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did in fact depose each of the expert witnesses testifying in this case, including Dr. Stalder. The actual motion in limine is not in the record for our review, and the oral motion merely indicates that Dr. Stalder's testimony should be excluded under *Daubert/Schafersman*. See *In re Interest of Britny S.*, 11 Neb. App. 704, 659 N.W.2d 831 (2003) (appellant bears burden of presenting adequate record on appeal). Furthermore, the motion was filed in the midst of the trial and instead should have been addressed in a pretrial motion to the court.

CONCLUSION

In sum, we find that the trial court did not abuse its discretion by overruling Tracey's motion for a new trial and that Tracey's assignment of error to that effect is without merit. Therefore, we affirm.

AFFIRMED.

IRWIN, Judge, participating on briefs.

LORINA HEESCH, APPELLANT, V. SWIMTASTIC SWIM SCHOOL AND TECHNOLOGY INSURANCE COMPANY, ITS WORKERS' COMPENSATION INSURANCE CARRIER, APPELLEES.

823 N.W.2d 211

Filed October 30, 2012. No. A-12-140.

1. **Workers' Compensation: Appeal and Error.** With respect to questions of law in workers' compensation cases, an appellate court is obligated to make its own determination.
2. ____: ____. In determining whether to affirm, modify, reverse, or set aside a judgment of the Workers' Compensation Court review panel, a higher appellate court reviews the findings of fact of the single judge who conducted the original hearing; the findings of fact of the single judge will not be disturbed on appeal unless clearly wrong.
3. **Jurisdiction: Words and Phrases.** Ancillary jurisdiction is the power of a court to adjudicate and determine matters incidental to the exercise of its primary jurisdiction of an action.
4. **Workers' Compensation: Courts: Statutes.** A statutorily created court, such as the Workers' Compensation Court, has only such authority as has been conferred upon it by statute, and its power cannot extend beyond that expressed in the statute.

5. **Workers' Compensation: Jurisdiction: Attorney Fees.** While the compensation court has jurisdiction to decide ancillary matters to a workers' compensation claim, an award of attorney fees for the creation of a common fund is not within such ancillary jurisdiction when the entity from which such fees are sought is not a party to the case.
6. **Workers' Compensation: Parties.** No supplier or payor may be made or become a party to any action before the compensation court.
7. **Workers' Compensation: Due Process: Attorney Fees.** If a court is to order that money be taken from a payor and paid to an attorney, a significant property interest is involved.
8. **Workers' Compensation: Due Process: Notice.** If a significant property interest is shown, due process requires notice and an opportunity to be heard that is appropriate to the nature of the case.
9. **Workers' Compensation: Due Process: Attorney Fees: Costs.** Fundamental due process requires that a payor or supplier have a forum in which to be heard before it can be ordered to pay any attorney fees or costs.
10. **Due Process.** Due process minimally requires that absent countervailing state interest of overriding significance, persons forced to settle claims of right and duty through the judicial process must be given a meaningful opportunity to be heard.
11. **Trial: Evidence: Appeal and Error.** To preserve a claimed error in admission of evidence, a litigant must make a timely objection which specifies the ground of the objection to the offered evidence.
12. **Workers' Compensation.** Whether a reasonable controversy exists under Neb. Rev. Stat. § 48-125 (Reissue 2010) is a question of fact.
13. **Workers' Compensation: Appeal and Error.** On appellate review of a workers' compensation award, the trial judge's factual findings have the effect of a jury verdict and will not be disturbed unless clearly wrong.
14. **Workers' Compensation.** A reasonable controversy under Neb. Rev. Stat. § 48-125 (Reissue 2010) may exist (1) if there is a question of law previously unanswered by the appellate courts, which question must be answered to determine a right or liability for disposition of a claim under the Nebraska Workers' Compensation Act, or (2) if the properly adduced evidence would support reasonable but opposite conclusions by the Nebraska Workers' Compensation Court concerning an aspect of an employee's claim for workers' compensation, which conclusions affect allowance or rejection of an employee's claim, in whole or in part.
15. **Workers' Compensation: Penalties and Forfeitures.** To avoid the penalty provided for in Neb. Rev. Stat. § 48-125 (Reissue 2010), an employer need not prevail on an employee's claim for compensation, but must have an actual basis in law or fact for disputing the claim and refusing compensation.
16. **Expert Witnesses.** "Magic words" indicating that an expert's opinion is based on a reasonable degree of medical certainty or probability are not necessary.
17. ____. An expert opinion is to be judged in view of the entirety of the expert's opinion and is not validated or invalidated solely on the basis of the presence or lack of the magic words "reasonable medical certainty."

18. **Pleadings: Waiver.** An admission made in a pleading on which the trial is had is more than an ordinary admission; it is a judicial admission and constitutes a waiver of all controversy so far as the adverse party desires to take advantage of it, and therefore is a limitation of the issues.
19. **Workers' Compensation.** An injured worker may recover workers' compensation benefits for a new injury resulting from medical or surgical treatment of a compensable injury, even though the new injury was not incurred while performing work duties.
20. **Workers' Compensation: Penalties and Forfeitures.** A 50-percent waiting-time penalty cannot be awarded when there is an award of delinquent medical payments, because that remedy is available only on awards of delinquent payments of disability or indemnity benefits, not on awards of medical payments.
21. **Workers' Compensation: Attorney Fees: Interest.** When an attorney fee is allowed pursuant to Neb. Rev. Stat. § 48-125 (Reissue 2010), interest shall be assessed on the final award of weekly compensation benefits, but interest is not proper for medical payments, because an award of medical payments is not one of the weekly compensation benefits for which interest, penalties, and attorney fees are available under § 48-125.

Appeal from the Workers' Compensation Court. Affirmed in part, and in part reversed and remanded with directions.

Terrence J. Salerno for appellant.

Justin High, of McAnany, Van Cleave & Phillips, P.C., for appellees.

IRWIN, SIEVERS, and PIRTLE, Judges.

SIEVERS, Judge.

The primary question before us is whether the Nebraska Workers' Compensation Court can compel the plaintiff's private health insurer, which was awarded its subrogation interest for payments it made on the plaintiff's behalf, to pay an attorney fee to the plaintiff's attorney. We answer that question in the negative, because in this case, Blue Cross Blue Shield (BC/BS), the holder of the subrogation interest, was not a party to the litigation in which such fees were sought. We also find that the trial judge erred in concluding that there was a reasonable controversy which prevented an award of penalty, interest, and attorney fees under Neb. Rev. Stat. § 48-125 (Reissue 2010).

FACTUAL AND PROCEDURAL BACKGROUND

On March 15, 2010, Lorina Heesch was performing her normal job duties at Swimtastic Swim School (Swimtastic), when she bent over to reach into the pool and felt a "pop" in her lower back. The trial judge's award recites that the parties stipulated in the pretrial order (which is not in our record) that (1) Heesch was employed by Swimtastic at a weekly wage of $273, (2) she suffered an injury to her back by an accident on March 15, and (3) she suffered an allergic reaction to her medical treatment (epidural cortisone injections), all of which arose out of and in the course of her employment, according to the stipulation. The award further recites that pursuant to the pretrial order, the "issues for trial" were whether the medical treatment Heesch had received to date was reasonable and necessary and, in addition, whether the treatment related to her work injury—which seems inconsistent with the court's recitation of the issues stipulated to in the pretrial order. The court also said that at issue were whether there is a need for continuing medical care, whether there is a reasonable controversy over the refusal of Swimtastic and its insurer (collectively the defendants) to pay "medical indemnity benefits," and whether Heesch is entitled to attorney fees and penalties.

At the outset, we think it is important to note that on March 30, 2011, the defendants filed an amended answer in which they admitted all the allegations of Heesch's petition, with the exception of her allegation that her back condition necessitated epidural injections, which caused an anaphylactic reaction requiring referral to and treatment by an allergist. Thus, summarized, the effect of the amended answer was an admission that Heesch had sustained the compensable on-the-job back injury that she alleged. In paragraph 6 of the petition, Heesch alleged that the matters in dispute were the extent of her disability, "continued medical care and treatment, payment of medical bills, temporary total disability benefits, permanent partial disability benefits, and other benefits as allowed by [law]." The defendants' amended answer admitted these were the disputed issues, and the trial judge's

award reflects that these were the issues tried and submitted for decision.

Heesch underwent conservative treatment for her back condition, including three epidural injections that caused an allergic reaction, which has resulted in hypersensitivity to various chemicals that continued up to the time of trial. Her hypersensitivity is manifested by difficulty in breathing, occasionally a tight chest, coughing, itchy and popping ears, and an itchy and scratchy throat. In July 2011, it was felt that conservative treatment, including extensive physical therapy, had been exhausted, and a neurosurgeon recommended and ultimately performed surgery on Heesch's lower back, which lessened her back and upper leg pain, but not the pain in her lower leg. At trial on January 30, 2012, the neurosurgeon's questionnaire was received in evidence, in which she opined that Heesch had not reached maximum medical improvement, that she would need further medical care and treatment, and that while she would have physical limitations, such could not yet be determined. The trial court determined that Heesch had not achieved maximum medical improvement and that any finding of permanent disability or loss of earning capacity would be premature.

The trial court's decision sets forth an itemized listing, derived from exhibit 16, of medical service providers and the costs charged by each provider. According to exhibit 16, the total charged medical expenses were $93,457.07, BC/BS was billed $42,919.96, and $22,683.39 was paid toward the medical expenses. After finding that all of the medical treatments received by Heesch as detailed by exhibits 1 through 18 were "reasonable and necessary and directly related to [Heesch's] work injury of March 15, 2010," the trial court ordered that the defendants shall pay all of the listed expenses to the listed providers, "less any amounts paid by [BC/BS]." The court further ordered that the "[d]efendant[s] shall reimburse [BC/BS] as its interest appears in Exhibit 16." It is clear from the evidence and briefing that there is no disagreement that the amount to be paid to BC/BS under this portion of the decision is $22,683.39. However, the trial court rejected Heesch's claim that BC/BS should pay her attorney a fee

for the recovery of the BC/BS subrogation interest that was ordered as part of the decision on her workers' compensation claim. The trial judge denied the fee on the basis that BC/BS was not a party to this litigation, citing our decision in *Kaiman v. Mercy Midlands Medical & Dental Plan*, 1 Neb. App. 148, 491 N.W.2d 356 (1992). Heesch has appealed. The defendants do not cross-appeal.

ASSIGNMENTS OF ERROR

Heesch's first assignment of error, restated, is that the compensation court erred in its determination that it lacked jurisdiction to decide whether her attorney was entitled to a fee from BC/BS for securing the recovery of its subrogation interest. Second, Heesch claims that the trial judge erred in admitting "the medical report of Dr. Mercier" and in finding that such report created a reasonable controversy. Finally, Heesch claims that no reasonable controversy could have existed after the neurosurgeon performed surgery in July 2011 and after the report of an independent medical examiner in September 2011.

STANDARD OF REVIEW

[1,2] With respect to questions of law in workers' compensation cases, an appellate court is obligated to make its own determination. *Tapia-Reyes v. Excel Corp.*, 281 Neb. 15, 793 N.W.2d 319 (2011). In determining whether to affirm, modify, reverse, or set aside a judgment of the Workers' Compensation Court review panel, a higher appellate court reviews the findings of fact of the single judge who conducted the original hearing; the findings of fact of the single judge will not be disturbed on appeal unless clearly wrong. *Stacy v. Great Lakes Agri Mktg.*, 276 Neb. 236, 753 N.W.2d 785 (2008).

ANALYSIS

Is Injured Worker's Counsel Entitled to Be Awarded Fee by Workers' Compensation Court for Recovery of Worker's Private Health Insurer's Subrogation Interest?

The question presented above is a question of law on which we reach an independent conclusion. In 1992, this court

authored *Kaiman, supra*. Our *Kaiman* decision was succinctly summarized by the Nebraska Supreme Court in *Kindred v. City of Omaha Emp. Ret. Sys.*, 252 Neb. 658, 662, 564 N.W.2d 592, 596 (1997):

> In *Kaiman*, an attorney who had obtained a favorable award for his client in a workers' compensation action filed an action against a health maintenance organization (HMO) which had received reimbursement from the award for medical expenses which it had paid on behalf of the injured worker. The attorney brought an action against the HMO in which he sought a percentage fee on the amount of the reimbursement under the common fund doctrine. The district court sustained a demurrer and dismissed the action. The Court of Appeals reversed, holding that the common fund doctrine permitted an injured worker "to shift an appropriate share of the cost of the litigation to a health care insurer *who directly and substantially benefits by the litigation through reimbursement*." (Emphasis supplied.) 1 Neb. App. at 162, 491 N.W.2d at 363.

At the outset, *Kaiman, supra*, is procedurally different from the present case, because there, the health maintenance organization that gained the recovery of the payments it had made on the injured worker's behalf was sued in the district court. In contrast, in the present case, BC/BS, against which the attorney fee is sought to be assessed, is not a party to this litigation occurring in the Workers' Compensation Court.

In *Kaiman v. Mercy Midlands Medical & Dental Plan*, 1 Neb. App. 148, 491 N.W.2d 356 (1992), Patty Junge, an employee of Bergan Mercy Hospital, asserted that she had sustained an on-the-job injury for which compensation benefits were denied. Junge had private health insurance with Mercy Midlands Medical and Dental Plan (Mercy Midlands), which paid $13,554.38 for medical expenses for her injury. Junge retained an attorney, who filed the workers' compensation suit that resulted in an award in Junge's favor. As a result of the award in Junge's favor, Mercy Midlands received full reimbursement of the $13,554.38 it had paid to Junge's medical providers. Junge's attorney then filed suit against Mercy Midlands in the district court for Douglas County, seeking

judgment against Mercy Midlands in the amount of $4,518.13 for a one-third attorney fee. Mercy Midlands filed a demurrer, which asserted that the district court lacked jurisdiction and that the petition failed to state a cause of action. The district court sustained the demurrer without comment or opinion. Junge's attorney perfected his appeal and assigned the sustaining of the demurrer as error. Our opinion said: "We must determine whether the petition states a cause of action, and if so, where jurisdiction lies." *Id.* at 150, 491 N.W.2d at 357.

After a lengthy examination of authority from Nebraska and other jurisdictions, we found that the petition did state a cause of action, concluding: "We cannot find, nor are we able to articulate, any logical, fair, or equitable reason why a health care insurer who receives reimbursement should not share in the cost of obtaining that reimbursement." *Id.* at 161, 491 N.W.2d at 363. Thus, we found that the common fund doctrine was applicable. However, we cited a previous version of Neb. Rev. Stat. § 48-120(8) (Reissue 2010), which provided, and still does, that

> [t]he compensation court shall order the employer to make payment directly to the supplier of any [medical] services provided for in this section or reimbursement to anyone who has made any payment to the supplier for services provided in this section. *No such supplier or payor may be made or become a party to any action before the compensation court.*

(Emphasis supplied.)

Thus, the compensation court has statutorily conferred jurisdiction to order the payment to be made to BC/BS. In *Kaiman*, the litigation over fees for creating the common fund was in the district court, rather than as here, where we have a claim advanced in the workers' compensation case. Heesch's brief correctly points out that the Nebraska Workers' Compensation Act was amended in 1990, specifically Neb. Rev. Stat. § 48-161 (Reissue 2010), so that such statute provides: "All disputed claims for workers' compensation shall be submitted to the Nebraska Workers' Compensation Court for a finding, award, order, or judgment. *Such compensation court shall have jurisdiction to decide any issue ancillary to*

the resolution of an employee's right to workers' compensation benefits . . . ." (Emphasis supplied.)

Heesch calls our attention to the Supreme Court's opinion in *Midwest PMS v. Olsen*, 279 Neb. 492, 778 N.W.2d 727 (2010), as support for her position that the compensation court can now award an attorney fee in the present case under the ancillary jurisdiction provided for in § 48-161 via the 1990 amendment. *Midwest PMS* initially notes that the ancillary jurisdiction was added to the statute by 1990 Neb. Laws, L.B. 313, which was enacted in response to the Supreme Court's opinion in *Thomas v. Omega Re-Bar, Inc.*, 234 Neb. 449, 451 N.W.2d 396 (1990). That legislation abrogated the majority's decision and adopted the three dissenting justices' language that the Workers' Compensation Court should "'have jurisdiction to decide any issue ancillary to the resolution of an employee's right to workers' compensation benefits.'" *Midwest PMS*, 279 Neb. at 496, 778 N.W.2d at 731. The *Midwest PMS* court then noted the legislative history of § 48-161 suggests that the amendment was made at the request of the Workers' Compensation Court and that the Legislature's primary concern was that a claimant's compensation might be delayed if the Workers' Compensation Court was unable to resolve ancillary issues that affected the claimant's ability to obtain benefits. Clearly, whether BC/BS has to pay Heesch's attorney a fee for creating its right to recover its subrogation interest does not affect Heesch's right to compensation benefits.

[3] In *Midwest PMS, supra*, the two "dueling" insurers were both parties to the litigation, and one insurer was arguing that it was entitled to be reimbursed by the other carrier for the workers' compensation benefits it had paid for and on behalf of the injured worker. But in *Midwest PMS*, by the time of trial, the worker's claim had already been fully resolved by a lump-sum settlement. Thus, the court phrased the issue as "[w]hether the court's jurisdiction over issues 'ancillary to the resolution of an employee's right to workers' compensation benefits' terminates when the employee's right to benefits is no longer at issue." *Id.* at 497, 778 N.W.2d at 732, citing *Schweitzer v. American Nat. Red Cross*, 256 Neb. 350, 591 N.W.2d 524 (1999). In answering the question in the negative, the court reasoned that

"'[a]ncillary jurisdiction' is the power of a court to adjudicate and determine matters incidental to the exercise of its primary jurisdiction of an action." *Midwest PMS*, 279 Neb. at 497, 778 N.W.2d at 732. The *Midwest PMS* court noted that a subrogation claim was involved, as it is in this case, but the two insurers who were involved in *Midwest PMS* were both parties to the litigation.

[4,5] In *Schweitzer*, the court held: "A statutorily created court, such as the Workers' Compensation Court, has only such authority as has been conferred upon it by statute, and its power cannot extend beyond that expressed in the statute." 256 Neb. at 358, 591 N.W.2d at 530, citing *Jolly v. State*, 252 Neb. 289, 562 N.W.2d 61 (1997). While the compensation court has jurisdiction to decide ancillary matters to a workers' compensation claim, such as which of two workers' compensation insurers is liable for an injury, there is no authority cited by Heesch that holds that an award of attorney fees for the creation of a common fund is within such ancillary jurisdiction when the entity from which such fees are sought is not a party to the case, and we know of no such authority.

[6-10] Earlier in our opinion, we cited § 48-120(8), which provides in part: "No such supplier or payor [of medical services] may be made or become a party to any action before the compensation court." Obviously, in the case before us, BC/BS is a "payor," and as such, it cannot be a party to this case. If a court is to order that money be taken from BC/BS and paid to an attorney, a property right of significance is involved. If a significant property interest is shown, due process requires notice and an opportunity to be heard that is appropriate to the nature of the case. *Prime Realty Dev. v. City of Omaha*, 258 Neb. 72, 602 N.W.2d 13 (1999). In short, BC/BS should have a forum and an opportunity to be heard on what fee, if any, it owes Heesch's attorney. This takes us back to the core rationale of our decision in *Kaiman v. Mercy Midlands Medical & Dental Plan*, 1 Neb. App. 148, 164, 491 N.W.2d 356, 365 (1992):

> We hold that fundamental due process requires that Mercy Midlands, as well as any other similarly situated payor or supplier, have a forum in which to be heard

> before it can be ordered to pay any attorney fees or costs. Due process minimally requires that absent countervailing state interest of overriding significance, persons forced to settle claims of right and duty through the judicial process must be given a meaningful opportunity to be heard.

None of the cases cited by Heesch in support of this claim of error have abrogated or weakened this fundamental concept. And, the statutory prohibition against a payor, such as BC/BS was in this case, being a party is still operative, given that the Legislature has not acted to change or modify the holding of *Kaiman, supra*. For these reasons, the Workers' Compensation Court did not err in holding that it lacked jurisdiction to grant an award of attorney fees to Heesch's counsel for enforcing BC/BS' subrogation rights. As *Kaiman* illustrates, there is another proper forum for such claim.

Did Trial Judge Err in Admitting Reports of Dr. Lonnie Mercier and Finding That Such Reports Created Reasonable Controversy?

[11] Heesch asserts that "the medical report of Dr. Mercier," the medical examiner for the defense, was improperly admitted. However, there are two reports from him in evidence, one dated November 11, 2010 (exhibit 21), and one dated January 3, 2012 (exhibit 25), and the assignment of error does not specify which report was allegedly wrongfully admitted. The trial judge found that while he was "not impressed with the overall analysis provided by Dr. Mercier, his reports provide the bare minimum to establish a reasonable controversy" so as to prevent an award of attorney fees and penalties. While the assignment of error is nonspecific as to which of the two reports the inadmissibility claim relates to, it appears from the argument section that it is the first report, exhibit 21, that is the intended target of this assignment. This conclusion comes from the argument asserting that exhibit 21 is the "sole basis" that was relied upon by the defendants for terminating medical care and treatment for Heesch. Brief for appellant at 11. However, when the defendants offered exhibit 21, Heesch's counsel stated: "I have no objection." Therefore, without an objection, the trial judge

did not err in admitting exhibit 21. See *Allphin v. Ward*, 253 Neb. 302, 570 N.W.2d 360 (1997) (to preserve claimed error in admission of evidence, litigant must make timely objection which specifies ground of objection to offered evidence). Thus, exhibit 21 was properly admitted and this assignment of error is without merit.

Was There Reasonable Controversy That Would Avoid the Defendants' Having to Pay Statutory Penalties?

The third assignment of error alleges error on the part of the trial judge in concluding that there was a reasonable controversy "after the July 2011 surgery . . . and the receipt of the report of the court appointed [independent medical examiner] in September 2011." Our analysis is somewhat complicated by the trial judge's failure to specify what the reasonable controversy was; e.g., over causation, nature of treatment, extent of disability, or all of such or some combination thereof. However, the defendants' brief argues that they are responsible only for

> the reasonable and necessary medical treatment that is proximately caused by a work-related injury. [Heesch] did not allege that her allergic reaction was caused by an independent injury or occupational exposure to any substances in . . . Swimtastic's facility. The allergic reaction was solely related to the injections [Heesch] received in the course of treatment that was proscribed for her back injury. As such, a reasonable controversy with regard to [Heesch's] back injury applies to any issues related to the treatment of that back injury.

Brief for appellees at 17-18.

[12-15] First, we set forth the legal principles that are applicable to the analysis of the reasonable controversy issue. *Manchester v. Drivers Mgmt.*, 278 Neb. 776, 775 N.W.2d 179 (2009), teaches that whether a reasonable controversy exists under § 48-125 is a question of fact. On appellate review of a workers' compensation award, the trial judge's factual findings have the effect of a jury verdict and will not be disturbed unless clearly wrong. *Lagemann v. Nebraska Methodist Hosp.*,

277 Neb. 335, 762 N.W.2d 51 (2009). A reasonable controversy under § 48-125 may exist (1) if there is a question of law previously unanswered by the appellate courts, which question must be answered to determine a right or liability for disposition of a claim under the Nebraska Workers' Compensation Act, or (2) if the properly adduced evidence would support reasonable but opposite conclusions by the Nebraska Workers' Compensation Court concerning an aspect of an employee's claim for workers' compensation, which conclusions affect allowance or rejection of an employee's claim, in whole or in part. See *Guico v. Excel Corp.*, 260 Neb. 712, 619 N.W.2d 470 (2000). To avoid the penalty provided for in § 48-125, an employer need not prevail on the employee's claim, but must have an actual basis in law or fact for disputing the claim and refusing compensation. See *Mendoza v. Omaha Meat Processors*, 225 Neb. 771, 408 N.W.2d 280 (1987).

Here, the prime issue is whether the defendants have an actual basis in fact for disputing the claim. Dr. Lonnie Mercier's first report, exhibit 21, does not address causation of Heesch's back condition in any way, so it obviously does not provide the necessary factual basis for a finding of reasonable controversy on causation.

[16,17] Exhibit 25, Mercier's second report, dated January 3, 2012, was received over the objection of Heesch's counsel on competence and relevance and on the ground that the opinions found therein were not stated "to a reasonable degree of medical probability or certainty." However, the third assignment of error does not attack the report's admissibility, but, rather, it assigns that the court erred in finding a reasonable controversy existed after Heesch's July 2011 surgery. "Magic words" indicating that an expert's opinion is based on a reasonable degree of medical certainty or probability are not necessary. *Richardson v. Children's Hosp.*, 280 Neb. 396, 787 N.W.2d 235 (2010). An expert opinion is to be judged in view of the entirety of the expert's opinion and is not validated or invalidated solely on the basis of the presence or lack of the magic words "reasonable medical certainty." *Id.* In the end, because the assignment of error does not raise the issue of admissibility, we deem that exhibit 25 was properly admitted.

When we review Mercier's January 3, 2012, report, it is clear his opinion was that Heesch had not sustained an on-the-job injury to her back at the Swimtastic pool in March 2010. His report recites: "I do not believe that any diagnosis can be connected with the activities of March 15 in that I do not believe an actual 'injury' was sustained. . . . I do not connect any diagnosis with any alleged injury of that date."

[18] Heesch's petition clearly alleged a back injury arising out of and in the course of her employment by Swimtastic on March 15, 2010, while she was "bending and reaching over the side of the pool giving instructions to a child when she felt a pop in her back." The occurrence of the work injury is alleged in paragraphs 2, 3, and 4 of the petition. In an amended answer filed March 30, 2011, the defendants expressly admit the allegations of paragraphs 2, 3, and 4. Additionally, while we do not have the pretrial order in our record, the trial judge's award recites that the parties stipulated pursuant to the pretrial order that Heesch suffered "an injury by accident to her back, and an allergic reaction to medical treatment, arising out of and in the course and scope of her employment." But because we do not have the stipulation in our record, we do not rely on it. However, the admissions in the amended answer are judicial admissions which bind the defendants. See *Saberzadeh v. Shaw*, 266 Neb. 196, 663 N.W.2d 612 (2003) (admission made in pleading on which trial is had is more than ordinary admission; it is judicial admission and constitutes waiver of all controversy so far as adverse party desires to take advantage of it, and therefore is limitation of issues).

In short, the amended answer filed March 30, 2011, completely resolved in Heesch's favor the question of whether she had sustained an on-the-job back injury on March 15, 2010. That she had sustained such injury was an established fact to be relied upon and considered by the trial judge in assessing Heesch's claim for attorney fees, interest, and the 50-percent waiting-time penalty provided for in § 48-125, because of a lack of reasonable controversy. And Mercier's opinion that she had not sustained such an injury is clearly nullified by the judicial admission and, thus, does not play any role in the assessment of whether there was a reasonable controversy.

Therefore, there was no reasonable controversy about the basic compensability of Heesch's workers' compensation claim of March 15.

At oral argument, and in their brief, the defendants asserted that the question of the connection of the allergic reaction from injections to the back condition is the basis for the trial judge's finding that there was a reasonable controversy. There was, according to the award, a stipulation that the allergic reaction to medical treatment arose out of and in the course and scope of Heesch's employment, but without such in our record, we cannot rely on a stipulation that is not before us. However, the defendants' own expert, Mercier, says in exhibit 25, his January 3, 2012, report: "I believe that the treatment that . . . Heesch has undergone is certainly reasonable and necessary." Although he qualifies that by saying that the "[treatment] is not connected with any activity of March 15, 2010 for the reasons that I stated previously." Those reasons are, of course, that he believes that she did not sustain an injury on March 15, 2010. But, as explained above, the defendants' judicial admissions effectively nullify, and render immaterial, Mercier's opinion that she was not injured on March 15. Therefore, the defendants' admission that Heesch had sustained a compensable back injury on March 15, when coupled with Mercier's opinion that all of her treatment was "reasonable and necessary" for her back condition, means that the defendants provided no factual basis that her treatment was not reasonable and necessary, including the epidural injections.

[19] Moreover, we think Nebraska law is clear that an injury suffered in the course of reasonable treatment for a compensable injury is likewise compensable. In *Smith v. Goodyear Tire & Rubber Co.*, 10 Neb. App. 666, 636 N.W.2d 884 (2001), we concluded that the injured worker was entitled to workers' compensation benefits for an injury that he suffered while he received physical therapy as treatment for compensable injuries he had sustained while on the job. In *Smith*, we recognized the legal proposition that an injured worker may recover workers' compensation benefits for a new injury resulting from medical or surgical treatment of a compensable injury, even though the new injury was not incurred while performing work duties.

The Nebraska Supreme Court approved our *Smith* holding and rationale and applied it in *Bennett v. Saint Elizabeth Health Sys.*, 273 Neb. 300, 729 N.W.2d 80 (2007).

Therefore, in this present case, it is clear that epidural injections were a reasonable conservative treatment measure, which had adverse health consequences requiring diagnoses and treatment, and that the associated expenses are compensable. Thus, we reject the defendants' argument that the resulting adverse consequences of the injections were not compensable medical expenses, and further, we find that there was no factual evidence, including expert opinion, to support the defendants' argument so as to create a reasonable controversy about the compensability of the injections, as well as the diagnosis and treatment of the allergic reactions to the injections that Heesch suffered. Finally, we note the lack of a cross-appeal of the trial judge's findings that a compensable injury occurred on March 15, 2010, or that the medical expenses resulting therefrom, including those for the allergic reaction to the injections, were compensable. Thus, we need not detail the evidence supporting such findings other than observing that the record clearly supports such conclusions.

[20,21] However, before proceeding further, we point out that a 50-percent waiting-time penalty cannot be awarded when there is an award of delinquent medical payments, because that remedy is available only on awards of delinquent payments of disability or indemnity benefits, not on awards of medical payments. See *Bronzynski v. Model Electric*, 14 Neb. App. 355, 707 N.W.2d 46 (2005). Additionally, when an attorney fee is allowed pursuant to § 48-125, interest shall be assessed on the final award of weekly compensation benefits, but interest is not proper for medical payments, because an award of medical payments is plainly not one of the "weekly compensation benefits" for which interest, penalties, and attorney fees are available under § 48-125. See *Bronzynski, supra*. In the present case, Heesch apparently missed little work, because her award of temporary total and temporary partial benefits was only $659.05. In any event, we find that she is entitled to recover the penalty, interest, and attorney fees because she was awarded some such "compensation"

payments. We additionally note that § 48-125(2) provides a limitation: "Attorney's fees allowed shall not be deducted from the amounts ordered to be paid for medical services nor shall attorney's fees be charged to the medical providers." In short, the attorney fees under such subsection are in addition to the payment of the medical expenses themselves that the award requires the defendants to pay.

CONCLUSION

For the reasons set forth above, we find that the Workers' Compensation Court trial judge's decision denying an award of fees from BC/BS for the award of its subrogation interest was correct as a matter of law. However, taking the defendants' judicial admissions in their amended answer along with Mercier's admission that all treatment for Heesch's back condition was necessary and reasonable means that there was no reasonable controversy over either the compensability of her injury or the compensability of her medical expenses, including for the allergic reaction she suffered from the epidural injections. Therefore, the trial court was clearly wrong in finding that there was a reasonable controversy, and as a result, we remand the cause to the compensation court trial judge for assessment of the 50-percent waiting-time penalty, interest, and attorney fees as provided for in § 48-125.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED WITH DIRECTIONS.