BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

MARK WITTROCK,

Claimant,

vs.

HY-VEE, INC.,

Employer,

and

EMC RISK SERVICES, LLC,

Insurance Carrier,
Defendants.

File No. 5053300

ARBITRATION DECISION

Head Note Nos.: 1801, 1803, 2500

STATEMENT OF THE CASE

Mark Wittrock, claimant, filed a petition in arbitration seeking workers' compensation benefits from defendants, Hy-Vee, the employer, and their workers' compensation insurance carrier, EMC Risk Services, LLC. The arbitration hearing was held on August 19, 2016 in Des Moines, Iowa.

Claimant provided testimony at hearing as did Darrell Short and Katie McKibben, both of whom are employees of defendant Hy-Vee. The evidentiary record also includes Claimant's Exhibits 1 through 13, and Defendants' Exhibits A through O. Exhibit O was submitted post-hearing by defendant without objection.

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.

Counsel for the parties submitted post-hearing briefs on October 3, 2016, and the case was considered fully submitted on that date.

ISSUES

The parties submitted the following disputed issues for resolution:

1. Whether the work injury was the cause of industrial disability and, if so, the extent thereof.

2. Whether the work injury was the cause of temporary total disability, and if so, the extent thereof.

3. Whether claimant is entitled to medical mileage and prescription medication expense reimbursement as identified in Exhibit 13.

4. Whether claimant is entitled to reimbursement for an independent medical examination under Iowa Code section 85.39.

5. Whether claimant is entitled to penalty benefits under Iowa Code section 86.13.

6. Assessment of costs.

FINDINGS OF FACT

At the time of the hearing claimant, Mark Wittrock, was 39 years old. (Transcript page 10) He was single and living in Storm Lake, Iowa. (Id.) Claimant is ambidextrous, but writes with his right hand. (Tr. p. 58; Exhibit 9, p. 3)

The parties have stipulated in the hearing report that claimant sustained an injury on July 1, 2014, which arose out of and in the course of his employment with Hy-Vee, Inc. (Hearing Report, p. 1) The injury involves claimant's left shoulder and occurred when he was working as a delivery driver. Claimant was unloading a refrigerated trailer when he slipped and fell, landing on his side with his left arm extended. (Tr. pp. 15-16)

Prior to the work injury, claimant graduated from Audubon High School in 1995. (Tr. p. 13) He later received an Associate of Science degree in civil engineering in 2002 from Iowa Western Community College. (Id.)

Claimant's work history includes working during high school on his family's farm. (Tr. p. 14) After high school, claimant worked at Twin Construction as a carpenter for about a year. (Tr. pp. 14, 29) He then worked for Terracon as a Level III engineering technician. (Tr. p. 29) While working for Terracon, claimant performed soil tests, foundation and structural steel inspections, among other things, which sometimes required lifting up to 50 pounds. (Tr. pp. 29-30) Claimant became a project manager for Terracon, which involved overseeing other technicians. (Tr. p. 33) Claimant testified that he did not have any impairment involving his left arm or shoulder while working for Twin Construction or Terracon. (Tr. pp. 14, 29)

Following his work at Terracon, claimant worked for Icon Ag Solutions as a Service Manager, which involved overseeing product improvements and setting up repair work in the shop. (Tr. p. 34) Claimant left that position for a higher wage as a service clerk at Alta Implement. (Tr. pp. 61, 89) Claimant was working long hours at Alta Implement and left that job to work for defendant Hy-Vee as a regular truck driver. (Tr. pp. 61-61)

Claimant began working for defendant Hy-Vee on June 17, 2014. (Ex. C, p. 2) He was injured on July 1, 2014, as described above.

Claimant had no permanent restrictions when he began working at Hy-Vee. He stated that he did not have any left shoulder problems prior to the July 1, 2014 date of injury. Darrell Short testified that claimant, at the time he was hired, was given a physical exam and showed no signs of any physical limitations and appeared able to do the job of truck driver. (Ex. 10, pp 5-6, 8)

Following the above-described work injury, claimant received medical care at Cherokee Regional Medical Center with Doyle Kruger, ARNP. He reported increasing weakness in his left shoulder with pain and burning that resolved with rest. (Ex. 2, p. 1) Claimant was placed on restrictions of no lifting over ten pounds with the left arm, no use of the left shoulder, and no over-the-road driving. (Ex. 2, p. 3)

On July 9, 2014, claimant began receiving treatment from Timothy Rice, D.O., at Cherokee Regional Medical Center. (Ex. 3, p. 1) Dr. Rice placed restrictions on claimant and he returned to work with these restrictions on light duty on July 14, 2014. (Ex. 3, p. 2; Hearing Report, Benefit Summary) Dr. Rice was concerned about a possible SLAP tear and recommended physical therapy and an MRI. (Ex. 3, p. 4) Following the MRI, Dr. Rice's assessment was a left shoulder strain with supraspinatus tendonitis. (Ex. 3, p. 6) Claimant was referred to an orthopedic physician, Ryan Meis, M.D. (Ex. 5, p. 1)

Dr. Meis, on September 22, 2014, during his initial meeting with claimant, incorrectly stated that claimant had been in the Air Force, Special Forces. (Ex. 5, p. 1) Claimant testified that he had signed up for military service, but never served. (Tr. p. 92) This fallacy unfortunately carries through other medical records as well.

Dr. Meis noted that claimant was experiencing popping in his shoulder that caused pain and that the MRI appeared to show an injury to the anterior labrum and possibly his superior labrum along with a potential HAGL (humeral avulsion of the glenohumeral ligament) lesion. (Ex. 5, p. 2) He ordered an MRI with contrast and Dr. Meis assigned restrictions of occasional lifting of zero to five pounds and no truck driving. (Ex. 5, p. 4)

On October 13, 2014, Dr. Meis noted that claimant had palpable and audible "clunking" in his left shoulder, which he described as "several different types of sounds and mechanical issues that are occurring with range of motion." (Ex. 5, p. 6) Conservative care did not produce significant relief and surgery was recommended. (Id.)

On November 4, 2014, claimant's restrictions were modified to allow him to work as a shag driver, but not over-the-road. (Ex. 5, p. 9) Claimant then applied for, or "posted" for the shag driver job, which he was given. (Tr. p. 112) The shag driver position was a lower wage position than the over-the-road position.

On December 15, 2014 claimant underwent left shoulder surgery. (Ex. 7, p. 1) Dr. Meis performed left shoulder arthroscopy with arthroscopic HAGL repair, subacromial decompression and extensive debridement. (Id.)

On December 29, 2014, following surgery, claimant was returned to work with the restriction of no use of the left arm and he was prescribed physical therapy. (Ex. 5, pp. 14-16; Ex. F)

On April 27, 2015, claimant was seen by Dr. Meis who noted that following surgery, he had significant improvement in range of motion and reduction of pain. However, he also noted that claimant continued to have occasional pain that he rated at 1-3/10 when lifting his arm at shoulder height and reaching full forward flexion. (Ex. 5, p. 17) Dr. Meis stated that the little "quirks" that claimant continued to have were expected to improve with time. (Id.) On this date, claimant requested a return to his normal job, which was granted. (Ex. 5, p. 17) He was to return to see Dr. Meis in six weeks at which time maximum medical improvement (MMI) was anticipated. (Id.)

Claimant returned to work following the April 27, 2015 release from Dr. Meis, where he continued to work in the shag driver position, and did not return to the over-the-road position that he was originally hired to do. (Tr. p. 112) Claimant then resigned from his employment with Hy-Vee on or about June 19, 2015. (Tr. p. 62; Ex. B) Claimant noted in his resignation letter his concerns about his shoulder injury and his disappointment that he was not returned to an over-the-road position at the higher wage. (Ex. B) He testified that he believed he would have trouble doing the job of shag driver following his work injury. He stated that he would have difficulty in the winter crawling under the trailers to hammer loose the trailer brakes and that he would not be able to hold onto a trailer door on a windy day. (Tr. p. 62)

Both Darrell Short, claimant's supervisor and Katie McKibben, a human resources processor at Hy-Vee testified that claimant did not give any indication that he was struggling with the shag driver job upon his return to work after April 27, 2015. They also stated that he did not complain that he was unable to complete any aspect of the shag driver job, and confirmed that he did not request any accommodations. (Tr. pp. 113-114)

On June 8, 2015, Dr. Meis deemed claimant to have reached MMI and his return to work at full-duty with no restrictions was confirmed. (Ex. G, pp. 1-2) At that time, Dr. Meis found claimant to have 150 degrees of forward flexion of the left shoulder and abduction of 90 degrees. (Ex. G, p. 1)

On June 26, 2015, Dr. Meis assigned a five percent impairment to the upper extremity, which he converted to a three percent whole person rating. (Ex. H, p. 2; Ex. I, p. 1)

Claimant was then seen by Marc Hines, M.D. on May 13, 2016, for the purpose of an independent medical examination. (Ex. 8, p. 1) Claimant reported that claimant's shoulder continued to ache, which gets worse throughout the day. He also reported that activity with the shoulder is difficult to maintain for more than 20 to 30 minutes and that he often sleeps in a recliner to obtain the most comfortable position. (Ex. 8, p. 4) Dr. Hines found upon examination that claimant complained of diffuse shoulder pain with difficulty stabilizing the shoulder for function. (Id.) He also found some diminished range of motion. Dr. Hines stated that claimant had 160 degrees of forward flexion

"without difficulty" and abduction of 170 degrees. (Id.) Although Dr. Hines states that the patient has 4/5 weakness on inversion and abduction, he goes on to state that "[t]he patient's overall strength otherwise seems unimpeded but the ability for him to stabilize across his shoulder is remarkably diminished as compared to strength elsewhere." (Ex. 8, pp. 4-5) Dr. Hines then opined that claimant had sustained permanent impairment and referenced the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, (AMA Guides) finding both a glenohumeral and an acromioclavicular impairment of 15 percent and 5 percent respectively, for a total impairment of 19 percent to the whole person. Dr. Hines referred to Table 16-18, page 499 of the Guides. (Ex. 8, pp. 5-6) He did not assign "specific restrictions," but did think it practical for claimant to avoid ladders and working at heights if gripping with his left hand/arm was required. Dr. Hines also suggested that claimant consider retraining. (Ex. 8, p. 6) It is unclear to the undersigned from a review of Table 16-18 of the AMA Guides and Dr. Hines' report, how he arrived at the particular percentages of impairment that he assigned.

On June 3, 2016, Dr. Hines issued an addendum to his report concerning restrictions in which he agreed that claimant "could not be a long haul truck driver both from an immediately practical matter of driving the truck itself, but also climbing up and around on the truck . . ." (Ex. 8, p. 6)

On July 8, 2016, Dr. Meis examined claimant and reviewed the report from Dr. Hines. (Ex. I, p. 1) At that time, he found that claimant was hesitant to move his shoulder and was substantially guarded and had facial grimacing and what seemed to be an exaggerated pain response. Dr. Meis noted that this was similar to behavior that he had observed since his initial examination of claimant. (Id.) An MRI was recommended with intra-articular contrast. (Ex. I, p. 2) The MRI was obtained on August 1, 2016, and Dr. Meis stated that he did not have much more to offer him in terms of surgical intervention and encouraged him to continue working on range of motion and strengthening. (Id.) Dr. Meis stated that he believed Dr. Hines' impairment assessment to be "quite high at this time as his range of motion is actually fairly good as is his strength." (Id.) Dr. Meis also stated in a letter to the claims adjuster that the 19 percent whole person rating "I feel, is far too high given the numbers from my evaluation today." (Ex. J, p. 1)

On July 31, 2016, Dr. Hines, after reviewing the report of Dr. Meis, stated that he concurred with "most things," but noted their disagreement was rooted in their respective examinations and assessment of permanency. In addition, Dr. Hines noted the differences were influenced by "the perception of the credibility of the patient." (Ex. 8, p. 9)

I find that claimant has sustained functional loss as indicated by both Dr. Meis and Dr. Hines, although they disagreed as to the extent. I find that the impairment rating assigned by Dr. Meis is a more accurate statement of claimant's loss of function in light of Dr. Meis's more recent examination of claimant and more importantly, due to claimant's continued employment and ability to perform his current occupation, discussed below.

Considering restrictions, I find that Dr. Hines initially indicated that "I have given the patient no specific restrictions . . ." although, he goes on to state that practically, he should avoid heights when his left grip will be required and that he may want to consider retraining. (Ex. 8, p. 6) Later, he states that claimant should not work as a long haul driver. (Id.) Barbra Laughlin also stated that claimant would benefit from retraining and that he would be able to obtain assistance through Iowa Vocational Rehabilitation. (Ex. 9, p. 9) However, claimant continues to work as a truck driver and has not sought retraining. His current employment requires repeated lifting up to 50 pounds and repeated pushing/pulling up to 100 pounds. Therefore, I conclude that claimant's continued employment as truck driver during the year prior to hearing provides the most convincing evidence of his abilities.

Claimant has shown himself to be intellectually capable, having obtained an Associate of Arts degree in engineering and therefore, he is able to be retrained if he would have chosen to do so. Further, the undersigned finds that claimant has education, skills, and work experience in the engineering field and may not require additional training to be gainfully employed outside the trucking industry.

Claimant testified at hearing that lifting his left arm caused pain and he continued to use over-the-counter medication to address his shoulder pain. (Tr. p. 31) Claimant stated that his shoulder remains stiff and painful. (Tr. pp. 26-27)

Claimant testified at hearing that he believed his shoulder pain would prevent him from performing his previous job as a technician at Terracon. (Tr. p. 30) He stated that any movement of the left arm causes an increase in pain. (Tr. p. 33) However, claimant believed that in his current condition, he could still do the service manager job he had at Icon Ag and the service clerk position at he did at Alta Implement. (Tr. p. 89)

Claimant testified that after the work injury he returned to the shag driver position, which kept him off the road. He stated that he was able to do this position at that time because running the jacks and kingpins can be done hydraulically, he was able to use his right arm and avoid using his left arm. (Tr. p. 43) Claimant testified that he has difficulty with his current regular driving job because he "pretty well can't jack the trailer up and down." (Id.) He testified that in his current position as a relief driver, he gets help from co-workers. (Tr. p. 44)

Following his resignation from Hy-Vee, claimant obtained employment with Dr. Pepper-Snapple, as a relief driver. (Tr. p. 44) Claimant testified that he was hired by Dr. Pepper-Snapple before he quit his job at Hy-Vee. (Tr. p. 78) He also stated that he was aware of the position that he was going to fill at Dr. Pepper-Snapple and that the job required the ability to lift up to 50 pounds repeatedly and push and pull up to 100 pounds repeatedly. (Ex. D, p. 2; Tr. pp. 78-79) In this position, claimant is responsible for operating a tractor-trailer semi-truck and delivering and off-loading product using a pallet jack and a two wheel cart to move product. (Tr. pp. 81-82) Claimant has not asked for any accommodations from Dr. Pepper-Snapple, but testified that he sometimes is assigned to work in tandem with another employee. (Tr. p. 80) Claimant also testified that he is sometimes given the less physically demanding routes, depending on who the supervisor is assigning the routes. (Tr. p. 85)

Concerning claimant's wage information, the parties stipulated in the hearing report that claimant's gross earnings at Hy-Vee were $711.77 per week. (Hearing Report, p. 1) The records indicate that claimant is earning more money per week at Dr. Pepper-Snapple than he did working at Hy-Vee. (Ex. E, p. 3) Claimant testified that, in his new job, he earns about $1,200 to $1,500 per week and agrees that he now earns significantly more than he did at Hy-Vee. (Tr. pp. 45, 86)

Ms. Barbra Laughlin, of Laughlin Management, provided an Employability Assessment to claimant's counsel, dated July 1, 2016. In that assessment, Ms. Laughlin indicated that she met with Mr. Wittrock and reviewed his deposition testimony. In addition, she reviewed medical records including the IME of Dr. Hines and medical records of Dr. Meis. (Ex. 9, p. 1) Relying upon the restrictions of Dr. Hines, Ms. Laughlin opined that based upon her assessment, claimant "would sustain a loss of 94.5% of all directly transferable occupations . . . a loss of 87.5% of generally transferable occupations . . . [and] a loss of 98.6% of unskilled occupations." (Ex. 9, p. 7) The undersigned finds that Ms. Laughlin's opinion does not seem to square with claimant's experience of beginning a truck driving/delivery job with Dr. Pepper-Snapple within a few days after quitting his job at Hy-Vee, and his continued employment in this job, which is physically demanding.

The defendants obtained a loss of earning capacity analysis concerning claimant with Ronald Schmidt, of Rehabilitation Management, LLC. Mr. Schmidt's report, dated July 28, 2016, indicates that he had a telephonic interview with claimant and reviewed medical records, wage information from the defendant and claimant's current employer, claimant's deposition, job descriptions, the report of Barbra Laughlin, medical records of Dr. Meis and Dr. Hines, along with other materials. (Ex. M, pp. 1-2, 4) Mr. Schmidt notes that claimant is currently working in a truck driving position, which is consistent with Dr. Meis's assignment of "no restrictions." (Ex. M, p. 8) Mr. Schmidt then states that if one relied upon the restrictions suggested by Dr. Hines that claimant's "loss of access to the labor market would be minimal . . . and I would estimate that the most it could be is 5%." (Ex. M, p. 9) This is based on Mr. Schmidt's conclusion that with Dr. Hines' restrictions, claimant would not be precluded from "occupations he has worked in the past – specifically as a service writer and in the field of civil engineering," which are areas that he has experience and education and the wage is as high or higher than he was earning at the time of his injury. (Id.) Mr. Schmidt also notes that Dr. Hines' restriction of not working as a long haul driver is not expressed in functional terms, i.e. lifting, bending, carrying, etc. making it harder to formulate a loss of earning capacity using his restrictions. (Id.)

Considering the competing vocational reports, I find that Mr. Schmidt's more closely reflects claimant's demonstrated abilities and access to the job market in view of his continued employment at Dr. Pepper-Snapple. Claimant has been employed for over a year with Dr. Pepper-Snapple at a higher income that he had at Hy-Vee.

At the time of the hearing, claimant was 39 years old and clearly remained motivated to work as shown by his work history.

Claimant testified that he continued to have pain in his shoulder and difficulty with continuous work involving the shoulder lasting more than 20 to 30 minutes and difficulty raising his left arm above shoulder level.

In consideration of claimant's functional impairment, medical condition before and after the injury, the situs and severity of the injury and surgery required, the length of healing period, claimant's work experience before and after the injury, after and potential for rehabilitation, his age, education and motivation to remain employed, as well as his earnings before and after the injury, and his testimony concerning his ongoing symptoms, along with other appropriately considered factors in the assessment of industrial disability, I find that claimant has sustained industrial disability of 15 percent.

Attached to the hearing report is a "Benefits Summary" that shows the following benefit payment history:

Date	Number of Weeks	Benefit Type	Rate
7/6/14 - 7/13/14	1.1429	TTD/HP	$381.98
7/14/14 - 11/16/14	18.0	TPD	
12/15/14 – 1/11/15	4.0	TTD/HP	$381.98
1/12/15 – 4/26/15	15.0	TPD	
4/27/15 – 6/28/15	9	PPD	$381.98

(Hearing Report, Benefits Summary).

After a review of all the evidence in this case, the undersigned provided notice to the parties via an Order to Show Cause issued January 25, 2017, of the undersigned's intent to reject the stipulated date of June 8, 2015 as the commencement date for permanency benefits in favor of July 14, 2014 as the proper date for commencement of permanent partial disability benefits (PPD). The parties responded on January 30, 2017 agreeing with the undersigned's rejection of the stipulation and assertion of July 14, 2014, as the commencement date for PPD benefits, if any.

Claimant argues in his brief that he returned to work on April 27, 2015, under restrictions that limited him to the shag driver positions only and that he should have been paid temporary partial disability benefits (because it was a lower wage than his prior position) rather than permanent partial disability benefits as indicated in the benefit summary. Claimant was hired initially to be an over-the-road truck driver and was in that position at the time of the work injury. Claimant argues that because he did not return to the position that he was in at the time of the injury, he is entitled to temporary partial disability. However, even if that were true, claimant has not presented sufficient evidence of wages and hours from which the undersigned could calculate an appropriate temporary partial disability benefit amount for the weeks in question. In addition, I have found above that claimant was returned to full-duty work on April 27, 2015, and he was therefore not medically restricted from over-the-road driving based on the medical records. Therefore, I find that claimant has failed to carry his burden of

proof that he is entitled to additional temporary benefits beyond the weeks he was paid, as set forth in the benefits summary.

Considering whether claimant is entitled to medical mileage and prescription medication expense reimbursement as identified in Exhibit 13, defendants agree in their brief that claimant is entitled to reimbursement for prescriptions as set forth in Exhibit 13, pages 5 through 21. (Def. Brief, p. 11) Concerning medical mileage, defendants acknowledge that claimant is entitled to some reimbursement, but argue that the evidence submitted does not coincide with the number of physical therapy appointments asserted by claimant. In support of their position, they assert that the physical therapy records in Exhibit 4 show 22 visits prior to the surgery and 15 visits post-surgery. (Ex. 4, pp. 12 & 16) These are for therapy certification periods of September 19, 2014 through November 19, 2014 and December 23, 2014 through February 23, 2015 respectively. (Id.) However, defendants overlook the July 11, 2014 through September 11, 2014 certification period which contained at least an additional 20 visits. (Ex. 4, p. 11) the undersigned finds that not all of the physical therapy notes were submitted, no doubt due to the fact that not all were deemed relevant or necessary for the undersigned to determine the issues in this matter. Nevertheless, there does appear to be three distinct periods of physical therapy as stated above, consisting of approximately two months in length per period, for a total of six months. I also find that claimant did provide testimony that the exhibit contains the list of medical visits, whether for therapy or for doctor visits prepared at his direction and that there is no evidence contrary to claimant's assertions in this regard. Therefore, I find that claimant is entitled to medical mileage reimbursement and prescription reimbursement as described in Exhibit 13, page 1, which is mileage of $3,871.71 and prescriptions of $304.39.

Considering the facts related to the issue of reimbursement to claimant under Iowa Code section 85.39, I find that on June 8, 2015, claimant is seen by Dr. Meis, who placed claimant at MMI and then on June 25, 2015, assigned an impairment rating of 3 percent of the whole body. (Ex, G, p. 1; Ex. H, p. 2) On May 13, 2016, 11 months later, claimant was seen by Dr. Hines for an independent medical exam (IME). (Ex. 8, p. 1) Claimant has indicated that the cost of Dr. Hines' IME evaluation and report is $1,291.67. (Ex. 12, p. 2). I find that claimant's IME expense is reasonable and the evaluation and report occurred after a physician retained by the employer made an evaluation of permanent disability.

Considering whether claimant is entitled to penalty benefits, it would appear from the benefit summary attached to the hearing report that defendants paid 14.1429 weeks of benefits at the rate of $381.98. However, claimant argues in his brief that "[i]t appears from the Hearing Report and attachments that EMC is trying to claim a credit for four missing checks." (Claimant's Brief, p. 15) This is a reference to Exhibit N and O, and four payments issued on August 13, 2015 in the amounts of $2,121.57, $964.73, $437.53 and $285.70, for a total amount of $3,809.53. (Ex. N) Although these payments were issued, defendants concede that they were never "endorsed, negotiated or otherwise deposited by Mark Wittrock or any other individual." (Ex. O, p. 2) Further, the records do not clearly identify exactly what these four payments were intended for, although defendants argue that they were PPD payments. (Defendants' Brief,

pp. 12-13) The payments in Exhibit N and O do not appear to match any particular payments identified in the benefit summary document, which would support claimant's argument that defendant seeks a credit for payments that were never received. An itemized payment summary would have been helpful to the undersigned, if it had been included in the exhibits to shed light on this matter.

In short, it is unclear to the undersigned what portion or portions of the amounts reflected in the benefit summary attached to the hearing report relate to the payments referred to in Exhibit N and O, if any. Therefore, in assessing penalty, I find that claimant received the benefits identified in the benefit summary, and the payments reflected in Exhibit N and O were in addition those referenced in the benefit summary and were not received by claimant.

The parties have stipulated in the hearing report that the applicable rate in this matter is $437.53.

It is clear that claimant was underpaid 5.1429 weeks of temporary benefits at the incorrect rate of $381.98. The stipulated rate as shown on the hearing report of $437.53 minus the incorrect rate of $381.98 produces an underpayment of $55.55 per week. This amount multiplied by 5.1429 weeks equals $285.69. Fifty (50) percent of $285.69 is $142.85.

It is also clear that claimant was underpaid 9 weeks of PPD benefits at the same incorrect rate, producing the same weekly underpayment of $55.55. This amount multiplied by 9 weeks is $499.95. Fifty (50) percent of this amount is $249.98.

The authorized treating physician, Dr. Meis, assigned a functional impairment of 3 percent to the body as a whole (15 weeks) on June 26, 2015. (Ex. H, p. 2) Based on the benefit summary attached to the hearing report, defendants paid only 9 weeks of permanency benefits. I find that 15 weeks less 9 weeks equals 6 weeks, which multiplied by the stipulated rate of $437.53 is $2,625.18. Fifty (50) percent of this amount is $1,312.59.

I find that claimant has shown an underpayment of temporary and permanent benefits totaling 14.1429 weeks in addition to non-payment of 6 weeks of permanent partial disability benefits as described above. Defendants argue that claimant had been returned to work without restrictions by Dr. Meis in support of their payment of only 9 weeks of permanency benefits. However, having failed to pay their own physician's functional impairment, I find that defendants have failed to establish a reasonable basis for their denial. I further find that defendants have not proven a reasonable or probable cause or excuse for the denial, delay of payment of the underpayment.

CONCLUSIONS OF LAW

The first issue in this case is whether the work injury was the cause of industrial disability, and if so, the extent thereof.

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).

In this case, the authorized treating provider, Dr. Meis and claimant's IME physician, Dr. Hines, have both opined that claimant sustained permanent impairment to the whole person as a result of the stipulated work injury. I have found above that the functional impairment assigned by Dr. Meis is more persuasive given claimant's continued employment in a truck driving position.

Since claimant has an impairment to the body as a whole, an industrial disability has been sustained. Industrial disability was defined in Diederich v. Tri-City R. Co., 219 Iowa 587, 593; 258 N.W. 899 (1935) as follows: "It is therefore plain that the legislature intended the term 'disability' to mean 'industrial disability' or loss of earning capacity and not a mere 'functional disability' to be computed in the terms of percentages of the total physical and mental ability of a normal man." Functional impairment is an element to be considered in determining industrial disability, which is the reduction of earning capacity. However, consideration must also be given to the injured worker's medical condition before the injury, immediately after the injury and presently; the situs of the injury, its severity, and the length of healing period; the work experience of the injured worker prior to the injury, after the injury, and potential for rehabilitation; the injured workers' qualifications intellectually, emotionally and physically; the worker's earning before and after the injury; the willingness of the employer to re-employ the injured worker after the injury; the worker's age, education, and motivation; and, finally the inability because of the injury to engage in employment for which the worker is best fitted. Thilges v. Snap-On Tools Corp., 528 N.W.2d 614, 616 (Iowa 1995); McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963); Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961).

Functional impairment is an element to be considered in determining industrial disability which is the reduction of earning capacity, but consideration must also be given to the injured employee's age, education, qualifications, experience, motivation, loss of earnings, severity and situs of the injury, work restrictions, inability to engage in employment for which the employee is fitted and the employer's offer of work or failure to so offer. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Olson v.

Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963); Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961).

I have considered above the various factors to be contemplated when determining industrial disability and found claimant to have sustained 15 percent industrial disability for the reasons there stated.

The next issue is whether the work injury was the cause of temporary total disability, and if so, the extent thereof.

Healing period compensation describes temporary workers' compensation weekly benefits that precede an allowance of permanent partial disability benefits. Ellingson v. Fleetguard, Inc., 599 N.W.2d 440 (Iowa 1999).

I have found above that claimant has failed to carry his burden of proof regarding his claim for additional healing period benefits. However, I have also found that claimant was underpaid for the temporary benefits he received as set forth in the benefit summary attached to the hearing report. I have found the underpayment to be $285.69 as calculated above.

The next issue is whether claimant is entitled to medical mileage and prescription medication expense reimbursement as identified in Exhibit 13.

The employer shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance, and hospital services and supplies for all conditions compensable under the workers' compensation law. The employer shall also allow reasonable and necessary transportation expenses incurred for those services. The employer has the right to choose the provider of care, except where the employer has denied liability for the injury. Section 85.27. Holbert v. Townsend Engineering Co., Thirty-second Biennial Report of the Industrial Commissioner 78 (Review-Reopening October 1975).

I have found above for the reasons there stated that claimant is entitled to reimbursement of medical mileage and prescription expenses as described in Exhibit 13, page 1, which is mileage of $3,871.71 and prescriptions of $304.39.

The next issue is whether claimant is entitled to reimbursement for an independent medical examination under Iowa Code section 85.39.

Section 85.39 of the Iowa Code permits an employee to be reimbursed for subsequent examination by a physician of the employee's choice where an employer-retained physician has previously evaluated "permanent disability" and the employee believes that the initial evaluation is too low. The section also permits reimbursement for reasonably necessary transportation expenses incurred and for any wage loss occasioned by the employee attending the subsequent examination.

Defendants are responsible only for reasonable fees associated with claimant's independent medical examination. Claimant has the burden of proving the

reasonableness of the expenses incurred for the examination. See Schintgen v. Economy Fire & Casualty Co., File No. 855298 (App. April 26, 1991). Claimant need not ultimately prove the injury arose out of and in the course of employment to qualify for reimbursement under section 85.39. See Dodd v. Fleetguard, Inc., 759 N.W.2d 133, 140 (Iowa App. 2008).

As described above, I have found that claimant is entitled to reimbursement of his independent medical evaluation with Dr. Hines in the amount of $1,291.67. (Ex. 12, p. 2) I also now conclude based on Iowa Code section 85.39, that claimant is entitled to mileage reimbursement in the sum of $185.15. (Ex. 12, p. 1)

The next issue for determination is whether claimant is entitled to penalty benefits under Iowa Code section 86.13

If weekly compensation benefits are not fully paid when due, section 86.13 requires that additional benefits be awarded unless the employer shows reasonable cause or excuse for the delay or denial. Weekly compensation payments are due at the end of the compensation week. Robbennolt v. Snap-on Tools Corp., 555 N.W.2d 229, 235 (Iowa 1996).

Delay attributable to the time required to perform a reasonable investigation is not unreasonable. Kiesecker v. Webster City Meats, Inc., 528 N.W.2d 109 (Iowa 1995).

It is not unreasonable to deny a claim when a good faith issue of law or fact makes the employer's liability fairly debatable. An issue of law is fairly debatable if viable arguments exist in favor of each party. Covia v. Robinson, 507 N.W.2d 411 (Iowa 1993). An issue of fact is fairly debatable if substantial evidence exists which would support a finding favorable to the employer. Gilbert v. USF Holland, Inc., 637 N.W.2d 194 (Iowa 2001).

An employer's bare assertion that a claim is fairly debatable is insufficient to avoid imposition of a penalty. The employer must assert facts upon which the commissioner could reasonably find that the claim was "fairly debatable." Meyers v. Holiday Express Corp., 557 N.W.2d 502 (Iowa 1996).

If the employer fails to show reasonable cause or excuse for the delay or denial, the commission must impose a penalty in an amount up to 50 percent of the amount unreasonably delayed or denied. Christensen v. Snap-on Tools Corp., 554 N.W.2d 254 (Iowa 1996). The factors to be considered in determining the amount of the penalty include the length of the delay, the number of delays, the information available to the employer and the employer's past record of penalties. Robbennolt, 555 N.W.2d at 238.

I have determined above that claimant was underpaid 5.1429 weeks of temporary benefits and 9 weeks of PPD benefits at the incorrect rate of $381.98.

As calculated above, I have found that claimant was underpaid $285.69 for temporary benefits and $499.95 for PPD benefits. I further found that the authorized treating physician, Dr. Meis, assigned a functional impairment of 3 percent impairment,

or 15 weeks and defendants paid only 9 weeks of permanency benefits. I found that claimant was unreasonably denied 6 weeks of PPD benefits, which, multiplied by the stipulated rate of $437.53 is $2,625.18.

The total amount of the underpayment and unreasonably denied temporary and PPD benefits is: $285.69 + $499.95 + $2,625.18 = $3,410.82. Fifty (50) percent of this amount is $1,705.41. I conclude that a penalty in the range of 50 percent is appropriate.

Claimant is entitled to penalty benefits in the range of 50 percent for defendants' unreasonable denial of benefits in the form of underpayment of the rate and non-payment of Dr. Meis's full 3 percent permanency rating. Defendant is obligated to pay penalty benefits in the amount of $1,700.00

The final issue is the assessment of costs.

Assessment of costs is a discretionary function of this agency. Iowa Code section 86.40. Costs are to be assessed at the discretion of the deputy commissioner or workers' compensation commissioner hearing the case. Rule 876 IAC 4.33. I conclude that claimant was successful in this claim and therefore exercise my discretion and assess costs against the defendants in this matter.

Claimant has identified costs in Exhibit 12. Of those listed in Exhibit 12, I award as costs the filing fee of $100.00 and Barbra Laughlin's vocational employability assessment in the amount of $150.00 pursuant to Iowa Code chapter 622.72 and Rule 876 IAC 4.33. I specifically do not include as costs: the expense associated with Dr. Hines' IME and mileage, which was addressed previously under Iowa Code section 85.39 above; the expense for claimant's deposition transcript copy, as the same was not submitted as evidence at the time of the hearing; and, the claimant's mileage to the vocational evaluation.

ORDER

THEREFORE, IT IS ORDERED:

Defendants shall pay claimant industrial disability benefits of seventy-five (75) weeks, beginning on July 14, 2014, the commencement date for PPD benefits, until all benefits are paid in full.

Defendants shall pay claimant four hundred ninety-nine and 95/100 dollars ($499.95) representing the underpayment of previously paid permanency benefits.

Defendants shall pay claimant two hundred eighty-five and 69/100 dollars ($285.69) representing the underpayment of previously paid healing period benefits.

Defendants shall be entitled to credit for all weekly benefits paid to date.

All weekly benefits shall be paid at the stipulated rate of four hundred thirty-seven and 53/100 dollars ($437.53) per week.

Defendants shall pay claimant one thousand seven hundred and 00/100 dollars ($1,700.00) in penalty benefits.

All accrued benefits shall be paid in a lump sum.

Defendants shall pay interest on any accrued weekly benefits pursuant to Iowa Code section 85.30

Defendants shall reimburse claimant one thousand two hundred ninety-one and 67/100 dollars ($1,291.67) for the cost of Dr. Hines' IME and, in addition thereto, one hundred eighty-five and 15/100 dollars ($185.15), for mileage to attend the IME.

Defendants shall reimburse claimant for unpaid mileage and prescription reimbursement as set forth in Exhibit 13.

Defendant shall pay costs of two hundred fifty and 00/100 dollars ($250.00), consisting of the one hundred and 00/100 dollar ($100.00) filing fee and one hundred fifty and 00/100 dollars ($150.00) for the vocational expert report.

Defendants shall file subsequent reports of injury (SROI) as required by this agency pursuant to rules 876 IAC 3.1(2) and 876 IAC 11.7.

Signed and filed this 10th day of February, 2017.

TOBY J. GORDON
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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TJG/srs

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.