> (1) The employee has demonstrated a denial, delay in payment, or termination in benefits.
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> (2) The employer has failed to prove a reasonable or probable cause or excuse for the denial, delay in payment, or termination of benefits.

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

> Based on the plain language of section 86.13, we hold an employee is entitled to penalty benefits if there has been a delay in payment unless the employer proves a reasonable cause or excuse. A reasonable cause or excuse exists if either (1) the delay was necessary for the insurer to investigate the claim or (2) the employer had a reasonable basis to contest the employee's entitlement to benefits. A "reasonable basis" for denial of the claim exists if the claim is "fairly debatable."
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> Christensen, 554 N.W.2d at 260.

The supreme court has stated:

> (1) If the employer has a reason for the delay and conveys that reason to the employee contemporaneously with the beginning of the delay, no penalty will be imposed if the reason is of such character that a reasonable fact-finder could conclude that it is a "reasonable or probable cause or excuse" under Iowa Code section 86.13. In that case, we will defer to the decision of the commissioner. See Christensen, 554 N.W.2d at 260 (substantial evidence found to support commissioner's finding of legitimate reason for delay pending receipt of medical report); Robbennolt, 555 N.W.2d at 236.
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> (2) If no reason is given for the delay or if the "reason" is not one that a reasonable fact-finder could accept, we will hold that no such cause or excuse exists and remand to the commissioner for the sole purpose of assessing penalties under section 86.13. See Christensen, 554 N.W.2d at 261.
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> (3) Reasonable causes or excuses include (a) a delay for the employer to investigate the claim, Christensen, 554 N.W.2d at 260; Kiesecker v. Webster City Meats, Inc., 528 N.W.2d at 109, 111 (Iowa 1995); or (b) the employer had a reasonable basis to contest the claim—the "fairly debatable" basis for delay. See Christensen, 554 N.W.2d at 260 (holding two-month delay to obtain employer's own medical report reasonable under the circumstances).
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> (4) For the purpose of applying section 86.13, the benefits that are underpaid as well as late-paid benefits are subject to penalties, unless the employer establishes reasonable and probable cause or excuse. Robbennolt, 555 N.W.2d at 237 (underpayment resulting from application

of wrong wage base; in absence of excuse, commissioner required to apply penalty).

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

Id.

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

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

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

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

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

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

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

Defendant bore the burden to establish a reasonable basis, or excuse, and to prove the contemporaneous conveyance of those bases to the claimant. Iowa Code section 86.13(4)(b)(2).

Defendant's brief relies upon Keystone Nursing Care Center v. Craddock, 705 N.W.2d 229, 308-309 (Iowa 2005) for the position that penalty may not be imposed for failure of a defendant to communicate the reason for the denial. However Iowa Code section 86.13 was amended in 2009 to specifically provide a penalty for failure to contemporaneously notify a claimant why benefits are being denied or terminated. See Iowa Code section 86.14(4) a, b, and c and 2009 Ia. Legis. Serv. Ch. 179 (S.F. 478) (WEST). Defendant's reliance on Keystone is misplaced.

There was no evidence offered by defendant that it conveyed the reason for the denial to the claimant. Claimant proved that her benefits were delayed. I find that claimant is entitled to penalty benefits for the delay in paying the 8 percent rating issued by Dr. Chen. Defendant shall pay a penalty for 15 weeks' delayed payment from December 1, 2015 – March 16, 2016. I find that the penalty shall be 40 percent of the benefits that were not paid. The award should provide reasonable incentive for defendant to comply with Iowa Code section 86.13 in the future. The amount of penalty awarded to claimant is $4,224.96 [15 x $704.16 = $10,562.40 x 40% = $4,224.96].

MEDICAL EXPENSE AND MEDICAL MILEAGE

The employer shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance, and hospital services and supplies for all conditions compensable under the workers' compensation law. The employer shall also allow reasonable and necessary transportation expenses incurred for those services. The employer has the right to choose the provider of care, except where the employer has denied liability for the injury. Section 85.27. Holbert v. Townsend Engineering Co., Thirty-second Biennial Report of the Industrial Commissioner 78 (Review-Reopening October 1975).

Pursuant to Iowa Code section 85.27, claimant is entitled to payment of reasonable medical expenses incurred for treatment of a work injury. Claimant is entitled to an order of reimbursement if she has paid those expenses. Otherwise, claimant is entitled only to an order directing the responsible defendants to make such payments directly to the provider. See Krohn v. State, 420 N.W.2d 463 (Iowa 1988).

In cases where the employer's medical plan covers the medical expenses, claimant is entitled to an order of reimbursement only if claimant has paid treatment costs; otherwise, the defendants are ordered to make payments directly to the provider. See Krohn v. State, 420 N.W.2d 463 (Iowa 1988). Where medical payments are made from a plan to which the employer did not contribute, the claimant is entitled to a direct payment. Midwest Ambulance Service v. Ruud, 754 N.W.2d 860, 867-68 (Iowa 2008) ("We therefore hold that the commissioner did not err in ordering direct payment to the

claimant for past medical expenses paid through insurance coverage obtained by the claimant independent of any employer contribution.") See also: Carl A. Nelson & Co. v. Sloan, (Iowa App. 2015) 873 N.W.2d 552 (Iowa App. 2015) (Table) 2015 WL 7574232 15-0323.

I found that the medical expenses submitted by claimant are related to claimant's June 22, 2015 injury and the costs are reasonable. Defendant shall pay claimant any costs she incurred out-of-pocket and pay claimant any payments made by an insurance carrier that defendant did not contribute. The defendant is responsible for the medical costs in Exhibit 9 and medical mileage in Exhibit 11.

COSTS

Claimant is entitled to reimbursement of some costs pursuant to 876 IAC 4.33. In my discretion I award claimant costs in the amount of $273.40. I do not award the cost of the filing fee for the claim that claimant dismissed.

ORDER

THEREFORE, IT IS ORDERED:

Defendant shall pay claimant one hundred twenty-five (125) weeks of permanent partial disability benefits at the weekly rate of seven hundred four and 16/100 dollars ($704.16) commencing on March 7, 2017.

Defendant shall pay claimant healing period benefits from November 30, 2015 through December 20, 2015 and from January 23, 2016 through March 6, 2016 at the weekly rate of seven hundred four and 16/100 dollars ($704.16)

Defendant shall pay a penalty to claimant of four thousand two hundred twenty-four and 96/100 dollars ($4,224.96).

Defendant shall receive a credit for benefits previously paid as set forth in the stipulations of the parties.

Defendant shall pay claimant costs of two hundred seventy-three and 40/100 dollars ($273.40).

Defendant shall pay claimant medical expenses as set forth in this decision.

Defendant shall pay claimant medical mileage of four hundred seventy-eight and 66/100 dollars ($478.66).

Defendant shall pay accrued weekly benefits 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).

Defendant shall file subsequent reports of injury (SROI) as required by this agency pursuant to rules 876 IAC 3.1(2) and 876 IAC 11.7.

Signed and filed this 19th day of July, 2018.

JAMES F. ELLIOTT
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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JFE/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.