BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

KAREN L. HARTHAN, Claimant, vs. THE RESOURCE CENTER, Employer, and CHURCH MUTUAL INSURANCE COMPANY, Insurance Carrier, Defendants.	FILED AUG 14 2017 WORKERS COMPENSATION	File No. 5052728 ARBITRATION DECISION Head Note Nos.: 1802, 1803, 4000.2

STATEMENT OF THE CASE

Karen Harthan, claimant, filed a petition in arbitration seeking workers' compensation benefits against The Resource Center, employer, and Church Mutual Insurance Company, insurer, for an accepted work injury date of April 2, 2015.

This case was heard on March 16, 2017, in Des Moines, Iowa. The case was considered fully submitted on April 21, 2017, upon the simultaneous filing of briefs.

The record consists of Joint Exhibits 1-7, Claimant's Exhibits 1-10, Defendants' Exhibits A-F, and claimant's testimony.

ISSUES

The extent of claimant's disability;

The commencement date of permanent partial disability benefits;

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

Whether claimant is entitled to mileage reimbursement for medical care visits;

Whether claimant is entitled to a reimbursement of an IME pursuant to Iowa Code section 85.39; and

Whether claimant is entitled to penalty benefits for failure to pay permanent partial disability (PPD).

STIPULATIONS

The parties stipulate claimant sustained an industrial disability arising out of an accepted work injury on April 2, 2015. Defendants have agreed to pay mileage itemized in Joint Exhibits 2 and 8, the IME of $3,177.50, and a medical bill in Joint Exhibit 9. Defendants have paid PPD from December 2, 2105, through March 29, 2017, in the amount of $40,026.21 as well as $40,515.57 for medical payments and/or hospitalization expenses, and seek a credit of those amounts against any benefits awarded.

The parties stipulate the claimant's gross weekly earnings at the time of the injury were $906.00 per week and that she was married and entitled to 3 exemptions. The weekly benefit rate is $589.10.

FINDINGS OF FACT

Claimant was a 56-year-old female at the time of the hearing. Her educational background includes a bachelor's degree achieved in 1982.

She began work for defendant employer in August of 1997 as the director at the Resource Center, an outreach ministry of Zion. The Resource Center provides digital and physical resources for churches, pastors and lay people who are looking for aids to produce worship, sermons, and small group studies.

Also among her duties was to secure memberships, look for grants and funding, and provide maintenance to the center including mowing, cleaning, vacuuming and dusting. When she attended an event, she would create displays and tote crates between 25 and 50 pounds. She would then stand and network throughout the day.

On the weekends, she played organ and piano for the church. Her work hours were in excess of 40 hours a week. When she originally began working, there were 5 employees, but at the time of her retirement, there was only 1. The Resource Center was closed in July of 2016. In November 2016, she found a new position as a secretary at a law office. She works approximately 40 hours per week, earning $12.00 per hour. (Exhibit 5)

It is imperative she work as she is the primary breadwinner in her family and takes care of a disabled brother-in-law. She still plays the organ and piano on the weekend.

On or about April 2, 2015, claimant tripped and fell while at work, striking her right hip while her right leg was extended. She called her husband. Her husband and son arrived and took her to the Clear Lake Family Clinic. (JE 1:1) She was then taken

via ambulance to Mercy Medical Center in Mason City. (JE 2) X-rays showed a hip fracture and surgery was performed immediately by Richard Rattay, M.D. (JE 3:5-8)

She was discharged on April 4, 2015.

On April 21, 2015, she returned to Dr. Rattay for followup. She was walking with a cane and expressed happiness at her progress. (JE 5:2) He released her and recommended she do "lots of walking." (Claimant's testimony; JE 5:3)

Claimant went to We Care Chiropractic for left-sided pain. (JE 4:14) She was provided temporary relief of the left-sided pain. Claimant returned to work on June 2, 2015, but was not able to be as active as she was in the past. Her pain continued and she returned to Dr. Rattay on October 21, 2015.

History of Present Illness:

> Karen Harthan is here for followup of her right hip femoral neck fracture surgery performed almost 7 months ago. This is a Workers Compensation claim.
>
> She is a church organist. She has not been able to get comfortable playing the organ because sitting on a hard bench causes discomfort. She stated that she has never really regained full function. She still has trouble walking. She tends to walk with somewhat of a limp and an unsteadiness. She tends to rest with her leg in a somewhat forward-flexed position, and straightening it in extension seems to cause more discomfort. She has pain at the lateral hip constantly. It bothers her at night and keeps her awake. She stated that she knows it is there all the time. She has not taken any anti-inflammatory medications but has tried Tylenol. It does wake her at night. She cannot sleep on either side due to the pain at the lateral hip. She does not get a lot of groin pain. It is more lateral hip and thigh pain. It does not radiate below the knee. No numbness or tingling distally. She is not walking with an assistive device.

(JE 5:6)

On examination, he found tenderness at the greater trochanter and concluded that she likely suffered from bursitis. He recommended an injection, which she agreed to. (JE 5:7-8) She returned for follow-up on December 2, 2015, with reports that the injection relieved her pain by 70 to 80 percent, but that she still was limited in her range of motion and strength. She was no longer using an assistive device. (JE 5:9) Dr. Rattay recommended she continue formal therapy for 1 more month, however determined that she was at maximum medical improvement (MMI). (JE 5:10) He anticipated that she may need a right hip greater trochanteric bursa injection once a year for the next 3 years and that a total hip arthroplasty may be in her future. (JE 5:10) He placed her at MMI as of December 2, 2015, and assigned a 15 percent whole body impairment. (JE 5:13)

After her physical therapy, her pain returned. She returned to Dr. Rattay, who performed another injection for bursitis. (JE 5:16) She returned on April 19, 2016, reporting improvement of 60 percent after the injection and that she was able to increase her lifting to 20 pounds and pushing-pulling to 30 pounds. (JE 5:18) She planned to continue to exercise at home. On June 27, 2016, the defendants requested an update on work restrictions from Dr. Rattay. The nurse's note indicates that she was under no restrictions. (JE 5:24)

> **Follow-up for Phone Call**
> **Follow-up Details:** The patient had a right hip femoral neck fracture bipolar hemiarthroplasty on 4/2/2015 by Dr. Rattay. Call placed to Karen, she does not have any restrictions as of now. She does do a lot of carrying big crates of books, climbing ladders, getting down on the floor and does do bending, squatting and kneeling. I informed Karen I will talk to Dr. Rattay regarding this. I will call her after I have talked to Dr. Rattay. I will fax a work note to Shane after Dr. Rattay has reviewed this. Karen voiced appreciation for the phone call and had no questions or concerns at this time. She will call if she has any questions or concerns.

(JE 5:23) Claimant explained in answers to interrogatories that Dr. Rattay believed that claimant was sedentary and that he did not understand the nature of her job. (Ex. D:6)

In September 2016, she experienced a new and deeper joint pain and returned to Dr. Rattay. (JE 5:26) Dr. Rattay injected her bursa. After the injection she called to report pain in the sciatica. (JE. 5:29) He believed that the pain was most likely coming from her back. (JE 5:29) Dr. Rattay suggested she seek out her family physician, who referred her back to Dr. Rattay. During the October 25, 2016, visit, Dr. Rattay recommended the total hip arthroplasty and referred her to Michael Crane. (JE 5:31)

Claimant saw Dr. Crane on November 28, 2016, for what claimant characterized as an unsuccessful visit. (JE 5:33) Claimant described Dr. Crane as irritated and brusque. She felt he did not have an understanding of her complaints. He told her that when she could no longer stand the pain, she should call him. The medical records indicate Dr. Crane wanted to obtain an MRI before proceeding with further recommendations. (JE 5:34) X-rays and MRI taken on January 10, 2017, showed degenerative changes in the lumbar spine, most advanced L5-S1, but no hip issues. (JE 3:9-10) Dr. Crane agreed that a revision would likely help most of her problems. However, the revision has its own complications and Dr. Crane did recommend that she wait until the issue is no longer tenable. (JE 5:40)

Claimant does not wish to return to Dr. Crane and informed Dr. Rattay of this. Dr. Rattay referred claimant to the University of Iowa Hospitals and Clinics (UIHC). (JE 5:43)

Claimant was seen at UIHC on March 15, 2017, by Nicolas O. Noiseux M.D. (Ex. F:2) She reported to Dr. Noiseux that she had right hip pain since her surgery in April 2015.

> Today Ms. Harthan reports right hip pain that has been present since the hip hemiarthroplasty in April 2015. She describes aching, stabbing, radiating, and pins and needles pain at her right hip, groin, and buttock. She is also tender at the right greater trochanter and ischial tuberosity. She describes feeling like something is shifting and clicking in the hip when she changes position. The hip pain is present all the time and interferes with driving, sleeping on her side or sitting on the toilet. She describes poor range of motion and balance. She takes Tylenol and occasionally naproxen for pain. She is working full time in a law office.

(Ex. F:4) Dr. Noiseux scheduled claimant for a right hip intra-articular injection, which took place on April 19, 2017. (Ex. F:6) The injection therapy had a positive result. Claimant said she was pain free. She was to follow up in three weeks. Claimant would like to continue with medical care at UIHC.

Claimant underwent an IME on January 9, 2017 with John D. Kuhnlein, M.D. (Ex. 1) During the examination, claimant walked with a slight right limp and was unsteady on her heels and toes. While she was able to squat using the table, she felt pulling sensations in her buttock and hip. She had reduced range of motion in the right hip and pain and muscle spasms throughout the entire right button with palpation. (Ex. 1: 7-8) Dr. Kuhnlein did not feel claimant was at MMI and felt she should stop smoking, have a second opinion with a hip specialist and possibly seek out a pain management specialist. (Ex. 1:10) He did go ahead and assign an impairment rating of 21 percent of the whole person due to the hip surgery and sensory issues. (Ex. 1:11) For restrictions, Dr. Kuhnlein recommended the following:

> With respect to material handling restrictions, Ms. Harthan can lift 10 pounds occasionally from floor to waist, 20 pounds occasionally from waist to shoulder, and 10 pounds occasionally over the shoulder.
>
> With respect to nonmaterial handling restrictions, Ms. Harthan can sit, stand, or walk on and [*sic*] as needed basis, being able to change positions for comfort. She has significant functional issues with prolonged sitting, given her right hip pain and this has affected her abilities in her current work for Eastman Law Office. She can stoop or squat rarely, bend or crawl rarely, and kneel rarely. She should not work on ladders or at height, and she can climb stairs occasionally. She can work at or above shoulder height occasionally, because of the "moment arm" with over the shoulder activities. She can grip or grasp without restrictions. She cannot operate foot operated machinery.
>
> There are no vision, hearing, or communication restrictions. She can travel for work but will need to take frequent breaks. As noted she said she took three breaks on the way here from home for this examination. She can use tools on an occasional basis. There are no environmental restrictions. If working on uneven surfaces, good footgear would be

> appropriate. There are no personal protective equipment restrictions. She can not work on production lines. There are no shiftwork issues.
>
> Many of Ms. Harthan's functional issues relate to playing the organ, as she has problems bearing weight on the right buttock while trying to play the keyboard with both hands while simultaneously playing the foot pedals with both legs, sometimes in a significantly abducted position as she attempts to hit the pedals with the right foot or as she tries to hit the registration stops to change organ settings. This has been significantly disabling for her, as she is proud of her skills playing the organ. She has accommodated the problems she now has by changing the way the stops are laid out, although that may be less convenient for her, especially since she now also had to change her musical repertoire to songs that no longer require such right sided pedaling or stopping as she did before.

(Ex. 1:11-12)

She has pain, particularly while playing the organ or piano. The organ has a two-level keyboard and large pedal board that is situated at a 45-degree angle. Many times she is required to kick out with her right foot which aggravates the pain in her hip. Her sleep is interrupted and she is never pain free. As a result, she has had to reduce her activities due to the pain, primarily in her hip, low back and buttock region.

During her period of recovery, claimant was paid her full wage and as part of the severance, full wages were paid until August 15, 2016. (Ex. 6:1, Ex. B:2) Despite believing that Dr. Rattay's impairment rating of 15 percent was too low, on August 30, 2016, claimant demanded a payment of the impairment rating of Dr. Rattay as well as interest. (Ex. 6:2) On October 13, 2016, defendants responded that since Dr. Rattay imposed no work restrictions, there was no industrial disability and therefore no benefits owed. (Ex. 6:9) However, on February 17, 2017, defendants voluntarily agreed to pay 75 weeks of permanent partial disability. (Ex. A)

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 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).

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.

Defendants argue that claimant was released without restrictions and therefore should not be paid more permanency benefits beyond the 75 weeks they have agreed to pay. Prior to the injury, claimant's job duties entailed cleaning, light maintenance, clerical work, administrative tasks, and public outreach. Since her injury, she has found new employment at a law office as a secretary. Her lifting is minimal.

It is more likely than not that claimant will need a future hip revision surgery. She suffers from near daily pain. While it is true that claimant does not have official work restrictions from her treating providers, these treating providers do not dispute that claimant is in pain and that eventually she will need a revision of her hip replacement. The medical advice is for her to return when the pain is unbearable. While Dr. Kuhnlein is the only expert to recommend restrictions, it is consistent with claimant's subjective

complaints of pain. These subjective complaints are not disputed by her treating physicians and claimant testified credibly at hearing about her pain complaints.

Based on claimant's consistent medical reports, the opinions of Drs. Rattay and Crane that she will need future revision therapy, and the report of Dr. Kuhnlein, the restrictions recommended by Dr. Kuhnlein are adopted. Prior to her injury, claimant worked a job that required some lifting of approximately 5-15 pounds on average and 25 pounds at the most. These weights are close to the weight restrictions recommended by Dr. Kuhnlein. Her current employment fits these restrictions. Dr. Kuhnlein recommends stooping, squatting, bending, or crawling only rarely.

Most of the activities claimant did in the past, she could do today with some modifications. She is able to sit or stand as long as she is able to change positions for comfort. She works full-time at a law office without any significant accommodations. She is motivated to work, has a college degree, and a good work history. Based on the foregoing, claimant's industrial disability is 50 percent.

The parties are in dispute over the commencement date of PPD benefits. PPD benefits commence when temporary or healing period benefits are no longer appropriate.

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, Iowa App. 312 N.W.2d 60 (1981). Healing period benefits can be interrupted or intermittent. Teel v. McCord, 394 N.W.2d 405 (Iowa 1986).

Claimant returned to work on or about June 2, 2015, and worked continuously until her position was eliminated on July 16, 2016. While claimant has had ongoing medical care, section 85.34(1) mandates that temporary or healing period benefits are appropriate until one of the three elements above occurs. Given that claimant returned to work and that her work ceased, not because of injury, but because the position she was working was eliminated, healing period benefits ended on June 1, 2015, and commencement date of PPD benefits would begin on June 2, 2015.

Claimant initially sought reimbursement for mileage, medical expenses, and the IME fee of Dr. Kuhnlein. Defendants agreed to pay for all of those medical charges except for the x-rays taken by Dr. Kuhnlein. Defendants assert that diagnostic tests performed as part of an IME are not reimbursable under the statute.

Section 85.39 governs the compensability of medical charges associated with an IME. Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839 (Iowa 2015). In the 2015 decision, the Iowa Supreme Court stated as follows:

> If the evaluation by the physician retained by the employer includes a permanent disability rating and "the employee believes this evaluation to be too low," the employee may obtain a subsequent examination by a physician of the employee's choice and be reimbursed by the employer for the reasonable fee of the examination, plus transportation expenses.

Id. at 843.

The court further identified the bounds of the examination stating:

> A "physical examination" is "[a]n examination of a person's body by a medical professional to determine whether the person is healthy, ill, or disabled." Id. at 680.

Id. at 845. An x-ray or other diagnostic study is part of the examination of the person's body to determine whether the person is disabled. Therefore the charge for the diagnostic study is reimbursable as part of the examination.

Claimant seeks taxation of costs including a follow-up report of Dr. Kuhnlein. The Iowa Supreme Court in Young made clear that an IME cannot be taxed under 4.33. Therefore, the follow-up report of Dr. Kuhnlein is disallowed as a cost. All other costs sought by claimant are awarded.

The final issue is that of penalty. No industrial benefits were paid until February 2017. Claimant argues that this delay is inappropriate and 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. Dr. Rattay issued a 15 percent impairment rating in February 2016, yet industrial benefits were not paid until a year later. Claimant inquired about the payment of industrial benefits in the fall of 2016 and did not receive a response until October 13, 2016, in which they refused to pay any industrial disability based on Dr. Rattay's lack of restrictions. Defendants argue that Dr. Rattay's opinion provided them with a good faith basis upon which to deny benefits. Yet Dr. Rattay imposed a 15 percent impairment rating.

It also 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). While claimant did return to her previous job and worked the position without complaint, there were many medical records which showed that claimant had ongoing pain, that she received treatment in the form of injections and therapy, and that eventually that pain would become so great that claimant would need to undergo hip revision. The failure to pay industrial benefits when the treating physician assigned a 15 percent impairment and when claimant consistently reported pain was not reasonable. Therefore, claimant is awarded 30 percent penalty benefits on the late payment of PPD benefits.

ORDER

THEREFORE, it is ordered:

That defendants are to pay unto claimant two hundred fifty (250) weeks of permanent partial disability benefits at the rate of five hundred eighty-nine and 10/100 dollars ($589.10) per week from June 2, 2015.

That claimant is entitled to a reimbursement of the examination charges of Dr. Kuhnlein pursuant to Iowa Code section 85.39 including the diagnostic testing.

That claimant is entitled to penalty benefits in the amount of thirty (30) percent for any late paid permanent partial disability payments.

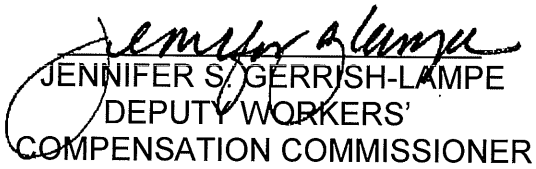
That defendants shall pay accrued weekly benefits in a lump sum.

That defendants shall pay interest on unpaid weekly benefits awarded herein as set forth in Iowa Code section 85.30.

That defendants are to be given credit for benefits previously paid.

That defendants shall pay the costs of this matter pursuant to rule 876 IAC 4.33, except for the second report of Dr. Kuhnlein.

Signed and filed this 14th day of August, 2017.



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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.