BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

MATTHEW L. SIMS,

Claimant,

vs.

POST HOLDINGS, INC. d/b/a MICHAEL FOODS, INC.,

Employer,

and

LIBERTY MUTUAL INSURANCE COMPANY,

Insurance Carrier,
Defendants.

File No. 5058181

ARBITRATION

DECISION

Head Note Nos.: 1100, 1803

STATEMENT OF THE CASE

Claimant, Matthew Sims, filed a petition in arbitration seeking workers' compensation benefits from Post Holdings, Inc. d/b/a Michael Foods, Inc., employer, and Liberty Mutual Insurance Company, insurance carrier, both as defendants, as a result of an alleged injury sustained on October 1, 2016. This matter came on for hearing before Deputy Workers' Compensation Commissioner Erica J. Fitch, in Des Moines, Iowa. The record in this case consists of joint exhibits 1 through 3, claimant's exhibits 1 through 3, defendants' exhibits A through F, and the testimony of the claimant and Crystal Oxenreider.

ISSUES

The parties submitted the following issues for determination:

1. Whether claimant sustained an injury on October 1, 2016 arising out of and in the course of his employment;
2. Whether the alleged injury is a cause of permanent disability;
3. Extent of claimant's industrial disability;
4. Whether defendants are responsible for claimed medical expenses; and
5. Whether claimant is entitled to penalty benefits under Iowa Code section 86.13 and, if so, how much.

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 undersigned, having considered all of the evidence and testimony in the record, finds:

Claimant was 36 years of age at the time of hearing. He is single, with no dependents. Claimant currently resides in Creston, Iowa; at the time of the alleged work injury, claimant resided in Corning, Iowa. Claimant completed the 10th grade; he lacks further formal education or training. Claimant denies any computer proficiency; he does not own a computer and has not used one in his employment history. (Claimant's testimony; DEC, p. 3) Claimant's work history prior to his employment at defendant-employer consists of construction and laborer positions. Claimant identified variable hourly wages, the highest of which being $25.00 per hour for construction work. (DEC, pp. 3-4)

In May 2016, claimant began work at defendant-employer. He earned $15.25 per hour. (DEC, pp. 3-4) Claimant's title was doboy operator; he was tasked with operating a machine which packaged precooked omelets and French toast. The physical demands of claimant's position included: standing and walking 8 hours; occasional bending, stooping, crouching, and kneeling; and occasional lifting and carrying up to 50 pounds. (Claimant's testimony; See also Mr. Palmer's testimony; DEF, p. 8) Claimant worked the 3:00 p.m.-to-finish shift. He testified the facility never finished before midnight; his end time varied and could be until 2:30 a.m. Claimant testified he routinely worked overtime and averaged 48 hours per week. (Claimant's testimony)

On Saturday, October 1, 2016, claimant testified he was at his work station operating the doboy machine. He turned around to retrieve a bucket and slipped on an omelet. He fell to the ground, landing upon his left hip. Claimant testified he was able to stand and make it over to a hand washing station with a water fountain. At that time, two of his supervisors, Josue and David, met claimant and took him to the office. Claimant testified he believed Josue completed some paperwork. Josue also telephoned Jose, his lead supervisor. Claimant was then taken to the break room and then to the locker room. Claimant testified someone retrieved his girlfriend, Crystal Oxenreider, from the production line. She helped claimant change out of his protective clothing and into his street clothes. Once changed, claimant testified he was advised he could leave, but was unable to walk to the car. Someone then retrieved a desk chair and the chair was utilized to push claimant to Ms. Oxenreider's car. Claimant testified he then spoke with Jose, who advised claimant not to seek medical treatment and

instead, to visit the plant nurse on Monday. Claimant testified he and Ms. Oxenreider left defendant-employer's parking lot at approximately 7:00 p.m. (Claimant's testimony)

Claimant's girlfriend, Crystal Oxenreider, testified at evidentiary hearing. Ms. Oxenreider was also an employee of defendant-employer on October 1, 2016; she remained so employed on the date of evidentiary hearing. On October 1, 2016, Ms. Oxenreider was operating the Breadman sealer, a machine which sealed cartons. Ms. Oxenreider stated she noticed the omelets had stopped coming down the line, when a coworker stated something had happened to claimant. Ms. Oxenreider testified she then looked around and saw claimant limping near the sink. She went to claimant, who stated he slipped on an omelet and fell. Claimant told her he was in pain and would be going to sit down. Ms. Oxenreider testified she then returned to work. Later, David approached Ms. Oxenreider and advised her she could leave to drive claimant home. She then went and assisted claimant change out of his work uniform. At that time, she testified she and David pushed claimant to her car in Jose's desk chair. Jose presented to the plant and spoke with claimant while he was seated in Ms. Oxenreider's car. Ms. Oxenreider witnessed the conversation and testified Jose told claimant to wait until Monday to see the plant nurse. (Ms. Oxenreider's testimony)

Claimant testified after leaving defendant-employer, he remained in pain. He decided to seek emergency care and chose to travel to Mercy Hospital in West Des Moines. Claimant testified he sought care in West Des Moines instead of locally, as he did not want defendant-employer to learn he sought care after being told not to. When he arrived at the hospital, claimant testified he gave a history of injury of a slip and fall at home. Claimant testified no such fall occurred at home, but he was afraid of getting in trouble at work and of potentially losing his job. Claimant also described the Des Moines area as home, which led him to always seek medical care in the metropolitan area. (Claimant's testimony)

Ms. Oxenreider testified claimant told her he claimed the injury happened at home out of fear he would be fired. Ms. Oxenreider testified she was fearful she would be fired for testifying at evidentiary hearing. (Ms. Oxenreider's testimony)

Ms. Oxenreider's testimony at the time of evidentiary hearing was direct and consistent with claimant's testimony. Her demeanor was acceptable, albeit nervous. Given Ms. Oxenreider's expressed concern that her testimony may impact her employment, I find her level of displayed anxiety reasonable. Ms. Oxenreider's demeanor gave the undersigned no reason to doubt her veracity. Ms. Oxenreider is found credible.

On October 1, 2016, at approximately 11:30 p.m., claimant arrived at the emergency room of Mercy Medical Center West Lakes. (JE1, p. 1) Joseph Peterson, D.O., examined claimant for complaints of left hip pain. Claimant reported he slipped in oil at home and fell upon his left hip, striking the hip on a concrete landing. (JE1, p. 4) Claimant underwent x-rays and a CT of his abdomen and pelvis. The CT revealed a nondisplaced fracture of the greater tuberosity of the left femur. (JE1, pp. 6, 13-14) Dr.

Peterson offered to admit claimant for pain control; claimant declined. (JE1, pp. 6-7) Dr. Peterson telephoned orthopedist, Steven Aviles, M.D., who recommended crutches, toe-touch weightbearing, pain medication, and orthopedic follow up. (JE1, p. 6) Dr. Peterson implemented these treatment recommendations and discharged claimant at approximately 4:30 a.m. on October 2, 2016. (JE1, pp. 2-3, 6-7) Claimant's personal health insurance covered the cost of claimant's emergency medical care. (CE2, pp. 1-2) Dr. Peterson subsequently confirmed the history of injury reported to him was of claimant slipping and falling in oil at home. (DEB, p. 1)

Claimant testified on Monday, October 3, 2016, he called in to work as he was too sore to complete his duties. (Claimant's testimony)

Kristy Goodale, nurse for defendant-employer, authored an email to a number of individuals on October 3, 2016. She noted claimant called in at 2:32 p.m. and reported he would not be at work. Ms. Goodale reported she and claimant's supervisor, Jose Yzaguirre, had telephoned claimant. At that time, claimant reportedly stated his hip was sore and he had difficulty getting around. Claimant also reportedly stated he did not desire to come to work or seek medical care that date. He reported he could get a ride the following day and might be willing to see a doctor at that time. Ms. Goodale indicated he and Mr. Yzaguirre encouraged claimant to see the company physician on October 3, 2016, but he refused. Ms. Goodale advised the email recipients she secured a medical appointment for claimant on October 4, 2016 at 2:30 p.m. (DEA, p. 1)

Ms. Goodale authored further email correspondence on October 4, 2016 describing events of that day. Ms. Goodale first noted claimant called in at 10:00 a.m. and she returned his call at 11:00 a.m. During the conversation, claimant reported he was not doing well and wished to see a doctor. Ms. Goodale advised claimant of the appointment at 2:30 p.m., with Linda Robinson, D.O. (DEA, p. 2) Claimant subsequently telephoned Ms. Goodale at 1:51 p.m., advising he lacked transportation and would not be attending his medical appointment. Claimant reportedly stated he was in a lot of pain, but did not wish to go to the doctor that date. Ms. Goodale telephoned claimant with plant manager, Gary Tullberg, present. At that time, claimant reportedly stated she was being "pushy" regarding claimant seeing a doctor. Ms. Goodale reported she stated concern regarding claimant's condition. Claimant then represented he had obtained a ride to his appointment. (DEA, p. 3)

Claimant testified he had been experiencing transportation issues and on October 4, 2016, was unable to get a ride to work or the doctor. Claimant testified he spoke with Ms. Goodale and Mr. Tullberg on October 4, 2016. Claimant admitted he was "short" during this conversation, a fact he attributed to his pain levels. Claimant testified, in hindsight, he did not agree with his behavior. (Claimant's testimony)

Claimant did not show up to his appointment on time. (DEA, pp. 4-5) Although late, claimant did present to Linda Robinson, D.O., of Mercy Hospital Corning Occupational Health on October 4, 2016. (JE2, p. 1; DEA, p. 5) Claimant reported he slipped and fell at work, resulting in left hip pain. Dr. Robinson noted claimant was

brought in by wheelchair and was uncooperative during examination. She commented claimant appeared quite anxious and argumentative. An x-ray showed a possible nondisplaced fracture of the left greater trochanter. As a result, Dr. Robinson referred claimant for orthopedic evaluation. (JE2, pp. 1, 3)

Ms. Goodale authored another email on October 5, 2016. Therein, she represented that claimant telephoned her at 11:15 a.m., demanding stronger pain medication. Ms. Goodale reportedly informed claimant she was unable to order pain medicine for him and further, that he should refrain from yelling at her and should conduct himself in a professional manner. (DEA, p. 6)

At approximately 11:30 a.m., on October 5, 2016, Dr. Robinson prescribed Percocet, as claimant was unable to take codeine or hydrocodone. (JE2, p. 2)

At the referral of Dr. Robinson, on October 11, 2016, claimant presented to Michael Morrison, M.D., for orthopedic evaluation. X-rays were repeated, which revealed a nondisplaced fracture of the greater trochanter. Following examination, Dr. Morrison recommended continued use of crutches and toe-touch weightbearing. He limited claimant to sedentary work. (JE2, pp. 4-5)

On October 13, 2016, defendants filed a first report of injury with the Iowa Division of Workers' Compensation via the Electronic Data Interchange (EDI). By this report, defendants reported claimant suffered an alleged work related injury on October 1, 2016. The record also reported the employer knew of the alleged injury on October 1, 2016. (CE3, p. 1)

On October 25, 2016, claimant returned to Dr. Morrison in follow up. Dr. Morrison noted much improved pain and ambulation with full weight. X-rays revealed the fracture line was filling in nicely. The record contains no examination findings. Dr. Morrison imposed a 40-pound lifting restriction for two weeks, followed by a release to full duty. (JE2, p. 6)

At the time of his work release, claimant testified he continued to experience left hip pain. Claimant denied significant pain in the morning, but testified his pain worsened over the course of the day. As time passed, he developed an altered gait. (Claimant's testimony)

On December 13, 2016, Dr. Morrison completed a check-the-box form drafted by defendants. Thereby, he noted claimant's diagnosis as a nondisplaced fracture of the left greater trochanter. He opined claimant achieved maximum medical improvement (MMI) on October 25, 2016, without permanent impairment or a need for permanent restrictions. (JE2, p. 7)

Defendants paid claimant's authorized medical care from October 4, 2016 through December 21, 2016. (DEF, p. 4)

At the referral of claimant's counsel, on December 14, 2016, claimant presented to board certified occupational medicine physician, Sunil Bansal, M.D., for independent medical examination (IME). Dr. Bansal issued a report containing his findings and opinions on April 25, 2017. Dr. Bansal performed a medical records review. (CE1, pp. 1-3) He noted a history of slip and fall at work, with claimant falling onto his left hip and injuring his left hip and femur. Claimant reported continued complaints of left leg pain at the end of a day; difficulty with pivoting motions, stairs, lifting, pulling, and pushing; and altered equilibrium. (CE1, p. 3)

Dr. Bansal performed a physical examination of claimant's bilateral hips and lower extremities. On examination of the left hip, Dr. Bansal noted tenderness to palpation into the left greater trochanter area, SI region, and gluteal muscles, and accentuation of pain with rotation of the hip. Dr. Bansal also made specific measurements of claimant's range of motion and strength. On examination of the right hip, Dr. Bansal noted no tenderness to palpation and full range of motion. On examination of the lower extremities, Dr. Bansal measured claimant's sensation and reflexes. (CE1, p. 4)

Following records review, interview, and examination, Dr. Bansal assessed a nondisplaced fracture of the left hip greater trochanter. (CE1, p. 4) Dr. Bansal opined claimant's left hip pathology was related to the alleged October 1, 2016 work injury both mechanistically and temporally. He noted claimant lacked left hip pain prior to the event and opined the act of falling onto the left hip was consistent with sustaining a nondisplaced fracture of the greater trochanter. (CE1, p. 5) Dr. Bansal opined claimant achieved MMI as of his full duty work release: November 8, 2016. (CE1, p. 4) Due to decrements in range of motion, Dr. Bansal opined claimant suffered a 10 percent lower extremity or 4 percent whole person permanent impairment. He recommended permanent restrictions of no lifting over 50 pounds occasionally or 25 pounds frequently and no frequent squatting or twisting. Dr. Bansal also opined future care might include cortisone injections, NSAIDs, and a home exercise program. (CE1, p. 5)

Claimant's employment at defendant-employer ceased in March 2017. Thereafter, claimant obtained employment at PPI. He worked at PPI during April and May 2017 and earned $15.60 per hour. (DEC, pp. 3-4) At PPI, claimant worked as a machine operator. Claimant testified he loved his work, but was fired for poor attendance. (Claimant's testimony) From June until August or September 2017, claimant worked at Iowa Cage Free and earned $13.75 per hour. At Iowa Cage Free, claimant worked 12-hour shifts, walking through chicken barns to retrieve eggs. Claimant testified both positions required prolonged standing and resulted in hip pain. (Claimant's testimony)

On April 25, 2018, claimant was charged with the following crimes: possession of a controlled substance methamphetamine; possession of a controlled substance marijuana; possession with the intent to deliver less than 5 grams of methamphetamine; possession with intent to deliver marijuana; and possession of prescription medication without a prescription. (DED, pp. 1-5)

In answers to interrogatories, claimant denied any prior convictions or pleas to criminal charges. He also denied any pending criminal charges. Claimant's answers to interrogatories were served on May 24, 2018. (DEC, pp. 1, 7) Claimant testified he completed his answers to interrogatories in January 2018, prior to the criminal charges. He testified his attorney's office did not serve the answers until after the charges had been filed. Claimant denied any intention of concealing the criminal charges; at the time he completed his answers, the answers were accurate. (Claimant's testimony)

On September 6, 2018, defendants served answers to interrogatories. Thereby, defendants represented claimant's claim was now denied on the basis he suffered an injury at home, as stated in Dr. Peterson's report. (DEE, p. 2)

Claimant testified he continues to experience left hip symptoms. He admitted his symptoms have improved since he last saw Dr. Morrison. However, at the conclusion of a shift, the hip is painful. Claimant also testified he has symptoms of his hip with walking. He self-treats with aspirin. (Claimant's testimony)

Claimant testified he submitted employment applications at a number of local employers, including Wal-Mart. Claimant testified he generally sought stocking jobs, which he believed he was capable of performing. At the time of evidentiary hearing, claimant worked at McDonalds. Claimant testified he began such employment approximately 1.5 months prior to hearing. He works 30 to 32 hours per week and makes $10.75 per hour. Claimant works as a janitor, work he described as not as physical as his prior employment. His duties include taking out the trash, power washing, cleaning, mopping, and sweeping. Claimant testified he believes the restrictions recommended by Dr. Bansal are consistent with his actual abilities. Claimant is not currently seeking other employment. (Claimant's testimony)

Dallas Palmer testified at evidentiary hearing. Mr. Palmer serves as defendant-employer's supervisor of safety and training. He was not employed at defendant-employer on the date of claimant's alleged injury; he started later in October 2016. Mr. Palmer testified his understanding was the first notification of an alleged work-related injury came on October 3, 2016, in Ms. Goodale's email. Mr. Palmer admitted he was not present at the time, so this position simply reflected his understanding on review of claimant's case. He testified defendant-employer did not learn of any potential injury at home until June 2017; until that time, defendant-employer believed the incident occurred at work and offered care. Mr. Palmer testified claimant is no longer employed be defendant-employer and was terminated for cause; he did not personally know the basis of the termination. Mr. Palmer testified claimant's preinjury position fell within the permanent restrictions recommended by Dr. Bansal. (Mr. Palmer's testimony)

Mr. Palmer's testimony was direct and professional. His demeanor gave the undersigned no reason to doubt his veracity. Mr. Palmer is found credible.

Defendants argue claimant is not a credible witness. Defendants cite to perceived discrepancies in claimant's testimony, claimant's report of an injury at home to Dr. Peterson, and claimant's denial of criminal charges in answers to interrogatories. Following review of the entirety of the evidentiary record, I reject defendants' contention and find claimant was a credible witness.

Claimant's testimony was largely consistent throughout, with any perceived inconsistencies easily explained by claimant providing additional information during follow-up questioning as opposed to any attempt to be evasive during initial questioning. Claimant's testimony was also entirely consistent with that of Ms. Oxenreider, who was not present during claimant's testimony.

Claimant's report to Dr. Peterson of suffering an injury at home is not unreasonable given the specific facts of this case. Both claimant and Ms. Oxenreider testified claimant was instructed to wait until Monday and seek care from the plant nurse. This testimony is unrebutted. Both claimant and Ms. Oxenreider also testified they were fearful of losing their jobs in connection with their actions related to this claim. This fear may not be well-founded; however, it does lead me to find claimant's report was not unreasonable. Claimant was certainly dishonest in reporting two competing histories of injury, but this isolated behavior is not indicative that claimant is entirely lacking in credibility.

Claimant's denial of criminal charges in answers to interrogatories is easily explained by a delay in service of those answers by his counsel. The charges fell in the interim period between which claimant answered the interrogatories and his counsel's service of those answers as part of the litigation process. I do not find any attempt by claimant to willfully conceal the criminal charges of April 25, 2018.

Claimant's demeanor at the time of evidentiary hearing gave the undersigned no reason to doubt claimant's veracity. Claimant is found credible.

CONCLUSIONS OF LAW

The first issue for determination is whether claimant sustained an injury on October 1, 2016 arising out of and in the course of his employment.

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 R. App. P. 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 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).

Claimant credibly testified he fell at work on October 1, 2016. Immediately following the event, claimant made it to the hand-washing station, where he was met by Ms. Oxenreider. Ms. Oxenreider credibly testified she contemporaneously witnessed claimant limping and he informed her he had slipped on an omelet and fallen. Claimant testified he reported the injury and paperwork was completed. Ms. Oxenreider then assisted claimant in changing his clothes and she and a supervisor wheeled claimant to her vehicle in an office chair. At that time, lead supervisor, Jose, presented to the plant. Claimant and Ms. Oxenreider testified Jose then advised claimant to seek care on Monday with the plant nurse. There is no testimony or evidence in the record which directly challenges or contradicts these accounts of claimant and Ms. Oxenreider.

Mr. Palmer testified to his knowledge, defendant-employer's first knowledge of the alleged work injury was on Monday, October 3, 2016, with Ms. Goodale's email. However, his testimony is entitled to little weight, as Mr. Palmer admitted he was not employed by defendant-employer on October 1, 2016 and therefore, would not be privy to all contemporaneous information. His testimony is also contradicted by the First

Report of Injury (FROI) filed by defendants on October 13, 2016. The FROI states the employer possessed knowledge of claimant's alleged injury on October 1, 2016. The FROI was filed by defendants and there is no explanation offered which identified this filing as an error. Further, Ms. Goodale's emails contain a significant number of details regarding her conversations with claimant. However, there is no mention in the October 3, 2016 email which states claimant was reporting a work-related injury on that date. It is therefore reasonable to believe that Ms. Goodale was previously aware of claimant's alleged injury.

Claimant did subsequently inform the emergency room personnel that his injury happened at home. Claimant credibly testified he gave this false report out of fear of losing his job. Ms. Oxenreider expressed similar concern with respect to her involvement in claimant's claim. Even if the fears of retaliatory actions and repercussions are not well-founded, these fears are capable of impacting decision-making. The facts of this case support the conclusion claimant did not sustain any injury at home on October 1, 2016. There is no evidence claimant left work early on October 1, 2016 for any reason other than he suffered an injury at work. As a result, for claimant to have suffered an injury at home on October 1, 2016, claimant would have either been injured prior to presenting to work at 3:00 p.m., or after he was sent home at approximately 7:00 p.m. Neither scenario is realistic. If claimant were injured before his shift, it is unlikely he would have been capable of performing his work duties for any extended period of time. It is even more improbable that claimant suffered the injury after 7:00 p.m., when his exit from work required him to be pushed to a waiting vehicle in a rolling desk chair.

No physician opined claimant's conditions were not work-related. Dr. Peterson noted he had been advised of a different history of injury; however, no provider opined claimant did not sustain a work-related injury. Dr. Bansal opined claimant's condition was temporally and mechanistically consistent with claimant's report of a fall at work onto his left hip.

After consideration of the above and the entirety of the evidentiary record, I find claimant has proven, by a preponderance of the evidence that he sustained an injury on October 1, 2016, which arose out of and in the course of his employment with defendant-employer.

The next issue for determination is whether the alleged injury is a cause of permanent disability.

The evidentiary record contains two medical opinions specifically addressing the extent, if any, of claimant's permanent impairment and need for permanent restrictions; authored by Drs. Morrison and Bansal. Dr. Morrison evaluated claimant on two occasions. Dr. Bansal evaluated claimant on one occasion.

At the time of Dr. Morrison's final evaluation, October 25, 2016, claimant remained under activity restrictions. Dr. Morrison opined claimant should remain restricted for two weeks and then resume full duty work. He did not evaluate claimant again. Utilizing his evaluation data, Dr. Morrison subsequently opined claimant sustained no permanent impairment and required no permanent restrictions. However, Dr. Morrison did not dictate any examination findings on October 25, 2016. It is therefore unclear upon what information he based these opinions.

Dr. Bansal evaluated claimant on December 14, 2016, following claimant's release to full duty work. Dr. Bansal examined claimant's bilateral hips and lower extremities. On examination of the left hip, Dr. Bansal noted tenderness to palpation about the hip region, as well as decrements in range of motion of the hip. Dr. Bansal also noted examination of the right hip revealed full range of motion without tenderness.

While Dr. Bansal did not record specific numeric findings regarding claimant's right hip for comparison purposes, Dr. Bansal's examination findings are far more specific than those provided by Dr. Morrison. Dr. Morrison dictated no examination findings on October 25, 2016, yet offered opinions on permanent partial impairment and need for restrictions without further evaluation. Dr. Bansal noted specific examination findings and then rated claimant's functional impairment in accordance with the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition. Therefore, Dr. Bansal's opinion as to the extent of claimant's permanent impairment is entitled to greater weight than that of Dr. Morrison.

Dr. Bansal also recommended permanent work restrictions, restrictions which claimant described as consistent with his abilities. Dr. Bansal's restrictions did not foreclose claimant from performing his preinjury job, as testified by Mr. Palmer. Accordingly, claimant's return to full duty in that position does not establish that no permanent restrictions are warranted. Given the above, I award the opinions of Dr. Bansal the greatest weight with respect to claimant's need for permanent work restrictions.

As I adopt the opinions of Dr. Bansal with respect to permanent impairment and permanent restrictions, I find claimant has proven by a preponderance of the evidence that the work injury of October 1, 2016 is a cause of permanent disability.

The next issue for determination is the extent of claimant's industrial disability.

Under the Iowa Workers' Compensation Act, permanent partial disability is compensated either for a loss or loss of use of a scheduled member under Iowa Code section 85.34(2)(a)-(t) or for loss of earning capacity under section 85.34(2)(u). The parties have stipulated claimant's disability shall be evaluated industrially.

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.

Claimant was 36 years of age on the date of evidentiary hearing. His education is limited to completion of the 10th grade. He lacks any further formal education or training. Given claimant's lack of education and formal training, his ability to learn and apply new skills is speculative. As a result of the work injury of October 1, 2016, claimant suffered a 4 percent whole person permanent impairment.

Claimant's work history consists of construction, laborer, and machine operator. As a result of the work injury, claimant now labors under permanent restrictions of a maximum lift of 50 pounds occasionally or 25 pounds frequently, and no frequent squatting or twisting. These restrictions limit claimant's ability to work in construction or as a heavy laborer. Claimant has proven capable of returning to machine operator work post-injury. He returned to his preinjury position at defendant-employer in such a role and subsequently worked at PPI as a machine operator. Claimant was capable of performing his duties adequately, albeit with left hip pain due to prolonged standing.

Following the work injury, claimant returned to work in his preinjury position without a loss of earnings. He was subsequently terminated. I am not privy to the basis of his termination and accordingly, cannot relate the termination to claimant's left hip condition. Shortly following his termination, claimant obtained employment at PPI at an hourly wage slightly greater than he earned at defendant-employer. He lost this employment due to attendance issues unrelated to his left hip condition. Claimant then obtained employment at Iowa Cage Free, with an hourly wage of $13.75 per hour. Neither position, PPI or Iowa Cage Free, exceeded the permanent restrictions imposed by Dr. Bansal.

Claimant's employment at Iowa Cage Free ended in approximately September 2017. Claimant was presumably without employment until he obtained work at McDonalds in approximately August or September 2018. During this one-year period, claimant unsuccessfully submitted applications for employment. Claimant testified he applied for positions within his physical abilities. He now works 30 to 32 hours per week and earns $10.75 per hour. His employment at McDonalds yields considerably less income than his employment at defendant-employer; however, I cannot relate this loss of earnings to his left hip condition on the facts presented. Given claimant's limited employment since his termination by defendant-employer and lack of specific evidence on interim work search efforts, I cannot find claimant to be a highly motivated individual.

Upon consideration of the above and all other relevant factors of industrial disability, it is determined claimant sustained a 15 percent industrial disability as a result of the work-related injury of October 1, 2016. Such an award entitles claimant to 75 weeks of permanent partial disability benefits (15 percent x 500 weeks = 75 weeks), commencing on the stipulated date of November 9, 2016. The parties stipulated at the time of the work injury, claimant's gross weekly earnings were $644.36, and claimant was single and entitled to 1 exemption. The proper rate of compensation is therefore, $398.94.

The next issue for determination is whether defendants are responsible for claimed medical expenses.

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).

When dealing with unauthorized care, to be entitled to payment, claimant must establish the care was rendered on a compensable claim. That being established, claimant must establish that the care provided on the compensable claim was both reasonable and the outcome more beneficial than the care offered by the defendants. Bell Bros. Heating v. Gwinn, 779 N.W.2d 193, 206 (Iowa 2010).

Claimant suffered a compensable work-related injury to his left hip on October 1, 2016. Following the injury, claimant sought treatment at an emergency room and those charges were paid under claimant's health insurance, as evidenced in Claimant's Exhibit 2. The care sought and received was related to the work injury. The care was not authorized by defendants; however, defendants did not provide claimant with any medical treatment on the date of his injury. Therefore, the care received in the emergency room, including pain medication and crutches, was more beneficial than the lack of treatment offered by defendants. The care claimant received in the emergency

room was rendered on a compensable claim, the care was reasonable and necessary, the charges were fair and reasonable, and the care was more beneficial than that offered by defendants. Accordingly, defendants are responsible for the medical expenses included in Claimant's Exhibit 2.

The final issue for determination is whether claimant is entitled to penalty benefits under Iowa Code section 86.13 and, if so, how much.

Iowa Code 86.13, as amended effective July 1, 2009, states:

> 4. 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.
>
> b. The workers' compensation commissioner shall award benefits under this subsection if the commissioner finds both of the following facts:
>
> (1) The employee has demonstrated a denial, delay in payment, or termination of benefits.
>
> (2) The employer has failed to prove a reasonable or probable cause or excuse for the denial, delay in payment, or termination of benefits.
>
> c. In order to be considered a reasonable or probable cause or excuse under paragraph *"b"*, an excuse shall satisfy all of the following criteria:
>
> (1) The excuse was preceded by a reasonable investigation and evaluation by the employer or insurance carrier into whether benefits were owed to the employee.
>
> (2) The results of the reasonable investigation and evaluation were the actual basis upon which the employer or insurance carrier contemporaneously relied to deny, delay payment of, or terminate benefits.
>
> (3) The employer or insurance carrier contemporaneously conveyed the basis for the denial, delay in payment, or termination of

benefits to the employee at the time of the denial, delay, or termination of benefits.

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

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

It 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).

If the employer fails to show reasonable cause or excuse for the delay or denial, the commissioner shall impose a penalty in an amount up to 50 percent of the amount unreasonably delayed or denied. Christensen v. Snap-on Tools Corp., 554 N.W.2d 254 (Iowa 1996). The factors to be considered in determining the amount of the penalty include the length of the delay, the number of delays, the information available to the employer and the employer's past record of penalties. Robbennolt, 555 N.W.2d at 238.

Defendants did ultimately deny liability for claimant's October 1, 2016 injury. However, defendants initially authorized care and provided benefits. There is no evidence any temporary disability benefits were delayed. Therefore, permanent disability benefits can be the only benefits which could be found to be unreasonably delayed or denied.

In this matter, defendants paid no permanent disability benefits. Although the undersigned found benefits are owed via this decision, claimant's entitlement to industrial disability benefits was fairly debatable prior to hearing. Dr. Morrison contemporaneously opined claimant sustained no permanent partial impairment and imposed no permanent restrictions. Following care, claimant returned to full duty work in his preinjury position, without loss of earnings attributable to the work injury. Given these facts, claimant's entitlement to permanent disability benefits was fairly debatable and no award of penalty benefits is warranted.

ORDER

THEREFORE, IT IS ORDERED:

The parties are ordered to comply with all stipulations that have been accepted by this agency.

Defendants shall pay unto claimant seventy-five (75) weeks of permanent partial disability benefits commencing November 9, 2016 at the weekly rate of three hundred ninety-eight and 94/100 dollars ($398.94).

Defendants shall receive credit for benefits paid.

Defendants shall pay accrued weekly benefits in a lump sum.

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

Defendants shall pay claimant's prior medical expenses submitted by claimant at the hearing as set forth in the decision.

Defendants shall file subsequent reports of injury as required by this agency pursuant to rule 876 IAC 3.1(2).

Costs are taxed to defendants pursuant to 876 IAC 4.33.

Signed and filed this 29th day of January, 2019.

Erica J. Fitch

ERICA J. FITCH
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

Copies to:

Jenna L. Green
Attorney at Law
6600 Westown Pkwy, Ste. 270
West Des Moines, IA 50266
jgreen@hupy.com

Nathan R. McConkey
Attorney at Law
2700 Westown Pkwy., Ste. 170
West Des Moines, IA 50266-1411
nmcconkey@desmoineslaw.com

EJF/kjw

Right to Appeal: This decision shall become final unless you or another interested party appeals within 20 days from the date above, pursuant to rule 876-4.27 (17A, 86) of the Iowa Administrative Code. The notice of appeal must be in writing and received by the commissioner's office within 20 days from the date of the decision. The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday. The notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 1000 E. Grand Avenue, Des Moines, Iowa 50319-0209.