BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

MARK MOSLEY, Claimant, vs. RATHBUN REGIONAL WATER ASSOCIATION, INC., Employer, and DAKOTA TRUCK UNDERWRITERS, Insurance Carrier, SECOND INJURY FUND OF IOWA, Defendants.	File No. 5043216 REVIEW-REOPENING DECISION Head Note Nos.: 1108, 1803.1, 1804 4000, 3200

STATEMENT OF THE CASE

The defendants, Rathbun Regional Water Association, Inc. (hereafter, "RRWA"), employer, and Dakota Truck Underwriters, its insurance carrier filed a petition for review-reopening seeking an assessment of permanency benefits in regard to the claimant, Mark Mosley, as well as a claim against the Second Injury Fund of Iowa. While the claim was filed as a review-reopening claim, it was really a bifurcated arbitration hearing. The original arbitration hearing was held on March 3, 2014. An arbitration decision was issued on January 15, 2015, which awarded a running award of temporary disability benefits. This matter was appealed and a final appeal decision was entered on August 30, 2016.

The claimant in this matter was represented by Corey Walker. The defendants were represented by Sasha Monthei, and the Second Injury Fund was represented by Sarah Brandt.

The matter came on for hearing on April 5, 2018, before deputy workers' compensation commissioner Joe Walsh in Des Moines, Iowa. The record in the case consists of joint exhibits 1 through 13, claimant's exhibits 14 through 31 and defense exhibits A through H. The claimant testified under oath at hearing. Jane Weingart served as court reporter. The matter was fully submitted on May 16, 2018, after helpful briefing by the parties.

ISSUES

The parties submitted the following issues for determination:

1. The primary issue is the nature and extent of claimant's permanent disability. Claimant alleges his disability is industrial. Defendants contend it is scheduled.

2. If the disability is scheduled, claimant alleges applicability of the Second Injury Fund for a prior injury.

3. The commencement date for permanency benefits is also disputed.

4. The claimant seeks payment for an independent medical evaluation under Section 85.39.

5. The claimant seeks alternate medical care for treatment for low back pain, a denied condition.

6. The claimant seeks a penalty for failure to pay industrial disability benefits.

STIPULATIONS

Through the hearing report, the parties stipulated to the following:

1. The parties had an employer-employee relationship.

2. Claimant sustained an injury which arose out of and in the course of employment on November 23, 2011.

3. The weekly rate of compensation is $943.63.

4. Section 85.27 medical expenses are not in dispute.

FINDINGS OF FACT AND COURSE OF PROCEEDINGS

Claimant, Mark Mosley, was 59 years old as of the date of hearing. Mr. Mosley testified live and under oath at hearing. He is found to be a highly credible witness. His hearing testimony was consistent with his previous sworn testimony, as well as the medical evidence. He is found to be an accurate historian. There was nothing about his demeanor at hearing which caused me any concern regarding his truthfulness.

An arbitration decision was entered on January 15, 2015. The findings of fact in the January 15, 2015, decision are binding upon the agency at this time and are deemed the law of the case. Relevant portions of those findings are set forth below:

Claimant, Mark Murphy [sic], was 55 years old at the time of the hearing. Claimant graduated high school and has a certificate from the Building and Trades program at a community college. Claimant's employment history is detailed in Exhibit 11, pages 125, 126. Most of his work has been construction and truck driving. Claimant has operated a construction business.

Claimant was hired by Rathbun as an inspector on a building project; Rathbun was building a water treatment facility. On November 23, 2011, while on the job, claimant fell about 5 feet and injured his knee. The parties have stipulated that this injury arose out of and in the course of his employment and this stipulation is accepted by the undersigned.

Claimant injured his right knee and was taken to a hospital in Centerville, Iowa and was later transferred to a hospital in Des Moines, Iowa. Claimant said he was in the hospital for about 12 days. The claimant had to retune [sic] for a third surgery on his knee and spent about six weeks in a knee immobilizer every day. (Transcript, page 37) Claimant was released to return to work in October 2012. Claimant returned to work at 20 hours per week with restrictions. (Tr. p. 38) As an accommodation, Rathbun provided claimant with an ATV so he could get close to the work site when he returned to work. Claimant was also allowed to sit in a van and watch work at the construction site.

On November 12, 2012, claimant was placed at maximum medical improvement (MMI) with the understanding that he would need a total knee replacement at some time. Claimant said he was given permanent restrictions of 20 pounds lifting and sitting work or off his feet 50 percent while at work. He also was to avoid kneeling, squatting and climbing. (Ex., 6, p. 70)

Claimant was terminated by Rathbun on December 19, 2012. The termination letter stated that the project he was hired to supervise was nearing completion and his services were no longer needed. (Ex. 14, p. 129; Ex. K, p. 1) Claimant testified he looked for work after his termination and received unemployment benefits. Claimant said he followed up on some of the job leads that Tom Karrow, vocational counselor, had provided him. Claimant said he talked to a community college about becoming an instructor in the Building Trades program, but concluded with his restriction he would not be able to perform the hands-on training. Claimant also determined he would not be able to perform the water treatment job that could be available if he was certified through a community college program in Ankeny, Iowa. (Tr. p. 55) Claimant has contacted the Iowa Division of Vocational Rehabilitation and was found eligible for services. Claimant talked about being a missionary. Claimant said the Iowa Division of Vocational Rehabilitation would not provide

> support for a job that paid just a little more than room and board. (Tr. p. 61)

(Arbitration Decision, January 15, 2015, pages 3-4) The arbitration decision then detailed his medical treatment since the work injury and made specific findings related to claimant's medical condition as of March 3, 2014.

> On November 23, 2011, Jeffery Farber, M.D., performed surgery on claimant's left knee. His postoperative diagnosis was, "Tibial plateau fracture, left tibia." (Ex. 2, p. 6) Claimant had another surgery on November 28, 2011, on his left knee by Chinedu Nwosa, M.D. The postoperative diagnosis was, "Closed left bicondylar tibial plateau fracture. Closed left tibial shaft fracture status post external fixation." (Ex. 6, p. 17) Dr. Nwosa referred claimant to Scott Meyer, M.D., for potential manipulation under anesthesia with arthroscopic debridement. (Ex. I, p. 9)
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> On March 30, 2012, claimant complained of increasing right hip pain at physical therapy. (Ex. 7, p. 88) He complained of right hip pain to his physician on May 9, 2012. (Ex. 6, p. 31) An x- ray report of May 14, 2012 showed "severe stage IV degenerative [*sic*] the RIGHT hip and the [*sic*] moderate stage II degenerative joint disease of the LEFT hip." (Ex. 6, p. 36) Dr. Meyer noted that his right hip degenerative joint disease predated claimant's left knee injury. Dr. Meyer also noted early degenerative changes in claimant's left knee and discussed with claimant he would likely need a total knee arthroscopy in the future. (Ex. 6, p. 36)
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> On May 22, 2012, Dr. Meyer performed a third surgery on claimant's left knee. His postoperative diagnosis was, "Left knee arthrofibrosis after bicondylar tibial plateau fracture with tricompartmental chondromalacia." (Ex. 6, p. 37) On September 17, 2012, claimant was prescribed an Ankle Foot Orthosis (AFO) for his left foot drop abnormal gait, which was noted by Michael Clark, PA-C. (Ex. 6, pp. 58, 61) Claimant was returned to sedentary work, four hours per day on September 5, 2012. (Ex. I, p. 17)
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> On November 12, 2012, Dr. Meyer told the claimant he should use an assistive device when walking. Claimant was to continue using an unloader brace and was placed at maximum medical improvement for his knee injury. (Ex. 6, p. 68) Dr. Meyer told claimant at this time he would still need a total arthroplasty of his left knee. Dr. Meyer recommended permanent restrictions of limiting lifting to 20 pounds, avoiding repetitive kneeling, squatting and climbing. Claimant was to do no ladder climbing. He also recommended that claimant sit 50 percent of the day and claimant be off his feet 30 minutes for every hour of work. (Ex. 6, p. 70; Ex. I, p. 23) Dr. Meyer provided a 30 percent impairment rating to the claimant's left lower extremity. (Ex. 6, p. 71) On February 6, 2014, Dr. Meyer agreed that claimant's left leg injury has caused an altered gait and the

altered gait was causing claimant increased pain and problems in his right hip. Dr. Meyer did not believe the right hip arthritis or the need for a possible right hip replacement was related to his work injury. (Ex. 6, p. 87)

On November 19, 2013, Dr. Meyer saw claimant for his left knee, right hip and left ankle pain. Claimant described his right hip pain as the greater problem. Dr. Meyer said he was willing to perform the knee replacement surgery, but referred clamant [sic] to Dr. Beecher for consideration of a right hip arthroplasty and Joseph Galles, M.D. for an evaluation of his left ankle. (Ex. 6, p. 83)

On January 21, 2014, Dr. Galles examined claimant's left ankle. Dr. Galles' assessment was left ankle contracture secondary to his previous foot drop. (Ex. 6, p. 86)

On July 12, 2013, John Kuhnlein, D.O., performed an independent medical examination (IME). (Ex. 8. pp. 92 – 106) Dr. Kuhnlein provided the following diagnoses,

> 1. Comminuted closed bicondylar tibial plateau fracture, closed left tibial shaft fracture with external fixation, November 24, 2011 (Farber), and open reduction and internal fixation on November 28, 2011 (Nwosa).
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> a. Adhesive capsulitis related to arthrofibrosis of the left knee, and osteoarthritis of the left knee related to the November 23, 2011, trauma with manipulation under anesthesia, lysis of adhesions, and arthroscopic lateral release and tricompartmental chondroplasty, May 22, 2012 (Meyer).
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> b. Persistent chronic pain, stiffness, and atrophy of the left leg with tricompartmental osteoarthritis.
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> 2. Osteoarthritis both hips with complaints of right hip pain – there are no complaints of left hip pain. X-rays performed by Dr. Meyer on May 14, 2012, showed severe Stage IV bone-on-bone osteoarthritis of the right hip, with moderate Stage II arthritis of the left hip, but he is only symptomatic in the right hip.
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> 3. Complaints of left ankle pain and stiffness.

(Ex. 8, p. 101) Dr. Kuhnlein found that the tibial plateau fracture was directly related to the work injury and the adhesive capsulitis developed as a sequela. He also opined that the osteoarthritis of the left knee was accelerated by the injury. (Ex. 8, p. 101)

Concerning claimant's right hip Dr. Kuhnlein wrote,

> The osteoarthritis in the right hip would have been "lit-up" by the gait changes related to this injury, but there are no previous right hip x-rays to compare to see if there was any objective difference in the osteoarthritis; however, symptoms from the disease itself were "lit-up" by the gait changes related to this significant left knee injury, and the disease became clinically apparent related to the gait changes caused by the significant knee injury. This right hip pain would be related to the November 23, 2011, injury as a sequela.

(Ex. 8, p. 101) Dr. Kuhnlein also opined claimant's left ankle pain and stiffness was related to his work injury and was a sequela to his work injury. (Ex. 8, pp. 8, 9)

Dr. Kuhnlein did not feel claimant was at MMI for his knee. Dr. Kuhnlein provided a 57 percent impairment rating to the left knee, but noted "this impairment would be invalid after Mr. Mosley has the total knee replacement." (Ex. 8, pp. 101-104)

Dr. Kuhnlein provided a 50 percent lower right extremity, 20 percent whole body, impairment rating for claimant's hip injury. He assigned an 11 percent impairment to the claimant's lower extremity for the left ankle injury. Combining the left knee and left ankle, Dr. Kuhnlein provided a 62 percent left lower extremity rating. (Ex. 8, p. 104)

Dr. Kuhnlein agreed with Dr. Meyer's restriction and added claimant should not work on uneven surfaces and should use a guardrail when on stairs. (Ex. 8, p. 105)

Claimant had an injury to his right hand in 2005. A paint sprayer malfunctioned and injected paint thinner into his hand. Claimant had his middle left finger amputated. Dr. Kuhnlein provided an 18 percent impairment rating to the hand. (Ex. 8, p. 105) Dr. Kuhnlein found that the injury extended into claimant's hand. I find that this injury qualifies as a first injury for Fund liability purposes

Dr. Sundermann performed an IME on January 23, 2014. (Ex. D, pp. 1 – 15) Dr. Sundermann is a board-certified emergency room physician. (Tr. p. 213) Dr. Sundermann found the claimant to be at MMI for his right knee on November 13, 2012, and recommended restrictions of avoiding continuous weight bearing on the left knee for more than 30 minutes as well as repetitive climbing, squatting, kneeling and carrying items over 20 pounds. (Ex. D, p. 7) Dr. Sundermann agreed that the fall

at work was the cause of claimant's left knee injury. As for the claimant's right hip and left foot injury, Dr. Sundermann said,

> There is no indication that Mr. Mosley sustained injuries to the right hip as a result of the industrial fall on November 23, 2011. More likely than not, his current right hip symptoms are due to his pre-existing and ongoing degenerative joint disease (which exists in multiple areas including his right and left hip, ankle, and foot) and his previous injury to his ankle/foot area than due to his industrial injury November 23, 2011.
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> Mr. Mosley was found to have a personal condition involving degenerative joint disease of the right hip on initial imaging studies. Given the significance of the level of arthritic changes demonstrated on MRI in comparison to the date of his industrial injury, this condition would not be work related. Likewise, Mr. Mosley's imaging study of the left foot and ankle, also revealed degenerative arthritic changes, along with his history of prior foot fracture, distal fibular fracture, and ankle injuries, to include a Lisfranc fracture. These arthritic conditions would not be related to the industrial fall as well.

(Ex. D, p. 7)

Dr. Sundermann provided a 22 percent lower extremity rating for the claimant's knee injury. (Ex, D, p. 8) Dr. Sundermann stated claimant would, in the future, need a total knee arthroplasty. (Ex. D, p. 9) Dr. Sundermann also testified at the hearing in this case. He commented that claimant had an extensive tibial plateau fracture from his fall at work. (Tr. p. 191) Dr. Sundermann stated claimant's hip problem was not related to his accident and that the claimant's gait alteration did not cause Stage IV arthritis to develop in his hip. (Tr. p. 205) Dr. Sundermann stated that claimant's life would get better with a total knee replacement and that claimant's functionality would increase after surgery. (Tr. pp. 207, 208) Dr. Sundermann acknowledged that claimant had not complained of hip pain to a heath provider since 2005, before his work accident. (Tr. p. 214) He also agreed that claimant's gait derangement is a factor in claimant's hip pain and that decreased range of motion in his hip was a ratable impairment. (Tr. p. 215) He also stated that claimant's altered gait and symptoms may go away after left knee surgery. (Tr. pp. 228, 229)

Based upon the medical evidence, I find that claimant is not at maximum medical improvement. I find that Dr. Kuhnlein's report as to claimant's medical condition, including his conclusion that claimant is not at maximum medical improvement, the most convincing of the medical

> reports. Dr. Kuhnlein's report is the most comprehensive and through [sic] of the independent medical examinations. Claimant is in a healing period for his knee.
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> I also find that claimant's left knee injury has caused an injury to claimant's right hip. To be sure, the knee injury did not cause the osteoarthritis in the hip, but the altered gate lit up his osteoarthritis and has caused the additional pain in his hip. This is supported by Dr. Meyer's opinion (Ex. 6, p. 87), Dr. Kuhnlein's opinion in his IME (Ex. 8, p. 101), and to a little extent, in Dr. Sundermann's testimony (Tr. pp. 214- 215).
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> As I have found that claimant is not at MMI, the evidence concerning claimant's vocational abilities and the credibility of the various lay witnesses was not material in my decision today.

(Arb. January 15, 2015, pp. 4-8) To summarize, the deputy made the following findings of fact:

1. Mr. Mosley suffered an injury to his left leg which lit up osteoarthritis in his right hip, as well as a condition in his left foot and ankle.

2. Mr. Mosley was not at maximum medical improvement for his left leg at the time of his March 3, 2014, hearing. He was in a healing period.

The deputy went on to award a running award of healing period benefits. (Arb. January 15, 2015, p. 10) This was based upon the premise that claimant was not at maximum medical improvement for his left leg or right hip. The arbitration decision found "no Fund liability in this claim." (Arb. January 15, 2015, p. 10)

This decision was appealed to the Iowa Workers' Compensation Commissioner. The Commissioner agreed with the arbitration decision that claimant suffered a sequela injury, but modified the decision since the claimant was not yet at maximum medical improvement.

> I affirm the deputy commissioner's finding that claimant sustained a sequela injury to his right hip. I affirm the deputy commissioner's award of running healing period benefits to be paid by defendants RRWA and DTU from December 20, 2012, and continuing because claimant is not at MMI. I affirm the deputy commissioner's award of a credit to defendants RRWA and DTU for benefits previously paid. I affirm the deputy commissioner's award of claimant's costs to be paid by defendants RRWA and DTU. I also affirm the deputy commissioner's determination not to award penalty benefits. I affirm the deputy commissioner's findings, conclusions and analysis regarding those issues.

> I conclude the deputy commissioner erred in dismissing claimant's claim against the Fund because the issue of permanency is not ripe for adjudication. I therefore reverse the dismissal of the Fund.

(Appeal, August 30, 2016, p. 2)

The Commissioner then included the following analysis regarding the medical causation of the claimant's right hip condition.

> Scott Meyer, M.D., one of claimant's treating physicians, and Ryan Sundermann, M.D., who provided an independent medical evaluation (IME), opined claimant's right hip pain is not causally related to the November 23, 2011, work injury. John Kuhnlein, D.O., who also provided an IME, disagreed, finding that while claimant had preexisting arthritis in his hips, claimant's gait changes related to the knee injury "lit up" his right hip symptoms. I agree with the deputy commissioner that Dr. Kuhnlein's causation opinion is more persuasive than the opinions of Dr. Meyer and Dr. Sundermann.
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> Dr. Kuhnlein opined that while claimant's right hip osteoarthritis predated the November 23, 2011, injury, claimant's right hip was asymptomatic before the injury, and the "symptoms from the disease itself were 'lit-up' by the gait changes related to this significant left knee injury, and the disease became clinically apparent related to the gait changes caused by the significant knee injury. This right hip pain would be related to the November 23, 2011, injury as a sequela." (Ex. 8, p. 101). Dr. Kuhnlein ultimately concluded claimant is not at MMI with respect to his left knee condition and opined the prognosis for the right hip symptoms to improve depends on the total left knee arthroplasty. (Ex. 8, p. 102)
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> Dr. Meyer concluded claimant's right hip condition was caused by preexisting degenerative arthritis and was not caused by his work injury. (Ex.. 6, p. 72; Ex. I, p. 24) However, in response to a letter from claimant's counsel, Dr. Meyer agreed "[b]ecause of Mark's left leg injury, his gait has been altered such that he now walks differently because of his work related left leg injury." (Ex. 6, p. 87) Dr. Meyer also agreed that while he does not believe claimant's right hip arthritis was caused by his work injury, "[b]ecause of his abnormal gait, Mark is having increased pain and problems with his right hip." (Ex. 6, p. 87)
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> Michael Clark, PA-C, a physician's assistant working with Dr. Meyer, documented claimant's gait change during an appointment on September 17, 2012. (Ex. 6, p. 59) Clark examined claimant and noted claimant's gait was "causing him to lift up on the opposite side making him use hip muscle which make [*sic*] bit sore on the RIGHT side hip." (Ex. 6, p. 59)

> Dr. Sundermann also opined it is more likely than not that claimant's current hip symptoms are due to preexisting degenerative joint disease and not his work injury. (Ex. D., p. 7) During the hearing, Dr. Sundermann acknowledged claimant had not complained about hip pain to a health provider since 2005, claimant's gait derangement is a factor leading to his right hip pain, and he believes claimant's right hip pain will likely go away after he has a left knee replacement. (Tr., pp. 214, 228-229)
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> The evidence supports the deputy commissioner's conclusion that claimant's knee injury resulted in his altered gait, which "lit up" claimant's osteoarthritis and caused pain in claimant's right hip. I affirm the deputy commissioner's finding that claimant sustained a sequela injury to his right hip as a result of the work injury of November 23, 2011.
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> As noted by Dr. Kuhnlein, "the prognosis for the right hip symptoms to improve depends on the total knee arthroplasty. If the gait changes continue to irritate the arthritic findings in the hip, his right hip symptoms may persist after the total knee arthroplasty, and he may need right hip arthroplasty as well." (Ex. 8, p. 102) The sequela injury may only be temporary in nature. Therefore, the issue of permanency is not ripe for adjudication.

(App., August 30, 2016, pp. 4-5) The Commissioner left open the possibility that the claimant's right hip condition may only be temporary in nature. "The sequela injury may only be temporary in nature. If the sequela injury proves to be temporary, the Fund may have exposure in this matter." (App. August 30, 2016, p. 5) In other words, since Mr. Mosley had not reached maximum medical improvement, it was premature to fix medical causation of any permanent disability, particularly since Dr. Kuhnlein himself held open the possibility that the hip condition could improve following further treatment on the left leg.

Following the March 3, 2014, hearing, Mr. Mosley continued to receive medical treatment primarily through Iowa Ortho. He followed up for his left ankle complaints in March and May 2014. In March 2014, Dr. Galles recorded the following:

> I discussed with the patient and tried to clarify my position on some issues with him. He did tell me today out of his 3 problems, his RIGHT hip, his LEFT knee, and his LEFT hindfoot, he feels the LEFT knee problem is the least severe of the three. He is getting by on injections. Today he did have a LEFT knee corticosteroid injection performed by Mike Clark, PA using 120 mg Depo-Medrol and 1 mL of lidocaine and Marcaine.

(Jt. Ex. 6, p. 94)

Mr. Mosley was not interested in surgery, which Dr. Galles felt was reasonable at that time. Dr. Galles released him from care for the ankle in May 2014. Mr. Mosley

then followed up in October 2014, for his left knee. (Jt. Ex. 6, p. 98) He had received a Synvisc-one injection in July 2014, and reported that it had helped when combined with "activity modifications and decreased activity." (Jt. Ex. 6, p. 98) A cortisone injection was performed in October 2014 and Dr. Meyer seemed to concur with claimant's desire to avoid surgery. (Jt. Ex. 6, p. 99) Mr. Mosley was being seen approximately every three months often receiving an injection.

Mr. Mosley also followed up for his right hip symptoms. He underwent a total hip replacement in June 2015 performed by Shehada Homedan, M.D. (Jt. Ex. 8, p. 157) Dr. Homedan recorded the following history:

> The patient is a 56-year-old male patient who presents with chronic right hip pain that got worse over the past few years. He was involved in a work accident that led to left proximal tibial fracture that was operated upon 5 times in the past and he believes that favoring his left side has aggravated his right side. He reports moderately severe pain in his groin and outer side of his hip radiating down his thigh associated with stiffness, popping, grinding and limping.

(Jt. Ex. 8, p. 155) The diagnosis was right hip degenerative joint disease. It is unclear in the record when precisely, he was released from Dr. Homedan's care.

Claimant underwent follow up treatment for his left total hip replacement which involved a number of follow up radiographic reports and monitoring of his condition. Mr. Mosley testified credibly that the nature of his hip pain changed after surgery. Prior to his surgery, the pain was primarily in his groin area. Following surgery he developed pain mostly in his hip socket. (Tr., p. 36) His left knee symptoms also worsened. (Jt. Ex. 6, p. 106) He is unable to enter or exit an automobile without the use of his cane and he can no longer cross his legs. (Tr. p. 30)

Dr. Galles prescribed more physical therapy for claimant's ankle in October 2015. (Jt. Ex. 6, p. 110) In November 2015, Dr. Meyer recommended total knee replacement as the best option moving forward. Mr. Mosley received another injection and opted to put this surgery off until January 2016. (Jt. Ex. 6, p. 113) He did not, however, proceed. In April 2016, Dr. Meyer documented that "Workmens' Compensation" had not provided approval for the initial procedure (hardware removal). (Jt. Ex. 6, p. 114)

In August 2016, Dr. Meyer documented that Mr. Mosley had begun complaining of low back pain. (Jt. Ex. 6, p. 117) He diagnosed left sacroiliac joint inflammation likely "due to his limping from his LEFT work-related knee pain." (Jt. Ex. 6, p. 119) He was referred for pain management at that time. In subsequent visits to Dr. Meyer in 2016, Mr. Mosley continued to postpone left knee replacement surgery, opting instead for an evaluation with Richard Holt, D.O., a pain management specialist who recommended and performed left genicular nerve block in November 2016. During this timeframe, Mr. Mosley expressed frustration with his inabilities, however, he continued to express his fear that he would lose function in his leg if he had surgery. (Jt. Ex. 6, p. 122) He ultimately expressed a preference to continue without a total knee replacement. Dr.

Holt also indicated claimant was a candidate for radiofrequency ablation. (Jt. Ex. 6, p. 128) The radiofrequency ablation was performed in June 2017. (Jt. Ex. 6, p. 139)

Both Dr. Meyer and Dr. Kuhnlein have provided expert opinions that the work injury was a substantial causal or aggravating factor to the development of his hip pain. (Jt. Ex. 6, p. 89; Jt. Ex. 9, p. 181; Jt. Ex. 10, p. 199) Dr. Meyer, however, provided equivocal opinions regarding whether his right hip condition had been permanently aggravated or altered. (Cl. Ex. 6, p. 89 *compared with* Jt. Ex. 6, pp. 90-91) Dr. Meyer's equivocal opinions were rendered prior to the right total hip replacement in June 2015.[1]

Dr. Kuhnlein updated his medical causation opinion in a report dated February 23, 2018. In his 2013 report, Dr. Kuhnlein had provided a thorough, well-reasoned analysis, which ultimately provided the opinion that claimant's right hip osteoarthritis condition was a sequela of his left knee problems.

> The osteoarthritis in the right hip would have been "lit-up" by the gait changes related to this injury, but there are no previous right hip x-rays to compare to see if there was any objective difference in the osteoarthritis; however, symptoms from the disease itself were "lit-up" by the gait changes related to this significant left knee injury, and the disease became clinically apparent related to the gait changes caused by the significant knee injury. This right hip pain would be related to the November 23, 2011, injury as a sequela.

(Jt. Ex. 9, p. 181) Dr. Kuhnlein further opined, at that time, that the hip was not at maximum medical improvement because the symptoms could improve in his hip following a left knee total replacement. (Jt. Ex. 9, p. 182)

Instead of having a left total knee replacement, however, claimant underwent a right total hip replacement in 2015. In his updated February 2018 report, Dr. Kuhnlein provided an impairment rating for the right hip replacement, assigning a 15 percent whole body impairment rating. (Jt. Ex. 10, p. 200) He causally connected this rating to the sequela injury of the original work injury. (Jt. Ex. 10, p. 199) This is actually the only explicit medical causation opinion in the record regarding claimant's right hip condition since the original hearing and since the right hip replacement surgery in June 2015. I find it is compelling. There is certainly no reason in this record to disregard this opinion.

The defendants rely upon the medical opinion of Charles Mooney, M.D. Dr. Mooney evaluated Mr. Mosley and wrote a thorough report in February 2018, which primarily focused on Mr. Mosely's left knee. (Def. Ex. G) Dr. Mooney, however, did not evaluate or provide opinions regarding claimant's right hip condition. (Def. Ex. G, pp. 1-

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[1] It is noted that Dr. Meyer's opinion regarding medical causation of the right hip was rejected in the Commissioner's appeal decision in this case, as was Dr. Sundermann's.

9) Instead, he focused exclusively on the knee. He diagnosed left knee injury including "left bicondylar tibial plateau fracture with open reduction internal fixation, manipulation under anesthesia and lateral release as well as evidence of advanced degenerative arthropathy of the left ankle and moderate atrophy of the left quadriceps and mild atrophy of the left calf with sensory deficit." (Def. Ex. G, p. 7) He opined that a left total knee replacement "could improve both his functional strength and reduce his pain complaints." (Def. Ex. G, p. 7) He opined claimant reached maximum medical improvement for his knee in November 2012.

Based upon my review of the entire record, with specific emphasis on the medical causation opinions, I find that the work injury is a cause of permanent disability in claimant's low back, right hip and left leg (including the foot/ankle). The most convincing medical opinion in the record is the opinion of Dr. Kuhnlein. His opinion is supported by the claimant's credible testimony and the medical notes of Dr. Homedan. There is no credible evidence in this record that Mr. Mosley's right hip or low back condition were merely temporary in nature. I further find that the claimant's decision to put off having knee surgery as long as he can, under the circumstances, is reasonable.

Dr. Kuhnlein estimated that claimant reached maximum medical improvement on approximately June 29, 2016, from all of his conditions and he suffered from a 38 percent whole person impairment. (Jt. Ex. 10, p. 200) This rating included ratings for both the low back and the right hip. He further recommended the following restrictions:

> These restrictions are being assigned for the back, hip, knee and ankle conditions. Material handling restrictions would include lifting 20 pounds occasionally from floor to waist, 30 pounds occasionally from waist to shoulder as long as weights are close to the axial plane of the body, 20 pounds occasionally from waist to shoulder if he is lifting more than an elbow's distance away from the axial plane of the body, and 20 pounds occasionally over the shoulder.
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> Nonmaterial handling restrictions would include sitting standing or walking on an as needed basis with the ability to change positions when necessary. Mr. Mosley can stoop or squat rarely, bend at the waist occasionally or occasionally crawl with a knee pad, occasionally kneel with a knee pad, and work on ladders or at height occasionally, and climb stairs occasionally. He would more likely than not use a tandem gait and would be the guardrail. Mr. Mosley can work at or above shoulder height occasionally.

(Jt. Ex. 10, p. 200) These restrictions are reasonable and fairly consistent with those recommended by Dr. Meyer. (Jt. Ex. 6, p. 149)

Defendants argue that since claimant has chosen to forego the total knee replacement, his healing period ended in spite of the running award of benefits. (Def. Brief, p. 9)

Mr. Mosley was terminated by the employer in December 2012. The employer contended that the job was only intended to be temporary. He did return to work for a short period of time in a highly accommodated position where he was allowed to drive an ATV to inspect work on a part-time basis. The evidence suggests that since his termination, he has looked for work extensively. (Cl. Ex. 18; Tr., pp. 45-49) I find that he was highly motivated to secure employment. Mr. Mosley has a strong work ethic as demonstrated by his work history. He looked for work even during his period of recuperation, which was quite extensive, from the date of his injury on November 23, 2011, through June 29, 2016.

Furthermore, Mr. Mosley worked with the Iowa Department of Vocational Rehabilitation (IDVR). IDVR categorized Mr. Mosley as significantly disabled and recommended he contact the Social Security Administration to seek disability. (Cl. Ex. 31, pp. 324-328) Mr. Mosley generally has a manual labor background. He did run his own successful construction company for several years. He does have some skills associated with running his own company, however, Mr. Mosley was clearly a working owner. (Tr., pp. 43-44) All of his work experience, including running his own construction firm, involved significant manual labor. (Cl. Ex. 14, pp. 220-221) He has limited computer skills and a limited educational background.

In April 2014, Mr. Mosley applied for Social Security Disability. He was approved in June 2014 with benefits going back to the date of his work injury. (Cl. Ex. 27, p. 294) While Mr. Mosley has continued to work with IDVR, he has not continued his extensive job searches since being awarded Social Security Disability.

Claimant has been evaluated by several vocational experts but only one since he has recuperated from his work injury. Phil Davis, MS, opined that Mr. Mosley is not employable in the competitive labor market. (Cl. Ex. 24, p. 280) His report is thorough and extensive. In reviewing the entire record as a whole, I agree with this assessment.

CONCLUSIONS OF LAW

The initial question in this case is whether Mr. Mosley has suffered any permanent disability in his right hip and/or low back as a result of his stipulated November 23, 2011, work injury.

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).

A personal injury contemplated by the workers' compensation law means an injury, the impairment of health or a disease resulting from an injury which comes about, not through the natural building up and tearing down of the human body, but because of trauma. The injury must be something that acts extraneously to the natural processes of nature and thereby impairs the health, interrupts or otherwise destroys or damages a part or all of the body. Although many injuries have a traumatic onset, there is no requirement for a special incident or an unusual occurrence. Injuries which result from cumulative trauma are compensable. Increased disability from a prior injury, even if brought about by further work, does not constitute a new injury, however. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); Ellingson v. Fleetguard, Inc., 599 N.W.2d 440 (Iowa 1999); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995); McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985). An occupational disease covered by chapter 85A is specifically excluded from the definition of personal injury. Iowa Code section 85.61(4) (b); Iowa Code section 85A.8; Iowa Code section 85A.14.

When an injury occurs in the course of employment, the employer is liable for all of the consequences that "naturally and proximately flow from the accident." Iowa Workers' Compensation Law and Practice, Lawyer and Higgs, section 4-4. The Supreme Court has stated the following. "If the employee suffers a compensable injury and thereafter suffers further disability which is the proximate result of the original injury, such further disability is compensable." Oldham v. Scofield & Welch, 222 Iowa 764, 767, 266 N.W. 480, 481 (1936). The Oldham Court opined that a claimant must present sufficient evidence that the disability was naturally and proximately related to the original work injury.

As set forth in the Commissioner's appeal decision in this case, it is important to remember the difference between an injury and disability. The claimant has already proven that he suffered a sequela injury to his right hip which was a natural consequence of his November 2011, work injury. At the first hearing, it was determined that the condition in his hip was causally connected to his original work injury and he was awarded a running healing period award. These findings were affirmed on appeal. Therefore, the law of the case is that claimant has suffered an injury to his right hip which was a cause of temporary disability. The questions before the agency at this time are whether the claimant reached maximum medical improvement for this condition, and whether there is any permanency associated with the condition. Additionally, claimant contends that he has developed a back condition since the original hearing, which is also permanent and compensable.

The claimant's argument is very simple. The claimant contends that since the first hearing, claimant has undergone a right total hip replacement and Dr. Kuhnlein has assigned permanent impairment and restrictions for this condition. The claimant points out that there is really no medical evidence to contradict Dr. Kuhnlein's opinion. In fact, claimant cites Poula v. Siouxland Wall & Ceiling, Inc., 516 N.W.2d 910 (Iowa App. 1994)

for the proposition that undisputed medical evidence cannot be summarily rejected. It is a simple, straightforward and compelling argument.

The defendants' argument is novel and nuanced. They contend that claimant cannot prove permanency for the right hip and low back because he chose not to have surgery on his left knee. The argument is set forth in detail in their brief.

> Defendants further contend permanency for Claimant's alleged sequelae injuries cannot be established unless and until Claimant undergoes a left total knee replacement. Since Claimant voluntarily chooses to forego a total left knee replacement and has done so since at least mid-2013, Defendants cannot be held liable for any perceived permanent impairment related to Claimant's right hip, left ankle, or low back, since the prognosis of those conditions was determined to be unknown as specifically decided in the 2016 Appeal Decision. Since permanency of Claimant's alleged sequelae injuries is not ripe for adjudication, Claimant's entitlement to PPD benefits is limited to the knee, which is a scheduled injury. As such, Claimant is not entitled to industrial disability benefits, and the commencement date for the beginning of PPD benefits is November 10, 2015, relying on Dr. Meyer's opinion regarding MMI of Claimant's left knee. Dr. Meyer previously assigned Claimant 30% impairment to the left lower extremity, which total 66 weeks of benefits. Defendants paid 72 weeks of benefits from November 10, 2015. (Ex. G). Therefore, Defendants contend no further permanency benefits are owed in this case.

(Def. Brief, p. 8) Defendants point out that they did receive an updated opinion from Dr. Meyer that claimant reached maximum medical improvement on his left knee after he had exhausted all conservative care on his knee. (Jt. Ex. 6, p. 132) If claimant, however, had the total knee replacement that the physicians recommend he have, other sequelae conditions would likely heal up. (Def. Brief, p. 10)

The evidence is overwhelming that Mr. Mosley is not in a healing period. He has reached maximum medical improvement for all of his conditions, with the possible exception of his back. While he likely will need a total knee replacement at some point in the future, his condition is permanent as of the time of hearing. The unrebutted medical evidence in the record demonstrates that claimant has permanent conditions in his left foot and ankle, left leg, left hip and low back. The only medical evidence in the record since the first hearing regarding causation and permanency is the opinion of Dr. Kuhnlein. His opinion was adopted as the best medical evidence at the first hearing. His updated, February 2018, opinion is consistent with his earlier opinion and is deemed the best evidence in the record. There is simply no reason in this record not to accept this opinion.

The defendants are really arguing that Mr. Mosley has failed to mitigate his damages. In other words, by failing to have surgery earlier, the claimant has caused the sequelae conditions and if he would just have the surgery, the claimant's functional

disabilities in his left leg, right hip and low back would vanish. Claimant contends that defendants have not properly raised this issue, citing R.E.T. Corp. v. Frank Paxton Co., 329 N.W.2d 416, 422 (Iowa 1983). Whether this issue was properly raised as a legal matter, I find that, as a matter of fact, the argument fails.

Defendants cite Walker v. Worley Warehousing, File No. 5035129 (Arb. January 26, 2012), and See v. Tone Bros., File No. 950142 (Arb. June 1993), for the proposition that an unreasonable refusal of medical treatment may result in a reduction of compensation benefits. Whether I agree with the legal conclusions in those decisions or not, the facts of this case do not support such a finding in this case. The claimant's care has been perfectly reasonable.

In September 2017, Dr. Meyer opined the following.

> The patient is currently recently satisfied with the status of his LEFT knee pain after his injections performed by Dr. Rayburn. He is not interested in pursuing a knee replacement at this point in time. *I think that is very reasonable and is according to standard management of knee arthritis.*

(Jt. Ex. 6, p. 144; *emphasis added*) Dr. Meyer is claimant's authorized treating physician.

Importantly, as early as in March 2014, Dr. Galles documented the following:

> I discussed with the patient and tried to clarify my position on some issues with him. He did tell me today out of his 3 problems, his RIGHT hip, his LEFT knee, and his LEFT hindfoot, he feels the LEFT knee problem is the least severe of the three. He is getting by on injections. Today he did have a LEFT knee corticosteroid injection performed by Mike Clark, PA using 120 mg Depo-Medrol and 1 mL of lidocaine and Marcaine.

(Jt. Ex. 6, p. 94) In other words, of all Mr. Mosley's ongoing medical conditions, the left knee was the least of his problems. The total knee replacement would require two or possibly three surgeries and there are significant risks involved. Moreover, while several physicians have suggested that a knee replacement surgery may alleviate some of the symptoms in his sequelae conditions, I find it to be highly speculative, to the point of improbability, that such a surgery would completely reverse the claimant's permanent functional disabilities which exist, particularly in claimant's surgically-repaired right hip.

For all of these reasons, I reject the defendants' arguments. I find that Mr. Mosley has suffered a permanent disability in his left leg, including the foot and ankle, right hip and low back. Since I have found that the disability extends into his body as a whole, I find that he has suffered a permanent industrial disability. The next question is the extent of disability.

A hip injury is generally an injury to the body as a whole and not an injury to the lower extremity. The lower extremity extends to the acetabulum or socket side of the

hip joint. For a hip injury to be industrially ratable, disability in the form of actual impairment to the body must be present. Lauhoff Grain v. McIntosh, 395 N.W.2d 834 (Iowa 1986); Dailey v. Pooley Lumber Co., 233 Iowa 758, 10 N.W.2d 569 (1943).

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 individuals with disabilities by making a current employer responsible only for the amount of disability related to an injury occurring while that employer employed the individuals with disabilities as if the individual had had no preexisting disability. See Anderson v. Second Injury Fund, 262 N.W.2d 789 (Iowa 1978); 15 Iowa Practice, Workers' Compensation, Lawyer, section 17:1, p. 211 (2014-2015).

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 355 (Iowa 1989); Second Injury Fund v. Mich. Coal Co., 274 N.W.2d 300 (Iowa 1970).

Since the disability is in claimant's body as a whole, there is no Second Injury Fund liability.

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 Ry. Co. of Iowa, 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.

Total disability does not mean a state of absolute helplessness. Permanent total disability occurs where the injury wholly disables the employee from performing work that the employee's experience, training, education, intelligence, and physical capacities would otherwise permit the employee to perform. See McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Diederich v. Tri-City R. Co., 219 Iowa 587, 258 N.W. 899 (1935).

A finding that claimant could perform some work despite claimant's physical and educational limitations does not foreclose a finding of permanent total disability, however. See Chamberlin v. Ralston Purina, File No. 661698 (App. October 1987); Eastman v. Westway Trading Corp., II Iowa Industrial Commissioner Report 134 (App. May 1982).

Although claimant is close to a normal retirement age, proximity to retirement cannot be considered in assessing the extent of industrial disability. Second Injury Fund v. Nelson, 544 N.W. 2d 258 (Iowa 1995). However, this agency does consider voluntary retirement or withdrawal from the work force unrelated to the injury. Copeland v. Boones Book and Bible Store, File No. 1059319, (App. November 6, 1997). Loss of earning capacity due to voluntary choice or lack of motivation is not compensable. Id.

The greater weight of evidence supports a finding that Mr. Mosley is permanently and totally disabled as a result of his November 23, 2011, work injury. I find the vocational opinion of Phil Davis to be compelling. (Cl. Ex. 24, pp. 279-280) Mr. Mosley was 59 years old at the time of hearing with a high school education and limited computer skills. He underwent a lengthy period of recuperation which lasted from the date of his injury, November 23, 2011, through June 29, 2016. He was terminated from his employer in December 2012. While he did perform some highly accommodated work shortly after the injury, he was clearly never able to perform his regular job on a full-time basis. Mr. Mosley is a highly-motivated individual who performed a thorough job search following his injury, even while he was recuperating. He worked with Iowa Vocational Rehabilitation where he was referred to Social Security Disability. He was awarded Social Security Disability shortly after applying.

Mr. Mosley's work limitations outlined by Dr. Kuhnlein are severe and detrimental to his employment prospects.

> These restrictions are being assigned for the back, hip, knee and ankle conditions. Material handling restrictions would include lifting 20 pounds occasionally from floor to waist, 30 pounds occasionally from waist to shoulder as long as weights are close to the axial plane of the body, 20 pounds occasionally from waist to shoulder if he is lifting more than an elbow's distance away from the axial plane of the body, and 20 pounds occasionally over the shoulder.
>
> Nonmaterial handling restrictions would include sitting standing or walking on an as needed basis with the ability to change positions when

> necessary. Mr. Mosley can stoop or squat rarely, bend at the waist occasionally or occasionally crawl with a knee pad, occasionally kneel with a knee pad, and work on ladders or at height occasionally, and climb stairs occasionally. He would more likely than not use a tandem gait and would be the guardrail. Mr. Mosley can work at or above shoulder height occasionally.

(Jt. Ex. 10, p. 200) These restrictions preclude him from all of his past employment. While Mr. Mosley does have some skills he developed while running his own business, I agree with Mr. Davis, that even while running his own business, Mr. Mosley was a hands-on construction worker. (Cl. Ex. 24, p. 279)

The only work which claimant has performed since his work injury is letting the neighbor's dog out for minimal pay. Considering all of the factors of industrial disability, I find Mr. Mosley is permanently and totally disabled. Consequently, he is entitled to weekly benefits from the date of injury.

The next issue is penalty.

The final issue for determination is whether claimant is entitled to penalty benefits.

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

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

Claimant contends that defendants should have voluntarily paid industrial disability benefits on this claim and the failure to do so should result in penalty. Instead, the defendants evaluated this case exclusively based upon the left knee condition. Defendants paid 68 weeks of benefits up through April 2, 2017. (Def. Ex. D, p. 6; Cl. Ex. 28)

Claimant's counsel wrote to defense counsel on multiple occasions between March 8, 2017 and March 5, 2018, demanding payment of industrial disability benefits. (Cl. Exs. 29, pp. 296-303) Each time, defendants responded with their position, which was that if Mr. Mosley would simply follow the treatment recommendations, his hip symptoms may improve. (Def. Ex. F, pp. 1-6) I find that the defendants' responses qualify as a contemporaneous excuse. The only question is whether the excuse was reasonable.

The defendants cite Walker v. Worley Warehousing, File No. 5035129 (Arb. January 26, 2012), to support their position. In Walker, the Deputy as follows:

> This agency has adopted the approach that where the risk of treatment is insubstantial and the probability of cure or improvement is high, then refusal of medical treatment will result in a termination of benefits. But if there is a real risk involved and a considerable chance that the procedure will result in no improvement or perhaps a worsening of the condition, then claimant cannot be forced to run the risk at the peril of losing his or her statutory compensation rights. OTC Holdings v. Prucha, 758 N.W.2d 839 (Iowa A00. [sic] 2008) Palmer v. Iowa Power, Inc., file no. 941807 (App. Dec., May 25, 1993); Hardy v. Abell-Howell Company, file no. 814126 (App. Dec. Dec. 21, 1990).

Walker, at p. 11.

While I have rejected the defendants defense in this case, I cannot find that their defense was per se unreasonable. In my assessment, the facts of this case are quite different than the facts in Walker. Nevertheless, the defendants did have a reasonable excuse to refuse to pay benefits beyond the functional impairment rating and this basis was presented contemporaneously to the claimant.

The final issue is costs and IME expense.

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).

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).

Claimant seeks the payment of Dr. Kuhnlein's 2013 IME expense, arguing it was mistakenly not addressed in the first arbitration decision. (Cl. Brief, p. 24) Claimant also seeks expenses for the second Dr. Kuhnlein report, as well as the report of Phil Davis.

Claimant specifically seeks the following costs:

- First Kuhnlein IME, July 12, 2013 $3,107.90
- Second Kuhnlein IME, November 8, 2017 $2,235.00
- Phil Davis vocational report $1,200.00

Having reviewed the entire file, I award the claimant $3,107.90 for the first Kuhnlein IME, as a Section 85.39 examination, $1,490.00 for the second Kuhnlein report, and $1,200.00 for the Davis report as costs under Rule 4.33.

ORDER

THEREFORE IT IS ORDERED

Defendants shall pay permanent total disability benefits at the rate of nine hundred forty-three and 63/100 ($943.63) per week commencing from the date of injury.

Defendants shall pay accrued weekly benefits in a lump sum.

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 be given credit for the weeks previously paid. Defendants shall be given a credit for the weeks claimant worked following the injury.

Defendants shall authorize treatment for claimant's low back condition.

Defendants shall pay the IME costs in the amount of three thousand one hundred seven and 90/100 dollars ($3,107.90).

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 as set forth in this decision, in the amount of two thousand six hundred ninety and no/100 dollars ($2,690.00).

Signed and filed this 20th day of September, 2019.

JOSEPH L. WALSH
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows.

Corey Walker (via WCES)

Sasha Monthei (via WCES)

Sarah Brandt (via Email)

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.