BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

ZACHARY MASON,

Claimant,

vs.

COSTCO WHOLESALE CORP.,

Employer,

and

LIBERTY MUTUAL INS. GROUP,

Insurance Carrier,
Defendants.

File No. 5058766

ARBITRATION

DECISION

Head Note Nos.: 1108, 1402,1700, 1802, 1803, 3000, 3800, 3002, 4000

STATEMENT OF THE CASE

This is a proceeding in arbitration. The contested case was initiated when claimant, Zachary Mason, filed his original notice and petition with the Iowa Division of Workers' Compensation. The petition was filed on April 13, 2017. Claimant alleged he sustained a work-related injury on March 20, 2016. (Original notice and petition)

For purposes of workers' compensation, COSTCO Wholesale Corp., is insured by Liberty Mutual Ins. Group. Defendants filed their answer on May 8, 2017. The defendants admitted the occurrence of the work injury on March 20, 2016. A First Report of Injury was filed on March 31, 2016.

The hearing administrator scheduled the case for hearing on May 2, 2018. The hearing took place at 150 Des Moines Street in Des Moines, Iowa. The undersigned appointed Ms. Sheila Cassady, as the certified shorthand reporter. She is the official custodian of the records and notes.

Claimant testified on his own behalf. Defendants did not call any witnesses to testify at the hearing. Joint Exhibits 1 through 8 were offered. Claimant offered exhibits 1 through 8. Defendants offered exhibits A through D. All proffered exhibits were admitted as evidence. The parties also submitted post-hearing briefs on May 31, 2018. 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 injury;

2. Claimant sustained an injury on March 20, 2016, which arose out of and in the course of his employment with respect to the abdomen/oblique and back;

3. The alleged injury is a cause of temporary disability;

4. Temporary benefits are no longer at issue;

5. If permanency is found the parties agree the method of calculation is by the industrial manner;

6. The commencement date for any permanent partial disability benefits is October 24, 2016;

7. The weekly benefit rate is $206.72 ;

8. Defendants waive any affirmative defenses they may have had available to them;

9. Medical benefits are no longer in dispute; and

10. The parties agree claimant has paid the costs listed.

ISSUES

The issues presented are:

1. Whether claimant sustained an injury to his chest wall and kidneys on March 20, 2016, which arose out of and in the course of his employment;

2. Whether the back condition is a cause of permanent disability;

3. If permanency is found there is the issue of the extent of claimant's permanent partial disability;

4. Whether claimant is entitled to penalty benefits pursuant to Iowa Code section 86.13 for the delay in payment of temporary benefits.

FINDINGS OF FACT

This deputy, after listening to the testimony of claimant and after judging the credibility of claimant, plus 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 Rule of Appellate Procedure 6.14(6).

Claimant is presently 24 years old and single. He is right hand dominant. Claimant graduated from Valley High School in West Des Moines, Iowa. He also has taken several college classes at Des Moines Area Community College.

Claimant commenced his employment with COSTCO in May of 2015. He was hired as a Front End Assistant/ Cashier Assistant. Claimant worked 32 hours per week. In September of 2016, claimant voluntarily terminated his employment at COSTCO. He was earning $13.00 per hour at the time of his termination.

Subsequent to terminating his employment at COSTCO, claimant sought and found employment at Cognizant, Mercer and Wells Fargo. All of the jobs were desk jobs. Claimant left Cognizant about two weeks after he started in May of 2017. Claimant worked at Mercer for four months. Then he voluntarily left. He worked at Wells Fargo for one week and then he terminated the position. He was paid $15.00 per hour. Claimant testified he left the job due to depression.

Claimant is now working for Aerotech. He is assigned to work at Wells Fargo in the mortgage department performing duties as a customer service representative. At the time of the hearing, claimant was earning $13.00 per hour.

Claimant's job duties at COSTCO were detailed in claimant's exhibit 6, page 37. They are incorporated by reference as though fully set out herein. One of claimant's primary duties was to retrieve carts and flatbeds from the parking area using a rope with a clasping hook. Claimant was told to push no more than 10 carts at one time.

On March 20, 2016, claimant was pushing 10 carts from the corral. He attempted to turn the carts when he fell to his knee in pain. He continued to push the carts even though he was in excruciating pain on the right side of his body. Claimant reported the injury to his manager. Another store manager drove claimant to Mercy West for emergency treatment.

At Mercy West, claimant was treated for chest wall pain and right-sided rib and trunk pain. Naproxen and Oxycodone were prescribed for pain. (Joint Exhibit 1, page 3) Claimant was to remain off work until he could be evaluated by the workers' compensation doctor for COSTCO.

However, claimant had become so ill during the course of the evening, he presented to Mercy North Family Practice and Urgent Care. (Jt. Ex. 2, pp. 26-27) Claimant had severe abdominal pain and pain in the right lower quadrant that radiated to claimant's groin. (Jt. Ex. 2, p. 26) Stephen Nowak, D.O., found claimant to be severely ill. An ambulance was called to take claimant to Mercy Hospital. (Jt. Ex. 2, p. 28)

Claimant was admitted to Mercy Hospital on March 21, 2016. He was treated for right-sided pain, lower back and abdomen pain, due to muscle strain versus disc bulge. (Jt. Ex. 1, p. 5) MRI testing of the lumbar spine was conducted while claimant was in the hospital. (Jt. Ex. 1, pp. 22-23) The results of the testing showed:

> At the L4-L5 level, very minimal disc desiccation seen. Very mild left far lateral disc bulging noted as well without any exiting L4 nerve root compromise. The other lumbar discs are normal.

(Jt. Ex. 1. p. 22)

Claimant was told to avoid heavy lifting over 10 pounds. Claimant was to avoid strenuous activity until he had been cleared by the family physician. (Jt. Ex. 1, p. 24)

COSTCO requested claimant visit Deborah Smith, ARNP. Nurse Smith examined claimant on March 25, 2016. Claimant's chief complaint was constant mid-back pain. Claimant was advised to remain off work until he could be re-evaluated on March 28, 2016. (Jt. Ex. 1, p. 31)

Claimant returned to see the nurse practitioner on March 28th. Once again, claimant reported low back pain and right flank pain. (Jt. Ex. 1, p. 33) Nurse Smith found the following abnormalities:

> **Physical Exam:**
>
> The following exam elements were documented to be normal:
>
> **Muscular:** positive.
> back pain with axial loading. distracted straight leg raise while sitting positive on left, skin hypersensitive to light touch over wide area negative, pain negative when rotating shoulders and pelvis in tandem.
> Inconsistently reproducible report of pain to a stimulus on right.
>
> **Muscular (Right abnormal and Left normal):** abnormality noted.
> positive straight leg raise test on right (sciatic pain on right during right leg raise), negative straight leg raise test on left
>
> **Muscular:** abnormality noted,
> slow with movement

(Jt. Ex. 3, p. 34)

The nurse practitioner diagnosed claimant with: unspecified pain that was stable and improved; other intervertebral disc degeneration in the lumbar region that was stable and improved; and other specified abnormal findings of blood chemistry with no workup. (Jt. Ex. 3, p. 35) Nurse Smith determined claimant was fit for duty effective March 28, 2016. (Jt. Ex. 3, p. 36) However, claimant was to avoid kneeling, bending,

and squatting entirely. There was to be no pushing and pulling greater than 10 pounds. Additionally, claimant was to avoid jumping, running, and climbing. Claimant was advised to increase his movement at home and to spend less time reclining on the couch. (Jt. Ex. 3, p. 36) The nurse practitioner recommended physical therapy for claimant. (Jt. Ex. 3, p. 36) A follow up examination was scheduled for April 1, 2016. The insurance carrier denied the physical therapy because the company was still investigating the claim. (Jt. Ex. 3, p. 37)

On April 1, 2016, claimant returned to see Nurse Practitioner Smith. (Jt. Ex. 3, p. 39) A physical examination was conducted. The following comments were noted:

> **Muscular:** abnormallty [sic] noted,
> pt persistently slow & cautious with his gait
>
> **Muscular (Right):** abnormality noted,
> facial grimace bilaterally but inconsistent with responses when reck [sic]
>
> **Muscular:** positive.
> back pain with axial loading, distracted straight leg raise while sitting negative, skin hypersensitive to light touch over wide area bilaterally, pain bilaterally when rotating shoulders and pelvis in tandem, inconsistently reproducible report of pain to a stimulus bilaterally
>
> **Muscular:** abnormality noted,
> slow with movement

(Jt. Ex. 3, p. 40)

Nurse Smith released claimant from care for the March 20, 2016 work injury. (Jt. Ex. 3, p. 41) The nurse practitioner opined claimant was fit for duty without any restrictions commencing April 1, 2016. (Jt. Ex. 3, p. 41)

On April 4, 2016, claimant presented to Mercy West Family Practice and Urgent Care. (Jt. Ex. 4, p. 43) Lisa Klock, D.O., examined claimant. The physician diagnosed claimant with acute lumbar back pain and low back pain with sciatica. Mobic and Oxycodone were prescribed. (Jt. Ex. 4, p. 45) Claimant was restricted from working from April 4, 2016 to April 18, 2016. (Jt. Ex. 4, p. 46) Then claimant was restricted from working from April 18, 2016 through April 20, 2016. (Jt. Ex. 4, p. 47)

On April 18, 2016, claimant saw a pain specialist, Matthew Herrmann, M.D. The physician diagnosed claimant with radiculopathy of the lumbosacral area. (Jt. Ex. 5, p. 64) Dr. Herrmann prescribed Gabapentin. He also administered a lumbar epidural steroid injection at L4-5. Claimant tolerated the procedure well. (Jt. Ex. 5, pp. 64-65)

Claimant returned to see Dr. Klock on April 20, 2016. Claimant had continued back pain with radiation into the legs. (Jt. Ex. 4, p. 48) He reported he could not tolerate physical therapy. He only completed four sessions. Dr. Klock increased

claimant's pain medication. Claimant was restricted from working until April 30, 2016. (Jt. Ex. 4, p. 50)

On April 27, 2016, claimant returned for follow up care with Dr. Klock. (Jt. Ex. 4, p. 51) Claimant reported he continued to experience back pain across the lumbar sacral junction and the pain radiated down both legs to the knees. Claimant indicated the right leg was worse than the left one. (Jt. Ex. 4, p. 51) Claimant was restricted from working until May 15, 2016. (Jt. Ex. 4, p. 52) X-rays of the lumbar spine were taken on the same date. (Jt. Ex. 4, p. 54) Claimant was restricted from work until May 27, 2016. (Jt. Ex. 4, p. 56)

Dr. Klock examined claimant on May 23, 2016. (Jt. Ex. 4, p. 57) The physician administered an injection for claimant's low back pain with sciatica. (Jt. Ex. 4, p. 58)

On May 26, 2016, claimant saw Ai Huong Phu, D.O., a physiatrist at Mercy Physical Medicine & Rehabilitation. Claimant reported his level of pain was 7 out of 10 on an analog scale with 10 being the worst pain imaginable. With respect to the musculoskeletal system, Dr. Phu noted:

> Musculoskeletal: Gait is with forward flexion and lean to the right at the waist. He is mildly antalgic on the right. Stance is normal. UnAble [sic] to walk on toes and heels with good balance. Able to single leg stand only with holding onto the wall.
>
> Alignment normal. No scoliosis, lordosis, no atrophy, no masses
>
> Tenderness over lumbar paraspinals L4-5, L5-S1 bilaterally, with light touch.
>
> AROM: limited flexion, extension, sidebending, rotation with pain
>
> Special tests: negative straight leg at degree on the right/left, limited passive ROM in all directions. He is very guarded.

(Jt. Ex. 6, p. 70)

Dr. Phu diagnosed claimant with "Acute lumbar back pain, Low back pain with sciatica." (Jt. Ex. 6, p. 71) The physiatrist recommended claimant refrain from working and wear a back brace up to six hours per day. Dr. Phu also suggested claimant begin aqua therapy. (Jt. Ex. 6, p. 71)

Claimant returned for follow up care on June 23, 2016. Claimant had started aqua therapy. He had reduced some of his medication on his own. Dr. Phu diagnosed claimant with low back pain, posture imbalance, impaired functional mobility and activity tolerance. (Jt. Ex. 6, p. 73)

Claimant's final appointment with Dr. Phu occurred on July 18, 2016. Claimant reported his pain had improved. Claimant indicated he could lift up to 20 pounds and walk approximately 2 miles. Dr. Phu had the following advice for claimant:

> #1 patient's lower back pain and leg pain have significantly improved. He has mild residual pain left in the right lower back. He does not have any weakness in his lower extremities. I do not detect any neurological deficits. It is possible that lifting heavy weights at this point is not without increased pain. I recommend that he maintain limited weight restrictions. I do encourage him to look at how he is going to financially support himself in a career path that has fewer physical demands. He will follow-up with with [sic] orthopedic evaluation.
>
> #2 he will start land-based physical therapy as he has completed aquatic physical therapy.
>
> #3 he can follow up with me in 3 months.

(Jt. Ex. 6, p. 79)

On July 22, 2016, claimant presented to Todd J. Harbach, M.D., an orthopedic surgeon at Iowa Ortho. Defendants had requested an independent medical examination. (Jt. Ex. 7) Dr. Harbach assessed claimant as follows:

> **Assessment/Plan**
>
> Description
>
> Low back pain at multiple sites
>
> Degenerative lumbar disc
>
> Overweight
>
> Clinically, the patient is essentially 100 percent back pain and RIGHT lower quadrant pain although his abdominal pain is pretty much resolved also. His RIGHT extremity pain has been gone now for about a month. His exam today was fairly benign other than some mild tenderness in his paraspinous musculature has some guarding with palpation there, but his range of motion was good and motor and sensory exam normal. His magnetic resonance imaging shows a degenerative disk at L4 L5 that preexists his work injury, but he does have a far lateral disk herniation on the RIGHT at L4 L5 that could have been caused by the work injury. Currently now he is asymptomatic for this. I do not believe he requires any surgery.

(Jt. Ex. 7, p. 82)

Dr. Harbach opined claimant sustained two injuries as a result of his work injury on March 20, 2016. The first injury was an acute strain or muscle tear of the oblique in claimant's right lower quadrant. The second injury did not become apparent immediately. It was a herniated disk on the far lateral on the RIGHT at L4 L5 and resulted in some right radicular symptoms. Dr. Harbach also opined there was a degenerative disk at L4 L5 that pre-existed claimant's work injury. Dr. Harbach indicated it was very common for a person to injure the back and not experience symptoms until 24 to 48 hours later. (Jt. Ex. 7, p. 83)

Dr. Harbach causally related the two injuries to claimant's work injury. (Jt. Ex. 7, p. 84) The orthopedic surgeon determined claimant was not at maximum medical improvement. Claimant needed six weeks of physical therapy. (Jt. Ex. 7, p. 84) Dr. Harbach restricted claimant from pushing and pulling carts at COSTCO and from lifting more than 25 pounds. (Jt. Ex. 8, p. 84)

On September 26, 2016, Dr. Harbach examined claimant for the second time. (Jt. Ex. 7, p. 86) Claimant reported his back pain was not as frequent or as intense as it had once been. (Jt. Ex. 7, p. 86) Dr. Harbach prescribed 75 mg tablets of Diclofenac. He also recommended formal physical therapy and low-impact aerobic conditioning. (Jt. Ex. 7, p. 86) Claimant was placed on modified duty. (Jt. Ex. 7, p. 88)

Claimant returned to Dr. Harbach on October 24, 2016. Claimant reported he experienced increased back pain when he bent or lifted objects. Dr. Harbach placed claimant at maximum medical improvement on the 24th. The orthopedic surgeon urged claimant to find work where he did not need to do lots of bending, lifting, or twisting. (Jt. Ex. 7, p. 89) Dr. Harbach opined there was no permanent partial impairment rating for claimant's lumbar condition. Additionally, claimant was not in need of future medical treatment. No work restrictions were warranted. (Jt. Ex. 7, pp. 91-92)

Claimant exercised his right to an independent medical examination pursuant to Iowa Code section 85.39. On May 26, 2017, claimant presented to Sunil Bansal, M.D., M.P.H. (Claimant's Exhibit 1) An examination occurred. Dr. Bansal diagnosed claimant with a L4-L5 disc herniation with impingement of the right L5 nerve root. (Cl Ex. 1, p. 14) With respect to the back, Dr. Bansal opined:

> BACK:
>
> In my medical opinion Mr. Mason incurred an acute or chronic injury to his lower back on March 20, 2016. He was engaged in tasks that included lifting up to 75 pounds, as well as frequent pushing of shopping carts. It is my opinion that his back injury started to symptomatically manifest on March 20, 2016 from the cumulative work at Costco.
>
> Against this backdrop, the spine is fairly vulnerable to injury, as the threshold is markedly lowered. Consistent with that, the twisting incident on March 20, 2016 served as the proverbial "straw that broke the camel's

> back." After this incident his body was no longer able to sustain or adapt to the cumulative toll that had occurred to his spine, causing L4-L5 and L5-S1 disc bulges, which minimally touch the exiting right L5 nerve root.
>
> Per the American Academy of Orthopedic Surgeons on risk factors for disc herniations:
>
> **Improper lifting.** Using your back muscles to lift heavy objects instead of your legs can cause a herniated disc. Twisting while you lift can also make your back vulnerable. Lifting with your legs, not your back, may protect your spine.
>
> ....
>
> Again, in my medical opinion Mr. Mason incurred an acute on [sic] injury to his lower back on March 20, 2016. He was engaged in tasks that included lifting of up to 75 pounds, as well as frequent pushing of shopping carts. It is my opinion that his back injury started to symptomatically manifest on March 20, 2016 from the cumulative work at Costco. Against this backdrop, the spine is fairly vulnerable to injury, as the threshold is markedly lowered. Consistent with that, the twisting incident on March 20, 2016 served as the proverbial "straw that broke the camel's back." After this incident, his body was no longer able to sustain or adapt to the cumulative toll that had occurred to his spine, causing an L4-L5 disc herniation.

(Cl. Ex. 1, pp. 15-16)

Dr. Bansal agreed with Dr. Harbach. Claimant reached maximum medical improvement with respect to the back on October 24, 2016. (Cl. Ex. 1, p. 16)

Dr. Bansal rated claimant's back at 8 percent to the body as a whole according to the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition. The independent medical examiner also determined claimant should have permanent restrictions. The restrictions imposed were:

1. No lifting over 30 pounds occasionally;
2. No lifting over 15 pounds frequently;
3. No frequent bending or twisting;
4. Avoid multiple steps, stairs or ladders; and
5. Avoid uneven terrain.

(Cl. Ex. 1, p. 17)

Both claimant and defendants retained the services of vocational consultants to provide vocational evaluations. Claimant retained the services of Ms. Carma Mitchell, M.S. Defendants retained Ms. Lana Sellner, M.S., to provide an opinion letter regarding claimant's employability.

Ms. Mitchell based her opinions primarily on the impairment rating and restrictions provided by Dr. Bansal. The following paragraphs detail Ms. Mitchell's views:

> **Vocational Implications:**
>
> Mr. Mason is a 23-year old male with a high school education and some community college credits. He has worked in the past 5 years as a cart attendant, night stocker and front end assistant.
>
> On March 20, 2016, he sustained work related injuries. Based on the limitations outlined by Dr. Bansal, Mr. Mason has lost access to jobs in the very heavy and heavy categories of work, which make up 0.7% and 9.1% of occupations respectively as well as 2/3 of occupations in the medium category of work for a combined 29.5% loss of access to the labor market.
>
> Mr. Mason has tried work at three different sedentary jobs in data entry and customer service since his injury, which fit the limitations outlined by Dr. Bansal (and what was suggested by Dr. Harbach). Mr. Mason needs to be selective from a physical standpoint in the jobs he can now perform, although I do not anticipate he will have difficulty finding employment. He is looking forward to returning to work and furthering his education.

(Cl. Ex. 3, pp. 26-27)

Ms. Sellner did not conduct an interview with claimant. She performed a records review only. Ms. Sellner reviewed the two independent medical examinations, claimant's deposition testimony, claimant's answers to interrogatories, claimant's notice of resignation, the job analysis, and the vocational evaluation performed by Ms. Mitchell. Ms. Sellner's recommendations and conclusions are duplicated below:

> **Recommendations and Conclusions:**
>
> Based on the information presented, it is this consultant's opinion that Mr. Mason continues to be employable. Mr. Mason has continued to work at his own employer until his resignation. He has obtained alternative employment but due to personal reasons, he terminated these positions on his own.
>
> Mr. Mason did work in a heavy occupation while at Costco. However, when considering the opinion of Dr. Harbach, treating physician, Mr. Mason has no vocational loss and can work in all occupations.

> If considering the imposed restrictions of Dr. Bansal's IME, Mr. Mason has been eliminated to some medium occupations along with heavy work. He has never demonstrated working in a very heavy occupation; therefore this is not included in the transferable skills analysis. He does have a loss of approximately 5-9% of access to the labor market. It is unclear why Ms. Mitchell included the very heavy work category when accessing employability as he has not worked or demonstrated success in that work category. A labor market survey identified positions that are currently available for him to pursue, if he chooses.

(Ex. D, p. 9)

RATIONALE AND CONCLUSIONS OF LAW

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 Electric 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).

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.

While a claimant is not entitled to compensation for the results of a preexisting injury or disease, its mere existence at the time of a subsequent injury is not a defense. Rose v. John Deere Ottumwa Works, 247 Iowa 900, 908, 76 N.W.2d 756, 760-61 (1956). It the claimant had a preexisting condition or disability that is materially, aggravated, accelerated, worsened or lighted up so that it results in disability, claimant is entitled to recover. Nicks v. Davenport Produce Co., 254 Iowa 130, 135, 115 N.W.2d 812, 815 (1962); Yeager v. Firestone Tire & Rubber Co., 253 Iowa 369, 375, 112 N.W.2d 299, 302 (1961).

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).

Claimant has established he sustained a permanent injury to his back as a result of his work injury on March 20, 2016. The undersigned finds Dr. Bansal's opinions more persuasive than the opinions held by Dr. Harbach. Dr. Bansal diagnosed claimant with an L4-L5 disc herniation with impingement of the right L5 nerve root. (Cl. Ex. 1, p. 14) Permanent restrictions were imposed. (Cl. Ex. 1, p. 17) Dr. Bansal rated claimant as having an 8 percent permanent impairment.

Dr. Harbach provided an opinion, but he did not assess any impairment rating. The rating physician opined claimant fell under DRE Lumbar Category I Table 15-3 on page 884 of the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition. In order to have a zero impairment rating, there must be no significant clinical findings. That is not what Dr. Harbach stated in Joint Exhibit 7, page 83. Dr. Harbach found:

> Mr. Mason's current diagnoses includes RIGHT oblique strains/sprain/tear of the muscle that is now healed and resolved. The 2nd diagnosis is a far lateral disk herniation to the RIGHT at L4 L5 that has resolved with time and conservative care by this point. He also has a lumbar degenerative disk at L4 L5 that preexisted his injury.

(Jt. Ex. 7, p. 83) Dr. Harbach recommended claimant secure a job where he did not have to perform regular bending, lifting or twisting. There were no formal restrictions imposed.

Dr. Harbach's diagnosis of a herniated disc at L4-L5 is the precise same diagnosis provided by Dr. Bansal. In addition to Dr. Bansal, other treating medical providers noted the clinical objective findings of disc derangement at L4-L5. Those providers related the findings to the work injury on March 20, 2016. The objective findings of a herniated disc at L4-L5 and the relation of those findings to the specific injury coupled with claimant's continued complaints of pain and radiculopathy, correlate more closely to Dr. Bansal's opinion about permanent impairment than to Dr. Harbach's opinion there is no permanent impairment.

Claimant has established by a preponderance of the evidence; he has a permanent partial disability to the back. His disability is to be calculated 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 very young man. He has his entire working life ahead of him. Claimant graduated from high school. He is subject to many types of retraining. He has taken some college courses at the community college. There is every reason to believe claimant would be a successful college student.

Claimant has established he is able to seek and find employment. At the time of his hearing, claimant was earning approximately the same hourly wage as he was earning when he left COSTCO. Claimant may be precluded from engaging in some heavy labor. However, he has never been driven towards jobs in the heavy work categories, such as construction, forestry, or heavy manufacturing positions.

Claimant does have some work restrictions. He should avoid frequent bending and twisting, as well as heavy lifting. All positions for which claimant was hired were sedentary in nature.

After considering all of the factors involving industrial disability; it is the determination of the undersigned; claimant has a permanent partial disability in the amount of fifteen (15) percent. Defendants shall pay unto claimant seventy-five (75) weeks of permanent partial disability benefits at the stipulated weekly benefit rate of $206.72 and commencing from October 24, 2016.

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. April 24, 2018).

Claimant is requesting 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).

Claimant is requesting penalty benefits pursuant to Iowa Code section 86.13 for the alleged unreasonable delay of healing period benefits for the period from March 21, 2016 through August 7, 2016. Defendants issued a check to claimant for the period of time on September 9, 2016. Claimant alleges defendants did not have a physician's opinion or any other reasonable basis upon which to deny claimant's claim.

According to claimant's calculations, the healing period benefits were paid 173 days following the work injury; 49 days after Dr. Harbach's IME, and 36 days following defendants' decision to accept the claim as compensable.

Defendants maintain they did not act unreasonably because claimant's back pain was not immediate, and because there were so many medical records to review. It appears to the undersigned; defendants engaged in "some foot dragging." They acted unreasonably, given the factual scenario surrounding the work injury. Penalty benefits are appropriate. It is the determination of this deputy; defendants shall pay unto claimant $1,300.00 in penalty benefits to claimant pursuant to Iowa Codes section 86.13.

The final issue is the matter of costs.

Iowa Code section 86.40 states:

> Costs. All costs incurred in the hearing before the commissioner shall be taxed in the discretion of the commissioner.

Iowa Administrative Code Rule 876—4.33(86) states:

> Costs. Costs taxed by the workers' compensation commissioner or a deputy commissioner shall be (1) attendance of a certified shorthand reporter or presence of mechanical means at hearings and evidential depositions, (2) transcription costs when appropriate, (3) costs of service of the original notice and subpoenas, (4) witness fees and expenses as provided by Iowa Code sections 622.69 and 622.72, (5) the costs of doctors' and practitioners' deposition testimony, provided that said costs do not exceed the amounts provided by Iowa Code sections 622.69 and 622.72, (6) the reasonable costs of obtaining no more than two doctors' or practitioners' reports, (7) filing fees when appropriate, (8) costs of persons reviewing health service disputes. Costs of service of notice and subpoenas shall be paid initially to the serving person or agency by the party utilizing the service. Expenses and fees of witnesses or of obtaining doctors' or practitioners' reports initially shall be paid to the witnesses, doctors or practitioners by the party on whose behalf the witness is called or by whom the report is requested. Witness fees shall be paid in accordance with Iowa Code section 622.74. Proof of payment of any cost shall be filed with the workers' compensation commissioner before it is taxed. The party initially paying the expense shall be reimbursed by the party taxed with the cost. If the expense is unpaid, it shall be paid by the party taxed with the cost. Costs are to be assessed at the discretion of the deputy commissioner or workers' compensation commissioner hearing the case unless otherwise required by the rules of civil procedure governing discovery. This rule is intended to implement Iowa Code section 86.40.

Iowa Administrative Code rule 876—4.17 includes as a practitioner, "persons engaged in physical or vocational rehabilitation or evaluation for rehabilitation." A report or evaluation from a vocational rehabilitation expert constitutes a practitioner report under our administrative rules. Bohr v. Donaldson Company, File No. 5028959 (Arb.

November 23, 2010); Muller v. Crouse Transportation, File No. 5026809 (Arb. December 8, 2010) The entire reasonable costs of doctors' and practitioners' reports may be taxed as costs pursuant to 876 IAC 4.33. Caven v. John Deere Dubuque Works, File Nos. 5023051, 5023052 (App. July 21, 2009).

Claimant is requesting certain costs as detailed on page 2 of the hearing report

The following costs are taxed to defendants:

Filing fee:	$100.00
Service Fee:	$13.12
Vocational Expert Report:	$357.50
Deposition:	$198.45

ORDER

THEREFORE, IT IS ORDERED:

Defendants shall pay unto claimant seventy-five (75) weeks of permanent partial disability benefits commencing from October 24, 2016 and payable at the stipulated rate of two hundred six and 72/100 dollars ($206.72).

All past due benefits shall be paid in a lump sum together with interest as allowed by law and as discussed in the body of the decision.

Defendants shall pay unto claimant, one thousand three hundred and no/100 dollars ($1,300.00) in penalty benefits pursuant to Iowa Code section 86.13.

Defendants shall pay costs as detailed in the body of the decision.

Defendants shall file all reports as required by law.

Signed and filed this 4th day of March, 2019.

Michelle A. McGovern

MICHELLE A. MCGOVERN
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.