BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

DAVID LEMMON, Claimant, vs. NEXTERA ENERGY RESOURCES, Employer, and EVEREST NATIONAL INS. CO., Insurance Carrier, Defendants.	:	File Nos. 5064232, 5064233 ARBITRATION DECISION Head Note Nos.: 1804, 4000

STATEMENT OF THE CASE

David Lemmon, the claimant, filed two petitions in arbitration, seeking workers' compensation benefits from the defendants, employer NextEra Energy, Inc. (NextEra) and insurance carrier New Hampshire Insurance Co. (New Hampshire), for alleged injuries to his back on January 7, 2016, and to his left upper extremity, shoulder, and neck on April 29, 2013. The agency combined the two files and the undersigned presided over a hearing in the consolidated case on August 27, 2019, in Des Moines, Iowa.

ISSUES

Under rule 876 IAC 4.19(3)(f), the parties jointly submitted a hearing report defining the claims, defenses, and issues submitted to the presiding deputy commissioner. Because the hearing report is a correct representation of the disputed issues and stipulations in this case, the undersigned issued an order approving it and entering it into the record. The parties identified the following disputed issues in the hearing report:

1) What is the extent of Lemmon's permanent disability?

2) Is Lemmon entitled to a penalty under Iowa Code section 86.13?

3) Is Lemmon entitled to recover the cost of an independent medical examination (IME) under Iowa Code section 85.39?

4) Are costs taxed against the defendants under Iowa Code section 86.40?

In the hearing report, the parties also entered into stipulations. The parties' stipulations in the hearing report are accepted and incorporated into this arbitration decision. This decision contains no discussion of any factual or legal issues relative to the parties' stipulations except as is necessary for clarity. The parties are bound by their stipulations.

FINDINGS OF FACT

The evidentiary record in this case consists of the following:

- Joint Exhibits 1 through 5;
- Claimant's Exhibits 1 through 9;
- Defendants' Exhibits 1 through 6; and
- Lemmon's credible hearing testimony.

After careful consideration of the evidence in the record, the parties' briefs, and the hearing report, the undersigned makes the following findings of fact.

Lemmon was 56 years old at the time of hearing. (Hearing Transcript page 9) He is right-hand dominant. (Hrg. Tr. p. 10) At the time of hearing, Lemmon had not been diagnosed with any learning disabilities. (Hrg. Tr. p. 11) He does not have difficulty reading or writing. (Hrg. Tr. p. 11)

In 1982, Lemmon graduated from Germantown High School in Tennessee. (Hrg. Tr. p. 10) He received Bs, Cs, and some Ds for high-school grades. (Hrg. Tr. p. 11) Lemmon took courses on electromechanical technology at Mesa Community College in Arizona, but did not receive a degree or certificate in such a program. (Hrg. Tr. pp. 11−12)

In Iowa, Lemmon worked for Pella Windows. (Hrg. Tr. p. 11) During his employment there, he received continuing education via courses through Des Moines Area Community College (DMACC) on subjects such as electric motors, basics of electricity, power transmission, and conveyor systems. (Hrg. Tr. p. 11)

In 2001 while employed with Pella, Lemmon had right shoulder impingement syndrome. (Hrg. Tr. p. 16) Dr. Thomas Greenwald performed arthroscopic surgery on Lemmon's right shoulder. (Hrg. Tr. p. 16) In 2012, he had a similar issue with his right shoulder. (Hrg. Tr. p. 16) Dr. Greenwald performed a debridement procedure on Lemmon due to the injury and released Lemmon to return to work without restrictions following the surgery. (Hrg. Tr. p. 16)

NextEra is the world's largest producer of wind and solar energy. (Hrg. Tr. p. 14) Generation Repair and Services is under the NextEra corporate umbrella. (Hrg. Tr. p.

13) Lemmon worked at the company's facility in Story City, Iowa, as a Gearbox Technician 2. (Hrg. Tr. p. 13) Workers in one part of the company would remove gearboxes from wind turbines such as those found in fields across Iowa. (Hrg. Tr. p. 13) NextEra would then send the gearboxes to Story City, where Lemmon and his coworkers would disassemble, clean, and refurbish them. (Hrg. Tr. pp. 13−14) The gears ranged in weight from approximately 800 to 3,000 pounds and gearboxes between 10,000 and 32,000 pounds. (Cl. Ex. 1, p. 2)

To do the job of Gearbox Technician 2, a worker must be able to bend, stoop, crawl, climb ladders, and have good balance. (Hrg. Tr. p. 15) NextEra imposed a 50-pound lifting limit on employees. (Hrg. Tr p. 15) If a worker had to lift anything over 50 pounds, the worker had to get a coworker to help or use a 10,000-pound gantry crane, which each work cell had. (Hrg. Tr. p. 15)

On April 29, 2013, Lemmon was at work for NextEra, re-torquing gearbox bolts, when he felt a pop in his shoulder. (Hrg. Tr. p. 16) Lemmon waited about an hour to see how his shoulder felt. (Hrg. Tr. p. 19) He then reported the injury to a supervisor. (Hrg. Tr. p. 19) After weeks of delays in getting care, Lemmon telephoned Dr. Greenwald's office on June 18, 2013. (Hrg. Tr. p. 21−22; Joint Exhibit 1, p. 1) During the time period between the injury and the start of care, Lemmon performed his job duties while trying to work below chest height in an effort to accommodate his injury. (Jt. Ex. 2, p. 59)

Ultimately, the defendants arranged care at Des Moines Orthopaedic Surgeons (DMOS) with Kary Schulte, M.D., on July 10, 2013. (Hrg. Tr. p. 22; Jt. Ex. 2, p. 59) Dr. Schulte ordered an arthrogram. (Jt. Ex. 2, p. 60; Jt. Ex. 3, p. 63) The arthrogram showed a partial-thickness rotator cuff tear, no full-thickness tear, and mild to moderate acromioclavicular degenerative joint disorder. (Jt. Ex. 2, p. 61)

On July 25, 2013, Dr. Schulte recommended physical therapy and released Lemmon to return to full-duty work based on the arthrogram. (Jt. Ex. 2, p. 61) On October 28, 2013, Dr. Schulte prescribed a home exercise regimen to Lemmon and released him from care despite Lemmon's ongoing pain complaints. (Jt. Ex. 2, p. 62) Lemmon continued to experience shoulder pain after Dr. Schulte released him from care. (Hrg. Tr. pp. 23−24)

Lemmon saw James Nepola, M.D., at the University of Iowa Hospitals and Clinics (UIHC) on August 6, 2015, because he had popping and pain in his shoulder that he did not have previously. (Jt. Ex. 4, p. 64) Dr. Nepola felt surgery would be risky and instead recommended Lemmon change his job due to its high-demand duties that increase the risk of a tear. (Jt. Ex. 4, p. 65) Dr. Nepola prescribed physical therapy. (Jt. Ex. 4, p. 65) He and Eric Aschenbrenner, M.D., gave Lemmon injections for his pain. (Hrg. Tr. p. 25; Jt. Ex. 4, pp. 68, 71, 78, 80, 83)

Lemmon was still working at NextEra on January 7, 2016. (Hrg. Tr. p. 35) After pushing a cart of ball bearings that he estimated weighed about 1,600 pounds, he felt a twinge of pain in his lower back that shot down both legs. (Hrg. Tr. p. 35; Jt. Ex. 5, p.

118) Lemmon waited to see if his symptoms improved before reporting the injury. (Hrg. Tr. 36)

After Lemmon's symptoms worsened, he reported the injury to a supervisor. (Hrg. Tr. p. 37) Lemmon was taken to the emergency room at Mary Greeley Medical Center. (Hrg. Tr. p. 37; Jt. Ex. 5, p. 118) Jonathan Burns, D.O., ordered an MRI and referred Lemmon to Sarkis Kaspar, M.D. (Jt. Ex. 5, p. 119)

Dr. Kaspar diagnosed Lemmon with a massive L5 disc herniation. (Jt. Ex. 1, p. 1) Lemmon's left leg was numb and he suffered from left foot drop. (Jt. Ex. 1, p. 11) On January 22, 2016, Dr. Kaspar performed a revision posterior decompression/foraminotomy and 36-degree fusion of the L4−5 level of Lemmon's spine. (Jt. Ex. 5, pp. 122−30) Lemmon participated in physical therapy and ultimately required a custom leg brace, prescribed by Dr. Kaspar.

On July 20, 2016, Dr. Aschenbrenner found Lemmon reached maximum medical improvement (MMI) for his right shoulder injury. (Jt. Ex. 4, p. 85) He also prescribed no work restrictions relating to Lemmon's shoulder. (Jt. Ex. 4, p. 85) However, Dr. Aschenbrenner felt a functional capacity examination (FCE) would be needed to determine what, if any, restrictions Lemmon might need relating to his back injury. (Jt. Ex. 4, p. 85)

Lemmon returned to Dr. Aschenbrenner on August 17, 2016. (Jt. Ex. 4, pp. 86−87) Dr. Aschenbrenner ordered an updated MRI arthrogram. (Jt. Ex. 4, p. 87; Jt. Ex. 4, p. 91) After the MRI, Dr. Nepola recommended surgery on Lemmon's right shoulder. (Jt. Ex. 4, pp. 89, 95−99)

On February 15, 2017, Dr. Nepola performed right-shoulder arthroscopy with rotator cuff debridement, distal clavicle resection, labral debridement, and glenohumeral synovectomy. (Jt. Ex. 4, pp. 100−103) Lemmon did strengthening exercises and participated in physical therapy as part of his post-surgery rehabilitation. (Jt. Ex. 4, p. 111) Dr. Nepola released Lemmon from his care at MMI relative to his right-shoulder injury on October 3, 2017. (Jt. Ex. 4, p. 115)

On November 3, 2017, Daniel Ihrke, P.T., performed a functional capacity examination (FCE) of Lemmon at E3 Millennium Work Therapy Services. (Jt. Ex. 4, p. 115) Ihrke deemed it a valid assessment of Lemmon's functional abilities. (Jt. Ex. 4, p. 115) In Ihrke's FCE report, he assigned Lemmon the following permanent work restrictions:

- Two-handed 10" to waist lifting up to 84 pounds occasionally;
- Two-handed 15" to waist lifting up to 91 pounds occasionally;
- Two-handed 20" to waist lifting up to 95 pounds occasionally;
- Right arm unilateral lifting up to 88 pounds occasionally;

- Static horizontal push/pull up to 95 pounds of force occasionally;
- Two-handed carry up to 74 pounds occasionally;
- Two-handed waist to crown lifting up to 46 pounds occasionally;
- Two handed overhead reaching limited to frequently. (Jt. Ex. 4, p. 115−16)

Jeri Griffiths of Broadspire Insurance wrote Dr. Nepola regarding Lemmon's right shoulder. (Jt. Ex. 4, p. 115) Dr. Nepola responded in a letter dated June 19, 2018. (Jt. Ex. 4, pp. 115−16) On the question of permanent disability to Lemmon's right shoulder, Dr. Nepola opined:

> To the nearest degree of medical certainty he has a permanent partial impairment rating of 15% to the upper extremity which is equivalent to 9% of the whole person according to the Guides to the Evaluation of Permanent Impairment of the AMA, 5th Edition. This rating is the result of loss of active forward flexion (1% upper extremity) and extension (1% upper extremity) per figure 16-40 on page 476, loss of active abduction (1% upper extremity) per figure 16-43 on page 477, loss of active internal rotation (3% upper extremity) per figure 16-46 on page 479, and distal clavicle resection arthroplasty (10% upper extremity) per table 16-27 on page 506 of the Guides. Impairment due to range of motion loss (6% upper extremity) was combined with impairment due to resection arthroplasty (10% upper extremity) per the Combined Values Chart to total 15% upper extremity impairment. Upper extremity impairment was converted to whole person impairment according to table 16-3 on page 439 of the Guides. This is intended to be an assessment of his total level of impairment on October 3, 2017 due to right shoulder complaints as a result of the reported April 29, 2013 work incident, and is not intended to be combined with any right shoulder impairment rating which may have been assigned previously.

(Jt. Ex. 4, p. 115)

The defendants did not pay Lemmon permanent partial disability benefits based on Dr. Nepola's permanent impairment rating until October 12, 2018. (Defendants' Exs.) The defendants sent Lemmon two checks dated October 12, 2018, that combined to total $143,202.80. (Def. Exs.) There is an insufficient basis in the record from which to identify the cause of the delay in payment.

Dr. Nepola assigned Lemmon the work restrictions recommended by Ihrke based on the November 3, 2017 FCE for his right-shoulder injury. (Jt. Ex. 4, pp. 115−16) He further opined that Lemmon may require ongoing maintenance care including non-steroidal anti-inflammatory medications, periodic corticosteroid injections, physical therapy, and possibly revision surgery. (Jt. Ex. 4, p. 116)

On April 3, 2018, Dr. Kaspar placed Lemmon at MMI for his back injury. (Jt. Ex. 1, p. 38) Using the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, Dr. Kaspar found Lemmon to have sustained a 28 percent permanent partial disability to the body as a whole. (Jt. Ex. 1, p. 45) Dr. Kaspar explained:

> This is based on lumbar herniation with neurologic damage to leg and severe dense footdrop with atrophy, that unfortunately did not improve with surgery or time. He also gets pain if he overdoes it and is limited in his activities by his AFO (ankle foot orthosis for footdrop), and some lancinating pains if he does more than sedentary daily activities.

(Jt. Ex. 1, p. 45)

Dr. Kaspar based the impairment rating on Table 15-3 of page 384 of the Guides. (Jt. Ex. 1, p. 45) He explained Lemmon "at least qualifies for DRE category iv which is (20−23%) for loss of motion due to fusion[.] However, due to the dens neurologic deficit, and loss of abilities, DRE category v (25−28%) is more appropriate, to include category iv criteria plus neurologic involvement." (Jt. Ex. 1, p. 45)

The defendants did not pay Lemmon permanent benefits to which he was entitled based on Dr. Kaspar's permanent impairment rating until October 12, 2018. (Def. Exs.) The defendants sent Lemmon two checks dated October 12, 2018, that combined to total $143,202.80. (Def. Exs.) There is an insufficient basis in the record from which to determine the cause of the delay in payment.

With respect to permanent work restrictions, Dr. Kaspar observed, "The FCE didn't work out because he felt the PTA performing it did too much and markedly exacerbated his pain. In my estimate he might potentially be able to start perhaps with part-time sedentary work and retraining, see what happens from there." (Jt. Ex. 1, p. 46)

NextEra followed up with Dr. Kaspar by sending a questionnaire regarding Lemmon's ability to perform the essential functions of his job. (Jt. Ex. 1, p. 47) Dr. Kaspar completed the questionnaire on July 26, 2018. (Jt. Ex. 1, p. 47. Dr. Kaspar opined Lemmon cannot perform the following essential functions of his job:

- Perform semi-skilled diversified light and heavy assembly of mechanical parts and components of up to 50 pounds for several specific win turbine gearbox technology units. This practice can take place numerous times throughout a single work day. (Jt. Ex. 1, p. 47)

- Use a variety of light and heavy hand and power tools of up to 50 pounds, solvents, paints, and metalworking equipment. This task can be performed numerous times throughout a single work day. (Jt. Ex. 1, p. 47)

- Assemble and run the single technology, assemble gearbox unit on the test stand with guidance. (Jt. Ex. 1, p. 47)

- Frequently squat/crouch (bent legs and spine), stoop (bent at waist), stand, crawl and balance to perform varied duties and tasks. (Jt. Ex. 1, p. 50)

Dr. Kaspar opined Lemmon can perform the following essential job functions:

- Work from simple drawings, blueprints, or sketches. (Jt. Ex. 1, p. 48)
- Travel to various sites to support maintenance and repair activities as required. (Jt. Ex. 1, p. 48)
- Perform basic office functions (i.e. using personal computer, reading, writing, interpreting information, speaking/answering the telephone, taking messages and producing documents). (Jt. Ex. 1, p. 48)
- Sit or stand for extended periods of time (i.e. meetings, training classes, seminars, work station, etc. with periodic breaks in order to perform work duties. (Jt. Ex. 1, p. 48)

Dr. Kaspar informed NextEra Lemmon "should only be doing sedentary work" and "should not be doing any lifting." (Jt. Ex. 1, p. 52) He indicated Lemmon is able to work a normal schedule of 40 hours per week with overtime up to 16 hours daily, as needed, if he is performing sedentary work only with no lifting. (Jt. Ex. 1, p. 49) Dr. Kaspar further opined Lemmon can do the following essential functions "within restrictions":

- Process multiple requests and activities at one time. (Jt. Ex. 1, p. 49)
- Work on a daily basis in stressful environments, respond to competing priorities and required deadlines. (Jt. Ex. 1, p. 49)
- Have regular and reliable attendance at work. (Jt. Ex. 1, p. 49)
- Traverse (walking, using a mobility assistive device, etc.) the parking area to the job site and within the job site, including distances up to 700 feet to one mile when arriving at or departing work as well as during the work day. (Jt. Ex. 1, p. 50)
- Be physically present in the office to work with team and other company personnel and third parties in order to carry out daily job responsibilities. (Jt. Ex. 1, p. 50)
- Attend online or in person required company training, which may include physical presence in a classroom for up to eight hours, receiving, instruction, taking notes, reading and comprehending training materials for passing written tests and videos. (Jt. Ex. 1, p. 50)

- If Lemmon's storm assignment is activated, he must be able to travel and to work extended hours (possible 16 hours per day, seven days per week) and possible for multiple weeks (depending on length of storm recovery period) at remote locations away from regular work area. (Jt. Ex. 1, p. 50)

- Assess all situations, make critical decisions, diagnose technical problems, and implement activities to assure proper solutions and safe work practices. (Jt. Ex. 1, p. 51)

- Be capable of reporting daily to a designated NEE work location in order to carry out responsibilities. (Jt. Ex. 1, p. 51)

Dr. Kaspar revisited Lemmon's work restrictions on August 30, 2018, in response to a request for clarification from NextEra. (Jt. Ex. 1, p. 57) Dr. Kaspar explained that Lemmon was limited to "sedentary or very light duty due to limitations." (Jt. Ex. 1, p. 57) He further explained Lemmon "may lift up to 25 lbs at his discretion," but could not engage in continuous lifting without breaks. (Jt. Ex. 1, p. 57)

NextEra sent Lemmon a letter, dated September 6, 2018, regarding his employment status. (Cl. Ex. 5, p. 43) NextEra informed Lemmon that, based on the information Dr. Kaspar provided regarding his physical limitations, the company had concluded he was "unable to perform the essential functions of [his] job, as a GRS Technician II, with or without reasonable accommodations due to the nature of [his] restrictions and the physical demands of [his] job." (Cl. Ex. 5, p. 43) NextEra gave Lemmon 45 days to find another job with the company that was within his work restrictions. (Cl. Ex. 5, p. 43)

Lemmon attempted to return to work for NextEra. (Hrg. Tr., p. 51) He signed up for NextEra's career hotline, which notified him of an open inventory tech position. (Hrg. Tr. p. 51) Lemmon informed his plant manager he was interested in applying for the open position. (Hrg. Tr., p. 51) But Lemmon's plant manager advised him to hold off on applying for the job, so he did not apply. (Hrg. Tr., p. 51)

Lemmon reformatted his résumé with help from NextEra. (Hrg. Tr., p. 51) Lemmon used it when applying for an electronics technician position at NextEra, which he believed was within the work restrictions Dr. Kaspar had given him. (Hrg. Tr., p. 51) NextEra send Lemmon a letter informing him the company would not hire him for the job. (Hrg. Tr., p. 21)

Lemmon talked to his plant manager about the rejection. (Hrg. Tr., p. 21) His plant manager informed him that the fallback duties of the position, when things are slow, is to work as a gearbox technician. (Hrg. Tr., p. 21) Because of Lemmon's work restrictions, NextEra did not think he was a good fit for the job due to the fallback work duties. (Hrg. Tr., p. 21) NextEra did not hire Lemmon for the job due to the functional limitations caused by his work injuries.

Lemmon's 45-day period came to an end without NextEra hiring him to fill an open position. (Cl. Ex. 5, p. 43) NextEra sent Lemmon a letter dated November 7, 2018. (Cl. Ex. 5, p. 43) In the letter, NextEra informed Lemmon that it was terminating his employment because he had not secured another position with the company within 45 days of the company removing him from his previous position because "there were no positions within the [c]ompany identified for which you were qualified based on [his] current skills and experience." (Cl. Ex. 5, p. 43) The letter also informed Lemmon that he could apply for disability benefits. (Cl. Ex. 5, p. 43) Lemmon did so with Cigna, NextEra's carrier for long-term and short-term disability benefits. Hrg. Tr., p. 57)

On January 7, 2019, Lemmon saw John Kuhnlein, D.O., for an independent medical examination (IME). (Cl. Ex. 1) Dr. Kuhnlein performed a physical examination of Lemmon and reviewed his medical records. (Cl. Ex. 1) He opined that Lemmon reached MMI for his right shoulder on October 3, 2017, and for his back condition on April 3, 2018. (Cl. Ex. 1, p. 22)

Dr. Kuhnlein used the Fifth Edition of the *AMA Guides* to assess Lemmon's permanent functional impairment. (Cl. Ex. 1, p. 22) With respect to Lemmon's right shoulder, Dr. Kuhnlein opined:

> Turning to Figure 16-40, 16-43 and 16-46, and when comparing the right to the unaffected left shoulder, there is a total of 4% right upper extremity impairment for deficits in range of motion. With respect to the distal clavicle excision, and turning to Table 16-27, Page 506, an initial 10% right upper extremity impairment would be assigned. However, this value must be multiplied by the modifier from Table 16-28, Page 499, if one reads the instructions of Page 498. When these values are multiplied together (10%x25%) and rounded according to the instructions on page 20, this is a 3% right upper extremity impairment for the distal clavicle excision.
>
> Turning to the Combined Values Chart on page 604, when these values are combined (4% +3%) this is a 7% right upper extremity impairment. Turning to Table 16-3, page 439, this would convert to a 4% whole person impairment.

(Cl. Ex. 1, 22–23)

Dr. Kuhnlein also addressed Dr. Nepola's opinion of Lemmon's shoulder impairment rating being differed from his, stating:

> In reviewing Dr. Nepola's impairment rating, he assigned 10% impairment for the distal clavicle resection without modifying the value by the value from Table 16-18, Page 499[,] as indicated by the instructions on page 498. It also does not appear that he used the other shoulder as a control for the measurements of the right shoulder, so this also affects the value of the impairment.

(Cl. Ex. 1, p. 23)

Thus, Dr. Kuhnlein provided a detailed description of the process and reasoning for his impairment rating. He also provides a clear explanation of why his right shoulder impairment rating differs from Dr. Nepola's rating. Further, Dr. Kuhnlein's physical examination of Lemmon and his impairment rating are more recent in time. For these reasons, Dr. Kuhnlein's permanent impairment rating of Lemmon's right shoulder is most persuasive.

Dr. Kuhnlein also considered Lemmon's permanent impairment due to his lumbar spine condition. (Cl. Ex. 1, p. 23). Referencing the Fifth Edition of the AMA Guides, he begins by expressing disagreement with how Dr. Kaspar arrived at his impairment rating, "With the prior surgeries and recurrent disc herniation at the L4-L5 level, and turning to pages 379 – 380, the range of motion method is indicated, not the DRE method as used by Dr. Kaspar." (Cl. Ex. 1, p. 23) Dr. Kuhnlein provided "an overall impairment rating for the lumbar spine" as follows:

> Turning to Table 15-7, Page 404, Mr. Lemmon would be assigned to Category IV, and a total of 18% whole person impairment would be assigned for the multiple surgeries at multiple levels. The validity criteria were met for range of motion measurement use an impairment rating. Turning to Table 15-8, page 407, 4% whole person impairment would be assigned for decrements in extension. Turning to Table 15-9, Page 409, 2% whole person impairment would be assigned for decrements in left lateral bending, and 1% whole person impairment would be assigned for decrements in right lateral bending. This would be an overall 13% whole person impairment for decrements in range of motion.
>
> The sensory deficits are in an L4-L5 distribution, primarily in the L4 distribution. Turning to Table 15-18, Page 424, 5% lower extremity impairment would be assigned initially for sensory loss in the L4 distribution. This value must be multiplied by the modifier from Table 15-15, Page 424; I would use a 30% modifier. When these values are multiplied (5% x30%) and rounded according to the instructions on page 20, this is 2% left lower extremity for the sensory radiculopathy. With respect to motor loss, and turning to Table 15-18, Page 424, 34% whole person impairment would be assigned initially for the motor loss in the left L$ distribution. This value must be multiplied by the modifier from Table 15-16, Page 424; I would use a 30% modifier. When these values are multiplied (34% x30%) this is 10% left lower extremity impairment motor loss. Using the Combined Values Chart on page 604, when these values are combined (10% x2%) this is a 12% left lower extremity impairment. Turning to Table 17-3, page 527, this would convert to a 5% whole person impairment.
>
> This case involves not only the sensory loss from the L4 level, and also the neuropathic pain in the left lower extremity. This is addressed by

> Section 17.2m, page 553, which refers the reader to Chapter 13 in Section 13.8, Page 34, which refers the reader to Table 13-15, Page 336 I would assign Mr. Lemmon to Class I and assign 5% whole person impairment for the neuropathic pain.
>
> When these values are combined using the combined values chart on page 604 (18% x13% x5%) this is 36% whole person impairment. As noted above, this is an overall impairment, including the prior lumbar spine conditions.

(Cl. Ex. 1, pp. 23–24)

Dr. Kuhnlein's impairment rating is based on both an extensive review of Lemmon's medical history and in-person physical examination. Dr. Kuhnlein's examination occurred most recently. His opinion on physical impairment of Lemmon's lumbar spine is thorough and detailed. Consequently, Dr. Kuhnlein's opinion on the question of Lemmon's permanent impairment to the lumbar spine is most persuasive. The evidence shows it is more likely than not that Lemmon has sustained a permanent impairment of 36 percent to the whole person due to his lumbar spine condition.

Dr. Kuhnlein also considered the November 3, 2017 FCE of Lemmon, concluding, "Given the findings on examination and the medical record, [it] makes very little sense, particularly with the onset of new cervical spine and thoracic pain after the test, as noted by Dr. Kaspar." Dr. Kuhnlein further opined that the FCE "is not consistent with the physical examination and would be medical inappropriate for anyone to follow in his case." The issues identified by Drs. Kuhnlein and Kaspar are compelling. The November 3, 2017 FCE is not credible and is therefore not given any weight in assessing Lemmon's work restrictions in this decision.

For Lemmon's shoulder and back conditions, Dr. Kuhnlein assigned him the material-handling restrictions of lifting up to ten pounds occasionally from each of the following: (1) floor to waist, (2) waist to shoulder, and (3) over the shoulder. (Cl. Ex. 1, p. 24) Moreover, Dr. Kuhnlein gave Lemmon the following nonmaterial-handling restrictions:

- Sitting, standing, or walking on an as needed basis with the ability to change positions when necessary;
- Stoop, squat, or crawl rarely;
- Occasionally climb stairs, bend, or kneel;
- No working on ladders or at height because "the foot drop would make it difficult if not impossible for him to maintain a three-point safety stance for any length of time while on a ladder";
- No operating foot-operated machinery with his left lower extremity; and

- Grip or grasp without restrictions below shoulder height within the material handling restrictions and occasionally at or above shoulder height. (Cl. Ex. 1, p. 24).

Dr. Kuhnlein further opined as to Lemmon's work restrictions as follows:

> There are no vision, hearing, or communication restrictions. He can travel for work if given the opportunity to take breaks from time to time to stretch. He can use hand or power tools on an occasional basis within the material handling restrictions . . . . There are no environmental restrictions. If working on uneven surfaces, good footgear would be appropriate. He cannot wear steel toed shoes. Mr. Lemmon should not work on production lines because of a combination of his right shoulder and low back conditions. There are no shiftwork issues.

(Cl. Ex. 1, p. 24)

Dr. Kuhnlein's work restrictions are based on an extensive review of Lemmon's medical records. Moreover, Dr. Kuhnlein's work restrictions are also based, in part, on a more recent physical examination of Lemmon than Dr. Nepola or Dr. Kaspar. While not as recent as the examination and opinion of Peter G. Matos, D.O, discussed below, Dr. Kuhnlein's opinion is supported by more detailed findings and a documented reliance on extensive medical records relating to Lemmon's past care.

Further, while neither Dr. Nepola nor Dr. Kaspar do so, Dr. Kuhnlein takes into account Lemmon's back and shoulder conditions. His restrictions take into account the totality of the physical limitations caued by Lemmon's injuries. For these reasons, Dr. Kuhnlein's work restrictions are the most persuasive of those in evidence. The weight of the evidence establishes Lemmon's physical limitations due to his injuries necessitate the work restrictions assigned by Dr. Kuhnlein. His opinion on Lemmon's functional impairment and work restrictions are therefore adopted.

Lemmon paid $6,847.50 for Dr. Kuhnlein's IME. (Cl. Ex. 3) The defendants have not reimbursed Lemmon for the cost of the IME. The cost is reasonable given the nature of Lemmon's injuries, the extensive medical records documenting the care he received for them, and the detailed and thorough report by Dr. Kuhnlein.

Lemmon searched for work after NextEra discharged him. (Hrg. Tr., p. 54) Lemmon contacted Manpower in Ames, Iowa. (Hrg. Tr., p. 54) He registered on the job-search websites Indeed.com and Career Builder. (Hrg. Tr., p. 54) Lemmon reviews leads and applies for jobs that he believes are within his work restrictions. (Hrg. Tr., p. 55)

On March 16, 2019, Lemmon submitted an application for a job as a lock technician. (Ex. Ex. 7, p. 54) Lemmon applied for a job as a wheelchair van driver on May 24, 2019. (Cl. Ex. 7, p. 53) And on June 5, 2019, Lemmon applied for a job as an inventory control specialist. (Cl. Ex. 7, p. 53) He also applied with a plumbing company

in Ames. (Hrg. Tr., p. 55) Lemmon did not hear back from any of the employers regarding these applications. (Hrg. Tr., p. 55)

As part of the disability insurance application process, Lemmon underwent an examination with Peter G. Matos, D.O., on June 7, 2019. (Cl. Ex. 6) Dr. Matos concluded Lemmon requires work activity restrictions consisting of:

- Sitting or standing for up to 30 minutes with positional change;
- Occasionally walking;
- Rarely reaching overhead, but not with his right arm;
- Rarely reaching below the waist;
- Occasionally lifting up to 10 pounds;
- Occasionally lifting up to 20 pounds;
- Rarely lifting between 21 and 50 pounds;
- No lifting over 50 pounds;
- Occasionally carrying up to 20 pounds;
- Rarely lifting between 21 and 50 pounds;
- Never lifting over 50 pounds;
- Occasionally pushing and pulling up to 25 pounds;
- Never climbing ladders;
- Occasionally climbing stairs; and
- Rarely stooping, kneeling, crouching, or crawling. (Cl. Ex., pp. 51–52)

Cigna found Lemmon eligible for disability benefits. (Hrg. Tr., p. 57) Ultimately, Lemmon applied for disability benefits with the federal Social Security Administration (SSA). (Hrg. Tr. p. 57; Cl. Ex. 8, pp. 55–56) SSA found Lemmon eligible for such benefits. (Hrg. Tr. p. 57; Cl. Ex. 8, pp. 55–56)

Lemmon registered on Iowa*WORKS*, a website administered by Iowa Workforce Development (IWD). (Hrg. Tr. p. 55) Workers may use the site to access services provided by IWD and its partners across the state and view job postings. As of the time of hearing, Lemmon had not received any services or job leads through the website. (Hrg. Tr. p. 55)

At the time of hearing, Lemmon had not participated in any postsecondary educational or training programs since the courses he took before he moved to Iowa. (Hrg. Tr.) He had therefore obtained no postsecondary degree or certificate. At 56, and given Lemmon's educational history, it is unlikely he will successfully pursue such a degree or certificate.

CONCLUSIONS OF LAW

In 2017, the Iowa legislature amended provisions of the Iowa Workers' Compensation Act. See 2017 Iowa Acts, ch. 23. The 2017 amendments apply to cases in which the alleged date of injury is on or after July 1, 2017. See id. at § 24(1); see also Iowa Code § 3.7(1). Because the injuries at issue in this case predate July 1, 2017, the 2017 amendments do not apply here. See, e.g., Smidt v. JKB Restaurants, LC, File No. 5067766 (App. Dec. 11, 2020).

1. Permanent Disability.

The parties stipulated that Lemmon's permanent disability is industrial in type. However, the parties dispute the extent of Lemmon's permanent disability. Lemmon asserts he is permanently and totally disabled. The defendants contend he has failed to meet his burden to prove such disability.

"Industrial disability is determined by an evaluation of the employee's earning capacity." Pease, 807 N.W.2d at 852. In considering the employee's earning capacity, the deputy commissioner evaluates several factors, including "consideration of not only the claimant's functional disability, but also [his] age, education, qualifications, experience, and ability to engage in similar employment." Swiss Colony, Inc. v. Deutmeyer, 789 N.W.2d 129, 137-38 (Iowa 2010). The inquiry focuses on the injured employee's "ability to be gainfully employed." Id. at 138.

The determination of the extent of disability is a mixed issue of law and fact. Neal v. Annett Holdings, Inc., 814 N.W.2d 512, 525 (Iowa 2012). Compensation for permanent partial disability shall begin at the termination of the healing period. Iowa Code § 85.34(2). Compensation shall be paid in relation to 500 weeks as the disability bears to the body as a whole. Id. § 85.34(2)(u).

In Iowa, a claimant may establish permanent total disability under the statute, or through the common law odd-lot doctrine. Michael Eberhart Constr. v. Curtain, 674 N.W.2d 123, 126 (Iowa 2004) (discussing both theories of permanent total disability under Idaho law and concluding the deputy's ruling was not based on both theories, rather, it was only based on the odd-lot doctrine). Under the statute, the claimant may establish the claimant is totally and permanently disabled if the claimant's medical impairment together with nonmedical factors totals 100 percent. Id. The odd-lot doctrine applies when the claimant has established the claimant has sustained something less than 100 percent disability, but is so injured that the claimant is "unable to perform services other than 'those which are so limited in quality, dependability or quantity that a

reasonably stable market for them does not exist.'" Id. (quoting Boley v. Indus. Special Indem. Fund, 130 Idaho 278, 281, 939 P.2d 854, 857 (1997)).

"Total disability does not mean a state of absolute helplessness." Walmart Stores, Inc. v. Caselman, 657 N.W.2d 493, 501 (Iowa 2003) (quoting IBP, Inc. v. Al-Gharib, 604 N.W.2d 621, 633 (Iowa 2000)). Total disability "occurs when the injury wholly disables the employee from performing work that the employee's experience, training, intelligence, and physical capacity would otherwise permit the employee to perform." IBP, Inc., 604 N.W.2d at 633.

While not dispositive, the fact that NextEra discharged Lemmon because of his work restrictions and its inability to accommodate them is of note.

> [An] important factor in the consideration of permanent and total disability cases is the employer's ability to retain the injured worker with an offer of suitable work. The refusal or inability of the employer to return a claimant to work in any capacity is, by itself, significant evidence of a lack of employability. Clinton v. All-American Homes, File No. 5032603 (App. April 17, 2013); Western v. Putco Inc., File Nos. 5005190/5005191 (App. July 29, 2005); Pierson v. O'Bryan Brothers, File No. 951206 (App. Jan. 20, 1995); Meeks v. Firestone Tire & Rubber Co., File No. 876894 (App. Jan. 22, 1993); see also Larson, Workers' Compensation Law, Section 57.61, pps. 10-164.90-95; Sunbeam Corp. v. Bates, 271 Ark 385, 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 knows the demands that are placed on its workforce. Its determination that the worker is too disabled for it to employ is entitled to considerable weight. If the employer in whose employ the disability occurred is unwilling or unable to accommodate the disability, there is no reason to expect some other employer to have more incentive to do so.

McNitt v. Nordstrom, Inc., File No. 5065697 (Rehrg. Jul. 20, 2020), aff'd and adopted as final agency action, (App. Aug. 7, 2020).

Here, Lemmon wanted to continue working for NextEra. After Lemmon received his final work restrictions with clarifications from Dr. Kaspar, which were less limiting than those of Dr. Kuhnlein, NextEra gave Lemmon notice it was removing him from his position and he would be fired if he could not find another open position with the company. After Lemmon could not find such a position, despite NextEra's assistance, the company discharged him. This employment action is given the considerable weight required in Iowa workers' compensation cases when considering the nature and extent of disability. See id.

Lemmon was 56 years old at the time of hearing. While he had taken some courses relating to his past jobs, he had not obtained a postsecondary degree. While Lemmon has shown a positive attitude and desire to obtain employment, it is unlikely he

will enroll in a postsecondary program and obtain a degree or certificate in an area within his work restrictions.

Further, Lemmon has performed physically demanding work throughout his time in the working world. It is unlikely Lemmon could return to one of the jobs he held before he sustained the work injuries at NextEra. Nor could he return to similar work. Lemmon has admirably engaged in a good-faith search for employment. But the evidence establishes it is most likely he will not be able to find a job within his work restrictions given his employment history and permanent work restrictions.

Based on the factors for evaluating industrial disability, Lemmon has met his burden of proof that he sustained a 100 percent loss of his earning capacity as a result of his work injuries. Lemmon is entitled to permanent total disability benefits under Iowa Code section 85.34(3) for the duration of his disability, commencing on the date of the second work injury, October 3, 2017, at the stipulated rate of $742.49. The defendants are entitled to a credit for benefits paid to date.

2. Penalty.

"Because penalty benefits are a creature of statute, our discussion begins with an examination of the statutory parameters for such benefits." Keystone Nursing Care Ctr. v. Craddock, 705 N.W.2d 299, 307 (Iowa 2005). Under Iowa Code section 86.13(4)(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.

This provision "codifies, in the workers' compensation insurance context, the common law rule that insurers with good faith disputes over the legal or factual validity of claims can challenge them, if their arguments for doing so present fairly debatable issues." Covia v. Robinson, 507 N.W.2d 411, 412 (Iowa 1993) (citing Dirks v. Farm Bureau Mut. Ins. Co., 465 N.W.2d 857, 861 (Iowa 1991) and Dolan v. Aid Ins. Co., 431 N.W.2d 790, 794 (Iowa 1988)). "The purpose or goal of the statute is both punishment and deterrence." Robbennolt v. Snap-On Tools Corp., 555 N.W.2d 229, 237 (Iowa 1996).

The legislature established in Iowa Code section 86.13(4)(b) a burden-shifting framework for determining whether penalty benefits must be awarded in a workers' compensation case. See 2009 Iowa Acts ch. 179, § 110 (codified at Iowa Code § 86.13(4)(b)); see also Pettengill v. Am. Blue Ribbon Holdings, LLC, 875 N.W.2d 740, 746–47 (Iowa App. 2015) as amended (Feb. 16, 2016) (discussing the burden-shifting required by the two-factor statutory test). The employee bears the burden to establish a prima facie case for penalty benefits by establishing a denial, delay in payment, or

termination of workers' compensation benefits. Iowa Code § 86.13(4)(b)(1). If the employee fails to prove a denial, delay, or termination, there can be no award of penalty benefits and the analysis stops. See id. at § 86.13(4)(b); see also Pettengill, 875 N.W.2d at 747. However, if the employee makes the requisite showing, the burden of proof shifts to the employer. See id. at § 86.13(4)(b); see also Pettengill, 875 N.W.2d at 747.

To avoid an award of penalty benefits, the employer must "prove a reasonable or probable cause or excuse for the denial, delay in payment, or termination of benefits." Iowa Code § 86.13(4)(b)(2). An excuse must meet all of the following criteria to be "a reasonable or probable cause or excuse" under the statute:

> (1) The excuse was preceded by a reasonable investigation and evaluation by the employer or insurance carrier into whether benefits were owed to the employee.
>
> (2) The results of the reasonable investigation and evaluation were the actual basis upon which the employer or insurance carrier contemporaneously relied to deny, delay payment of, or terminate benefits.
>
> (3) The employer or insurance carrier contemporaneously conveyed the basis for the denial, delay in payment, or termination of benefits to the employee at the time of the denial, delay, or termination of benefits.

Id. § 86.13(4)(c).

> This paragraph creates a mandatory timeline for the employer to follow in showing it had a "reasonable or probable cause or excuse" for the termination of benefits. Iowa Code § 86.13(4)(c)(1)-(3). First, the employer's excuse for the termination must have been *preceded* by an investigation. Id. § 86.13(4)(c)(1). Second, the results of the investigation were "*the actual basis ... contemporaneously*" relied on by the employer in terminating the benefits. Third, the employer "*contemporaneously* conveyed the basis for the ... termination of benefits to the employee *at the time of the ... termination.*" Id. § 86.13(4)(c)(3)

Pettengill, 875 N.W.2d at 747. "An employer cannot unilaterally decide to terminate an employee's benefits without adhering to Iowa Code section 86.13; to allow otherwise would contradict the language of that section." Id.

"A 'reasonable basis' for denial of the claim exists if the claim is 'fairly debatable.'" Keystone Nursing Care Ctr., 705 N.W.2d at 307 (quoting Christensen v. Snap-On Tools Corp., 554 N.W.2d 254, 260 (Iowa 1996)). A claim may be fairly debatable because of a good faith legal or factual dispute. See Covia, 507 N.W.2d at 416 (finding a jurisdictional issue fairly debatable because there were "viable arguments in favor of either party"). "[T]he reasonableness of the employer's denial or termination of benefits does not turn on whether the employer was right. The issue is whether there

was a reasonable basis for the employer's position that no benefits were owing." Keystone Nursing Care Ctr., 705 N.W.2d at 307–08.

If the employer establishes a "reasonable or probable cause or excuse," no penalty benefits are awarded. However, if the employer fails to meet its burden of proof, penalty benefits must be awarded. In the current case, the defendants have not marshaled enough evidence from which to conclude a reasonable or probable cause or excuse exists for their delayed payment of permanent disability benefits during the time periods between Dr. Nepola's opinion on Lemmon's permanent disability for his shoulder or Dr. Kaspar's opinion on his permanent disability for his back and payment of the permanent benefits based on those opinions.

Under the Iowa Workers' Compensation Act, weekly benefits payments are due at the end of the compensation week. Id. at 235.

The following factors are used in determining the amount of penalty benefits:

- The length of the delay;
- The number of the delays;
- The information available to the employer regarding the employee's injuries and wages; and
- The prior penalties imposed against the employer under Iowa Code section 86.13. Robbennolt v. Snap-On Tools Corp., 555 N.W.2d at 238.

Here, the defendants delayed in two ways. They delayed in requesting permanent impairment ratings. Then the defendants delayed payment of disability benefits based on those permanent impairment ratings.

With respect to Lemmon's shoulder, Dr. Nepola found him at MMI on October 3, 2017. Dr. Nepola did not issue an opinion on permanency until June 19, 2018. The defendants did not pay Lemmon benefits based on the rating until October 12, 2018. The delay between Dr. Nepola's rating and the defendant's payment of benefits was five months and three weeks.

Dr. Kaspar declared Lemmon at MMI for his back condition on April 3, 2018. The defendants did not request an opinion from Dr. Kaspar on permanent impairment until June 26, 2018. Dr. Kaspar issued his opinion in a letter dated July 4, 2018. The defendants did not pay Lemmon benefits based on Dr. Kaspar's permanent impairment rating until October 12, 2018. The delay between Dr. Kaspar's letter and payment of benefits was over three months.

There is no indication the defendants were lacking any information about Lemmon's wages or his injuries during the time periods of delay between either rating and the defendants' payment of benefits. There is no reason for the defendants to have waited the multiple months it took to pay Lemmon permanent benefits based the

impairment ratings issued by Drs. Nepola and Kaspar. Given the delays of three and six months, the fact that the defendants twice delayed payment of benefits to Lemmon for no known reason, and the fact that there is no indication the defendants lacked all information needed to make timely payment of benefits, a penalty is appropriate regardless of the defendants' past record regarding penalties in cases before the agency.

For the delay between Dr. Nepola's permanent impairment rating and payment of benefits and the delay between Dr. Kaspar's permanent impairment rating and payment of benefits to Lemmon, the defendants shall pay a penalty equal to 40 percent of the combined benefit total of the benefits paid to Lemmon on October 12, 2018. The defendants shall therefore pay to Lemmon a penalty of $71,601.40 for the two delayed payments.

3. IME Reimbursement.

An employer has the right to obtain an opinion on what, if any, permanent impairment an injured employee has sustained due to a work injury. Iowa Code § 85.39(1). If the injured employee disagrees with the opinion of the employer-chosen doctor, the employee may obtain an IME with a doctor of the employee's choosing. Id. at § 85.39(2). The employer must reimburse the injured employee for the reasonable fee of the IME. Id.

The evidence establishes that the defendants obtained opinions on Lemmon's permanent impairment from Drs. Kaspar and Nepola. Lemmon felt the impairment ratings they gave were too low, so he obtained an IME with Dr. Kuhnlein. There is an insufficient basis in the evidence from which to conclude there are any issues with the cost of Dr. Kuhnlein's IME that merit the defendants not paying the full amount. Under Iowa Code section 85.39(2), Lemmon is therefore entitled to reimbursement for the full cost of Dr. Kuhnlein's IME, which is reasonable given the nature of Lemmon's injuries and extensive medical records regarding their care.

4. Costs.

The parties identified costs as being at issue in the hearing report. Specifically, according to the hearing reports, Lemmon is seeking taxation of costs in Claimant's Exhibit 3, which consists of the bill for Dr. Kuhnlein's IME and a copy of the checks used to pay the bill. Because Dr. Kuhnlein's IME is reimbursable under Iowa Code section 85.39(2), it is not taxed as a cost under rule 876 IAC 4.33. Exhibit 3 contains no other evidence relating to costs paid and the hearing report identifies no other such costs. Consequently, no costs are taxed to the defendants.

CONCLUSION

It is therefore ordered:

1) The defendants shall pay to the claimant permanent total disability benefits at the rate of seven hundred forty-two and 49/100 dollars ($742.49) per week from April 3, 2018, and into the future during the period of the claimant's continued disability.

2) The defendants are entitled to a credit for benefits paid.

3) The defendants shall pay accrued weekly benefits in a lump sum.

4) The defendants shall pay interest on unpaid weekly benefits awarded herein as set forth in Iowa Code section 85.30.

5) The defendants are to be given the credit for weekly benefits previously paid.

6) The defendants shall file subsequent reports of injury as required by agency rules.

7) The defendants shall pay to the claimant penalty benefits in the amount of seventy-one thousand six hundred one and 40/100 dollars ($71,601.40).

8) The defendants shall pay to the claimant six thousand eight hundred forty-seven and 50/100 dollars ($6,847.50) as reimbursement for the IME performed by Dr. Kuhnlein under Iowa Code section 85.39(2).

9) The parties shall be responsible for paying their own hearing costs.

Signed and filed this 15th day of April, 2021.

BENJAMIN G. HUMPHREY
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Eric Bair (via WCES)

David Castello (via WCES)

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 filed via Workers' Compensation Electronic System (WCES) unless the filing party has been granted permission by the Division of Workers' Compensation to file documents in paper form. If such permission has been granted, the notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 150 Des Moines Street, Des Moines, Iowa 50309-1836. The notice of appeal must be received by the Division of Workers' Compensation 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 legal holiday.