BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

TRAVIS M. SCHULTZ, Claimant, vs. VENDORS UNLIMITED, Employer, and CINCINNATI INSURANCE, Insurance Carrier, Defendants.	FILED FEB 07 2019 WORKERS COMPENSATION	File No. 5049177 REVIEW-REOPENING DECISION Head Note Nos.: 2905, 4000.2, 4100

STATEMENT OF THE CASE

Claimant, Travis Schultz, filed a petition in review-reopening, seeking workers' compensation benefits from Vendors Unlimited (Vendors), employer and Cincinnati Insurance Company, insurer, both as defendants. This matter was heard in Des Moines, Iowa on November 13, 2018, with a final submission date of December 13, 2018.

The record in this case consists of Joint Exhibits 1 through 3, Claimant's Exhibits 1 through 9, Defendants' Exhibits A through F and the testimony of claimant.

The parties filed a hearing report at the commencement of the review-reopening hearing. On the hearing report, the parties entered into various stipulations. All of those stipulations were accepted and are hereby incorporated into this review-reopening 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 is entitled to additional benefits under a review-reopening proceeding; and if so,

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

Whether defendants are liable for penalty under Iowa Code section 86.13.

FINDINGS OF FACT

Claimant was 47 years old at the time of hearing. Claimant graduated from high school. Claimant has an associate's degree in electronics from Hamilton Technical College.

Claimant has worked as a driver in construction. Claimant worked for nine months as a correctional officer at Anamosa State Prison in 2001. Claimant provided security at a bar. From 2004 to approximately 2008, he did maintenance work for Airways in Cedar Rapids, Iowa.

Claimant was a route driver for Vendors. As a driver for Vendors, claimant drove a route, between 100 to 180 miles every day filling vending machines.

On October 6, 2010, claimant fell from his truck at work. When he fell, he hit his perineum. Claimant eventually had a spinal cord stimulator (SCS) implanted in May of 2013. (Arbitration Decision, page 5) Claimant was examined by Joseph Chen, M.D., who found claimant had a 23 percent permanent impairment to the body as a whole. (Arb. Dec., p. 5) Claimant was also evaluated by Mark Taylor, M.D., who generally agreed with Dr. Chen's rating and found claimant had a 25 percent permanent impairment to the body as a whole. (Arb. Dec., p. 6) Dr. Taylor also recommended claimant be limited to lifting 30 to 40 pounds, and be allowed to sit, stand and walk as needed. (Arb. Dec., p. 6)

At the time of the arbitration hearing, claimant was still working at Vendors. The arbitration decision found that claimant had a 35 percent industrial disability or loss of earning capacity. (Arb. Dec., p. 6)

Claimant testified that following the November 2015 arbitration hearing, he continued to work as a route driver for Vendors. He testified that in the summer of 2016, he got a smaller truck for his route. He said the smaller truck was easier to get in and out of. He said the smaller truck also required more bending.

Claimant said that following the arbitration decision, he began to have difficulty with his SCS. He said the SCS began "zapping" him and that he began having difficulty keeping the battery for the stimulator charged.

On January 31, 2017, claimant was evaluated by Chandan Reddy, M.D. Claimant complained of the SCS zapping him. Claimant was assessed as having an SCS dysfunction. Plans were made to replace the SCS in March 2017. (Joint Exhibit 1, p. 51)

On March 8, 2017, claimant underwent surgery to have the SCS replaced. (Jt. Ex. 1, pp. 62-70) Claimant was eventually allowed to return to work at light duty on July 5, 2017. (Jt. Ex. 1, p. 85)

Claimant testified the second SCS overall made his pain worse. He said the SCS did help him better with sleep.

In an August 3, 2017 note, Saul Wilson, M.D., from the University of Iowa Hospitals and Clinics (UIHC), returned claimant to light duty with a lifting restriction of ten pounds maximum. Claimant was allowed to return to drive a truck. (Jt. Ex. 1, p. 95)

Claimant returned to work to light duty as per Dr. Wilson's work restrictions on August 7, 2017. (Jt. Ex. 1, p. 93) Claimant testified he was given an assistant and assigned a route to stock vending machines. Claimant testified the assistant did most of the lifting. Claimant testified the route job, even with the assistant, increased his pain. (Transcript, pp. 23-24)

On September 26, 2017, claimant returned to Dr. Wilson. Claimant indicated greater activity with driving a route truck increased his pain. Dr. Wilson opined it was unlikely claimant would be allowed to return to full duty at his current job. He opined that working as a route driver was not a long term solution for claimant. (Jt. Ex. 1, p. 97)

Given Dr. Wilson's opinion regarding claimant's abilities, claimant was taken off his route truck and moved to the kitchen at Vendors in approximately October of 2017. Claimant's job in the kitchen was to make and package sandwiches for vending machines. Claimant testified that along with his work in the kitchen, he also did part-time clerical work in the office. Claimant testified that his job at Vendors, at that time was within his work restrictions. (Tr., pp. 29-31, 71)

After being moved to the kitchen, Vendors gave claimant a form asking him to detail limitations he had as a route driver. Claimant was also asked to identify any accommodations he thought would help. Claimant indicated, on the form, he was limited to lifting up to ten pounds. He indicated he could sit most of the work day if given the opportunity to get up when needed. (Claimant's Ex. 1, pp. 1-2)

Claimant met with Danielle Miller at Vendors on November 8, 2017 to discuss the form. Claimant indicated full time kitchen work caused him too much pain. (Ex. A, pp. 1-3)

Claimant testified that sometime in mid-November 2017, he was informed by Ms. Miller that Vendors had no more office work for him and he was to work part-time in the kitchen. Claimant said that when he went to part-time work, he lost his benefits. He said that he was earning $9.00 an hour and worked between 20 and 25 hours part-time in the kitchen job.

Claimant was evaluated by Dr. Wilson on November 14, 2017. Dr. Wilson noted that because of claimant's chronic pain he would likely not be able to perform the duties that he had previously held at work. Dr. Wilson indicated he would not provide claimant with a new work release or modifications of prior letters. (Jt. Ex. 1, p. 114)

Claimant was evaluated by Dr. Chen at the UIHC on January 10, 2018. Claimant was working at Vendors for approximately 5 and one-half hours a day and was in such pain he could not do anything else. Dr. Chen noted claimant's condition had worsened since 2014. Dr. Chen opined claimant's second SCS surgery aggravated claimant's chronic pain. He found claimant had an additional 5 to 8 percent permanent impairment, in addition to the 23 percent given by Dr. Chen in 2014. Dr. Chen disagreed with Dr. Wilson regarding claimant's lifting restrictions and believed claimant's ability might increase if he went through a pain rehabilitation program. (Jt. Ex. 1, pp. 120-125)

Claimant returned to Dr. Chen on February 20, 2018. Claimant saw Dr. Chen for a spine rehabilitation evaluation to receive additional information on how to deal with chronic pain. Claimant indicated his condition had worsened over the last several months. Claimant was assessed as having perineal pain, chronic bilateral back pain and tingling in his extremities and severe anxiety and depression. He was recommended to participate in a spine rehabilitation program. (Jt. Ex. 1, pp. 132-137)

Claimant testified that from mid-March of 2018 until mid-July of 2018 he was moved to a warehouse job. In the warehouse job claimant pulled product for route deliveries. He said he was paid $10.00 an hour and worked approximately 20 hours a week.

Claimant was evaluated by the Iowa Vocational Rehabilitation Services (IVRS). IVRS found that claimant was an individual with significant disability. Claimant was found on May 31, 2018 to be eligible for vocational rehabilitation services. (Cl. Ex. 4, pp. 34-40)

Claimant said he applied to IVRS to find work. He said he was told by IVRS that with all the pain he was in, there was not much IVRS could ultimately do for him.

In a June 5, 2018 report, Dr. Taylor gave his opinions of claimant's condition following an independent medical evaluation (IME). Claimant had numbness and pain in the groin area and down parts of his legs. He indicated worsening back pain since the second SCS was placed. Dr. Taylor found that claimant had a 30 percent permanent impairment to the body as a whole. He believed claimant's condition had worsened since the previous evaluation in May of 2015. Dr. Taylor essentially agreed with Dr. Wilson's lifting restrictions of 10 pounds. He indicated claimant should be allowed to sit, stand or walk as needed. Claimant was told to avoid ladders. He was told to rarely use stairs. Dr. Taylor noted that claimant could not return to a full work shift. (Cl. Ex. 2, pp. 16-24)

In a June 27, 2018 note, claimant's counsel requested that defendants send claimant to Mayo's pain rehabilitation clinic. (Cl. Ex. 6, p. 54)

Defendants denied claimant's request to attend the Mayo program, but told claimant that he could attend the pain rehabilitation clinic at the UIHC. (Cl. Ex. 6, p. 55)

Claimant testified that he was initially interested in attending the UIHC pain clinic, until Dr. Chen informed him that he would be taken off of all pain medications to attend the clinic. Because claimant believed he needed pain medication to deal with his chronic pain, claimant did not want to attend the UIHC pain clinic, but wanted to attend the pain clinic in Mayo Clinic.

On July 24, 2018, claimant was terminated from Vendors. Claimant was given restrictions, from Dr. Taylor, indicating limitations to rarely bend. Vendors did not have any positions that could meet these new restrictions. Claimant was terminated. Claimant's last day at work was July 17, 2018. (Cl. Ex. 1, p. 15)

Claimant testified that as a full time route driver, he earned approximately $1,600.00 biweekly. He said that his earnings decreased dramatically when he was assigned to part-time jobs in the kitchen and warehouse. In 2015, claimant earned $32,323.00 a year. In 2017, claimant earned $21,346.00 a year. (Cl. Ex. 5) At the time of hearing, claimant had no earnings.

Claimant testified he began looking for other jobs when he was moved to part-time work at Vendors. He testified that he has not had any job offers. Claimant applied for approximately 16 jobs in 2017. Claimant applied for approximately 60 different jobs in 2018. Since his termination from Vendors, claimant has applied for approximately 5 jobs. (Cl. Ex. 8)

Claimant testified his pain affects his ability to focus and his attention when he was working. Claimant said he occasionally loses control of his right leg. He says his right leg will give out and occasionally he will fall. Claimant testified he has problems with his bowels and bladder control. He testified that while working at Vendors he occasionally soiled his clothes due to his bowel and bladder control issues.

CONCLUSIONS OF LAW

The first issue to be determined is whether claimant is entitled to additional benefits under a review-reopening proceeding.

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).

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

N.W.2d 109 (1957). A failure of a condition to improve to the extent anticipated originally may also constitute a change of condition. Meyers v. Holiday Inn of Cedar Falls, Iowa, 272 N.W.2d 24 (Iowa App. 1978).

In a review-reopening procedure, the claimant has the burden of proof to prove whether he has suffered an impairment of earning capacity proximately caused by the original injury. E.N.T. Associates v. Collentine, 525 N.W.2d 827, 829 (Iowa 1994).

At the time of the November 2015 arbitration hearing, claimant had a 23 percent permanent impairment from Dr. Chen and a 25 percent permanent impairment from Dr. Taylor. (Jt. Ex. 3, p. 169, Jt. Ex. 4, p. 180) Since then, Dr. Chen has indicated claimant's permanent impairment has increased to 28 to 31 percent to the body as a whole. Dr. Taylor has also increased claimant's permanent impairment to the body as a whole. Both physicians have found claimant's condition had worsened. (Jt. Ex. 1, p. 125, Cl. Ex. 2)

At the time of his November 2015 hearing, claimant had a 30 to 40 pound lifting restriction. (Jt. Ex. 4, p. 181) At the time of hearing claimant had a 10 pound lifting restriction. He was also limited to rarely bending or squatting, rare use of stairs and no use of a ladder. Dr. Taylor opined that claimant could not work full duty. At the time of the November 2015 arbitration hearing, claimant was working full time. (Jt. Ex. 1, p. 95, 114, Cl. Ex. 2, pp. 23-24)

At the time of the November 2015 hearing, claimant was working full time driving a route. He had earned $32,327.00 in 2015. (Cl. Ex. 5, pp. 50-53) Claimant was eventually relegated to part-time work at Vendors. In the part-time position he worked between 20 and 25 hours a week for $9.00 to $10.00 an hour. At the time of hearing, claimant had no income.

Since his November 2015 arbitration hearing, claimant's permanent impairment has increased. Claimant's permanent restrictions have become more onerous. At the time of the November 2015 hearing, claimant was earning over $32,000.00 a year. At the time of the review-reopening hearing, claimant had been terminated from Vendors and had no income. Given this record, claimant has carried his burden of proof he sustained a change in his physical condition that has impacted his earning capacity.

The next issue to determine 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.

In Guyton v. Irving Jensen Co., 373 N.W.2d 101 (Iowa 1985), the Iowa court formally adopted the "odd-lot doctrine." Under that doctrine a worker becomes an odd-lot employee when an injury makes the worker incapable of obtaining employment in any well-known branch of the labor market. An odd-lot worker is thus totally disabled if the only services the worker can perform are "so limited in quality, dependability, or quantity that a reasonably stable market for them does not exist." Id., at 105.

Under the odd-lot doctrine, the burden of persuasion on the issue of industrial disability always remains with the worker. Nevertheless, when a worker makes a prima facie case of total disability by producing substantial evidence that the worker is not employable in the competitive labor market, the burden to produce evidence showing availability of suitable employment shifts to the employer. If the employer fails to produce such evidence and the trier of facts finds the worker does fall in the odd-lot category, the worker is entitled to a finding of total disability. Guyton, 373 N.W.2d at 106. Factors to be considered in determining whether a worker is an odd-lot employee include the worker's reasonable but unsuccessful effort to find steady employment, vocational or other expert evidence demonstrating suitable work is not available for the worker, the extent of the worker's physical impairment, intelligence, education, age, training, and potential for retraining. No factor is necessarily dispositive on the issue. Second Injury Fund of Iowa v. Nelson, 544 N.W.2d 258 (Iowa 1995). Even under the odd-lot doctrine, the trier of fact is free to determine the weight and credibility of evidence in determining whether the worker's burden of persuasion has been carried, and only in an exceptional case would evidence be sufficiently strong as to compel a finding of total disability as a matter of law. Guyton, 373 N.W.2d at 106.

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

A finding that claimant could perform some work despite claimant's physical and educational limitations does not foreclose a finding of permanent total disability,

however. See Chamberlin v. Ralston Purina, File No. 661698 (App. October 29, 1987); Eastman v. Westway Trading Corp., II Iowa Industrial Commissioner Report 134 (App. 1982).

Claimant was 47 years old at the time hearing. Claimant graduated from high school. He has an associate's degree in electronics. Claimant has worked as a driver and in construction. He worked as a correctional officer. Claimant worked for Vendors from 2010 to July of 2018.

Claimant has had two surgeries for implantation of the SCS devices. Claimant has between a 30 to 31 percent permanent impairment to the body as a whole. (Jt. Ex. 1, p. 125, Cl. Ex. 2) Claimant has a 10 pound lifting restriction. He is also restricted to standing, sitting and walking as needed. Claimant is limited to rarely squatting and bending. Claimant is to avoid ladders. Claimant was also instructed to avoid full shift work. (Cl. Ex. 2, pp. 23-24) Claimant was earning approximately $32,000.00 a year working full time as a route driver for Vendors. The arbitration decision indicates that claimant was motivated to return to work despite his ongoing chronic pain. (Arb. Dec., p. 7) Claimant returned to work after his second surgery. Vendors attempted to make accommodations for claimant after his second surgery by supplying him with an assistant. When that did not work, claimant continued to work for Vendors at essentially two part-time jobs in the kitchen and warehouse. Claimant continued to work at Vendors even though bladder and bowel problems caused him to soil his clothes. Claimant was eventually terminated by Vendors when they could no longer meet his job restrictions. (Cl. Ex. 1, p. 15)

The refusal of defendant-employer to return claimant to work in any capacity is, by itself, significant evidence of a lack of employability. Pierson v. O'Bryan Brothers, File No. 951206 (App. January 20, 1995). Meeks v. Firestone Tire & Rubber Co., File No. 876894, (App. January 22, 1993); See also, 10-84 Larson's Workers' Compensation Law, section 84.01; Sunbeam Corp. v. Bates, 271 Ark. 609 S.W.2d 102 (1980); Army & Air Force Exchange Service v. Neuman, 278 F. Supp. 865 (W.D. La. 1967); Leonardo v. Uncas Manufacturing Co., 77 R.I. 245, 75 A.2d 188 (1950). An employer who chooses to preclude an injured worker's re-entry into its workforce likely demonstrates by its own action that the worker has incurred a substantial loss of earning capacity. As has previously been explained in numerous decisions of this agency, if the employer in whose employ the disability occurred is unwilling to accommodate the disability, there is no reason to expect some other employer to have more incentive to do so. Estes v. Exide Technologies, File No. 5013809 (App. December 12, 2006).

Since 2017, claimant has applied to approximately 80 different employers. Claimant has had no job offers.

IVRS has found claimant to have a significant disability. (Cl. Ex. 4, pp. 34-40)

At the time of hearing, claimant had no income and was not working.

Claimant has between a 30 to 31 percent permanent impairment to the body as a whole. He has onerous work restrictions. Claimant was terminated by Vendors. He has looked for work and has been unable to find work. IVRS has indicated claimant has a significant disability.

Given the record as detailed above, claimant has made a prima facie case that he is not employable in the competitive labor market.

The burden to produce evidence showing availability of suitable employment now shifts to the employer.

Defendants contend claimant has not made an aggressive enough job search since his termination from Vendors. Defendants also contend claimant has not aggressively pursued pain rehabilitation clinic options, as recommended by Dr. Taylor and Dr. Chen.

Neither of these arguments are evidence of the availability of suitable employment.

Assuming, for argument's sake, that defendants' two arguments are actually evidence of suitable employment, these arguments still fail. As noted, claimant has made over 80 job applications since being demoted to part-time work at Vendors. Claimant sought the services of IVRS. IVRS has found claimant to have a significant disability. IVRS has not been able to find claimant any employment.

Regarding the pain rehabilitation clinic, claimant's unrebutted testimony is that he did not want to go to the UIHC program, recommended by Dr. Chen, as Dr. Chen told him he would have to go off all his pain medication. Given claimant's long history of chronic pain, it is understandable that claimant would not want to choose Dr. Chen's option. Claimant has asked defendants to send him to the Mayo Clinic pain rehabilitation clinic. Defendants have denied authorization to the Mayo Clinic.

In brief, defendants have offered no evidence of the availability of suitable employment. Given this record, claimant has carried his burden of proof he is an odd-lot employee.

Claimant would also be found to be permanently and totally disabled using the same criteria as detailed above.

The final 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.
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> (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.
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> (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).
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> (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).
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> > 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).

The record indicates defendants paid claimant an additional five percent permanent partial disability benefits based on Dr. Chen's finding that claimant had an additional five to eight percent permanent impairment. At the time of hearing, defendants had paid claimant 200 weeks of permanent partial disability benefits. Defendants have authorized claimant to go to the pain rehabilitation clinic at the UIHC. As noted, it is understandable why claimant did not pursue this option. However, defendants have made an effort to get claimant to a pain rehabilitation clinic so he can improve his functional ability.

As noted, claimant is found to be permanently and totally disabled. However, because defendants have paid claimant 200 weeks of permanent partial disability benefits, because defendants have paid permanency benefits based on claimant's

functional rating, and because they have authorized claimant to attend treatment that can improve his functional ability, a penalty is not appropriate in this case.

ORDER

THEREFORE, IT IS ORDERED:

That defendants shall pay claimant permanent total disability benefits at the rate of four hundred thirty-seven and 18/100 dollars ($437.18) per week for the period of claimant's permanent and total disability commencing on July 20, 2018.

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 credit for benefits previously paid.

That defendants shall pay costs.

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

Signed and filed this 7th day of February, 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.