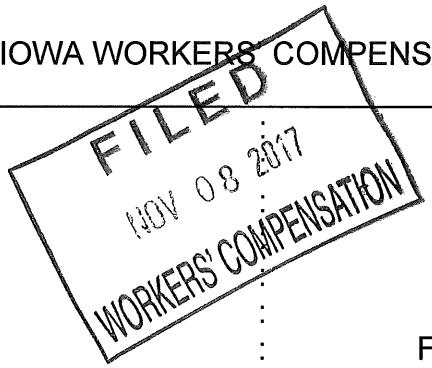
BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER



DAVID MARSHALL, Claimant, vs. QUAKER OATS COMPANY, Employer, and INDEMNITY INSURANCE COMPANY OF NORTH AMERICA, Insurance Carrier, Defendants.	File Nos. 5049370, 5055680 A R B I T R A T I O N D E C I S I O N Head Note Nos.: 1402.30, 1402.40, 2501, 2701, 2907, 3001, 4000.2

STATEMENT OF THE CASE

David Marshall, claimant, filed two petitions in arbitration and seeks workers' compensation benefits from defendant, Quaker Oats Company, as the employer and Indemnity Insurance Company of North America, as the insurance carrier. Hearing was held on April 18, 2017.

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.

The evidentiary record includes Joint Exhibits 1 through 11, Claimant's Exhibits 1 through 11, and Defendants' Exhibits A through I. All exhibits were received into the evidentiary record without objection.

Claimant testified on his own behalf. No other witnesses testified live at the hearing.

At the conclusion of the arbitration hearing, counsel for the parties requested the opportunity to file post-hearing briefs. Their request was granted and the parties filed their briefs simultaneously on May 19, 2017, at which time the case was considered fully submitted.

ISSUES

In File No. 5049370, the parties submitted the following disputed issues for resolution:

1. Whether claimant's alleged knee injuries are causally related to the admitted hip injury occurring on September 27, 2013.

2. The extent of claimant's entitlement to healing period benefits.

3. The extent of claimant's entitlement to permanent disability.

4. The proper commencement date for permanent disability benefits.

5. Claimant's gross weekly earnings and applicable corresponding weekly rate of compensation at which benefits are owed.

6. Whether claimant is entitled to payment, reimbursement, or satisfaction of past medical expenses itemized at Claimant's Exhibits 6 and 7.

7. Whether claimant is entitled to an award of alternate medical care for his alleged knee injuries.

8. Whether claimant is entitled to an award of penalty benefits for unreasonable delay in payment of permanent partial disability benefits.

9. Whether costs should be assessed against either party.

In File No. 5055680, the parties submitted the following disputed issues for resolution:

1. Whether claimant sustained an injury that arose out of and in the course of his employment on January 15, 2015.

2. Whether the alleged injury caused temporary disability and, if so, claimant's entitlement to temporary disability, or healing period, benefits.

3. Whether the alleged injury caused permanent disability and, if so, the extent of claimant's entitlement to permanent disability benefits.

4. Whether the January 15, 2015 injury, if any, was a scheduled or unscheduled injury.

5. The proper commencement date for permanent disability benefits, if any.

6. Whether claimant is entitled to payment, reimbursement, or satisfaction of past medical expenses itemized at Claimant's Exhibits 6 and 7.

7. Whether claimant is entitled to alternate medical care for his alleged knee injuries.

8. Whether defendants are entitled to apportionment for any benefits awarded in File No. 5049370.

9. Whether claimant is entitled to an award of penalty benefits for an alleged unreasonable delay or denial of weekly benefits.

10. Whether the costs of this case should be taxed against either party.

FINDINGS OF FACT

The undersigned, having considered all of the evidence and testimony in the record, recognizing that there may be competing or contradictory facts within this evidentiary record, finds the following facts:

1. Claimant, David Marshall, was 59 years old on the date of the arbitration hearing. (Transcript, page 19)

2. Mr. Marshall graduated from high school but has no further education. (Transcript, p. 19)

3. Claimant's employment history includes working at his grandmother's bar, construction work, on an assembly line at Rockwell Collins, performing repair and installation of railroad tracks for Chicago Northwestern Railroad, including work as a machine operator, regular track person, laborer, assistant foreman and as a foreman. (Tr., pp. 20-22)

4. When he was working for Chicago Northwestern Railroad, claimant also worked part-time for this employer, Quaker Oats. (Tr., p. 20-21)

5. Once claimant obtained full-time employment with Quaker Oats, he quit his position at the railroad. (Tr., p. 24)

6. In his work for Quaker Oats, claimant works in the bulk products department and has held several different positions with Quaker Oats. (Tr., p. 26)

7. Claimant's current position is in the sack room. He obtained this position within the past year. (Tr., p. 27)

8. In each of his positions with Quaker Oats, claimant was required to perform lifting, carrying, pushing, and pulling and in most of his jobs with Quaker Oats claimant performed climbing, stooping, crouching, and kneeling job duties. (Tr., pp. 28-29)

9. As of the date of the arbitration hearing, claimant continued to work for Quaker Oats in the sack room.

10. On September 27, 2013, claimant was inspecting a semi at the Quaker Oats facility. After completing his inspection, claimant was attempting to get down from the semi. He had to jump down from a height of approximately 40 to 44 inches. Upon landing, claimant felt a "big pull" in his right hip.

11. Defendants admitted and provided medical care for claimant's right hip injury.

12. Ultimately, claimant's injury was diagnosed as a labral tear in claimant's right hip.

13. Surgery was performed by Matthew L. White, M.D., on claimant's right hip on January 20, 2014. (Tr., p. 41; Joint Exhibit 8, p. 1)

14. A subsequent surgery, in which a right hip capsular repair and labral debridement was performed, occurred on September 12, 2016. (Jt. Ex. 8, p. 14)

15. Dr. White opined that Mr. Marshall's right hip achieved maximum medical improvement on February 24, 2017, and assigned a permanent impairment equivalent to four percent of the whole person for the right hip injury. (Jt. Ex. 6, pp. 75-76)

16. Acknowledging there are competing impairment ratings from Mark Taylor, M.D. and Theron Q. Jameson, D.O., I find Dr. White's impairment rating to be credible and convincing. I find that claimant has proven he sustained a four percent permanent impairment of the whole person as a result of the right hip injury on September 27, 2013.

17. Dr. White also opined that claimant may return to full duty work following recovery from his right hip injury. (Jt. Ex. 6, p. 75)

18. Again recognizing there are competing medical opinions in this record, I find that Dr. White was the physician most familiar with claimant's injury, rehabilitation, and that his opinion carries the most weight in this situation. I find that claimant requires no permanent work restrictions as a result of the right hip injury.

19. There is dispute between the parties about whether claimant's right knee injury is causally related to, materially aggravated by, or a sequela of the September 27, 2013 work injury.

20. Subsequent to his right hip surgery, claimant was required to report to light duty work at Quaker Oats. He explained that the company sent a taxi to pick him up for work each day because he was unable to drive. However, given that it was winter conditions, that he remained on crutches, and given the configurement of his driveway, claimant became concerned about traversing over his icy driveway to get into a cab. Quaker Oats provided claimant with a pair of Yaktrax to wear on his shoes to prevent him from slipping on the ice and snow. Unfortunately, the Yaktrax were slippery on the dry, smooth pavement in claimant's garage and claimant fell one morning while attempting to get to the taxi to get to work.

21. After he fell in his garage, claimant developed right knee pain that required medical treatment.

22. On May 15, 2014, claimant submitted to a partial meniscectomy on his right knee. (Claimant's Ex. 1, p. 4)

23. In his April 2, 2014 office note, Dr. White indicated that claimant "has certainly aggravated his knee." (Jt. Ex. 6, pp. 7) When asked specifically about causation of the right knee, Dr. White opined, "it is at least as likely as not that his knee concerns are related to his recovery from hip surgery." (Jt. Ex. 6, p. 9) On April 29, 2014, Dr. White indicated in an office note, "I certainly think this could be related to the fall that he sustained post-operatively." (Jt. Ex. 6, p. 11)

24. By July 18, 2014, Dr. White recorded that claimant had no pain in the right knee and released claimant to return to work without restrictions. (Jt. Ex. 6, p. 22)

25. With respect to this right knee injury, claimant's independent medical evaluator, Dr. Taylor, opines:

> [I]t is possible that Mr. Marshall injured it at the time of the original injury. However, I was not able to identify specific mention of right knee pain or clicking until after his right hip surgery. As noted in the records, Mr. Marshall reportedly sustained a fall when attempting to utilize his crutches along with the "Yak-trax." ...
>
> In this circumstance, I would consider the right knee injury to represent a sequela of his original injury. But for the right hip injury, Mr. Marshall would not have been utilizing crutches and the "Yak-trax", and it is very unlikely that he would have slipped in his garage

> on normal concrete if he had not been utilizing these two items due to his hip injury. Therefore, I would consider his right knee injury to be a sequela of the original September 27, 2013 right hip injury.
>
> (Claimant's Ex. 1, p. 10)

26. Defendants also obtained an independent medical evaluation to address the causation issue, performed by Dr. Jameson on November 15, 2014. Dr. Jameson opined that claimant did not sustain a right knee injury as a result of the September 27, 2013 work injury. He opined that the MRI of claimant's right knee showed a medial meniscus tear and explained that the claimant's symptoms described on the outside of the right knee do not match the MRI findings. Therefore, Dr. Jameson concluded that the right knee condition is not causally related to the September 27, 2013 work injury.

27. Dr. Jameson does not discuss the fall after claimant's right hip surgery or the ramifications of that fall on claimant's right knee.

28. Considering each of the medical expert's opinions, I find Dr. Taylor's analysis and explanation of the causal connection between claimant's right knee and the initial injury to be most convincing. Specifically, I find that claimant did not prove that he sustained a right knee injury as a direct result of the September 27, 2013 work incident. However, I find that claimant proved he fell as a direct result of being on crutches and walking with Yaktrax. I find that the right knee injury is a sequela of the September 27, 2013 work injury.

29. I accept Dr. Taylor's declaration of maximum medical improvement for the right knee on July 22, 2014 and his opinion that claimant sustained a two percent permanent impairment of the right lower extremity as a result of the right knee injury.

30. Mr. Marshall also asserts that he sustained a left knee injury as sequela of the September 27, 2014 work injury. Specifically, Mr. Marshall asserts that he sustained an injury to the left knee as a result of physical therapy activities performed during rehabilitation of his right hip.

31. Mr. Marshall had a significant pre-existing history of treatment and problems with his left knee, including prior surgical intervention and even mention of a possible left knee replacement prior to January 2015.

32. Claimant was also evaluated by Jeffrey M. Nassif, M.D., on January 29, 2015. Dr. Nassif opined that claimant had left knee osteoarthritis, noted bone-on-bone within the left knee, and recorded a history of left knee pain for several years from 1997 through 2001 with increased pain occurring in the year and a half before Dr. Nassif's evaluation. (Jt. Ex. 10, pp. 3-4)

33. Claimant's testimony contradicted Dr. Nassif's history to some extent. (Tr., p. 84)

34. Ultimately, claimant's left knee required a total knee replacement, performed by Cassandra S. Lange, M.D., on March 2, 2017.

35. Claimant has not reached maximum medical improvement for the left knee following his total knee replacement and claims a running healing period if the left knee is found to be causally related to the September 27, 2014 work injury.

36. Dr. Jameson addressed the left knee condition in his November 15, 2014 report. He opined that the "right knee condition and left knee conditions were not mentioned initially in the complaint of the alleged injury of 09/27/13." (Defendants' Ex. A, p. 4)

37. Claimant concedes that he did not experience left knee pain or symptoms after he jumped on September 27, 2013. (Tr., p. 89)

38. However, claimant asserts that he injured his left knee while performing physical therapy exercises recovering from his right hip surgery and right knee surgery. (Tr., p. 47)

39. Dr. Jameson does not specifically contemplate this scenario in his report and actually authors his report prior to the purported physical therapy causing claimant's left knee injury.

40. On September 3, 2014, Dr. White indicated in an office note that claimant had "left knee osteoarthritis which is likely sequelae from previous partial medial meniscectomies that have deteriorated over time." (Jt. Ex. 6, p. 27)

41. However, in June 2016, Dr. White noted increased symptoms in claimant's left knee after physical therapy. (Jt. Ex. 6, p. 60)

42. Dr. White referred claimant to Dr. Lange for definitive left knee treatment, which resulted in the left total knee replacement.

43. Dr. Lange ultimately opined:

> As part of his post-surgery rehabilitation, he was undergoing a work-hardening program that included jumping activities that particularly irritated his left knee. His prior left knee work injuries and surgeries increased the risk of reinjury.... The jumping activity was a material aggravation of his underlying left knee problem....

> Based on this history, a total left knee replacement has been recommended.
>
> (Jt. Ex. 11, p. 7)

44. Dr. Lange's explanation corresponds relatively closely to the opinions expressed by Dr. Taylor. Dr. Jameson's opinions and Dr. Nassif's opinions were offered before the therapy that ultimately aggravated claimant's left knee condition.

45. Therefore, I find that claimant failed to prove he sustained a left knee injury as a direct result of the September 27, 2013 work incident. However, I find that claimant's physical therapy after his right knee surgery caused a material aggravation and acceleration of his underlying left knee condition, causing him to require a left total knee replacement sooner than would otherwise have been required.

46. I specifically find that claimant has proven he sustained the left knee injury and resulting left total knee replacement as a sequela of the September 27, 2013 work incident.

47. Mr. Marshall asserted a second date of injury of January 15, 2015, in which he slipped and fell on some black ice at work.

48. I find that the slip and fall occurred on January 15, 2015.

49. Claimant testified that he believed the fall on January 15, 2015 was a factor in causing his left knee replacement.

50. I find that claimant did not prove a material aggravation or acceleration of any of his asserted injuries as a direct result of the January 15, 2015 incident. Rather, as noted above, I find that the right hip is directly related to the September 27, 2013 incident and that the right knee and left knee developed as sequela of the September 27, 2013 injury.

51. At the commencement of hearing, defendants conceded that the past medical expenses submitted by claimant were related to his right and left knee injury claims. Defendants further conceded that, if the left and right knee injuries were found to be compensable, the medical expenses would also be compensable. (Tr., pp. 7-10)

52. Therefore, I find that the medical expenses, including medical mileage, claimant has introduced at Claimant's Exhibits 6 and 7 are for reasonable and necessary medical treatment and that those expenses are causally related to the September 27, 2013 work injury.

53. Mr. Marshall also seeks an order for alternate medical care and specifically for ongoing and future treatment of his left knee through Dr. Lange. Given their denial of liability for the left knee, defendants have not offered treatment for the left knee. I find that treatment with the treating surgeon, Dr. Lange, is the most reasonable option for claimant and that future care of the left knee is likely necessary.

54. Mr. Marshall seeks an award of healing period benefits from April 18, 2016 through May 7, 2016 as well as healing period from March 2, 2017, the date of his left total knee replacement, through the date of the arbitration hearing.

55. I find that claimant has not achieved maximum medical improvement of the left knee and that it is not yet ripe to determine permanent disability for the left knee.

56. From the date of surgery on claimant's left knee through the time of the hearing, claimant was not capable of performing substantially similar employment to that performed on September 27, 2013 due to his ongoing recovery from his left total knee replacement.

57. From the date of surgery on claimant's left knee through the time of the hearing, claimant remained off work as a result of the left total knee replacement.

58. Although Mr. Marshall claims entitlement to healing period from April 18, 2016 through May 7, 2016, he produced an affidavit specifying the dates he was unable to work. He did not claim he was unable to work between April 18, 2016 and May 7, 2016. (Claimant's Ex. 5)

59. Neither party briefed the healing period claim for the dates from April 18, 2016 through May 7, 2016.

60. I am unable to find evidence in this record that demonstrates claimant was not working and was unable to perform substantially similar employment during the period from April 18, 2016 through May 7, 2016.

61. Therefore, I find that claimant failed to prove he was off work and was unable to perform substantially similar work during his claimed healing period from April 18, 2016 through May 7, 2016.

62. Mr. Marshall also asserts a claim for underpayment of healing period benefits, which is determined by calculation of claimant's gross weekly earnings and applicable weekly worker's compensation rate.

63. Claimant earned bonuses while working at Quaker Oats.

64. The weeks ending September 21, 2013, August 31, 2013, August 17, 2013, and July 20, 2013, claimant took vacation. The earnings for these weeks are not representative of claimant's typical and customary earnings prior to his date of injury.

65. The week ending July 6, 2013, claimant was absent. Claimant's earnings for this week are not representative of his typical and customary earnings prior to his date of injury.

66. Claimant asserts that certain bonuses should be included within the average gross weekly wage. (Defendants' Ex. F, pp. 7, 20, 31, 42, 44-45)

67. Review of the record demonstrates that these bonuses are actually a few different types of bonuses, including a performance bonus, a vacation bonus, and a QFSPFP bonus. (Ex. F, p. 7, 20, 31, 42)

68. The evidentiary record is not well developed on when or the criteria determining if these bonuses are paid. Claimant offered testimony suggesting these are regular bonuses, but also testified that the bonus (no specification of which bonus or if this intends to refer to all bonuses) is paid based on "how the plant does as a whole."

69. I find that claimant has not established which, if any, of the bonuses paid are regular bonuses. Therefore, I do not include the bonuses in my calculation of the average gross weekly wage.

70. Claimant's average gross weekly wage is calculated as follows:

Pay Period End Date	Total Hours (at $27.70 per hour)	Hourly Earnings (at $27.70 per hour)	Shift Differential Paid	Total Earnings
9/14/13	40	$1108.00	0.00	$1108.00
9/7/13	52	1440.40	1.40	$1441.80
8/24/13	49	1357.30	3.15	$1360.45
8/10/13	64	1772.80	9.20	$1782.00
8/3/13	68	1883.60	7.80	$1891.40
7/27/13	64	1772.80	6.00	$1778.80
7/13/13	52	1440.40	4.20	$1444.60
6/29/13	52	1440.40	4.20	$1444.60
6/22/13	68	1883.60	5.10	$1888.70
6/15/13	60	1662.00	4.20	$1666.20
6/8/13	54.5	1509.65	5.48	$1515.13
6/1/13	58	1606.60	8.60	$1615.20
5/25/13	56	1551.20	6.00	$1557.20
				$20,494.08

67. Dividing the total earnings of $20,494.08 by 13 weeks, results in average gross weekly earnings of $1576.47.

68. I find that claimant's customary and typical gross average weekly earnings prior to the September 27, 2013 injury date were $1576.47 per week.

69. Defendants paid weekly benefits prior to trial at the rate of $932.15 per week.

71. At trial, defendants urged a weekly rate of $952.22 be adopted.

72. No evidence or explanation was produced to establish a reasonable basis for paying at the lower rate of $932.15 per week.

73. No evidence or explanation was produced to establish a reasonable basis for not rectifying the weekly rate prior to trial.

74. I find that defendants failed to carry their burden of proof to demonstrate a reasonable basis for the weekly rate they paid and the obvious underpayment of benefits.

75. I find that defendants failed to establish they contemporaneously conveyed their basis for delay or denial of benefits to claimant in this respect.

76. Claimant also asserts that defendants' investigation was slow and justifies an award of penalty benefits.

77. I find that, beyond the underpayment of weekly rate, claimant has not established a delay or denial of benefits prior to March 2, 2017. Defendants clearly had a reasonable basis to challenge causal connection of the left knee by that date and claimant was clearly aware of the opinions of Dr. Nassif and Dr. Jameson prior to March 2, 2017. Therefore, I find no basis for award of penalty benefits other than the underpayment of the weekly rate.

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).

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, 76 N.W.2d 756 (1956). If 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, 115 N.W.2d 812 (1962); Yeager v. Firestone Tire & Rubber Co., 253 Iowa 369, 112 N.W.2d 299 (1961).

Having found that both the right and left knee injuries were sequela of the September 27, 2013 right hip injury and following treatment, I conclude that claimant has proven that he sustained a right hip injury, right knee injury, and left knee injury that all arose out of and in the course of his employment on September 27, 2013.

Section 85.34(1) provides that healing period benefits are payable to an injured worker who has suffered permanent partial disability until (1) the worker has returned to work; (2) the worker is medically capable of returning to substantially similar employment; or (3) the worker has achieved maximum medical recovery. The healing period can be considered the period during which there is a reasonable expectation of improvement of the disabling condition. See Armstrong Tire & Rubber Co. v. Kubli, 312 N.W.2d 60 (Iowa App. 1981). Healing period benefits can be interrupted or intermittent. Teel v. McCord, 394 N.W.2d 405 (Iowa 1986).

Having found that claimant did not prove he was off work or unable to perform substantially similar employment during a claimed healing period between April 18, 2016 and May 7, 2016, I conclude that claimant failed to prove entitlement to healing period benefits during this period of time.

On the other hand, I found that claimant has proven he was off work, not capable of performing substantially similar work, and was not at maximum medical improvement between March 2, 2017 (left knee surgery) and the date of the arbitration hearing. Therefore, I conclude that claimant is entitled to healing period benefits during that period of time and continuing into the future until the earliest date when one of the factors of Iowa Code section 85.34(1) is achieved. Claimant will therefore be awarded a running healing period from March 2, 2017 through the date of hearing and into the future until the healing period terminates pursuant to one of the factors outlined in Iowa Code section 85.34(1).

The next issue for determination is the applicable gross weekly earnings and corresponding weekly rate of compensation owed claimant. The parties stipulate that claimant was married and entitled to two exemptions on the date of injury. (Hearing Report) 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.

If the employee is paid on a daily or hourly basis or by output, weekly earnings are computed by dividing by 13 the earnings over the 13-week period immediately preceding the injury. Any week that does not fairly reflect the employee's customary earnings is excluded, however. Section 85.36(6).

In this case, I found that certain weeks of earnings were not representative or typical of claimant's pre-injury earnings. I excluded those weeks and included the next representative week of earnings in my calculations. Iowa Code section 85.36(6).

Claimant also advocated for inclusion of some bonuses paid by the employer. There were multiple types of bonuses included within the pay records. However, the evidentiary record was not well developed on this issue and it is unclear under what criteria those bonuses were paid. However, claimant testified that the bonus was paid based upon the profitability, or how well the plant does as a whole. Accordingly, claimant was testifying that the bonus he received was a profit sharing bonus.

The Iowa Workers' Compensation Commissioner recently considered the issue of profit sharing bonuses in a declaratory order. In that declaratory order, the commissioner concluded that the profit sharing bonus was an irregular bonus because it was dependent upon the overall profitability of the employer. He also concluded that the bonus was irregular because it was variable and erratic. The commissioner concluded that the profit sharing bonus should be excluded as an irregular bonus under Iowa Code section 85.61(3). In re Declaratory Order Regarding Profit Sharing Bonus and Continuous Improvement Pay Plan, (July 12, 2017).

The commissioner's declaratory order is binding precedent upon the undersigned. Therefore, I conclude that the bonuses testified to by claimant are profit sharing bonuses and are legally considered irregular. I conclude that the bonuses claimant was paid should not be included in the calculation of claimant's weekly rate based upon the holding in the commissioner's July 12, 2017 declaratory order.

The weekly benefit amount payable to an employee shall be based upon 80 percent of the employee's weekly spendable earnings, but shall not exceed an amount, rounded to the nearest dollar, equal to 66-2/3 percent of the statewide average weekly wage paid employees as determined by the Department of Workforce Development. Iowa Code section 85.37.

The weekly benefit amount is determined under the above Code section by referring to the Iowa Workers' Compensation Manual in effect on the applicable injury date. Iowa Code section 85.37; 85.61(6); 876 IAC 8.8. Having found that claimant's gross average weekly wage was $1,576.47, and using the Iowa Workers' Compensation Manual (rate book) with effective dates of July 1, 2013 through June 30, 2014, I determine that the applicable weekly rate for weekly benefits is $956.13.

Having reached this conclusion about the weekly rate, and considering the parties' stipulation about underpayment of rate pertaining to healing period, I conclude that claimant has established an underpayment of the weekly rate and is owed the difference of the weekly rate for any healing period benefits paid to date.

Claimant seeks an award of medical expenses contained at Claimant's Exhibits 6 and 7. Pursuant to the findings relative to the right and left knees and the agreements made by defendants at the commencement of hearing, I conclude that claimant is entitled to an award of past medical expenses. Iowa Code section 85.27.

Claimant also seeks alternate medical care, specifically for ongoing treatment of his left knee through Dr. Lange. Defendants have denied liability for the left knee and offered no treatment for that condition. Claimant has obtained a left total knee replacement through Dr. Lange and it is reasonable and logical to continue care through Dr. Lange. Claimant is clearly entitled to ongoing treatment pursuant to Iowa Code section 85.27. Therefore, an order will be entered granting claimant alternate medical care in the form of ongoing treatment of the left knee through Dr. Lange. Iowa Code section 85.27.

Mr. Marshall also asserts a claim for penalty benefits for the underpayment of the weekly rate and for a delay in investigation of his knee claims.

Iowa Code section 86.13(4) provides:

> a. If a denial, a delay in payment, or a termination of benefits occurs without reasonable or probable cause or excuse known to the employer or insurance carrier at the time of the denial, delay in payment,

or termination of benefits, the workers' compensation commissioner shall award benefits in addition to those benefits payable under this chapter, or chapter 85, 85A, or 85B, up to fifty percent of the amount of benefits that were denied, delayed, or terminated without reasonable or probable cause or excuse.

b. The workers' compensation commissioner shall award benefits under this subsection if the commissioner finds both of the following facts:

(1) The employee has demonstrated a denial, delay in payment, or termination in benefits.

(2) The employer has failed to prove a reasonable or probable cause or excuse for the denial, delay in payment, or termination of benefits.

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).

I found that the defendants had a reasonable basis for challenging claimant's knee claims and that the employer provided the medical record from Dr. Jameson such that claimant was aware of the basis for this challenge. I conclude there is no basis for award of penalty benefits for challenging claimant's knee claims.

On the other hand, I found that defendants did not offer a reasonable excuse for the delay in payment, or underpayment, of benefits. Iowa Code section 86.13(4)(b)(2). In fact, defendants changed and increased their urged weekly rate prior to trial without making up the difference in the weekly rate. Defendants offer no evidence to justify this underpayment or the failure to rectify the underpayment prior to trial.

Moreover, defendants did not contemporaneously convey their bases for delay of benefits. Iowa Code section 86.13(4)(c)(3). Defendants bore the burden to establish a reasonable basis, or excuse, and to prove the contemporaneous conveyance of those bases to the claimant. Defendants failed to carry their burden of proof on the penalty issues, and a penalty award is appropriate. Iowa Code section 86.13.

The purpose of Iowa Code section 86.13 is both punishment for unreasonable conduct but also deterrence for future cases. Id. at 237. In this regard, the Commission is given discretion to determine the amount of the penalty imposed with a maximum penalty of 50 percent of the amount of the delayed, or denied, benefits. Christensen v. Snap-On Tools Corp., 554 N.W.2d 254, 261 (Iowa 1996).

In exercising its discretion, the agency must consider factors such as the length of the delays, 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. Meyers v. Holiday Express Corp., 557 N.W.2d 502, 505 (Iowa 1996). Claimant introduced evidence to demonstrate a record of past penalties against both the employer and the insurance carrier. Defendants offered essentially no justification for their underpayment

of rate or their failure to rectify that underpayment despite arguing for a rate higher than they actually paid.

Reviewing the payment records at Exhibit H, I gather that defendants voluntarily paid approximately nine weeks of temporary disability, and the hearing report stipulates that they paid ten weeks of permanent disability. Assuming approximately 19 weeks of voluntary benefits were paid by defendants, their underpayment totaled $23.98 per week for 19 weeks, or $455.62.

Having considered the relevant factors and the purposes of the penalty statute, I conclude that a section 86.13 penalty in the amount of $200.00 is appropriate in this case.

Finally, claimant seeks assessment of his costs related to both files. Assessment of costs is a discretionary function of the agency. Iowa Code section 86.40.

In File No. 5049370, claimant has prevailed on the majority of the issues. I conclude it is reasonable to assess claimant's costs against defendants in this file. Claimant seeks assessment of his filing fee ($100.00) and service fee ($6.48). Both are reasonable and are assessed pursuant to 876 IAC 4.33(3) and (7).

Mr. Marshall seeks assessment for collection of medical records and reports totaling $192.10. Claimant seeks assessment for three sets of records and reports. Pursuant to 876 IAC 4.33(6), the cost of obtaining no more than two reports can be obtained. I conclude it is reasonable to assess the cost of Dr. Lange's March 13, 2017 report totaling $117.00 and the cost of obtaining Scan State Technologies records totaling $38.80. I assess both of these costs pursuant to Rule 4.33(6).

Finally, claimant seeks assessment of the cost of obtaining his deposition transcripts. Claimant introduced these deposition transcripts, but they were not really necessary in my judgment. The transcripts did not reduce the need for a witness to testify and simply added to the amount of documentation the undersigned was required to review in this case. I conclude that this request for taxation is not reasonable and decline to assess the cost of claimant's deposition transcripts. In total, I conclude that it is reasonable to assess costs against defendants totaling $262.28 in File No. 5049370.

With claimant having received no award in File No. 5055680, I conclude that the parties should bear their own costs relative to that file.

ORDER

THEREFORE, IT IS ORDERED:

In File No. 5049370:

Defendants shall rectify their underpayment of the weekly rate for all healing period benefits voluntarily paid to date.

Defendants shall pay claimant healing period benefits from March 2, 2017 through the date of the arbitration hearing and into the future until the first factor identified in Iowa Code section 85.34(1) is achieved.

All weekly benefits shall be paid at the rate of nine hundred fifty-six and 13/100 dollars ($956.13) per week.

Any claim for permanent disability is not ripe for determination at this time and is bifurcated for hearing upon the filing of a review-reopening petition by any party.

Defendants are entitled to a credit for all weekly benefits paid to date.

Defendants shall pay applicable interest pursuant to Iowa Code section 85.30 for all accrued weekly benefits, including but not limited to the underpayment of weekly rate.

Defendants shall pay any outstanding medical charges directly to the medical providers, reimburse claimant for any charges already paid directly by claimant, reimburse claimant for all medical mileage, or otherwise satisfy and hold claimant harmless for all past medical expenses and medical mileage, as detailed in Claimant's Exhibits 6 and 7.

Defendants shall provide claimant future medical treatment, as necessary, for his right hip, right knee, and left knee, including but not limited to ongoing treatment for his left knee with Dr. Lange.

Defendants shall pay claimant two hundred and 00/100 dollars ($200.00) in penalty benefits pursuant to Iowa Code section 86.13.

Defendants shall reimburse claimant's costs totaling two hundred sixty-two and 28/100 dollars ($262.28).

In File No. 5055680:

Claimant shall take nothing.

All parties shall bear their own costs.

Signed and filed this 8th day of November, 2017.

WILLIAM H. GRELL
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

Copies to:

Robert R. Rush
Attorney at Law
PO Box 637
Cedar Rapids, IA 52406-0637
bob@rushnicholson.com

Timothy W. Wegman
Attorney at Law
6800 Lake Dr., Ste. 125
West Des Moines, IA 50266
tim@peddicord.law

WHG/sam

Right to Appeal: This decision shall become final unless you or another interested party appeals within 20 days from the date above, pursuant to rule 876-4.27 (17A, 86) of the Iowa Administrative Code. The notice of appeal must be in writing and received by the commissioner's office within 20 days from the date of the decision. The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday. The notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 1000 E. Grand Avenue, Des Moines, Iowa 50319-0209.