BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

CHAD SIMONS,

Claimant,

vs.

MASTERBRAND CABINETS, INC. d/b/a OMEGA CABINETRY,

Employer,

and

ACE AMERICAN INSURANCE COMPANY,

Insurance Carrier,
Defendants.

File No. 5061998

ARBITRATION

DECISION

Head Notes: 1704, 1803.1, 3003, 4000.2

STATEMENT OF THE CASE

Claimant, Chad Simons, filed a petition in arbitration seeking workers' compensation benefits from Masterbrand Cabinets, Inc., d/b/a Omega Cabinetry (Omega), employer, and Ace American Insurance Company, insurer, both as defendants. This matter was heard in Waterloo, Iowa on February 19, 2019 with a final submission date of March 13, 2019.

The record in this case consists of Joint Exhibits 1-9, Claimant's Exhibits 1-7, Defendants' Exhibits A-G, and the testimony of claimant and Jeffrey Orr.

The parties filed a hearing report at the commencement of the arbitration hearing. On the hearing report, the parties entered into various stipulations. All of those stipulations were accepted and are hereby incorporated into this arbitration decision and no factual or legal issues relative to the parties' stipulations will be raised or discussed in this decision. The parties are now bound by their stipulations.

ISSUES

Whether claimant's injury should be analyzed as a scheduled member disability or an industrial disability;

The extent of claimant's entitlement to permanent partial disability benefits;

The commencement date of payment of permanent partial disability benefits;

Rate;

Whether defendants are liable for penalty under Iowa Code section 86.13; and

Credit.

FINDINGS OF FACT

Claimant was 44 years old at the time of hearing. Claimant graduated from high school. He has an associate's degree in business administration from a community college. Claimant has worked for fast food restaurants.

Claimant began employment with Omega in 1997. Omega manufactures cabinets and cabinet accessories. On the date of injury claimant worked as a lead person. As a lead person, claimant was required to move cabinets off the line.

Claimant sustained an accepted work related injury to his right knee on November 10, 2015.

On November 10, 2015, claimant was evaluated by Arnold Delbridge, M.D., for a swollen right knee. The knee was aspirated. (Joint Exhibit 1, page 1)

On November 30, 2015, claimant was evaluated by Matthew Smith, M.D. Claimant was assessed as having acid reflux, right knee pain, gout, pre-diabetes, and overweight. (Jt. Ex. 2, p. 4)

Claimant was seen by Benjamin Torrez, D.O., for right knee pain on December 9, 2015. Claimant was assessed as having a right knee partial quad tear. Claimant was recommended to have an MRI. (Jt. Ex. 3, pp. 5-6)

An MRI, taken on December 16, 2015, showed evidence of a distal quadriceps tendon tear. (Jt. Ex. 4, p. 9; Jt. Ex. 5, p. 11)

Claimant saw James Stanford, D.O., on February 4, 2016. Surgery was discussed and chosen as a treatment option. (Jt. Ex. 6, pp. 13-14)

On February 5, 2016, claimant underwent surgery with Dr. Stanford. Surgery consisted of right quad tendon repair. (Jt. Ex. 7, pp. 22-23)

Claimant was recommended by Dr. Stanford to undergo physical therapy. Claimant underwent physical therapy from February 18, 2016 through August 18, 2016. (Jt. Ex. 8)

Claimant testified he returned to full duty work at Omega on March 20, 2016. (Transcript, p. 41)

Claimant returned to Dr. Stanford on March 24, 2016. Claimant's return to work caused right knee pain and swelling. Dr. Stanford aspirated the right knee. Claimant was told to use ice after work. (Jt. Ex. 6, p. 15)

Claimant had his final physical therapy session on August 18, 2016. Claimant had improvement in range of motion and quad strength and had returned to work normal duties. Claimant indicated his knee was not as good as it was prior to surgery. (Jt. Ex. 8, p. 37)

Claimant returned in follow-up with Dr. Stanford. Claimant had more pain than normal. A new MRI was recommended. (Jt. Ex. 6, p. 20)

Claimant underwent a second MRI on October 24, 2016. The MRI showed the distal quad repair with no findings of a re-tear. (Jt. Ex. 9, p. 39)

In a January 11, 2017 letter, Dr. Stanford found that claimant had a 12 percent permanent impairment to the lower extremity for loss of extension strength, converting to a 5 percent permanent impairment to the body as a whole. He also found that claimant had a 10 percent permanent impairment to the lower extremity due to loss of range of motion, converting to a 4 percent permanent impairment to the body as a whole. Claimant was not given any permanent restrictions for work. (Defendants' Ex. G, p. 1)

In an August 21, 2017 report, Dr. Delbridge gave his opinions on claimant's condition following an independent medical evaluation (IME). Claimant complained of some pain in the buttocks going down the leg to his foot at times. (Claimant's Ex. 1, pp. 1-3)

Dr. Delbridge agreed with Dr. Stanford's permanent impairment rating to the right lower extremity. He also found that claimant had a 13 percent permanent impairment to the body as a whole based on weakness and loss of range of motion in the right hip. He opined that claimant had a partial disruption of the quad tendon and a weakening of the flexion of the right hip, due to the November 10, 2015 work injury. (Cl. Ex. 1, pp. 1-4)

In an October 12, 2017 letter, written by claimant's counsel, Dr. Smith agreed with Dr. Delbridge that claimant's quad tendon tear resulted in an impairment to the hip. (Cl. Ex. 2, pp. 7-8)

In a March 28, 2018 letter, Dr. Stanford indicated he saw no evidence in any treatment records that claimant complained of right hip pain while in his care for the quad tendon surgery. As a result, Dr. Stanford did not believe claimant's right hip pain was related to his work related knee injury. (Ex. G, p. 2)

In a December 13, 2018 report, Jeffrey Westpheling, M.D., gave his opinions of claimant's condition following an IME. He agreed that claimant's right hip was related to his November 10, 2015 injury. This was because the quadriceps crosses over the right

hip joint and is a powerful hip flexor. He opined that weakness in claimant's right hip flexor was related to the work injury. He disagreed with Dr. Stanford's and Dr. Delbridge's permanent impairment ratings. He agreed that claimant should not require any permanent restrictions. He found that claimant was at maximum medical improvement (MMI) for the right knee as of August 22, 2016. (Ex. A, pp. 1-2)

In a follow up report dated February 17, 2018, Dr. Westpheling found that claimant had a 5 percent permanent impairment to the right hip, converting to a 2 percent permanent impairment to the body as a whole. He found that claimant had a 12 percent permanent impairment to the right knee, converting to a 5 percent permanent impairment to the body as a whole. The combined values resulted in a 7 percent permanent impairment to the body as a whole. (Ex. A, p. 4)

Claimant testified that he had hip pain in the latter part of 2017 but did not complain of hip pain to Dr. Stanford, as he was focused on healing his quad tendon. Claimant testified he did not seek treatment for his hip as he found it was a hassle to get any kind of medical treatment through workers' compensation.

Claimant testified that because of his work injury, he no longer runs, bikes or lifts weights. He said that doing maintenance around his home is difficult due to his injury. Claimant said he has difficulty with sleep due to his injury. Claimant said he takes over-the-counter medication occasionally for pain. Claimant testified he was still employed at Omega at the time of hearing.

Jeffery Orr testified he is the safety manager for Omega. In that capacity he is familiar with claimant's work injury and his workers' compensation claim. Mr. Orr testified claimant returned to his old job with no restrictions. He said that claimant has received merit pay increases since his return to work.

The 20 weeks of claimant's pay, before his injury are as follows:

Pay Period Ending	Total Hours	Rate	Weekly Wages
11/7/2015	45.52	$22.41	$1,020.10
10/31/2015	45.93	$22.41	$1,029.29
10/24/2015	36.19	$22.41	$811.02
10/17/2015	44.54	$22.41	$998.14
10/10/2015	35.76	$22.41	$801.38
10/3/2015	43.69	$22.41	$979.09
9/26/2015	44.76	$22.41	$1,003.07
9/19/2015	35.84	$22.41	$803.17
9/12/2015	50.78	$22.41	$1,137.98
9/5/2015	46.9	$22.41	$1,051.03
8/29/2015	47.05	$22.41	$1,054.39
8/22/2015	40	$22.41	$896.40
8/15/2015	45.9	$22.41	$1,028.62
8/8/2015	40	$22.41	$896.40
8/1/2015	40	$22.41	$896.40

7/25/2015	47.11	$22.41	$1,055.74
7/18/2015	35.83	$22.41	$802.95
7/11/2015	36.33	$22.41	$814.16
7/4/2015	49.06	$22.41	$1,099.43
6/27/2015	32.79	$22.41	$734.82

Claimant testified he usually works "40-ish" hours per week. (Tr. p. 28) He also testified that he usually worked between 36 hours to 47 hours during the period before his injury. (Tr. p. 38)

CONCLUSIONS OF LAW

The first issue to be determined is whether claimant sustained an injury to his right hip that arose out of and in the course of employment. Defendants accept liability for claimant's right knee injury, but deny that the November 10, 2015 injury caused an injury to the right hip.

The party who would suffer loss if an issue were not established has the burden of proving that issue by a preponderance of the evidence. Iowa Rule of Appellate Procedure 6.14(6).

The claimant has the burden of proving by a preponderance of the evidence that the alleged injury actually occurred and that it both arose out of and in the course of the employment. Quaker Oats Co. v. Ciha, 552 N.W.2d 143 (Iowa 1996); Miedema v. Dial Corp., 551 N.W.2d 309 (Iowa 1996). The words "arising out of" referred to the cause or source of the injury. The words "in the course of" refer to the time, place, and circumstances of the injury. 2800 Corp. v. Fernandez, 528 N.W.2d 124 (Iowa 1995). An injury arises out of the employment when a causal relationship exists between the injury and the employment. Miedema, 551 N.W.2d 309. The injury must be a rational consequence of a hazard connected with the employment and not merely incidental to the employment. Koehler Elec. v. Wills, 608 N.W.2d 1 (Iowa 2000); Miedema, 551 N.W.2d 309. An injury occurs "in the course of" employment when it happens within a period of employment at a place where the employee reasonably may be when performing employment duties and while the employee is fulfilling those duties or doing an activity incidental to them. Ciha, 552 N.W.2d 143.

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).

Four experts have opined regarding the extent of claimant's injury. Dr. Delbridge treated claimant on one occasion for his knee. He also issued an IME finding that claimant's right hip was caused by his right quad tendon tear. Dr. Delbridge opined that claimant had loss of range of motion and strength in the right hip caused by the November 10, 2015 injury. (Cl. Ex. 1, p. 3)

Dr. Smith, claimant's family doctor, also opined that claimant had an impairment to his right hip caused by the November 20, 2015 work injury. (Cl. Ex. 2, p. 1)

Dr. Westpheling, is defendants' expert. He also found that claimant's right hip injury was caused by claimant's right knee injury. Dr. Westpheling indicated: "Although the hip joint itself is not directly involved, the quadriceps tendon crosses the hip joint and is a powerful hip flexor. Therefore, any weakness of the right hip flexion would be related to the original work injury." (Ex. A, p. 1)

Dr. Stanford opined that claimant's injury of November 10, 2015 was only to the lower extremity and did not extend to the hip. The reason for this opinion is that there is no indication in his medical records claimant complained of right hip pain. (Ex. G, p. 2)

Claimant credibly testified he did not begin experiencing right hip pain until late 2017. He also testified he did not seek treatment from Dr. Stanford for hip pain because he was told, that after he reached MMI, his leg was as good as it was going to get. Claimant also credibly testified that he did not seek treatment for his right hip as he found it to be a hassle to get the workers' compensation insurer to approve medical treatment. (Tr. p. 26)

The record does indicate claimant did not complain of right hip pain during any of his treatment with Dr. Stanford or during physical therapy. Given this record, I appreciate defendants' position in this case. However, three of the four experts opined claimant's left hip condition was caused by the November 10, 2015 work injury. Defendants' own expert opined that because the quadriceps tendon crosses over the hip joint, and because it is a powerful hip flexor, any weakness of the hip flexion would be tied to the original work injury. (Ex. A, p. 1) Claimant gave credible testimony why he did not seek treatment for his right hip pain with Dr. Stanford. Given the totality of these facts, it is found that claimant carried his burden of proof he sustained an injury to his right hip and his right knee that arose out of and in the course of employment.

The next issue to be determined is the extent of claimant's entitlement to permanent partial disability benefits.

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 was 44 years old at the time of hearing. Claimant graduated from high school. He has an AA degree in business administration. Since 1997 he has worked at Omega. Dr. Stanford and Dr. Delbridge both provided permanent impairment ratings for claimant's knee and hip. Dr. Westpheling opined those ratings were incorrect as they rated for both muscle strength and range of motion. The Guides indicate that this method of rating is incorrect. (AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, p. 526, Table 17-2) I am able to follow Dr. Westpheling's rating for permanent impairment using the Guides. Because Drs. Stanford and Delbridge use incorrect rating methods, and I am able to understand the methodology used by Dr. Westpheling, it is found that Dr. Westpheling's findings regarding permanent impairment are more convincing. Dr. Westpheling found claimant had a 2 percent permanent impairment to the body as a whole for the right hip injury, and a 5 percent permanent impairment to the body as a whole due to the knee injury. The combined values charts in the Guides indicate that a 2 and a 5 percent rating result in a 7 percent permanent impairment to the body as a whole. (Guides, p. 606, Ex. A, p. 4) Claimant has a 7 percent permanent impairment to the body as a whole.

Claimant returned to work with no permanent restrictions. The record indicates claimant has lost strength and range of motion in the knee and right hip due to his injury. When all relevant factors are considered, it is found claimant has a ten percent industrial disability or loss of earning capacity.

The next issue to be determined is the commencement date of claimant's permanent partial disability benefits.

The parties dispute the proper commencement date for permanent disability. Permanent partial disability benefits commence on the earliest date when claimant returns to work, is medically capable of performing substantially similar work, or achieves maximum medical improvement. Iowa Code section 85.34(1); Evenson v. Winnebago Industries, Inc., 881 N.W.2d 360, 372 (Iowa 2016).

Claimant returned to full duty work on March 20, 2016. Claimant's permanent partial disability benefits should commence on March 20, 2016. Iowa Code section 85.34(1); Evenson, 881 N.W.2d at 372.

The next issue to be determined is rate.

Section 85.36 states the basis of compensation is the weekly earnings of the employee at the time of the injury. The section defines weekly earnings as the gross salary, wages, or earnings to which an employee would have been entitled had the employee worked the customary hours for the full pay period in which the employee was injured as the employer regularly required for the work or employment. The various subsections of section 85.36 set forth methods of computing weekly earnings depending upon the type of earnings and employment.

Under section 85.36(7), the gross weekly earnings of an employee who has worked for the employer for less than the full 13 calendar weeks immediately preceding the injury are determined by looking at the earnings of other similarly situated employees employed over that full period, but if earnings of similar employees cannot be determined, by averaging the employee's weekly earnings computed for the number of weeks that the employee has been in the employ of the employer.

Both parties submitted rate calculations, found at Claimant's Exhibit 5 and Defendants' Exhibit C. Claimant used "pay period ending" as the date of pay. This notation is supported by the records found in Exhibit 5. Exhibit C does not include detailed pay records, which is why I choose the dates shown in Claimant's Exhibit 5, page 27. Despite the differences in dates, hours worked and amounts paid appear to correlate between Exhibits 5 and C.

Both parties excluded the 40 hours received for straight time pay taken for vacation found in pay periods ending on August 22, 2015; August 8, 2015 and August 1, 2015. (Shown in Defendants' Exhibit C as August 28, 2015; August 14, 2015; and August 7, 2015)

Claimant testified he worked between 36 to 47 hours at Omega. (Tr. p. 38) For that reason, the weeks of pay periods ending on October 10, 2015 (35.76 hours); September 19, 2015 (35.84 hours); July 18, 2015 (35.83 hours); and June 27, 2015 (32.79 hours), are excluded from the calculation.

In his calculation, claimant included amounts he received for bonuses. Iowa Code section 85.36 sets forth the basis for determining an injured employee's compensation or rate. The statute defines "gross earnings" as "recurring payments by

employer to the employee for employment, before any authorized or lawfully required deduction or withholding of funds by the employer, excluding irregular bonuses, retroactive pay, overtime, penalty pay, reimbursement of expenses, expense allowances, and the employer's contribution for welfare benefits," and "pay period" as "that period of employment for which the employer customarily or regularly makes payments to employees for work performed or services rendered." Id. § 85.61(3), (5).

In a declaratory ruling by the Commissioner, irregular bonuses that are dependent on variables are improper to include in a rate calculation. John Deere Des Moines Works, July 12, 2017 (Iowa Workers' Comp. Comm'r, Declaratory Order).

There is no evidence in the record that bonuses detailed in Exhibit C were regularly occurring bonuses. For this reason, bonuses shown in Exhibit C are excluded from the rate calculation.

Excluding the weeks and bonuses detailed above, claimant's 13 weeks prior to his injury indicates he earned $13,082.06. His average weekly wage is $1,006.31 ($13,082.06 ÷ 13). Claimant was married with 3 exemptions. His rate is $646.33 per week.

The next issue to be determined is whether defendants are liable for penalty.

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).

As noted, per the Evenson decision, claimant's permanent partial disability benefits should commence as of March 20, 2016, the date claimant returned to work. The Evenson case was issued on June 3, 2016. On or by July 1, 2016, defendants' counsel knew, or should have known, that claimant should be paid permanent partial disability benefits as of March 20, 2016. At that time, defendants knew or should have known that they should have been seeking Dr. Stanford's opinion for a permanent impairment. Defendants did not do this. Dr. Stanford found that claimant was at MMI as of August 22, 2016. Defendants certainly knew that claimant should have been receiving permanent partial disability benefits commencing as of August 22, 2016. Instead, for some unknown and unexplained reason, defendants did not get a permanent impairment rating from Dr. Stanford until January 11, 2017. Defendants paid claimant the permanent partial disability benefits, commencing on August 22, 2016, despite a Supreme Court decision indicating that benefits should have commenced as of March 20, 2016. Defendants underpaid claimant's rate based on an error that claimant was married with two exemptions. Defendants' corrected that error on November of 2017.

To summarize, at the very least, defendants should have been paying permanent partial disability benefits on or about late August 2016. They did not. Defendants did not get a rating for claimant until January 2017. This was ten months after claimant's return to work and four months after the authorized physician found that claimant was at MMI. Based on Evenson, defendants should have commenced benefits back to March 20, 2016. They did not. Defendants underpaid claimant's permanent partial disability benefits for nearly a year based on an insurer error. Defendants provided no rationale or communication of any kind for any of these discrepancies. They provided no communication and no rationale for their failure to pay claimant permanent partial disability benefits timely and accurately. Based on this record, a penalty is appropriate in this case.

The period of time between August 22, 2016 and January 11, 2017 is approximately 20 weeks. Defendants are liable for a penalty of $6,463.30 ($646.33 x 20 x 50%).

Claimant also contends he is due a penalty for underpayment of rate. Claimant testified he worked between 36 to 47 hours per week. (Tr. p. 38) As detailed in the Findings of Fact and Conclusions of Law, neither party's rate was found to be the proper rate. Given this record, a penalty is not appropriate for an alleged underpayment of rate.

The final issue to be determined is credit. Defendants contend they are due a credit for overpayment. Defendants contend they overpaid claimant 50.09 weeks of permanent partial disability benefits at the rate of $641.25. As detailed above, the proper rate is, in this case $646.33. Because of this, defendants do not have a credit for overpayment of rate. Defendants do have a claim for credit for benefits previously paid.

ORDER

THEREFORE, IT IS ORDERED:

That defendants shall pay fifty (50) weeks of permanent partial disability benefits at the rate of six hundred forty-six and 33/100 dollars ($646.33) per week commencing on March 20, 2016.

That defendants shall pay claimant all temporary benefits at the rate of six hundred forty-six and 33/100 dollars ($646.33) per week.

That defendants shall pay accrued weekly benefits in a lump sum.

Defendants shall pay interest on unpaid weekly benefits awarded herein as set forth in Iowa Code section 85.30. Defendants shall pay accrued weekly benefits in a lump sum together with interest at the rate of ten percent for all weekly benefits payable and not paid when due which accrued before July 1, 2017, and all interest on past due weekly compensation benefits accruing on or after July 1, 2017, shall be payable at an annual rate equal to the one-year treasury constant maturity published by the federal reserve in the most recent H15 report settled as of the date of injury, plus two percent. See Gamble v. AG Leader Technology, File No. 5054686 (App. Apr. 24, 2018).

That defendants shall receive a credit for benefits previously paid.

That defendants shall pay costs.

That defendants shall file subsequent reports of injury (SROI) as required by this agency under rule 876 IAC 3.1(2).

That defendants shall pay a penalty of six thousand four hundred sixty-three and 30/100 dollars ($6,463.30).

Signed and filed this 8th day of April, 2019.

JAMES F. CHRISTENSON
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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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.