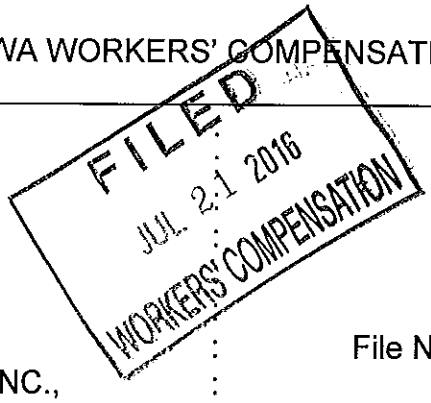
BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER



MARCUS HILLIARD,

Claimant,

vs.

ABF FREIGHT SYSTEM, INC.,

Employer,

and

ACE AMERICAN INSURANCE COMPANY,

Insurance Carrier,
Defendants.

File Nos. 5052136, 5052137

ARBITRATION

DECISION

Head Note Nos.: 1803, 3000

STATEMENT OF THE CASE

These are proceedings in arbitration. The contested cases were initiated when claimant, Marcus Hilliard, filed his original notices and petitions with the Iowa Division of Workers' Compensation. The petitions were filed on January 16, 2015. Claimant alleged he sustained two work-related injuries. In File No. 5052136, claimant alleged he sustained a work-related injury on August 8, 2013. A first report of injury was filed on January 30, 2014. In File No. 5052137, claimant alleged he sustained a work-related injury on February 17, 2014. (Original notices and petitions) A first report of injury was filed on September 18, 2015.

ABF Freight System Inc., is located in Cedar Rapids, Iowa. For purposes of Workers' Compensation, the employer is insured by ACE American Insurance Company.

The hearing administrator scheduled the cases for hearing on April 13, 2016 at 1:00 p.m. The hearing took place in Des Moines, Iowa at the Iowa Workforce Development building. The undersigned appointed Ms. Julie M. McCurnin as the certified shorthand reporter. She is the official custodian of the records and notes.

Claimant testified on his own behalf. Defendants elected not to call any witnesses.

The parties offered exhibits. Claimant offered Exhibits marked 1 through 14. All exhibits were admitted with the exception of Exhibit 11, pages 4 and 5. Defendants offered Exhibits marked A through G. All proffered exhibits from defendants were admitted as evidence in the case.

Post-hearing briefs were due on May 16, 2016. The case was deemed fully submitted on that date.

STIPULATIONS

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

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

2. Claimant sustained work injuries on August 8, 2013 and February 17, 2014, which arose out of and in the course of his employment;

3. The injuries caused a temporary disability;

4. The parties agree claimant was off work from December 22, 2014 through February 19, 2016;

5. The parties agree claimant reached maximum medical improvement on February 19, 2016;

6. The parties agree the weekly benefit rates are as follows:

    a. August 9, 2013 $705.46

    b. February 17, 2014 $720.14

7. Defendants have waived all affirmative defenses they may have had available to them;

8. Prior to the hearing, defendants paid benefits to claimant at the rate of $575.75 per week from December 22, 2014 through the date of the hearing; and

9. The parties do not dispute the costs claimant has paid to litigate the claim.

10. Defendants agree to compensate claimant for the independent medical examination performed by Dr. Adams in the amount of $1,700.00.

ISSUES

The issues presented are:

1. Whether claimant sustained a permanent disability as a result of the work injuries on August 8, 2013 and/or February 17, 2014;

2. If claimant sustained a permanent disability, there is the issue of the extent of the industrial disability;

3. Claimant is seeking reimbursement for an independent medical examination pursuant to Iowa Code section 85.39;

4. Whether claimant is entitled to alternate medical care pursuant to Iowa Code section 85.27;

5. Whether there has been an underpayment of the weekly benefits rate; and

6. Whether claimant is entitled to penalty benefits pursuant to Iowa Code section 86.13.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

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

Claimant is now 36 years old. He is married with three minor children. Claimant resides on his farm in Brandon, Iowa in Buchanan County. Brandon is a very small community of just 311 residents. Claimant's parents also reside with claimant and his family on the farm. Claimant has 140 acres with crops and he raises 50 head of cattle.

Claimant graduated from Washington High School in Vinton, Iowa in 1998. He testified he earned C and D grades during high school. Claimant reported he has only limited computer skills.

After his graduation from high school, claimant commenced employment with Stickle Warehousing. He also obtained a commercial drivers' license that year. It is valid until June 2, 2019. Claimant continued to work for Stickle until 2007.

In 2005, claimant started working as a casual driver for ABF Freight System, Inc. Claimant worked as a casual driver until he was hired as a full time employee on September 10, 2007. Claimant was hired to drive a forklift truck, or a semi-tractor

trailer. He checked in freight, picked up freight, hooked trailers, and lifted trailers, as well as delivered all types of goods. There were weeks when claimant worked overtime hours.

On August 8, 2013, claimant was unloading a semi-trailer with a forklift at the ABF Cedar Rapids terminal. While driving backward out of the trailer, claimant hit the dock plate with the forklift. The forklift stopped suddenly, and jerked claimant. The jolt caused the fuel tank strap on the forklift to hit the back of the seat. Claimant's hat flew from his head. The entire terminal building shook. The undercarriage of the forklift was deemed inoperable. Claimant's foreman, Mr. Tim Russler, viewed the accident from his office window and assisted claimant. Claimant testified he was confused, not orientated to his surroundings; he had blurred vision, and a sore neck.

On August 27, 2013, claimant visited the Urgent Care Clinic in Hiawatha because his head was jarred at work and he hit his head. (Exhibit 1, page 1) Claimant did not inform his employer he was seeking medical treatment. His health and accident insurance paid for the care.

The medical history claimant reported consisted of:

> Subjective: Patient is in today reporting headache over the past 3 days with pain in the frontal, retro-ocular and occipital region. He also states that his neck and eyes hurt. Headache is described as sharp and throbbing however states that it is better now. He reports at times he has felt light-sensitive and having trouble focusing. States that 3 weeks ago he hit his head at work but this felt better after one week and he states that headache increased during sexual activity. Denies any gastrointestinal upset, paresis or paresthesis, prior history of headaches, family history of headaches, fever or respiratory symptoms. He had tried taking some ibuprofen, Tylenol and Excedrin Migraine with minimal relief,

(Ex. 1, p. 1) Jerome W. Janda, D.O., diagnosed claimant with "Headache, likely tension type." (Ex. 1, p. 1)

Claimant returned to Urgent Care-Westside on November 5, 2013. He complained of "left upper back/neck pain with pain going down his arm, states it is from a forklift accident at work in August." (Ex. 1, p. 3) Rebecca A. Watts, M.D., found claimant's neck had some tenderness in the paraspinous muscles. There was normal range of motion of the neck and shoulder. The strength in the upper extremities was symmetrical. (Ex. 1, p. 3) Claimant related the pain was due to his forklift injury. (Ex. 1, p. 3) Dr. Watts diagnosed claimant with "Back pain." Drug therapy was prescribed. (Ex. 1, p. 3)

On November 20, 2013, claimant returned to Urgent Care Westside. (Ex. 1, p. 4) Regina A. Butteris, M.D., diagnosed claimant with "Neck pain." Physical therapy was

ordered. (Ex. 1, p. 4) The physician found extension and flexion of the neck to be limited. (Ex. 1, p. 4)

Six days later, claimant returned to the same clinic. Casey J. Boyles, M.D., claimant's personal physician, examined claimant. (Ex. 1, pp. 6-7) Dr. Boyles diagnosed claimant with a post neck injury at work with left-sided radicular symptoms. (Ex. 1, p. 6) Dr. Boyles recommended MRI testing of the cervical spine. (Ex. 1, p. 6)

On December 2, 2013, claimant underwent a cervical MRI. The radiologist, Craig E. Clark, M.D., interpreted the results as:

1. Large left paracentral-left posterior lateral protrusion C5-C6 with neural foraminal narrowing and loss of disc space height.

2. Right neural foraminal narrowing C6-C7.

3. Moderate left neural foraminal narrowing C3-C4.

(Ex. 3)

Per a referral from Dr. Boyles, claimant saw Chad D. Abernathey, M.D., a neurosurgeon in Cedar Rapids, Iowa. (Ex. 2) The initial examination occurred on December 20, 2013. Dr. Abernathey opined:

> **IMPRESSION/RECOMMENDATIONS:** Mr. Marcus Hilliard clinically presents with left C6 radiculopathy secondary to left C5-6 disc extrusion with osteophyte formation and stenosis. I discussed the risks, goals, and alternatives of conservative management vs. surgical intervention with the patient in detail. I emphasized the risks of carotid, tracheal, esophageal, and cranial nerve injuries, non-fusion, collapse of fusion graft, dislocation of fusion, fusion complications, instability, CSF leak, spinal cord injury, vertebral artery injury, stroke, heart attack, death, infection, paralysis, sensorimotor deficits, bladder or bowel dysfunction, autonomic complications, persistent pain, allergic and adverse drug reactions, anesthetic complications, hemorrhage, phlebitis, DVT, PE, recurrence, possibility of persistent symptoms, instrumentation vs. non-instrumentation, allograft vs. autograft, and so on. He states he fully understands the breadth of our conversation and wishes to consider his options. He will contact me if and when he wishes to proceed with a C5-6 ACDF with instrumented allograft.

(Ex. 2, p. 1)

Claimant elected not to undergo the surgery at that time. He returned to work in the same capacity.

On February 17, 2014, claimant was unloading freight at the Cedar Rapids terminal at the same dock site where he had sustained his injury on August 8, 2013. A very similar accident occurred while claimant was driving a forklift truck. Claimant hit the dock plate; there was a sudden stop and claimant was jolted vigorously. Mr. Russler, the foreman, again assisted claimant, following the incident.

Claimant presented to the emergency room at St. Luke's Hospital in Cedar Rapids. Craig A. Hovda, M.D., examined claimant. Dr. Hovda diagnosed claimant with "Acute strain of the neck muscle." The physician prescribed medication and physical therapy for claimant. Claimant continued to work, although it was somewhat difficult for him to perform his regular duties.

On December 14, 2014, claimant presented to the Urgent Care Westside Clinic with complaints of right arm and neck pain as well as numbness and tingling in his right arm. (Ex. 1, p. 8) Claimant discussed his work injury that occurred on August 13, 2013. Gordon B. Urbi, M.D., attended to claimant. The physician removed claimant from work until he had an opportunity to be examined by Dr. Abernathey. (Ex. 1, p. 9) On December 22, 2014, Dr. Boyles, claimant's personal physician, removed claimant from work until after he had undergone cervical surgery. (Ex. 4)

Dr. Abernathey examined claimant on December 22, 2014. Claimant explained he was ready for surgery on the cervical spine. (Ex. 2, p. 3) Another MRI was ordered. Claimant's condition had deteriorated. The study showed: "large left C5-6 and right C6-7 disc protrusions with osteophyte formation and neuroforaminal stenosis." (Ex. 2, p. 3)

Per the request of defendants, claimant presented himself to Arnold Delbridge, M.D., for an independent medical examination. The examination occurred on March 16, 2015. (Ex. 7) Dr. Delbridge opined:

> On my exam on 3-16-15, Mr. Hilliard had markedly decreased range of motion of his cervical spine. His cervical spine motion was somewhat inhibited by pain and tightness but it was markedly decreased compared to expected. He could rotate his neck only 20 degrees and he had very limited flexion and limited extension. Side-to-side bending was at best 10-15 degrees on the right and 10 degrees on the left. Recently he woke up and his right arm would not move at all.
>
> On exam in my office, his fingers and wrists had some numbness on both sides. He could abduct to 90 degrees with his shoulder and flex to 130 degrees. He had weak grip in both hands. He had limited motion with his shoulders, limited grip and numbness in both hands with his neck mobility markedly compromised.
>
> The patient's difficulties are tied originally to his injury while at work with the fork lift. He was given a choice of surgery or conservative treatment in 2013. He chose conservative treatment but got steadily

> worse. He has now decided to go ahead with recommended surgery at two levels of his cervical spine.
>
> There is no convincing evidence of previous injuries and it is my conclusion that he at least materially aggravated his situation on August 8, 2013 at work.
>
> It is my conclusion that Dr. Abernathey's proposal of two level surgery and fixation is appropriate at this time. It is medically necessary and causally related to his injury.

(Ex. 7, pp. 2-3) Dr. Delbridge recommended claimant have the surgical procedure outlined by Dr. Abernathey. (Ex. 7, p. 3)

There was a delay in authorizing the surgery. Finally it was scheduled for August 13, 2015. Dr. Abernathey performed a "C5-C6 and C6-C7 anterior cervical diskectomy, osteophytectomy, instrumented allograft fusion, microscope." (Ex. 2, p. 5)

Subsequently, Dr. Abernathey opined the following with respect to claimant's spinal condition:

1. I believe that patient's ultimate need for surgical intervention is related to his alleged work injury. I do not see any clear evidence to the contrary.

2. I believe that the patient has achieved Maximum Medical Improvement at this point as of today, 2-19-16.

3. I would consider the patient to have an 11% whole body impairment rating as a result of a two level anterior cervical discectomy and fusion with instrumented allograft.

4. I do not believe that patient has or needs any restrictions related to his alleged work incidents.

(Ex. 2, p. 8)

Claimant requested an independent medical examination pursuant to Iowa Code section 85.39. Richard F. Neiman, M.D., a neurologist in Iowa City, examined claimant on October 7, 2015. (Ex. 8) Dr. Neiman opined claimant had a 20 percent permanent impairment rating according to the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition. Dr. Neiman placed claimant in DRE Cervical Category IV. (Ex. 8, p.3) Dr. Neiman attributed claimant's condition to the work injury on August 8, 2013. (Ex. 8, p. 3) The doctor did note there was an additional injury reported on February 17, 2014, but Dr. Neiman did not explain how the second injury impacted claimant's condition, if at all. (Ex. 8, p. 3)

Dr. Neiman recommended permanent work restrictions. The physician concluded claimant was not able to drive a forklift or other type of truck. Dr. Neiman opined claimant could lift in the range of 10 to 15 pounds with a maximum lift of 25 pounds but no more than 4 times per hour. (Ex. 8, p.3) Dr. Neiman recommended a pain clinic as an option for future medical treatment. (Ex. 8, p. 3)

At his arbitration hearing, claimant testified he requested another MRI in November 2015 but his request was denied. Claimant also testified he requested treatment in the form of pain management but that too was denied after an appointment had been scheduled. Claimant testified, he experienced tingling and numbness in his fingers, tingling in his biceps, pain in his shoulders and in his neck. He reported sleeping disturbances during the night.

During direct examination, claimant testified he had spoken to his supervisor, Dan Parnell, in January or February of 2016. Mr. Parnell inquired into the date claimant could return to work. Claimant testified he was not capable of performing the physical aspects of the job.

RATIONALE AND CONCLUSIONS OF LAW

The claimant has the burden of proving by a preponderance of the evidence that the injury is a proximate cause of the disability on which the claim is based. A cause is proximate if it is a substantial factor in bringing about the result; it need not be the only cause. A preponderance of the evidence exists when the causal connection is probable rather than merely possible. George A. Hormel & Co. v. Jordan, 569 N.W.2d 148 (Iowa 1997); Frye v. Smith-Doyle Contractors, 569 N.W.2d 154 (Iowa App. 1997); Sanchez v. Blue Bird Midwest, 554 N.W.2d 283 (Iowa App. 1996).

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 expert's opinion is based upon an incomplete history it is not necessarily binding on the commissioner or the court. It is then to be weighed, together with other facts and circumstances, the ultimate conclusion being for the finder of the fact. Musselman v. Central Telephone Company, 154 N.W.2d 128, 133 (Iowa 1967); Bodish v. Fischer, Inc., 257 Iowa 521, 522, 133 N.W.2d 867 (1965).

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

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

The evidence supports the conclusions; claimant sustained both a temporary and a permanent disability as a result of the two work injuries he sustained on August 8, 2013 and February 17, 2014. There are the medical opinions of the authorized treating surgeon, Dr. Abernathey, Dr. Delbridge, defendants' evaluating doctor, Dr. Neiman, claimant's independent medical examiner, and Dr. Boyles, claimant's personal physician. All physicians concur there was a nexus between claimant's condition and the forklift accidents.

It is the determination of the undersigned; the injury on August 8, 2013 caused a permanent condition. The injury on February 17, 2014 merely caused a temporary aggravation of claimant's condition after the August 8, 2013 injury.

Since claimant sustained a permanent injury to the cervical spine; the injury is to the body as a whole. Claimant is entitled to have his disability figured by the industrial method. Since claimant has an impairment to the body as a whole, an industrial disability has been sustained. Industrial disability was defined in Diederich v. Tri-City R. Co., 219 Iowa 587, 258 N.W. 899 (1935) as follows: "It is therefore plain that the legislature intended the term 'disability' to mean 'industrial disability' or loss of earning

capacity and not a mere 'functional disability' to be computed in the terms of percentages of the total physical and mental ability of a normal man."

Functional impairment is an element to be considered in determining industrial disability which is the reduction of earning capacity, but consideration must also be given to the injured employee's age, education, qualifications, experience, motivation, loss of earnings, severity and situs of the injury, work restrictions, inability to engage in employment for which the employee is fitted and the employer's offer of work or failure to so offer. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963); Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961).

Compensation for permanent partial disability shall begin at the termination of the healing period. Compensation shall be paid in relation to 500 weeks as the disability bears to the body as a whole. Section 85.34.

Claimant is a relatively young man with a high school education. He has no technical training beyond the high school level. He has either farmed or driven various types of trucks since he left high school. Claimant holds a current commercial drivers' license (CDL). The license does not expire until June 2, 2019. (Ex. 12, p. 3)

There are two impairment ratings for claimant. Dr. Abernathey rated claimant's permanent impairment of the cervical spine at 11 percent. It is true claimant underwent a serious surgical procedure. Dr. Neiman rated the permanent impairment of the cervical spine at 20 percent. Dr. Abernathey opined work restrictions were not warranted. Dr. Neiman imposed numerous work restrictions and even went so far as to deem claimant incapable of ever driving a forklift or other truck again. (Ex. 8, p. 3)

This deputy considers the restrictions imposed by Dr. Neiman to be extreme. Dr. Neiman examined claimant on one occasion only. When Dr. Neiman examined claimant, he was just two months post-surgery. Claimant was still in a healing period and had not reached maximum medical improvement. Dr. Neiman acknowledged claimant needed additional medical treatment. The undersigned does not accept the restrictions imposed by Dr. Neiman as legitimate. Since the writing of Dr. Neiman's independent medical report, claimant has had additional time to heal.

Claimant does not believe he is capable of returning to ABF Freight System, Inc., however, he and members of management have not negotiated a return to work date. Claimant has not even attempted to return to work on a schedule with reduced hours, in order to begin a work hardening program. From the evidence presented, it appears Mr. Parnell is interested in returning claimant to work. Claimant has not sought employment elsewhere.

In his deposition, claimant testified about his farming operation. He testified he decided to rent out the land in the fall of 2013 because claimant did not believe he could perform the physical tasks and because he thought renting the land would be financially

advantageous for his income status. (Ex. 12, p. 2) Claimant also testified he raises 50 head of cattle. (Ex. 12, pp. 2-3) Claimant feeds and waters the cattle; he drives a tractor and skid loader; he moves and opens gates which weigh up to 40 pounds. (Ex. 12, p. 6) There are occasions when claimant seeks help from family members.

In light of all of the factors involving industrial disability, it is the determination of the undersigned; claimant has sustained an industrial disability in the amount of thirty (30) percent as a result of the work injury on August 8, 2013. Defendants shall pay unto claimant, 150 weeks of permanent partial disability benefits at the weekly benefit rate of $705.46 per week. Said benefits shall commence from February 19, 2016. Defendants shall take credit for all benefits previously paid to claimant.

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

The next issue for resolution is the matter of healing period benefits. 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).

Claimant was off work and in a healing period from December 22, 2014 through February 19, 2016 when Dr. Abernathey opined claimant had reached maximum medical improvement. This was a period of 60.571 weeks. Defendants owe claimant healing period benefits for the same period at the rate of $705.46 per week. On April 22, 2015, the third party administrator tendered a check to claimant in the amount of $6,909.00. (Ex. 9, p. 1) The check covered the period from December 22, 2014 through March 15, 2015. This was a period of 12 weeks at the incorrect weekly benefit rate of $575.75. Then on June 1, 2015, the third party administrator tendered a check to claimant in the amount of $6,333.25. (Ex. 9, p.2) The check represented the period from March 16, 2015 through June 1, 2015. This was a period of 11 weeks at the incorrect weekly benefit rate of $575.75. Thereafter, claimant was paid healing period benefits until claimant had reached maximum medical improvement. However, the weekly benefits had been paid at the incorrect rate of $575.75. Defendants also owe interest, as required.

The third issue in the present case is the matter of penalty benefits pursuant to Iowa Code section 86.13. In Christensen v. Snap-on Tools Corp., 554 N.W.2d 254 (Iowa 1996), and Robbennolt v. Snap-on Tools Corp., 555 N.W.2d 229 (Iowa 1996), the supreme court said:

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

Christensen, 554 N.W.2d at 260.

The supreme court has stated:

(1) If the employer has a reason for the delay and conveys that reason to the employee contemporaneously with the beginning of the delay, no penalty will be imposed if the reason is of such character that a reasonable fact-finder could conclude that it is a "reasonable or probable cause or excuse" under Iowa Code section 86.13. In that case, we will defer to the decision of the commissioner. See Christensen, 554 N.W.2d at 260 (substantial evidence found to support commissioner's finding of legitimate reason for delay pending receipt of medical report); Robbennolt, 555 N.W.2d at 236.

(2) If no reason is given for the delay or if the "reason" is not one that a reasonable fact-finder could accept, we will hold that no such cause or excuse exists and remand to the commissioner for the sole purpose of assessing penalties under section 86.13. See Christensen, 554 N.W.2d at 261.

(3) Reasonable causes or excuses include (a) a delay for the employer to investigate the claim, Christensen, 554 N.W.2d at 260; Kiesecker v. Webster City Meats, Inc., 528 N.W.2d at 109, 111 (Iowa 1995); or (b) the employer had a reasonable basis to contest the claim—the "fairly debatable" basis for delay. See Christensen, 554 N.W.2d at 260 (holding two-month delay to obtain employer's own medical report reasonable under the circumstances).

(4) For the purpose of applying section 86.13, the benefits that are underpaid as well as late-paid benefits are subject to penalties, unless the employer establishes reasonable and probable cause or excuse. Robbennolt, 555 N.W.2d at 237 (underpayment resulting from application of wrong wage base; in absence of excuse, commissioner required to apply penalty).

> If we were to construe [section 86.13] to permit the avoidance of penalty if any amount of compensation benefits are paid, the purpose of the penalty statute would be

> frustrated. For these reasons, we conclude section 86.13 is applicable when payment of compensation is not timely . . . or when the full amount of compensation is not paid.

Id.

(5) For purposes of determining whether there has been a delay, payments are "made" when (a) the check addressed to a claimant is mailed (Robbennolt, 555 N.W.2d at 236; Kiesecker, 528 N.W.2d at 112), or (b) the check is delivered personally to the claimant by the employer or its workers' compensation insurer. Robbennolt, 555 N.W.2d at 235.

(6) In determining the amount of penalty, the commissioner is to consider factors such as the length of the delay, the number of delays, the information available to the employer regarding the employee's injury and wages, and the employer's past record of penalties. Robbennolt, 555 N.W.2d at 238.

(7) An employer's bare assertion that a claim is "fairly debatable" does not make it so. A fair reading of Christensen and Robbennolt, makes it clear that the employer must assert facts upon which the commissioner could reasonably find that the claim was "fairly debatable." See Christensen, 554 N.W.2d at 260.

Meyers v. Holiday Express Corp., 557 N.W.2d 502 (Iowa 1996).

Weekly compensation payments are due at the end of the compensation week. Robbennolt, 555 N.W.2d 229, 235.

Penalty is not imposed for delayed interest payments. Davidson v. Bruce, 593 N.W.2d 833, 840 (Iowa App. 1999). Schadendorf v. Snap-On Tools Corp., 757 N.W.2d 330, 338 (Iowa 2008).

When an employee's claim for benefits is fairly debatable based on a good faith dispute over the employee's factual or legal entitlement to benefits, an award of penalty benefits is not appropriate under the statute. Whether the issue was fairly debatable turns on whether there was a disputed factual dispute that, if resolved in favor of the employer, would have supported the employer's denial of compensability. Gilbert v. USF Holland, Inc., 637 N.W.2d 194 (Iowa 2001).

Defendants commenced payment of healing period benefits as outlined earlier in the body of this decision. The first payment was 12 weeks late and it did not cover all of the weeks that had transpired. The second payment was made 11 weeks later. The third party administrator did not explain why there was a delay in the payment of the benefits. All weekly benefits were paid at an inaccurate rate. There was a significant underpayment made with each weekly check. There was no explanation for the considerable underpayment.

Defendants argue they had no idea claimant was treating for a work-related cervical injury. They maintain Dr. Boyles' December 22, 2014 note took management by surprise, as claimant had been working his normal job duties without accommodation. Defendants then note a petition was filed on January 14, 2015 and the litigation process commenced. Defendants did not answer the petition until March 17, 2015. They denied the occurrence of the work injuries. The discovery process commenced. Defendants scheduled claimant for an independent medical examination with Dr. Delbridge on March 16, 2015. The physician authored his report on April 7, 2015. Dr. Delbridge determined claimant's condition was causally connected to his work injury.

There is some validity in defendants' argument about needing time to investigate the claim. However, when the third party administrator tendered the first check for healing period benefits on April 22, 2015, the check only covered the period from December 22, 2014 through March 16, 2015. The check should have covered the entire healing period through April 22, 2015. Then defendants did not make another payment until June 1, 2015. There was no explanation why there was such a delay between April 22nd and June 1st in making the second payment. Penalty benefits are in order for the delay and for the significant underpayment.

Under Iowa Code section 86.13, the workers' compensation commissioner has the authority to award penalty benefits up to 50 percent of the amount of the benefits that were denied, delayed, or terminated without reasonable or probable cause or excuse. It is the determination of the undersigned; defendants shall pay unto claimant; $2,000.00 in penalty benefits pursuant to Iowa Code section 86.13.

Claimant is requesting a return visit to Dr. Abernathey. In his notes from November 11, 2015, the neurosurgeon wrote in relevant portion:

> ...I discussed the risks, goals, and alternatives of various diagnostic and treatment options. He has undergone physical therapy without significant improvement. We mutually felt that he undergo new MRI and X-rays studies to better delineate the pertinent anatomy. Based upon the results of those studies, I will make additional neurosurgical recommendations. He states he fully understands.

(Ex. 2, p. 4)

An employer's right to select the provider of medical treatment to an injured worker does not include the right to determine how an injured worker should be diagnosed, evaluated, treated, or other matters of professional medical judgment. Assman v. Blue Star Foods, File No. 866389 (Declaratory Ruling, May 19, 1988).

Dr. Abernathey is the authorized treating neurosurgeon. Under Assman, defendants may not interfere into matters involving Dr. Abernathey's professional judgment. As soon as practicable, defendants shall schedule claimant for an

appointment with Dr. Abernathey, and defendants shall approve all tests deemed appropriate by the neurosurgeon.

Finally, there is the issue of the cost of the independent medical examination that Dr. Neiman provided. Section 85.39 permits an employee to be reimbursed for a 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: Dodd v. Fleetguard, Inc., 759 N.W.2d 133, 140 (Iowa App. 2008).

In this case, Dr. Delbridge provided an independent medical evaluation on March 16, 2015, but it was not for the purpose of rendering a permanent impairment rating. Claimant obtained an independent medical evaluation with Dr. Neiman on October 15, 2015. Defendants did not obtain an impairment rating from Dr. Abernathey until February 19, 2016. Therefore, claimant has failed to establish the necessary prerequisites to qualify for an employer-reimbursed examination pursuant to Iowa Code section 85.39. Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839, 843-844 (Iowa 2015).

ORDER

THEREFORE, IT IS ORDERED:

In File No. 5052137, claimant shall take nothing from these proceedings.

The remainder of the paragraphs relate to File No. 5052136.

Defendants shall pay unto claimant one hundred fifty (150) weeks of permanent partial disability benefits at the weekly benefit rate of seven hundred five and 46/100 dollars ($705.46) per week and commencing from February 19, 2016.

Defendants shall pay unto claimant healing period benefits from December 22, 2014 through February 19, 2016, and said benefits shall be paid at the weekly benefit rate of seven hundred five and 46/100 dollars ($705.46).

Defendants shall pay two thousand and 00/100 dollars ($2,000.00) in penalty benefits to claimant pursuant to Iowa Code section 86.13.

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

Defendants shall take credit for all benefits paid prior to the filing of this decision.

Costs are assessed to defendants.

Defendants shall file all requisite reports in a timely manner.

Signed and filed this 21st day of July, 2016.

Michelle A. McGovern

MICHELLE A. MCGOVERN
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

Copies To:

Matthew J. Petrzelka
Attorney at Law
1000 – 42nd St. SE, Ste. A
Cedar Rapids, IA 52403
mpetrzelka@petrzelkabreitbach.com

Stephen W. Spencer
Attorney at Law
6800 Lake Dr., Ste. 125
West Des Moines, IA 50266
steve.spencer@peddicord-law.com

MAM/sam

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.