BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

HOLLY HUTCHISON-SACHEN, Claimant, vs. COMPREHENSIVE SYSTEMS, Employer, and UNITED HEARTLAND INS. Insurance Carrier, Defendants.	: : : : : : : : : : : : : : :	File No. 5028520 A R B I T R A T I O N D E C I S I O N Head Note No.: 1700; 1800; 1803; 2500; 2501; 3700; 3800; 4000

STATEMENT OF THE CASE

This is a proceeding in arbitration. The contested case was initiated when claimant, Holly Hutchison-Sachen, filed her original notice and petition with the Iowa Division of Workers' Compensation. She alleged she sustained back pain radiating into the lower extremities. Claimant provided the alleged injury date of December 27, 2007. (Original notice and petition.) A single petition was filed on January 6, 2009.

Defendant, Comprehensive Systems, Inc., is engaged in the care and support of individuals with developmental disabilities. For purposes of workers' compensation, Comprehensive Systems, Inc. is insured by United Heartland Insurance Company, defendant. Defendants filed their answer on January 26, 2009. Defendants admitted the occurrence of the work injury on the alleged date. Representatives of defendants filed the first report of injury on October 9, 2008.

The hearing administrator scheduled the case for a backup hearing on October 20, 2009, at 11:00 a.m. The hearing took place in Mason City, Iowa, at the Cerro Gordo County Courthouse. The undersigned appointed Ms. Tracy Hett, as the certified shorthand reporter. She is the official custodian of the records and notes.

Claimant testified on her own behalf. She was the sole witness to testify.

The parties offered exhibits. Claimant offered exhibits 1 through 24. Defendants offered exhibits A through X. All proffered exhibits were admitted as evidence in the

case. Defendants stipulated they would pay causally connected prescription charges so long as claimant produced proper documentation for the medications, and as detailed in exhibit 23.

Post hearing briefs were ordered to be filed on November 3, 2009. Claimant filed her brief on November 3, 2009. Defendants filed their brief on November 4, 2009. The case was deemed fully submitted on November 4, 2009.

STIPULATIONS

The parties completed the designated hearing report for the alleged date of injury of December 27, 2009. The parties entered into various stipulations for the same date. They are:

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

2. Claimant sustained an injury on December 27, 2007, which arose out of and in the course of her employment;

3. The injury is a cause of both temporary and permanent disability;

4. The payment of temporary or healing period benefits is no longer in dispute;

5. The permanent disability is an industrial disability;

6. The weekly benefit rate for which benefits should be paid is $169.18 per week based on the statutory minimum weekly benefit rate;

7. Medical benefits are not at issue per the stipulation of defense counsel regarding exhibit 23;

8. Prior to the hearing, claimant was paid 40 weeks of permanent partial disability benefits at the rate of $169.18 per week; and

9. The parties are able to stipulate the costs detailed in exhibit 15 have been paid by claimant.

ISSUES

The issues presented are:

1. The extent of permanent partial disability benefits to which claimant is entitled;

2. The commencement date for permanent partial disability benefits to which claimant is entitled; and

3. Whether claimant is entitled to Iowa Code section 86.13 penalty benefits, and if so, the extent of those penalty benefits.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This deputy, after listening to the testimony of the claimant at hearing, after judging the credibility of the witness, 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 that issue by a preponderance of the evidence. Iowa R. App. P. 6.14(6).

Claimant is a 33 year old married mother of four minor children. She stands five feet five inches in height and weighs approximately 230 pounds. John Kuhnlein, D.O., claimant's independent medical examiner, found claimant to have a body mass index, (BMI) of 38, thus placing claimant in the morbidly obese category. Claimant smokes tobacco products and has done so since the age of 13. All of her physicians have counseled claimant to discontinue smoking. Her doctors have advised her to lose weight. Claimant has been unsuccessful in changing her lifestyle, despite the warnings from medical providers. Claimant reports it is too painful for her to exercise and she is only able to walk two blocks before she tires.

Currently, claimant resides in Charles City, Iowa. Charles City is located in Floyd County. The town is the county seat, however the town is small and rural. According to the Iowa 2010 Iowa Transportation Map, Charles City has 7,812 residents.

Claimant dropped out of high school when she was in the eleventh grade. In 1995, claimant obtained her GED through North Iowa Area Community College. Claimant has no formal education beyond the GED level. All of her training has been accomplished on the job.

Claimant has a criminal record that bears upon her ability to tell the truth. On November 10, 1997, claimant was sentenced for 5th degree theft, a simple misdemeanor. On July 13, 1998, claimant was again sentenced for 5th degree theft, another simple misdemeanor. In both criminal matters, claimant was ordered to pay a fine.

Claimant entered a guilty plea in the State of Arkansas to the charges of "Theft of Property," a Class C felony in that state. The disposition date for the criminal matter was October 6, 2000. Claimant received a suspended sentence of three years; she was ordered to pay a fine of $500.00 and she was ordered by the court to make restitution in the amount of $1,666.00.

Claimant has had other skirmishes with law enforcement officials but the matters do not bear on claimant's credibility as a witness. This deputy did not find claimant to be an especially convincing witness. There were some discrepancies between her testimony and her employment records that left doubt in this deputy's mind regarding her capacity to tell the truth. At the time of the arbitration hearing, charges were pending against claimant for allegedly providing alcohol to a minor. Claimant testified the matter was all "a big misunderstanding."

Claimant has a sporadic employment history. She is given to finding part time or temporary employment for only brief periods of time and then abandoning the job or not showing for her scheduled shift. While claimant maintained at hearing, she had never been terminated from any job, her various personnel records show otherwise. Claimant was terminated twice by Comprehensive Systems, Inc. She had received numerous counseling sessions about coming to work when she was scheduled. The counseling did not seem to improve claimant's attendance at work. During both terms of her employment at Comprehensive Systems, Inc., claimant did not call and she did not appear for work on many occasions. (Exhibit C, page 9) Claimant worked as a cashier at K-Mart from March 2, 2006 through April 23, 2006. She was terminated by management at K-Mart for absenteeism. (Ex. D, p. 1) Claimant worked as a cashier at Wal-Mart on two separate occasions. During the second period of employment, claimant abandoned her job in the toy department, when she did not call the store and did not appear for work on December 14, 15, 16, 17, 19, and 20, 2006. A member of management at Wal-Mart indicated he would not recommend claimant for rehiring. (Ex. F, p. 2) Claimant worked at Salsbury Baptist Home from June 26, 2006 through July 9, 2006. Again, she failed to call her employer or show for work. She was terminated from the position on July 18, 2006. (Ex. E, p. 2) Claimant worked for Midland Technology during the week of October 20, 2008 and until Thursday, December 4, 2008. Claimant never appeared for work after December 4th and she did not tender notice of termination to her employer. All, in all, claimant has a very poor record as a reliable and dependable employee. For whatever reasons, claimant has attendance issues.

At the time of the hearing, claimant was not employed in any capacity. She stated her husband is an over-the-road truck driver and is traveling for much of a given week. As a consequence, claimant testified it would not be financially advantageous for her to seek employment, as she would have to pay for a caregiver for at least the three youngest children. The fifteen year old child is capable of staying alone in the home. Claimant testified she did not believe she was capable of working. Nevertheless, just shortly before her arbitration hearing, she applied for employment at Casey's in Charles City, at the Hy-Vee Grocery Store, at a Laundromat, and at the Dollar Store.

As indicated in the hearing report, defendants do not dispute claimant sustained a permanent injury to her back on December 28, 2007. Defendants paid claimant eight percent permanent partial disability benefits to the body as a whole on May 19, 2009.

Immediately following the work injury, claimant sustained pain in her low back. Later she experienced pain that radiated down her right leg. Defendants authorized treatment with Kevin Kimm, D.O. The initial examination occurred on January 3, 2008. Dr. Kimm surmised claimant had "Lumbar radiculopathy, suspicious for herniated nucleus pulposus." (Exhibit 2, page 7) Dr. Kimm prescribed muscle relaxants, pain pills, and MRI testing. (Ex. 2, p. 7)

Robert J. Shook, M.D., a radiologist from Independent Radiology Services, LTD., interpreted the MRI test results. He said the test results showed:

> Disc degeneration with mild diffuse disc bulge and probably a small annular tear L4-5 level.
>
> L5-S1 level shows a focal disc protrusion centrally, abutting the right S1 nerve root without significant compression or displacement.

(Ex. 5, p. 1)

After the MRI test results were interpreted, Dr. Kimm referred claimant to a neurosurgeon, David W. Beck, M.D. Dr. Beck practices neurosurgery in Mason City, Iowa. Dr. Beck opined the following with respect to claimant's back condition:

> . . . . Basically she has low back strain. MRI is totally unremarkable. I recommend physical therapy be done in Charles City. I have also started her on a Medrol Dosepak. She will see you in follow-up. There is no need for me to see her again.

(Ex. 6, p. 1) Dr. Beck referred claimant back to Dr. Kimm for medical management. (Ex. 6, p. 2)

Claimant did not have confidence in the opinions Dr. Beck rendered. She requested a second opinion. Dr. Kimm referred claimant to Caple A. Spence, M.D., at the Iowa Spine and Brain Institute. Dr. Spence examined claimant on February 5, 2008. The physician diagnosed claimant with:

1. Lumbago

2. Possible right S1 radicular.

(Ex. 7, p. 2) Dr. Spence found claimant had "a benign physical exam. . . . " (Ex. 7, p. 2) Dr. Spence recommended an epidural steroid injection. Two steroid injections were administered to claimant. The injections did not provide long term relief. Dr. Spence determined claimant could perform sedentary work effective February 13, 2008. (Ex. 7, p. 8) Claimant was provided with temporary restrictions.

On April 28, 2008, Dr. Spence returned claimant to work with a 35 pound lifting restriction, and she was to avoid repetitious twisting, bending or squatting. (Ex. 7, p. 17) The physician referred claimant to Jay D. Mixdorf, M.D., a physician at Healthworks Occupational Health. Dr. Mixdorf assessed claimant's condition as "Chronic lumbar pain with resolved right lower extremity radiculopathy." (Ex. 9, p. 4) Dr. Mixdorf prescribed a TENS unit, and physical therapy for spine stabilization and strengthening of the back. (Ex. 9, p. 1) Only conservative treatment was employed.

On June 12, 2008, Dr. Mixdorf discontinued claimant's therapy because she had not responded adequately to one month of physical therapy. (Ex. 9, p. 5) Dr. Mixdorf prescribed Diflunisal, recommended a home exercise program and referred claimant to a physician who specialized in physical medicine and rehabilitation, Erin C. Peterson, D.O.

Dr. Peterson examined claimant on July 7, 2008. (Ex. 10, p. 1) Dr. Peterson diagnosed claimant with:

1. Chronic low back pain, diskogenic and musculoskeletal.

2. Right lower extremity radicular pain resolved with epidural steroid injection.

3. Work injury December 2007.

(Ex. 10, pp. 2-3) Dr. Peterson prescribed Lidoderm patches and Neurontin. (Ex. 10, p. 3) Only conservative measures were recommended for treatment. Dr. Peterson also kept the same work restrictions in place as Dr. Spence had imposed. (Ex. 10, p. 4) In August 2008, Dr. Peterson noted claimant was much improved. (Ex. 10, p. 5) On September 3, 2008, claimant reported her pain level was a 1 on a 10 point scale. (Ex. 10, p. 7) She reported she had been performing nearly all of her regular duties. There was only mild tenderness on palpation of the spine at the midline. (Ex. 10, p. 7) Therefore, claimant was allowed to return to full duty work. (Ex. 10, p. 8)

Three weeks later, claimant returned to Dr. Peterson with pain complaints after performing her regular work duties. (Ex. 10, p. 9) Claimant stated she was not interested in surgery, even if recommended. (Ex. 10, p. 9) Claimant refused a third epidural steroid injection. (Ex. 10, p. 10) Dr. Peterson opined claimant was nearing maximum medical improvement. (Ex. 10, p. 10)

On October 8, 2008, claimant participated in a functional capacity evaluation, (FCE). (Ex. 11) Claimant was somewhat consistent and the results were probably valid. (Ex. 11, p. 1) The therapist determined claimant was able to lift 10 pounds on an occasional basis. (Ex. 11, p. 2) Dr. Peterson reviewed the results of the FCE. She opined claimant could function above the 10 pound lifting requirement of the FCE. The specialist in physical medicine imposed the following permanent work restrictions:

> . . . . I have written her permanent restrictions today for 20 pounds lift/carry/push/pull with occasional bend/twist/kneel/squat. I do not perform impairment ratings, and will request from her insurance company that an appointment be made for her to accomplish this.

(Ex. 10, p. 11) On October 17, 2008, Dr. Peterson prescribed Lidoderm patches again for claimant. (Ex. 10, p. 11) This was the final appointment claimant had with Dr. Peterson.

Defendants did not send claimant for an evaluation to assess an impairment rating until April 16, 2009. (Ex. 12, p. 7) Kenneth McMains, M.D., the Medical Director of Allen Occupational Health Services, rated claimant as having an 8 percent permanent impairment rating. (Ex. 12, p. 7)

Defendants did not authorize payment of any permanency benefits until May 21, 2009 or May 22, 2009.

Claimant requested her independent medical examination pursuant to Iowa Code section 85.39. As indicated earlier in the body of this decision, Dr. Kuhnlein performed the independent medical examination. Dr. Kuhnlein examined claimant on October 5, 2009. The physician also rated claimant as having an 8 percent permanent impairment rating. The two physicians were consistent with respect to the impairment ratings provided.

Dr. Kuhnlein diagnosed claimant with “Chronic musculoskeletal back pain with features consistent with intermittent radiculitis in an L5-S1 distribution, but not true radiculopathy.” (Ex. 13, p. 14)

Dr. Kuhnlein recommended weight loss, reasonable exercise with a focus on improving her core abdominal muscles, smoking cessation, reasonable work restrictions, and possibly a pain multidisciplinary pain program if claimant could arrange child care for her family. (Ex. 13) Dr. Kuhnlein agreed with Dr. Peterson. A 20 pound lifting restriction was proper. (Ex. 13) Claimant was advised not to lift more than10 pounds over her shoulders on an occasional basis. All of the suggestions Dr. Kuhnlein made, were recommendations only, and not medical orders.

Claimant testified that as of the time of her hearing, she was unable to attend functions where her children participated in activities. Claimant stated she was unable to play with her children out of doors. She reported problems climbing stairs, picking up her young children; she reported she had sleep disturbances, and she testified she was unable to work at Comprehensive Systems, Inc., even with the restrictions imposed.

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.

The question facing this deputy is the loss of claimant's earning capacity. Prior to her employment at Comprehensive Systems, claimant had only part time employment and an extremely poor attendance record. Not much has changed for her even though she sustained a low back injury. She is still capable of working in at least a part time capacity.

Claimant is 33 years old. She is a young woman with more than 30 years left to work before retirement age. She only holds a GED but she appears of at least average intelligence and capable of retraining or advanced education. She is not especially motivated to seek retraining.

Claimant has a less than stellar employment history. Claimant readily admitted she had a history of short term employment. At hearing, she attributed her employment record to an abusive personal relationship with someone. Traditionally, claimant has held part time positions for short periods of time. Claimant often abandons her job without any prior notice to her employer. She simply does not appear for work. Her wages are often at the low end of the wage scale since she is an unskilled worker without training beyond the high school level. Claimant's own employment record may be working against her in obtaining future jobs. Job abandonment is not viewed positively by potential employers. Claimant lives in a small town and the employment opportunities may not be readily available to someone who has a poor work record in the local community. Some individuals may consider claimant's attitude to be cavalier when it comes to working outside the home.

Claimant's criminal record may also impede her ability to be hired. She has a Class C felony. It bears upon her ability to be honest and trustworthy. Claimant acknowledged at hearing that she failed to disclose her criminal history to Comprehensive Systems when she applied for employment. Employers are reluctant to

hire someone to work in their establishment if the person has a criminal record for theft and the person is working around money, such as cashiering in a retail operation. A criminal past does not bar an individual from the protections of the Iowa Workers' Compensation laws. Ryan v. Iowa Concrete Cutting, No. 5020691 (Arb). Dec. December 28, 2007; App. Dec. January 8, 2009).

Defendant-employer had a part time position for claimant at the facility both before and after the work injury in question. Members of management viewed claimant as a capable worker when she came to work at her scheduled time. Exhibit 21, pages 1 and 2, show claimant had numerous absences unrelated to her back injury. Claimant had been working there until she no longer appeared for work. She just refused to show. Once again, she abandoned her position. No physician restricted claimant from employment. But for claimant's actions, she would still be employed at the care center and in the same capacity. No permanent work restrictions were imposed until after claimant was terminated. Then Dr. Peterson imposed the 20 pound lifting restriction. Claimant had already abandoned her job even before the work restrictions were put into place.

Subsequent to her abandonment of her job at Comprehensive Systems, claimant obtained part time employment at the trucking firm, Midland Technologies, where her husband was employed. Once again, claimant failed to show for her scheduled days to work. (Ex. G, p. 1) As a result, claimant was laid off from work. (Ex. 22) There is no indication, claimant was physically unable to handle the job duties. She has not worked since her part time employment at Midland Technologies. She contends there is no job for which she is capable of holding. This deputy seriously questions whether claimant is precluded from all employment. While she does have the 20 pound lifting requirement, no physician is restricting her from working. Claimant prefers to remain at home with her family.

Claimant has subjective pain complaints. Subjective complaints of pain do not qualify as impairment under the AMA Guides to the Evaluation of Permanent Impairment. Robbennolt v. Snap On Tools Corp., 555 N.W. 2d 229, 234 (Iowa 1996). There are functional impairment ratings of 8 percent. Functional impairment is only one element to consider in determining industrial disability. It is not the only element to review.

Therefore, after reviewing the record in its entirety and after considering the relevant factors that impact the loss of earning capacity; it is the determination of this deputy; claimant has an industrial disability in the amount of 25 percent. Claimant is entitled to 125 weeks of permanent partial disability benefits in the amount of $169.18 per week and commencing from October 17, 2008, the date claimant reached maximum medical improvement. Prior to the hearing, claimant was paid 40 weeks of permanent partial disability benefits and defendants shall take credit for the same. Defendants owe an additional 85 weeks of permanency benefits to claimant at the stipulated weekly benefit rate.

The next issue for resolution is the matter of penalty benefits pursuant to Iowa Code section 86.13.

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 Custom 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. In the present case, the insurer sent the checks to the employer, not to the claimant. The employer then delivered the checks to the claimant. In this case, payment is not "made" for penalty purposes until the claimant actually receives the check. See Id. 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 1999).

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)

Claimant requests penalty benefits. She alleges there was a delay of 228 days between the date of claimant's functional capacity evaluation on October 8, 2008 where permanent restrictions were imposed and the date defendants obtained a permanent impairment rating. The rating was obtained on or about April 16, 2009 from Dr. McMains. Nothing was done to obtain a rating until March 2009.

Defendants maintain there was a fairly debatable issue regarding the presence of permanency. A check for the permanent impairment rating that Dr. McMains determined was not issued until on or about May 21, 2009. Permanency benefits in the amount of $6,882.65 were paid to claimant. Interest in the amount of $418.25 was tendered on the unpaid amount. It was also included in the check that was sent to claimant and her counsel.

Defendants delayed in obtaining a permanency rating for claimant once they learned Dr. Peterson did not perform impairment ratings for her patients. Dr. Peterson notified defendants she did not perform impairment ratings on October 8, 2008. No rating was sought from any other physician until March 2009. An impairment evaluation did not occur until April 16, 2009. Then the permanency benefits were not paid for another 35 days following the issuance of the rating.

There is no question; defendants did not seek an impairment rating for an extended period of time, even though defendants knew permanent restrictions had been imposed by the authorized treating physician, Dr. Peterson. Once Dr. Peterson declined to conduct an impairment rating, defendants should have sought another physician to evaluate claimant for the purpose of providing a permanent impairment rating. Defendants had an obligation to seek a rating from one of its chosen physicians. However, defendants did nothing until March 2009. There was an unnecessary delay in seeking the rating of nearly five months. As a consequence, claimant had to wait to seek her own independent medical evaluation. The case was "in Limbo" and the case processing was unnecessarily delayed. It is the determination of this deputy; claimant is entitled to six (6) weeks of penalty benefits at the stipulated weekly benefit rate of $169.18 per week and payable pursuant to Iowa Code section 86.13.

The final issue to resolve is the matter of medical benefits in the form of prescription charges. 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).

All of the medical bills in exhibit 23 were charges for prescriptions obtained through Connors' Clinic Pharmacy in Charles City, Iowa. The charges were incurred on various dates and were for Skelaxin, Hydrocodone, Gabapentin, and Lidoderm patches for the low back condition. The prescriptions were all prescribed by authorized treating physicians for the work related condition. Defendants are liable for the same charges pursuant to Iowa Code section 85.27.

ORDER

THEREFORE, IT IS ORDERED:

Defendants shall pay unto claimant one hundred twenty-five (125) weeks of permanent partial disability benefits at the stipulated weekly benefit rate of one hundred sixty-nine and 18/100 dollars ($169.18) per week and commencing from October 17, 2008, the date claimant reached maximum medical improvement.

Defendants shall take credit for forty (40) weeks of permanency benefits previously paid to claimant in the amount of six thousand eight hundred eighty-two and 65/100 dollars ($6,882.65), plus interest previously paid to claimant.

Defendants shall also pay unto claimant, six (6) weeks of penalty benefits pursuant to Iowa Code section 86.13 per week, plus any interest as allowed by law.

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

Defendants are liable for the prescription charges detailed in exhibit 23 as provided in Iowa Code section 85.27.

Defendants shall file all requisite reports in a timely manner.

Signed and filed this ___26th____ day of August , 2010.

_____
MICHELLE A. MCGOVERN
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

Copies to:

Jackie D. Armstrong
Attorney at Law
PO Box 679
Mason City, IA 50402-0679
jdarmstrong@iabar.org

Jean Z. Dickson
Attorney at Law
111 E. 3rd St., Ste. 600
Davenport, IA 52801-1524
jzd@bettylawfirm.com

MAM/dll

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.