BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

FILED
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WORKERS COMPENSATION

TWILA MARCHANT, Claimant, vs. SALVATION ARMY, Employer, and ZURICH AMERICAN INSURANCE COMPANY, Insurance Carrier, and SECOND INJURY FUND OF IOWA, Defendants.	File Nos. 5055127, 5055128 ARBITRATION DECISION Head Note Nos.: 1803, 2501, 2701 3200, 4000

STATEMENT OF THE CASES

These are proceedings in arbitration. File Number 5055127 was initiated when claimant, Twila Marchant, filed her original notice and petition with the Iowa Division of Workers' Compensation. The petition was filed on October 16, 2015. Claimant alleged she sustained a work-related injury on October 10, 2014. She also alleged she was entitled to benefits pursuant to the Second Injury Fund of Iowa. (Original notice and petition.)

For purposes of workers' compensation, the Salvation Army, defendant, is insured by Zurich American Insurance Company, defendant. Defendants filed their answer on December 7, 2015. They admitted the occurrence of the work injury. A First Report of Injury was filed on October 30, 2014.

The Second Injury Fund of Iowa filed its answer on November 13, 2015. The Fund denied liability for any benefits due to claimant.

In File Number 5055128, claimant filed her original notice and petition on October 16, 2015. She alleged she sustained a work-related injury on January 25, 2014. (Original notice and petition)

The Salvation Army and Zurich American Insurance Company filed their answer on December 7, 2015. They denied the occurrence of the work injury. A First Report of Injury was filed on July 25, 2014.

The hearing administrator scheduled the case for hearing on November 30, 2016. The hearing took place in Des Moines, Iowa at the Iowa Workforce Development Building. The undersigned appointed Ms. Susan Frye as the certified shorthand reporter. She is the official custodian of the records and notes.

Claimant testified on her own behalf. Defendants elected not to call any witnesses at the hearing. The parties offered exhibits. Claimant offered exhibits marked 1 through 15. Defendants, the Salvation Army and Zurich American Insurance Company offered exhibits marked 16 through 19. The Second Injury Fund of Iowa did not offer any exhibits. All proffered exhibits were admitted as evidence in the case.

The original transcript was filed on January 3, 2017. Post-hearing briefs were filed on January 11, 2017. The cases were deemed fully submitted on that date.

FILE NUMBER 5055128 **(JANUARY 25, 2014)** STIPULATIONS

The parties completed the designated hearing report. The various stipulations are:

1. There was the existence of an employer-employee relationship at the time of the alleged injury;

2. Claimant sustained an injury on January 25, 2014 which arose out of and in the course of her employment;

3. Claimant withdrew her claim for healing period benefits and agreed the amount paid on August 10, 2016, for the period from September 4, 2014 through September 29, 2014, in the amount of $1,284.49 was the correct amount of healing period benefits for the January 25, 2014 work injury;

4. The injury is a cause of permanent disability;

5. The disability is a scheduled member disability to the left knee;

6. The commencement date for permanent partial disability benefits is September 30, 2014;

7. The parties believe the weekly rate to be $345.85;

8. All affirmative defenses have been withdrawn;

9. Prior to the hearing, claimant was paid $1,248.49 and defendants are entitled to a credit for the same;

10. Prior to the date of the hearing, defendants paid claimant 0 weeks of permanent partial disability benefits; and

11. The parties agree certain costs that are detailed were paid by claimant.

ISSUES

The issues presented are:

1. To what extent is claimant's permanent partial disability?

2. Is claimant entitled to medical costs?

3. Is claimant entitled to the payment of an independent medical evaluation pursuant to Iowa Code section 85.39?

4. Is claimant entitled to penalty benefits pursuant to Iowa Code section 86.13? and,

5. For which costs are defendants liable?

FILE NUMBER 5055127 **(October 10, 2014)** STIPULATIONS

1. There was the existence of an employer-employee relationship at the time of the alleged injury;

2. Claimant sustained an injury on October 10, 2014 which arose out of and in the course of her employment;

3. The injury is a cause of temporary disability during a period of recovery;

4. Claimant stipulates the healing period benefits paid to her on August 10, 2016 for the period from July 27, 2015 through August 7, 2015, in the amount of $590.28 is the correct amount of healing period benefits for the October 10, 2014 work injury;

5. If permanency benefits are awarded, the commencement date is August 7, 2015;

6. The parties believe the weekly benefit rate is $344.39 per week;

7. Affirmative defenses have been withdrawn;

8. Prior to the hearing, defendants paid unto claimant $590.28 in healing period benefits and defendants are entitled to a credit for the same; and

9. The costs listed in the attachment have been paid by claimant.

ISSUES

The issues presented are:

1. Does claimant have a permanent partial disability to the right knee?
2. If so, is claimant entitled to permanency benefits from defendants?
3. Is claimant entitled to benefits from the Second Injury Fund of Iowa?
4. If so, to what extent is claimant entitled to benefits from the Second Injury Fund of Iowa;
5. Is claimant entitled to medical benefits pursuant to Iowa Code section 85.27?
6. Is claimant entitled to an independent medical examination pursuant to Iowa Code section 85.39?
7. Is claimant entitled to penalty benefits pursuant to Iowa Code section 86.13? and;
8. To whom shall costs be assessed?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This deputy, after listening to the testimony of claimant at hearing, after judging her credibility, and after reading the evidence, and the post-hearing briefs, makes the following findings of fact and conclusions of law:

The party who would suffer loss if an issue were not established has the burden of proving the issue by a preponderance of the evidence. Iowa Rule of Appellate Procedure 6.14(6).

Claimant is 53 years old and has been married for 22 years. She did not graduate from high school but she did obtain her General Education Development certificate, (GED) in 1981. The only other education claimant has obtained is on the job training.

Claimant is a heavy smoker of tobacco products. She smokes one pack of cigarettes per day.

Left knee injury on January 25, 2014

On August 9, 2011, claimant commenced employment as a part-time cashier at the Salvation Army Thrift Store in Newton, Iowa. Several weeks later, claimant became

a full-time employee. Then she was promoted to store manager. She advanced very quickly.

Claimant testified about her work injury during her arbitration hearing. She testified:

> Q. (By Ms. Mauss) Let's talk about January 25th, 2014.
>
> What happened on that day?
>
> A. Ann and I was [*sic*] transferring a couch from the back room to the sales floor. When I went to line it up in the row of other furniture, I went and I pushed it in as I was turning, and I felt something in my knee. It was a sharp pop and pain.
>
> Q. Which knee?
>
> A. Oh. In my left knee.
>
> Q. And that was on January 25th. Did you go to the doctor that day?
>
> A. No, ma'am.
>
> Q. Did you keep working?
>
> A. I did.
>
> Q. When did you go to the doctor?
>
> A. I went and seen [*sic*] him on the 21st of April, I believe.

(Transcript, pages 20-21)

A written statement was submitted by Ms. Anne Tappendick to claimant's counsel. Ms. Tappendick was a witness to the events of January 14, 2014. Ms. Tappendick stated:

> January 2014 Twila and I were carrying a couch out to the floor when we turned to put it in I seen [*sic*] Twila grab her knee and she had to sit down[.] I could see she was in pain.

(Exhibit 8, p. 123a)

On April 9, 2014, claimant presented to the Newton Clinic, P.C. She complained of pain and swelling in the left knee area. (Ex. 1, p. 1) Mureema M. Solberg, M.D., examined claimant. The doctor found the following during the physical examination of the left knee:

Physical Exam:

> General – Twila is alert and interactive. She climbs up on the examining table easily. She is of normal weight. Extremities – I looked at both knees and palpated both knees. Her left knee is a little more warm [*sic*] than the right one. In looking at her dimples around her knee caps the dimples are more filled in on the left side consistent with a little bit of effusion. She was wondering about a blood clot in that leg because there is a strong family history among male family members of blood clots. I checked the size of her calf and it was equal to the right side. The calf did not feel warm and she had no edema around her ankle at all. It seemed that her symptoms localized more to that left knee. The color of the skin of that lower left leg was the same as on the right side.

(Ex. 1, p. 3)

Dr. Solberg diagnosed claimant with acute knee pain. The physician prescribed Naburmetone and Tramadol for the knee pain and swelling. (Ex. 1, p. 3)

On April 21, 2014, Gregory L. Ingle, D.O., examined claimant for left leg swelling with pain radiating into the buttocks. (Ex. 2, p. 5) Claimant reported the following history to Dr. Ingle:

> She thinks that she hurt it sometime in December or January while working at the Salvation Army. She thinks that she remembers hearing a pop and having pain when lifting some furniture. . . . Examination of the left knee reveals some tenderness both medial and laterally with some mild swelling. She has full range of motion. She has good flexor/extensor strengths of both the thigh and the leg. Negative abductor/adductor sign.

(Ex. 2, p. 5)

Dr. Ian Lin, M.D., an orthopedic surgeon at Des Moines Orthopaedic Surgeons, P.C., began to treat claimant's left knee pain per a referral from Dr. Ingle. The initial examination occurred on June 30, 2014. Dr. Lin recommended a left knee arthroscopy and a lateral meniscectomy. (Ex. 3, pp. 15-16)

On August 12, 2014, Ms. Fran Pack, Claims Representative for Chesterfield Services, Inc., the third party administrator for the Salvation Army, sent a letter denying claimant's alleged injury. (Ex. 10, p. 124) It is unclear from the letter to whom the denial was sent. (Ex. 10, p. 148)

During direct examination, claimant testified about information she received from Ms. Pack. Claimant stated:

Q. (By Ms. Mauss) At Exhibit 10, page 148, there's a letter from the workers' compensation carrier dated August 12th, 2014, stating that they couldn't substantiate that the injury was work related.

Is that what was told to you?

A. No. No. She told me that it wasn't within the time frame.

Q. When you say she told you, who are you - -

A. Fran, Fran Pack or Pock. I think it's Pack.

Q. And she's a representative of the workers' compensation carrier?

A. Yes, ma'am. Yes.

Q. What happened after that?

Well, first of all, she said that it was not – tell me again what she said.

A. She said it was not within the time frame, that there was a certain time frame that you have to go and have it filed, and I wasn't within that time frame.

Q. Okay.

A. I didn't realize there was a time frame.

Q. What happened after the denial?

A. Then he would schedule the surgery; Dr. Lin.

(Tr., pp. 24-25)

On September 4, 2014, Dr. Lin performed a partial lateral meniscectomy. (Ex. 3, p. 19) The surgery was performed by arthroscopic means. (Ex. 3, p. 20) Post-surgery, claimant was placed in a bulky dressing and taken into the recovery room. She was in a stable condition. (Ex. 3, p. 20)

On September 15, 2014, claimant returned to Dr. Lin. There was not much swelling. (Ex. 3, p. 21) Claimant's gait was slightly altered. Range of motion was good. The surgeon determined claimant should be off work through September 29, 2014. (Ex. 3, p. 22)

However, on October 22, 2014, claimant returned to Dr. Lin because of a fall claimant sustained at the Salvation Army. Claimant reported she was carrying boxes and tripped over an object. (Ex. 3, p. 23) Claimant landed on both knees. (Ex. 3,

p. 23) Dr. Lin observed a small bruise on the anterior part of the right knee. (Ex. 3, p. 23) Claimant reported her right knee had improved since the fall. (Ex. 3, p. 23)

Dr. Lin assessed claimant's bilateral condition as:

> **Assessment/Plan**
>
> Status post left arthroscopy and partial lateral meniscectomy. I think she is doing fine. It has definitely gotten better. She has just bruised her knees. If it does not get any better she will call me and we may try a small injection or something like that.

(Ex. 3, p. 23)

Dr. Lin released claimant to return to work without restrictions on October 29, 2014. Claimant determined she could no longer lift heavy boxes or move furniture. She described her left knee as painful. (Tr., p. 26) Claimant testified she attempted to perform some duties in the sitting position. (Tr., p. 26)

Dr. Lin rated claimant as having a two percent permanent impairment to the left lower extremity for a partial lateral meniscectomy. (Ex. 3, p. 25) Dr. Lin relied upon the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, at page 546 for the calculation of two percent to the lower extremity. As indicated previously, Dr. Lin did not impose any work restrictions.

Claimant sought an independent medical examination from Sunil Bansal, M.D., M.P.H., a well-known independent medical examiner who provides opinions on behalf of injured workers in Iowa. Dr. Bansal concurred with the two percent rating to the lower extremity that was provided by Dr. Lin for the left knee. Dr. Bansal, however, deemed work restrictions to be appropriate for claimant. Dr. Bansal opined claimant should not engage in frequent kneeling, squatting, climbing or twisting. Additionally, Dr. Bansal opined claimant should not stand or walk for greater than 45 minutes at one time. (Ex. 6, pp. 93-94)

The weight to be given an expert opinion may be affected by the accuracy of the facts the expert relied upon as well as other surrounding circumstances. St. Luke's Hospital v. Gray, 604 N.W.2d 646 (Iowa 2000).

Expert testimony may be buttressed by supportive lay testimony. Bradshaw v. Iowa Methodist Hospital, 251 Iowa 375, 380; 101 N.W.2d 167, 170 (1960).

The commissioner as trier of fact has the duty to determine the credibility of the witnesses and to weigh the evidence. Together with the other disclosed facts and circumstances, and then to accept or reject the opinion. Dunlavey v. Economy Fire and Casualty Co., 526 N.W.2d 845 (Iowa 1995).

Under the Iowa Workers' Compensation Act permanent partial disability is categorized as either to a scheduled member or to the body as a whole. See

section 85.34(2). Section 85.34(2)(a)-(t) sets forth specific scheduled injuries and compensation payable for those injuries. The extent of scheduled member disability benefits to which an injured worker is entitled is determined by using the functional method. Functional disability is "limited to the loss of the physiological capacity of the body or body part." Mortimer v. Fruehauf Corp., 502 N.W.2d 12, 15 (Iowa 1993); Sherman v. Pella Corp., 576 N.W.2d 312 (Iowa 1998). Compensation for scheduled injuries is not related to earning capacity. The fact-finder must consider both medical and lay evidence relating to the extent of the functional loss in determining permanent disability resulting from an injury to a scheduled member. Terwilliger v. Snap-On Tools Corp., 529 N.W.2d 267, 272-273 (Iowa 1995); Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417, 420 (Iowa 1994).

In File Number 5055128, the parties stipulated claimant sustained a permanent partial disability to the left leg as a result of the work injury on January 25, 2014. It is a scheduled member disability pursuant to Iowa Code section 85.34(2)(o). The subsection reads:

> o. The loss of two-thirds of that part of a leg between the hip joint and the knee joint shall equal the loss of a leg, and the compensation therefor shall be weekly compensation during two hundred twenty weeks.

The undersigned finds claimant sustained a 2 percent loss to the left leg. Therefore, claimant is entitled to 4.4 weeks of compensation commencing on September 30, 2014 and payable at the stipulated benefit rate of $345.85 per week. Accrued benefits shall be paid in a lump sum, together with interest as allowed by law.

In arbitration proceedings, interest accrues on unpaid permanent disability benefits from the onset of permanent disability. Farmers Elevator Co., Kingsley v. Manning, 286 N.W.2d 174 (Iowa 1979); Benson v. Good Samaritan Ctr., File No. 765734 (Ruling on Rehearing, October 18, 1989).

Claimant is requesting penalty benefits pursuant to Iowa Code section 86.13(4)(a). The sub-section provides:

> o. 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 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.

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."
>
> 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.
>
> (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.
>
> (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).
>
> (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).

Penalty benefits are in order for the left knee injury. Originally, the claims' representative, Ms. Pack, erroneously informed claimant the claim was not filed within 90 days of the date of the alleged occurrence. Notice had been given within the 90-day requirement period provided by Iowa Code section 85.23.

Later, a denial letter was issued on August 12, 2014. There was no indication whether the letter was provided to claimant. The employer or insurance carrier is mandated by Iowa Code section 86.13(4)(c)(3) to convey the basis for any denial to claimant. Had claimant received the August 12, 2014 letter, she may have been able to provide adequate information to Ms. Pack. Defendants did not comply with the provisions of 86.13. A penalty is in order in File Number 5055128. The amount assessed is $400.00.

Right knee injury on October 10, 2014

As indicated above, claimant sustained a fall on October 10, 2014 at the Salvation Army. Claimant described the fall during her arbitration hearing. She testified:

> Q. (By Ms. Mauss) On October 10th, 2014, can you describe what happened?
>
> A. Yes, ma'am. I was in the back room bringing out two boxes. I was bringing it around to the desk.
>
> There was a pile of donations, and someone had taken a suitcase in as part of the donations, and it was sticking out into the aisle just far enough where it tripped - - or it didn't trip, I tripped on it, and fell.
>
> Q. How did you land?
>
> A. There was a wood-framed chair sitting in front of me, and as I came down both knees hit the wooden frame of that wood chair and then straight down to the concrete.
>
> Q. What did you do after you fell?
>
> A. Well, it took me a while to compose myself. It was excruciating when I came down on the knee I just had surgery on. So it took awhile [*sic*] to compose myself, and then I got up and sat at the desk.
>
> Q. And at that point what injuries did you believe that you had sustained?
>
> A. I felt like the right leg felt like the left leg did, that there was a tear in there.
>
> Q. Did you report the injury?
>
> A. Yes, I did.

(Tr., pp. 28-29)

Claimant returned to work at the Salvation Army Store. She continued in her capacity as store manager. She encountered difficulties with another employee. There was conflict. Claimant presented the issue to her superiors but she felt she did not receive proper support. As a consequence, claimant tendered her formal written notice on November 6, 2014. (Ex. 10, p. 150) Claimant's last day of employment was November 15, 2014.

On January 22, 2015, claimant returned to Dr. Ingle with complaints of bilateral knee pain. (Ex. 2, p. 9) MRI testing of the right knee showed a "Small vertical tear through the mid body of the lateral meniscus on the right." (Ex. 2, p. 12) Dr. Ingle referred claimant to Craig R. Mahoney, M.D., an orthopedic surgeon at Iowa Ortho. (Ex. 4, p. 26)

On January 30, 2015, Ms. Pack sent another denial of treatment letter. This time the letter was sent to the Prairie Family Clinic where Dr. Ingle practices medicine. The letter stated:

> This letter is to inform you that we have investigated this claim further, and we stand by our decision to deny the MRI requested on 1-22-15. Furthermore, we are denying further treatment at this time.
>
> Based on the medical records from Dr. Lin on 10-22-15, he found the bilateral knee injury of Twila Marchant was a bruise. It was at his suggestion that if she didn't get better, she was to call him and they may try a small injection or something like that.
>
> If an MRI is obtained our position will stand and we will continue to deny treatment.

(Ex. 10, p. 146a)

Claimant presented with complaints of bilateral knee pain to Dr. Mahoney on February 27, 2015. (Ex. 4, p. 29) Dr. Mahoney injected the knees. (Ex. 4, p. 31) At the time, Dr. Mahoney recommended non-operative care for the right knee. (Ex. 4, p. 31)

Claimant returned to Dr. Mahoney on April 17, 2015, with complaints of continued bilateral knee pain and she expressed very mild improvement. (Ex. 4, p. 34) Dr. Mahoney diagnosed claimant with "Chondromalacia of the patella." (Ex. 4, p. 35) The orthopedic surgeon opined claimant was experiencing pain "secondary to an anterior process area." (Ex. 4, p. 35) The treatment modality recommended was physical therapy. (Ex. 4, p. 35)

Ultimately, on July 27, 2015, Dr. Mahoney performed a right knee arthroscopy. The surgery consisted of a partial lateral meniscectomy to correct internal derangement of the right knee. (Ex. 4, p. 39) There were no surgical complications. (Ex. 4, p. 40)

On August 7, 2015, claimant returned to Dr. Mahoney's office for a surgical follow-up appointment. (Ex. 4, p. 41) Claimant reported the surgery was a complete success. (Ex. 4, p. 41) She stated she had no pain and was not using any pain medication. (Ex. 4, p 41) Casey J. Howe, PAC, wrote the following in his clinical notes for the same date:

> Overall, the patient is doing extremely well. She is happy with the results of her arthroscopy. She will continue to increase her activities as tolerated. We will see her back in one month for postoperative recheck if she has anything to discuss.

(Ex. 4, p. 43)

During her arbitration hearing, claimant denied making the above statements to the physician's assistant. (Tr., pp. 73-74) Claimant did not return to Dr. Mahoney until November 3, 2016. (Ex. 4, p. 44) Dr. Mahoney had a long discussion with claimant during the November 3rd appointment. He asked claimant why she had not returned to his office since August 7, 2015. The following is the record, Dr. Mahoney made:

> I had a very long discussion with the patient. I will outline my findings.
>
> RIGHT knee: The last time we saw the patient was August 7, 2015. At that time she was documented as doing very well. She tells me that despite the fact that this was documented she continued to have problems with her knee. When I asked her why she did not follow up, she stated there were a number of things in her life that got in the way and she also stated that she did not have a follow up appointment. I tried to make sure I understand why that was and really could not come up with an answer. Despite that, she continues to complain of mechanical symptoms in her RIGHT knee similar to the symptoms she had before [t]he arthroscopy.
>
> LEFT knee: She correlates the fall with the increased mechanical symptoms she has in the LEFT and the swelling she has behind her LEFT knee. She states that this is similar to the findings she has been having for a long period of time. They are mechanical and she does have swelling associated with them.
>
> Given the duration of symptoms and the quality of the symptoms I have recommended the following.
>
> I believe both knees should have a repeat magnetic resonance imaging. This should be arthrogram magnetic resonance imaging. I have ordered these. I think this will set the table for documenting if any significant problems exist at this point and whether or not there is anything to do about them surgically. She will follow up after the magnetic resonance imaging has been completed and until then she can have activities as tolerated.

(Ex. 4, p. 46)

Claimant testified she was not going to pursue the MRI testing. She indicated she had experienced enough time with doctors. She was just tired of dealing with the medical profession. (Tr., pp. 74-75)

Dr. Bansal rated claimant as having a two percent permanent impairment to the right lower extremity. Dr. Bansal based his rating on the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, at Table 17-33. (Ex. 6, p. 95) Dr. Bansal opined that in addition to the work restrictions he imposed for the left lower extremity, Dr. Bansal would restrict claimant from working on uneven surfaces. (Ex. 6, p. 95)

Dr. Lin declined to rate claimant's right lower extremity. Dr. Mahoney did not provide a permanency rating either. Therefore, Dr. Bansal's opinion is unrebutted. The rating imposed by Dr. Bansal for the right knee meniscectomy is identical to the rating issued by Dr. Bansal for the left knee meniscectomy and the rating imposed by Dr. Lin for the left knee meniscectomy.

Defendants shall pay unto claimant, 4.4 weeks of permanent partial disability benefits to claimant for the right knee. Said benefits shall be paid at the stipulated weekly benefit rate of $344.39 per week and the benefits shall commence from August 7, 2015. Accrued benefits shall be paid in a lump sum together with interest as allowed by law.

Claimant is again requesting penalty benefits pursuant to Iowa Code section 86.13. Claimant is also entitled to penalty benefits for the denial to pay permanency benefits for the right leg. Claimant is absolutely correct in her brief. The January 30, 2015 denial letter makes no sense. The adjusting company acknowledged Dr. Lin considered possible future treatment. Nevertheless, when the treatment was sought, it was denied. The adjusting company refused authorization for the MRI testing and outright denied future medical care. "If an MRI is obtained our position will stand and we will continue to deny treatment." (Ex. 10, p. 146a) The adjusting company totally disregarded the duty to conduct ongoing investigations.

It is the determination of this deputy; claimant is entitled to penalty benefits pursuant to Iowa Code section 86.13. Defendants shall pay unto claimant $400.00 in penalty benefits.

Medical Benefits for the left knee injury and the right knee injury

Claimant is requesting the payment of medical benefits pursuant to Iowa Code section 85.27. Those medical benefits include medical mileage in the amount of $282.00. The medical bills and the mileage are detailed in Exhibit 14.

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 16, 1975).

Defendants are liable for the medical benefits to treat both the left knee and the right knee as detailed in Exhibit 14. Medical mileage is also due to claimant.

Claimant is requesting the payment of the independent medical examination and report completed by Dr. Bansal. The total equals $2,590.00. Claimant seeks reimbursement of her independent medical evaluation pursuant to Iowa Code section 85.39. Section 85.39 permits an employee to be reimbursed for subsequent examination by a physician of the employee's choice where an employer-retained physician has previously evaluated "permanent disability" and the employee believes that the initial evaluation is too low. The section also permits reimbursement for reasonably necessary transportation expenses incurred and for any wage loss occasioned by the employee attending the subsequent examination.

Defendants are responsible only for reasonable fees associated with claimant's independent medical examination. Claimant has the burden of proving the reasonableness of the expenses incurred for the examination. See: Schintgen v. Economy Fire & Casualty Co., File No. 855298 (App. April 26, 1991). Claimant need not ultimately prove the injury arose out of and in the course of employment to qualify for reimbursement under section 85.39. See Dodd v. Fleetguard, Inc. 759 N.W.2d 133, 140 (Iowa App. 2008).

In this case, Dr. Linn rendered an opinion concerning permanent impairment of the left leg on August 22, 2016. However, Dr. Lin was a physician selected by claimant. Claimant also sought an opinion from Dr. Bansal on October 5, 2016.

Claimant is not in compliance with Iowa Code section 85.39. She has failed to establish the necessary prerequisites to qualify for an employer-reimbursed examination pursuant to Iowa Code section 85.39. Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839, 843-844 (Iowa 2015).

Claim for benefits pursuant to the Second Injury Compensation Act

Claimant is alleging she is entitled to benefits pursuant to the Second Injury Compensation Act. Section 85.64 governs Second Injury Fund liability. Before liability of the Fund is triggered, three requirements must be met. First, the employee must have lost or lost the use of a hand, arm, foot, leg, or eye. Second, the employee must sustain a loss or loss of use of another specified member or organ through a compensable injury. Third, permanent disability must exist as to both the initial injury and the second injury.

The Second Injury Fund Act exists to encourage the hiring of handicapped persons by making a current employer responsible only for the amount of disability related to an injury occurring while that employer employed the handicapped individual as if the individual had had no preexisting disability. See Anderson v. Second Injury Fund, 262 N.W.2d 789 (Iowa 1978); Iowa Practice, Workers' Compensation, Lawyer and Higgs, section 17-1 (2006).

The Fund is responsible for the industrial disability present after the second injury that exceeds the disability attributable to the first and second injuries. Section 85.64. Second Injury Fund of Iowa v. Braden, 459 N.W.2d 467 (Iowa 1990); Second Injury Fund v. Neelans, 436 N.W.2d 335 (Iowa 1989); Second Injury Fund v. Mich. Coal Co., 274 N.W.2d 300 (Iowa 1970).

The Iowa Supreme Court has stated that Iowa Code section 85.64 requires two scheduled injuries to invoke Fund liability. Second Injury Fund v. Bergeson, 526 N.W.2d 543, 548 (Iowa 1995).

The Iowa Second Injury Fund compensates an injured worker for a permanent industrial disability resulting from the combined effect of two separate injuries to a scheduled member. Each leg equates to a two percent permanent disability to the lower extremity. Defendants were ordered to pay a total of eight point eight (8.8) weeks of permanency benefits for the two legs.

It is appropriate to determine whether claimant has an industrial disability. 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 returned to the Salvation Army Store after her left knee surgery. Dr. Lin had released claimant to return to work on September 29, 2014. The surgeon did not impose any work restrictions for the left lower extremity. Claimant was able to perform

her duties as the store manager. However, she felt she was unable to engage in heavy lifting or incapable of dragging cumbersome furniture across the floor.

Claimant sustained her trip and fall on October 10, 2014. She sought medical attention for both knees. She returned to work following the fall. Dr. Lin characterized claimant's right knee condition as a bruise. (Ex. 2, p. 23) Much later claimant had surgery on the right knee by Dr. Mahoney, a different orthopedic surgeon.

On November 6, 2014, claimant tendered her notice of resignation due to alleged difficulties with another employee. Claimant felt it would be impossible to continue working as the manager of the store unless she received additional support from her supervisors. The resignation did not have any bearing on claimant's physical ability to perform her position as store manager.

A Major Jeff released claimant from her duties prior to the effective date of her resignation. Claimant testified the Major told her:

> He said that "Headquarters does not want you here. I need your keys." I took the store keys off my ring, give them to him, and said, "That's fine."

(Tr., p. 68) Claimant selected the two orthopedic surgeons who were involved in performing surgery. She also selected Dr. Bansal as her independent medical examiner. Only Dr. Bansal imposed work restrictions. The restrictions were:

> No frequent kneeling, squatting, climbing, or twisting.
>
> No prolonged standing or walking greater than 45 minutes at a time.
>
> Claimant should not be working on uneven ground.

(Ex. 6, p. 94)

Claimant sought a vocational evaluation from Carma Mitchell, M.S., at Mitchell Rehabilitation Services. Ms. Mitchell's vocational opinion was based solely on the restrictions imposed by Dr. Bansal. The vocational specialist did not take into consideration the fact, neither Dr. Lin nor Dr. Mahoney issued any work restrictions for claimant. The following is a summary of Ms. Mitchell's vocational opinion:

> **Vocational Implications:**
>
> Ms. Marchant is a 53-year-old female with a GED who has worked full-time in the past 15 years as an accounting clerk and store manager. Her work as a store manager for the Salvation Army required heavy to very heavy lifting when moving donations such as furniture and appliances.

> Based on the limitations outlined by Dr. Bansal, Ms. Marchant has lost access to occupations in the very heavy and heavy categories of work as well as at least 90% of the jobs in the medium category and at least 50% of jobs in the light category. This would account for a 0.7%, 9.1%, 26.6% and 24.8% loss respectively for a combined 61.2% loss of access to the labor market.
>
> Occupations in the very heavy, heavy, medium categories of work require standing and or walking 6 hours out of an 8 hour day as well as positions requiring the full range of light work. She is now limited to those medium and light jobs that would allow her to alternate positions and not require prolonged walking or standing as well as sedentary work.
>
> Ms. Marchant has shown motivation doing work on a self-employed basis, performing tasks, as she is able.

(Ex. 7, pp. 102-103)

No one knows what opinions Ms. Mitchell would provide if she had looked at claimant's employability from the perspective of an injured worker who did not have any work restrictions, as suggested by the orthopedic surgeons. Since Ms. Mitchell only considered the opinions of Dr. Bansal, this deputy does not accord much weight to the vocational assessment.

Claimant works approximately 3 hours per day or 15 hours per week as a care-giver for her mother-in-law. She prepares meals, organizes medications for the week, reads the newspaper out-loud and performs light housekeeping. She is paid $50.00 per day.

Claimant also sells antiques and collectibles through E-Bay. Claimant testified her sales business is part-time and she earns between $14,000.00 and $15,000.00 per year.

At the time of the hearing, claimant testified it is difficult for her to stand from the seated position. She has trouble climbing stairs and it is hard for her to get up from the floor. She testified it is troublesome walking on uneven terrain; riding a bicycle or hiking. The longest she is able to walk at one interval is 45 minutes. Walking is easier to perform than is standing in one place. During the hearing, the undersigned observed claimant as she walked. She did not appear to have any difficulties ambulating.

After reviewing all of the factors involving industrial disability; it is the determination of the undersigned; claimant has a permanent partial disability in the amount of 5 percent. An industrial disability of 5 percent equals 25 weeks of permanent partial disability benefits. The Second Injury Fund of Iowa shall take credit for the 8.8 weeks of permanency benefits owed from the Salvation Army and Zurich American Insurance Co. Thus, the Fund is responsible to claimant for 16.2 weeks of permanent

partial disability benefits. The rate shall be paid at the stipulated rate of $344.39 per week.

Interest accrues on unpaid Second Injury Fund benefits from the date of the decision. Second Injury Fund of Iowa v. Braden, 459 N.W.2d 467 (Iowa 1990).

The final issue is costs to litigate. Iowa Code section 86.40 states:

> **Costs.** All costs incurred in the hearing before the commissioner shall be taxed in the discretion of the commissioner.

Iowa Administrative Code Rule 876—4.33(86) states:

> **Costs.** Costs taxed by the workers' compensation commissioner or a deputy commissioner shall be (1) attendance of a certified shorthand reporter or presence of mechanical means at hearings and evidential depositions, (2) transcription costs when appropriate, (3) costs of service of the original notice and subpoenas, (4) witness fees and expenses as provided by Iowa Code sections 622.69 and 622.72, (5) the costs of doctors' and practitioners' deposition testimony, provided that said costs do not exceed the amounts provided by Iowa Code sections 622.69 and 622.72, (6) the reasonable costs of obtaining no more than two doctors' or practitioners' reports, (7) filing fees when appropriate, (8) costs of persons reviewing health service disputes. Costs of service of notice and subpoenas shall be paid initially to the serving person or agency by the party utilizing the service. Expenses and fees of witnesses or of obtaining doctors' or practitioners' reports initially shall be paid to the witnesses, doctors or practitioners by the party on whose behalf the witness is called or by whom the report is requested. Witness fees shall be paid in accordance with Iowa Code section 622.74. Proof of payment of any cost shall be filed with the workers' compensation commissioner before it is taxed. The party initially paying the expense shall be reimbursed by the party taxed with the cost. If the expense is unpaid, it shall be paid by the party taxed with the cost. Costs are to be assessed at the discretion of the deputy commissioner or workers' compensation commissioner hearing the case unless otherwise required by the rules of civil procedure governing discovery. This rule is intended to implement Iowa Code section 86.40.

Iowa Administrative Code rule 876—4.17 includes as a practitioner, "persons engaged in physical or vocational rehabilitation or evaluation for rehabilitation." A report or evaluation from a vocational rehabilitation expert constitutes a practitioner report under our administrative rules. Bohr v. Donaldson Company, File No. 5028959 (Arb. November 23, 2010); Muller v. Crouse Transportation, File No. 5026809 (Arb. December 8, 2010) The entire reasonable costs of doctors' and practitioners' reports may be taxed as costs pursuant to 876 IAC 4.33. Caven v. John Deere Dubuque Works, File Nos. 5023051, 5023052 (App. July 21, 2009).

The following costs are assessed to defendants, the Salvation Army and Zurich American Insurance Co.:

Filing fee	$100.00
Service fee	$ 20.22
Deposition	$138.90

The following cost is assessed against the Second Injury Fund of Iowa:

Vocational Report from Ms. Carma Mitchell $312.00

ORDER

THEREFORE, IT IS ORDERED:

File Number 5055128 (January 25, 2014)

Defendants, the Salvation Army and Zurich American Insurance Company shall pay unto claimant, four point four (4.4) weeks of permanent partial disability benefits at the stipulated weekly benefit rate of three hundred forty-five and 85/100 dollars ($345.85) and payable from the stipulated date of September 30, 2014.

Accrued benefits shall be paid in a lump sum, together with interest, as provided by law.

Defendants, the Salvation Army and Zurich American Insurance Company shall pay four hundred and 00/100 dollars ($400.00) in penalty benefits to claimant pursuant to Iowa Code section 86.13.

Defendants, the Salvation Army and Zurich American Insurance Company shall pay medical expenses and medical mileage as detailed in Exhibit 14.

Costs are assessed to defendants, the Salvation Army and Zurich American Insurance Company and as detailed in the body of this decision.

File Number 5055127 (October 10, 2014)

Defendants, The Salvation Army and Zurich American Insurance Company shall pay unto claimant, four point four (4.4) weeks of permanent partial disability benefits at the stipulated weekly benefit rate of three hundred forty-four and 39/100 dollars ($344.39) per week and payable from the stipulated date of August 7, 2015.

Accrued benefits shall be paid in a lump sum, together with interest as provided by law,

Defendants, the Salvation Army and Zurich American Insurance Company shall pay four hundred and 00/100 dollars ($400.00) in penalty benefits to claimant as provided by Iowa Code section 86.13.

Defendants, the Salvation Army and Zurich American Insurance Company shall pay medical expenses and medical mileage as detailed in Exhibit 14.

Defendants, the Salvation Army and Zurich American Insurance Company shall pay costs as detailed in the body of the decision.

Defendant, the Second Injury Fund of Iowa, shall pay unto claimant, sixteen point two (16.2) weeks of benefits from the Fund at the rate of three hundred forty-four and 39/100 dollars ($344.39), and said benefits shall commence after all benefits have been paid by the Salvation Army and Zurich American Insurance Company.

Interest accrues on unpaid Second Injury Fund benefits from the date of the decision.

Defendant, the Second Injury Fund of Iowa shall pay the one cost detailed in the body of the decision.

All defendants shall file subsequent reports as required by law.

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

Michelle A. McGovern

MICHELLE A. MCGOVERN
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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