BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

FILED
JAN 27 2017
WORKERS COMPENSATION

DORAYNE FINK, Claimant, vs. OELWEIN HEALTH CARE CENTER, Employer, and MIDWEST EMPLOYERS CASUALTY COMPANY, Insurance Carrier, Defendants.	File No. 5042481 REVIEW-REOPENING DECISION Head Note Nos.: 1802, 1803, 4000.2

STATEMENT OF THE CASE

Dorayne Fink, claimant, filed a petition in arbitration seeking a review-reopening of her Agreement for Settlement, which was previously approved by this agency on April 2, 2014. The hearing concerning this review-reopening petition was held on August 5, 2016, in Waterloo, Iowa.

At the hearing, claimant provided testimony. The evidentiary record also includes Claimant's Exhibits 1 through 26 and Defendants' Exhibits A through J, all of which were admitted without objection.

Counsel for the parties submitted post-hearing briefs on September 12, 2016, and the case was considered fully submitted at that time.

At the hearing, the parties submitted a hearing report, which contains numerous stipulations. The parties' stipulations are accepted. No factual findings or conclusions of law will be made in this decision regarding the parties' stipulations. The parties are now bound by their stipulations.

ISSUES

The parties submitted the following disputed issues for resolution:

1) Claimant's entitlement to temporary benefits, and the extent thereof, if any.

2) Whether claimant sustained a change in condition, causally related to the original work injury, since the Agreement for Settlement was approved on April 2, 2014, and if so, the extent of any additional industrial disability.

3) Entitlement to medical expenses.

4) Penalty benefits.

FINDINGS OF FACT

At the time of the review-reopening hearing claimant was 55 years old and she remained employed with the defendant employer. (Transcript pages 11-12)

Claimant's original work injury occurred on February 27, 2009. At that time, claimant injured her shoulder while assisting a resident. (Tr. p. 14) She had surgery on the affected shoulder and was eventually returned to work without restrictions concerning the shoulder. (Tr. pp. 13, 17) However, during physical therapy for the shoulder, on September 8, 2009, claimant was lifting a weighted box and had low back pain with numbness and weakness in the right leg. (Tr. p 18; Exhibit 1, p. 1) Claimant received medical treatment for her back injury following this incident. (Ex. 2, p. 1; Ex. 3, p. 5; Ex. 5, p. 1)

In March 2003, prior to the September 8, 2009 incident described above, claimant reported pain in her low back. At that time she had a popping sensation on the left side and a sharp pain travel down the back of her left leg, past her knee. (Ex. D, p. 1) In 2006, she had pain in her low back, radiating into her right leg after she slipped on ice. (Ex. E, p.1) In February 2008, she slipped on ice again and had back pain, but without any radicular symptoms. (Ex. E, p. 6)

Claimant began working for Oelwein Health Care Center, the defendant employer, on March 3, 1993, as a Certified Nursing Assistant (CNA). (Tr. p. 43) She worked as a CNA for over 20 years until about October 29, 2013, when she changed jobs to Patient Nutritional Assistant (PNA) and Door Greeter. (Ex. 24; Tr. pp. 46, 92) This change in job duties occurred about six months before the Agreement for Settlement was approved on April 2, 2014. Claimant testified that her job change was due to the fact that she could no longer safely perform the CNA job because of her shoulder, back and leg. (Tr. pp. 45-46)

Claimant's new position was described as a "combination job" because of the two job titles and requires her to feed and hydrate residents with dysphagia, open the office on the weekends, and greet people that come into the facility and make them feel comfortable and welcome. (Ex. 24, pp. 1, 6; Tr. pp. 46-47) Claimant described the new position as allowing her to do "light things." (Tr. pp. 46, 48) She continued to hold this position at the time of the hearing. (Tr. p. 53)

The door greeter job did not exist prior to claimant starting that job. (Tr. p. 48) Claimant does not believe that there are any other existing jobs at the care center that

she could do. (Tr. pp. 48-49) Claimant testified that the employer has been very accommodating regarding her pain, allowing her to do "[w]hatever I need to do." (Tr. p. 49)

There was no evidence that claimant had a change in her job duties or hours worked post-settlement, other than during the period of time that she was off work following surgery.

After the September 8, 2009 incident that resulted in low back pain and symptoms in her right leg, Kenneth McMains, M.D. of Allen Occupational Health Services opined on October 14, 2009, that claimant sustained no impairment concerning her low back and needed no restrictions. (Ex. 2, p. 6) Claimant returned to full duty work as a CNA. (Tr. p. 71)

Claimant testified that her symptoms never completely improved. (Tr. p. 22) In October 2010, claimant fell in her backyard after stepping in a hole. (Tr. p. 29; Ex. A, pp. 42-43) She had a temporary increase in back pain, but did not have any new back or leg symptoms following this incident and testified that she returned to her baseline level pain. (Tr. p. 29) The medical records indicate that claimant's primary concern following this incident was her wrist, not her back. (Ex. 6, pp. 1-3) She did not miss any work following this incident and continued to work in her position as a CNA without restrictions. (Ex. A, pp. 43-44)

In June 2012, claimant was bending over in her flower bed and had what she described as a "flare-up" that she testified did not make her back condition permanently worse. (Tr. pp. 32-33; Ex. 9, p. 1) She testified that she did not have any new symptoms following this incident. (Tr. pp. 32-33)

The Agreement for Settlement, approved on April 2, 2014, included two letters from Arnold Delbridge, M.D. The first letter dated November 13, 2013, states his opinion that "her low back had a material aggravation at the time she was rehabbing from her shoulder and injured it lifting a box." (Ex. 20, p. 7) The second letter dated November 22, 2013, includes Dr. Delbridge's assignment of a 5 percent impairment for the spine injury and 6 percent for the shoulder. (Ex. 20, p. 10) Dr. Delbridge also assigned permanent restrictions of: no lifting over 30 pounds from knee to waist or slightly above; no lifting over 10 pounds above chest level; and, only occasionally stooping and beginning to lift from floor level. (Id.)

As a result of the February 27, 2009 work injury, claimant's extent of industrial disability was established by the Agreement for Settlement, in the amount of four percent to the body as a whole. (Ex. 20, p. 1)

The Agreement for Settlement clearly took into consideration claimant's low back injury when establishing claimant's industrial disability. In addition to Dr. Delbridge's opinions, the settlement also provides that "Covenant Pain Clinic, Dr. Ronald Harbut, is the authorized treating physician for Claimant's low back condition." (Ex. 20, p. 2)

Clearly, the low back condition was intended to be covered by the Agreement for Settlement with medical care being provided into the future.

On March 18, 2014, a few weeks before the settlement was approved, claimant was seen by Dr. Harbut, who stated that her pain management was generally going very well, except for breakthrough periods in the morning and after lunch. (Ex. 5, p. 47)

Following the Agreement for Settlement, on April 24, 2014, claimant reported to Dr. Harbut a "worsening low back and right posterior thigh pain – the same she has had before," and a "repeat" injection was scheduled. (Ex. 5, p. 50)

Claimant continued to have medical treatment, including injections, to address the low back and right leg pain. She had periods of relief from the injections. However, on September 29, 2014, claimant reported to Dr. Harbut that she felt her "right lower extremity pain is getting worse over-all [sic]." (Ex. 5, p. 74) At that time a new lumbar MRI was recommended. (Id.)

On October 10, 2014, claimant had a new MRI, which showed a "[p]osterior annular fissure with central and paracentral disc protrusion and superimposed right paracentral disc extrusion/sequestration extending inferiorly," and "[s]evere right lateral stenosis causing impingement of the right L5 nerve root." (Ex. 4, p. 8) It is noted that an MRI obtained on July 5, 2012, prior to the Agreement for Settlement, indicated findings suggestive of a "small annular tear," at the L4-5 level. (Ex. 4, p. 5)

On October 29, 2014, claimant described pain radiating down the right leg with pain and numbness extending to the outer three toes and reported that the "pain has continued to worsen in the past month." (Ex. 5, pp. 78-79)

Claimant was referred to Chad Abernathey, M.D., and saw him on February 4, 2015. He noted right sciatica that worsened in the fall of 2014, with no specific injury. (Ex. 13, p. 1) Dr. Abernathey recommended surgery. (Ex. 13, p. 2)

On February 19, 2015, claimant underwent surgery with Dr. Abernathey, who performed a "[r]ight L4-5 partial hemilaminectomy, discectomy." (Ex. 14, p. 1) Claimant was off work following the surgery, until she was returned to work on April 10, 2015. (Ex. 13, p. 2) At that time, Dr. Abernathey did not assign any restrictions. (Id.)

Defendants did not pay temporary benefits during the time that claimant was off work following surgery, relying primarily upon claimant's long history of her back condition and further relying on events that pre-dated the Agreement for Settlement. (Ex. 18, pp. 2-4)

Shortly after the surgery, defendants ceased providing authorized medical care and the vast majority of medical treatment thereafter was paid for by claimant or her health insurance carrier. (Ex. 21; Ex. I, pp. 3-10) Claimant incurred mileage that also was not reimbursed. (Ex. 25)

A follow-up MRI was conducted on July 24, 2015, which showed an L4-5 "Posterior disk protrusion somewhat right paracentral in nature. However, this has improved since the prior study." (Ex. 4, p. 10) Dr. Abernathey referred to this MRI as "essentially unrevealing." (Ex. 13, p. 3)

Claimant continued to receive injections after surgery to address her ongoing complaints of pain even after she returned to work in the PNA/Door Greeter position. (Ex. 5, pp. 106, 110)

She often reported pain levels from 6 to 8 out of 10, with a low of 5 and a high of 9 between July, 2015 and July, 2016. (Ex. 5, pp. 102, 107, 111, 115, 124, 128, 132, 136, & 140) For approximately one year prior to the approval of the Agreement for Settlement, claimant was regularly reporting pain levels of 5-6/10 with a high of 7. (Ex. 5, pp. 23, 26, 30, 34, 41, 44, & 48)

I find that claimant's subjective pain level appears to have increased post-settlement.

On July 20, 2016, the medical providers at Covenant Pain Clinic recommended an appointment with Dr. Abernathey to determine if claimant is a candidate for a spinal cord stimulator. (Ex. 5, p. 141)

In regards to claimant's education, she completed the eleventh grade and did not obtain a G.E.D. (Tr. p. 11) She did obtain her CNA certification and continued at the time of the hearing to keep that certification current. (Tr. p. 54) Her formal education did not change since the Agreement for Settlement was approved.

Dr. Broghammer performed a records review and concluded on August 19, 2015, that claimant's current low back condition was not related to the low back injury that occurred on September 8, 2009. (Ex. B, p. 14) His opinion is that the current condition of claimant's low back is due to "factors, including but not limited to other intervening causes (i.e., her fall in 2010, as well as her gardening incident in June 2012), as well as the normal aging process and associated degenerative changes." (Ex. B, p. 16) He also concluded that the last treatment claimant had for her back condition was on July 9, 2013, prior to the settlement in April, 2014. (Id.) However, this is not accurate. Claimant's low back treatment was continuing in the month just prior to the April 2, 2014 settlement. (Ex. 5, p. 47)

On July, 22, 2016, Dr. Broghammer reviewed additional medical records and provided a supplemental opinion. (Ex, B, p. 1) Dr. Broghammer stated that the surgery with Dr. Abernathey was due to a natural progression of chronic lumbar spondylosis resulting in disk herniation. (Id.) Dr. Broghammer agreed that the impairment rating assigned by Dr. Delbridge of 13 percent to the whole person is appropriate under the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, concerning claimant's low back condition. (Ex. B, p. 5) However, he also reiterated that the

impairment is due, in his opinion, "entirely to personal, non-industrial factors unrelated to Ms. Fink's alleged injury." (Id.)

The 2010 and 2012 incidents referred to by Dr. Broghammer were previously considered by the parties, having pre-dated the Agreement for Settlement, which was approved on April 2, 2014. (Ex. 20) The Agreement for Settlement clearly contemplates that claimant's low back condition was considered and that authorized medical care would be provided for said condition post-settlement. (Ex. 20, p. 2) Defendants cannot now re-litigate matters that pre-dated the Agreement for Settlement to attempt to terminate a causal connection that they previously agreed existed. The other factor cited by Dr. Broghammer is merely a deterioration of the existing condition due to age and time. He cites no intervening cause occurring after the Agreement for Settlement to sever the causal connection. Therefore, I assign no weight to the opinion of Dr. Broghammer concerning causation.

As stated above, Dr. Delbridge opined prior to the settlement on November 22, 2013, that claimant sustained a 5 percent impairment for the back, and he assigned restrictions. (Ex. 20, p. 10) On March 28, 2016, claimant was seen by Dr. Delbridge for the purpose of an independent medical examination. (Ex. 16, p. 2) On June 28, 2016, Dr. Delbridge issued his report and stated that claimant's functional impairment concerning her back had increased to 13 percent, under the AMA Guides, Fifth Edition. (Ex. 16, p. 4) He also imposed restrictions due to the spine injury of: no lifting over 10 pounds repetitively; 15 pounds knee to chest; and no repetitive bending or twisting the low back. (Ex. 16, pp. 4-5) Claimant testified that she agrees with these restrictions. (Tr. p. 40) Although the claimant's job descriptions indicate lifting requirements beyond the restrictions, she provided uncontroverted testimony that she is essentially allowed to do what she needs to do at work to address her pain levels. (Ex. 24; Tr. p. 49)

It is important to note, as Dr. Delbridge did in his June 28, 2016 IME report, the claimant had "no new injuries subsequent to her approval of the settlement on April 2, 2014 . . . ." (Ex. 16, p. 3) He then opined that "her eventual need for surgery stemmed from the September 8, 2009 incident . . . ." (Ex. 16, p. 4)

I find the causation opinion of Dr. Delbridge persuasive given that the injury is to the same location of the low back contemplated by the parties at the time of the settlement agreement, and there is no identifiable intervening injury or other more likely explanation, except that the low back injury deteriorated to the point where further treatment including surgery was necessary. I further accept the 13 percent whole person functional impairment that was assigned by Dr. Delbridge and agreed to by Dr. Broghammer as an accurate statement of impairment. I also accept the restrictions assigned by Dr. Delbridge, which claimant appears to be substantially, if not entirely, compliant with in her position of PNA and Door Greeter.

Considering whether claimant has carried her burden of proof to establish a compensable review-reopening claim, the undersigned notes that since the Agreement

for Settlement was approved on April 2, 2014, claimant has undergone a partial hemilaminectomy, discectomy. She has sustained an increase in functional impairment to 13 percent whole person. Dr. Delbridge has assigned more substantial restrictions than he had assigned prior to settlement. She has also had an increase in her subjective complaints of pain and is concerned about her ability to perform work outside her present job, if the need would ever arise. However, the undersigned also notes that claimant continues in the same job, with the same employer, that she had prior to the agreement for settlement. Her change to the less strenuous PNA and Door Greeter position occurred prior to the Agreement for Settlement. Claimant appears to have had no decrease in work hours or wages post-settlement other than the time off work following surgery. In consideration of these and all other appropriate factors, I find that claimant has carried her burden of proof warranting a review-reopening of her previously established industrial disability and I now find that claimant has sustained a 35 percent industrial disability.

Having accepted the opinion of Dr. Delbridge, that the need for surgery "stemmed from the September 8, 2009 incident," I return to the issue of healing period benefits. (Ex. 16, p. 4) Defendants did not pay temporary benefits during the time that claimant was off work following surgery. I find that defendants are liable for healing period benefits from February 19, 2015 through and including April 9, 2015.

Concerning the medical expenses detailed in Exhibit 21, in reliance upon the causation opinion of Dr. Delbridge, claimant's testimony and other evidence presented I find that the same are related to the work injury and defendant is therefore responsible for payment of the same. I likewise find that claimant is entitled to mileage reimbursement as set forth in Exhibit 25.

Considering penalty benefits, claimant asserts penalty is applicable for both healing period and permanency benefits. The healing period benefits cover the period of February 19, 2015 through and including April 9, 2015, which is 7.143 weeks. Reviewing the evidence presented, I find that on February 11, 2015, the surgery was authorized by the defendant. (Ex. 18, p. 9) On March 4, 2015, about two weeks after the surgery, claimant's counsel wrote to the insurance carrier requesting payment of healing period benefits. (Ex. 18, p. 8) On March 16, 2015, claimant's counsel again wrote to the insurance carrier requesting healing period benefits. (Ex. 18, p. 7) This second letter indicates that the reason healing period benefits had not yet been paid was apparently due to the insurance carrier's belief that the Agreement for Settlement had terminated their obligation to pay indemnity benefits. On March 31, 2015, over five weeks after the approved surgery had occurred, the insurance carrier advised claimant's counsel, that although they previously approved the surgery one and a half months earlier, that they now were investigating the request for healing period benefits and needed a new patient's waiver. (Ex. 18, p. 6) It is clear that healing period benefits were not paid. The first response to why they were not paid came on March 31, 2015, which did not provide the basis for the denial, but rather a general statement that the matter was being investigated. I find that a denial of healing period benefits has occurred for the period in question. I further find that there is no evidence that the

denial was preceded by a reasonable investigation or that the results of that investigation were communicated contemporaneously to claimant. Penalty benefits are applicable for the healing period in question at the rate of 50 percent. I arrive at 50 percent as the appropriate percentage based on the length of the denial and the fact that Dr. Broghammer's August 19, 2015 opinion denying causation was not issued until six (6) months after the February 19, 2015 surgery. The healing period involved of 7.143 weeks multiplied by the stipulated rate of $364.45 is $2,603.27. Fifty (50) percent of $2,603.27 is $1,301.64.

Concerning the claim for penalty benefits relating to industrial disability, I note that Dr. Abernathey, the treating surgeon, released claimant to return to work without restrictions. Although the undersigned has determined that Dr. Delbridge's opinions concerning permanency and restrictions were the most persuasive, it was not unreasonable for defendants to consider and rely upon Dr. Abernathey's opinion. Further, claimant returned to full-time, full-duty work to the same position, at the same pay and hours that she had prior to the Agreement for Settlement. I therefore, find that defendants have not unreasonably delayed or denied permanency benefits.

CONCLUSIONS OF LAW

The first issue for consideration is whether claimant sustained a change in condition, causally related to the original work injury to establish a review-reopening of the extent of industrial disability previously established by Agreement for Settlement, and if so, the extent of permanent partial disability.

Iowa Code section 86.14(2) provides: "[i]n a proceeding to reopen an award for payments or agreement for settlement as provided by section 86.13, inquiry shall be into whether or not the condition of the employee warrants an end to, diminishment of, or increase of compensation so awarded or agreed upon."

In a review-reopening, "[t]o justify an increase in compensation benefits, the claimant carries the burden of establishing by a preponderance of the evidence that, subsequent to the date of the award under review, he or she has suffered an impairment or lessening of earning capacity proximately caused by the original injury." Simonson v. Snap-On Tools Corp., 588 N.W.2d 430, 434 (Iowa 1999).

The Supreme Court stated in Kohlhaas v. Hog Slat, Inc.,

> The review-reopening claimant need not prove, as an element of his claim, that the current extent of disability was not contemplated by the commissioner (in the arbitration award) or the parties (in their agreement for settlement).

Kohlhaas v. Hog Slat, Inc., 777 N.W.2d 387, 392 (Iowa 2009).

The Supreme Court in the case of Kohlhaas v. Hog Slat, Inc., also stated that:

> A compensable review-reopening claim filed by an employee requires proof by a preponderance of the evidence that the claimant's current condition is "proximately caused by the original injury." See Simonson, 588 N.W.2d at 434 (original emphasis omitted) (quoting Collentine, 525 N.W.2d at 829). While worsening of the claimant's physical condition is one way to satisfy the review-reopening requirement, it is not the only way for a claimant to demonstrate his or her current condition warrants an increase of compensation under section 86.14(2). See Blacksmith v. All–Am., Inc., 290 N.W.2d 348, 354 (Iowa 1980) (holding a compensable diminution of earning capacity in an industrial disability claim may occur without a deterioration of the claimants physical capacity).

Kohlhaas v. Hog Slat, Inc., 777 N.W.2d 387, 392 (Iowa 2009).

Upon review-reopening, claimant has the burden to show a change in condition related to the original injury since the original award or settlement was made. The change may be either economic or physical. Blacksmith v. All-American, Inc., 290 N.W.2d 348 (Iowa 1980); Henderson v. Iles, 250 Iowa 787, 96 N.W.2d 321 (1959). A mere difference of opinion of experts as to the percentage of disability arising from an original injury is not sufficient to justify a different determination on a petition for review-reopening. Rather, claimant's condition must have worsened or deteriorated in a manner not contemplated at the time of the initial award or settlement before an award on review-reopening is appropriate. Bousfield v. Sisters of Mercy, 249 Iowa 64, 86 N.W.2d 109 (1957). A failure of a condition to improve to the extent anticipated originally may also constitute a change of condition. Meyers v. Holiday Inn of Cedar Falls, Iowa, 272 N.W.2d 24 (Iowa App. 1978).

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).

As discussed above, Dr. Broghammer concluded that claimant's current low back condition was not related to the original work injury, but is due to non-occupational factors. He relies on circumstances such as a fall in 2010 and a gardening incident in June 2012, along with ordinary deterioration, and opines that these issues brought about the surgery with Dr. Abernathey in February 2015. However, the 2010 and 2012 incidents as well as other elements that pre-dated the Agreement for Settlement, were considered by the parties at the time the settlement was established and approved on April 2, 2014. Defendants do not now have the opportunity to reach back in time an undo causation that they previously agreed to.

The principles of res judicata apply in a review-reopening situation. "The agency, in a review-reopening petition, should not reevaluate an employee's level of physical impairment or earning capacity if all of the facts and circumstances were known or knowable at the time of the original action." Kohlhaas v. Hog Slat, Inc., 777 N.W.2d 387, 393 (Iowa 2009).

"[S]ection 86.14(2) does not provide an opportunity to relitigate causation issues that were determined in the initial award or settlement agreement." Kohlhaas v. Hog Slat, Inc., 777 N.W.2d 387, 393 (Iowa 2009).

Dr. Broghammer's causation opinion has been rejected. The undersigned has accepted the opinion of Dr. Delbridge concerning causation finding the same to be persuasive, particularly in view of the lack of any evidence of any intervening injury or cause for claimant's deteriorated condition as the need for surgical intervention. I also accepted the restrictions assigned by Dr. Delbridge, noting that claimant's current job, appears generally compatible with those restrictions.

As stated above, I have found that claimant has carried her burden of proof to establish a compensable review-reopening of her claim and I have further found that claimant has sustained a 35 percent industrial disability, which is 175 weeks of benefits.

The second issue for determination is whether claimant is entitled to temporary benefits and the extent thereof, if any.

Section 85.34(1) provides that healing period benefits are payable to an injured worker who has suffered permanent partial disability until (1) the worker has returned to work; (2) the worker is medically capable of returning to substantially similar employment; or (3) the worker has achieved maximum medical recovery. The healing period can be considered the period during which there is a reasonable expectation of improvement of the disabling condition. See Armstrong Tire & Rubber Co. v. Kubli, 312 N.W.2d 60 (Iowa App. 1981). Healing period benefits can be interrupted or intermittent. Teel v. McCord, 394 N.W.2d 405 (Iowa 1986).

As stated above, I have determined causation in favor of the claimant, and I further conclude that claimant is entitled to payment of healing period benefits for the period of February 19, 2015 through and including April 9, 2015.

The third issue is claimant's entitlement to medical expenses as identified in her Exhibit 21.

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).

Having found causation in favor of claimant and noting the lack of any intervening injury or cause, I likewise conclude that the medical expenses contained in Exhibit 21 are causally related to the work injury and are causally connected to the medical condition upon which the claim of injury is based. I therefore, conclude, as stated above, that defendants are liable for payment of the medical bills contained in Exhibit 21 and mileage reimbursement contained in Exhibit 25.

The final issue is penalty benefits.

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

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

It also is not unreasonable to deny a claim when a good faith issue of law or fact makes the employer's liability fairly debatable. An issue of law is fairly debatable if viable arguments exist in favor of each party. Covia v. Robinson, 507 N.W.2d 411 (Iowa 1993). An issue of fact is fairly debatable if substantial evidence exists which would support a finding favorable to the employer. Gilbert v. USF Holland, Inc., 637 N.W.2d 194 (Iowa 2001).

An employer's bare assertion that a claim is fairly debatable is insufficient to avoid imposition of a penalty. The employer must assert facts upon which the commissioner could reasonably find that the claim was "fairly debatable." Meyers v. Holiday Express Corp., 557 N.W.2d 502 (Iowa 1996).

If the employer fails to show reasonable cause or excuse for the delay or denial, the commissioner shall impose a penalty in an amount up to 50 percent of the amount unreasonably delayed or denied. Christensen v. Snap-on Tools Corp., 554 N.W.2d 254 (Iowa 1996). The factors to be considered in determining the amount of the penalty

include the length of the delay, the number of delays, the information available to the employer and the employer's past record of penalties. Robbennolt, 555 N.W.2d at 238.

As stated above, I have found that defendants are liable for payment of penalty benefits concerning healing period benefits and the same shall be at fifty (50) percent. However, I have found that defendants are not liable for penalty related to industrial disability benefits for the reasons stated above.

Assessment of costs is a discretionary function of this agency. Iowa Code section 86.40. Costs are to be assessed at the discretion of the deputy commissioner or workers' compensation commissioner hearing the case. 876 IAC 4.33. I further concluded that claimant was successful in this claim and therefore exercise my discretion and assess costs against the defendants. However, it is noted that the parties advised at the outset of the hearing that the 85.39 IME matter was not an issue and defendants intended to pay the same, therefore it was not addressed as an issue herein. Therefore, the costs assessed by this decision exclude the IME amount identified in Exhibit 26. The remaining costs therein are taxed against defendants

ORDER

IT IS THEREFORE ORDERED:

Defendants shall pay claimant healing period benefits for the period of February 19, 2015 though and including April 9, 2015.

Defendants shall pay claimant one hundred and seventy-five (175) weeks of industrial disability benefits, less a credit for the 20 weeks of benefits previously paid under the agreement for settlement, beginning on the stipulated commencement date of March 2, 2010.

All weekly benefits shall be paid at the stipulated rate of three hundred sixty-four and 45/100 dollars ($364.45).

Defendants shall reimburse claimant for her out-of-pocket medical expenses set forth in Exhibit 21 and shall pay, reimburse, and or otherwise satisfy all remaining medical expenses contained therein.

Defendants shall reimburse claimant for her mileage expense as set forth in Exhibit 25.

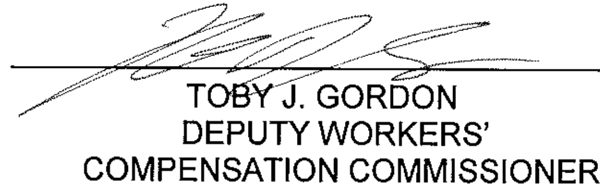
Defendant shall pay claimant penalty benefits of one thousand three hundred one and 64/100 dollars ($1,301.64) for the unreasonable denial of healing period benefits.

Accrued benefits shall be paid in lump sum together with interest pursuant to Iowa Code section 85.30.

Costs as set forth in this decision are taxed to the defendants pursuant to rule 876 IAC 4.33.

Defendants shall file subsequent reports of injury (SROI) as required by this agency pursuant to rules 876 IAC 3.1(2) and 876 IAC 11.7.

Signed and filed this 27th day of January, 2017.



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TJG/srs

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.