BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

MARK SIMMONS, Claimant, vs. DUBUQUE AUTO PLAZA, Employer, and WESTFIELD NATIONAL INS. CO., Insurance Carrier, Defendants.	File No. 5061978 ARBITRATION DECISION Head Note Nos.: 1803, 4000

STATEMENT OF THE CASE

Mark Simmons, the claimant, filed a petition in arbitration seeking workers' compensation benefits from the defendants, employer Dubuque Auto Plaza (DAP) and insurance carrier Westfield National Insurance Company (Westfield), for a work injury to his back. The agency held a hearing in the consolidated case on February 13, 2020, in Des Moines, Iowa, with the undersigned deputy workers' compensation commissioner presiding.

ISSUES

Under rule 876 IAC 4.19(3)(f), the parties jointly submitted a hearing report defining the claims, defenses, and issues in this contested case proceeding. The hearing report was approved and entered into the record via an order because it is a correct representation of the disputed issues and stipulations in this case. The parties identified the following disputed issues in the hearing report:

1) Is Simmons entitled to temporary disability or healing period benefits from July 21, 2016, through July 25, 2016?

2) What, if any, is Simmons's industrial disability relating to the stipulated work injury, if any?

3) Is Simmons entitled to a penalty for underpayment of permanent partial disability benefits?

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

STIPULATIONS

In the hearing report, the parties entered into the following stipulations:

1) An employer-employee relationship existed between Simmons and DAP at the time of the stipulated work injury.

2) Simmons sustained a back injury on July 21, 2016, which arose out of and in the course of his employment with DAP.

3) The stipulated injury Simmons sustained on July 21, 2016, is a cause of temporary disability during a period of recovery.

4) Simmons was off work from July 21, 2016, through July 25, 2016.

5) The stipulated injury is a cause of permanent disability.

6) The commencement date for permanent partial disability benefits, if any are awarded, is July 25, 2016.

7) At the time of the stipulated injury:

    a. Simmons's gross earnings were $1,073.43 per week.

    b. Simmons was single.

    c. Simmons was entitled to two exemptions.

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. The parties are bound by their stipulations.

FINDINGS OF FACTS

The evidentiary record in this case consists of the following:

- Joint Exhibits (Jt. Ex.) 1 through 4;
- Claimant's Exhibits (Cl. Ex.) 1 through 4;
- Defendants' Exhibits (Def. Ex.) A through H; and
- Hearing testimony by Simmons.

After careful consideration of all of the evidence in the record, the undersigned makes the following findings of fact.

Simmons was 50 years old at the time of hearing. (Hrg. Tr. p. 62; Def. Ex. H, p. 54, Depo. P. 3) Simmons first worked on his family's dairy farm where he grew up. (Hrg. Tr. p. 12) The work was physically demanding. (Hrg. Tr. p. 12)

Simmons achieved a B average in high school. (Hrg. Tr. p. 12) He graduated in 1987. (Hrg. Tr. p. 12, Def. Ex. C, p. 6) Simmons then attended Loras College in Dubuque, Iowa. (Hrg. Tr. p. 13; Def. Ex. C, p. 6) He had a C average while earning his Bachelor of Arts degree in accounting. (Hrg. Tr. p. 13; Def. Ex. C, p. 6)

Simmons worked while attending Loras. During the school year, Simmons worked in the dining hall and computer lab. (Hrg. Tr. p. 14) He worked construction during the summer. (Hrg. Tr. p. 14) Simmons has not worked in construction since graduating from college. (Hrg. Tr. p. 63)

Simmons got a job for an accounting firm after he graduated. (Hrg. Tr. p. 14) He performed audits for schools, earning an annualized salary of about $24,000. (Hrg. Tr. pp. 15) Simmons worked there for about nine months. (Hrg. Tr. p. 15) After his employer lost the contract to perform these audits, it terminated his employment. (Hrg. Tr. p. 15)

Simmons next worked at Cigna from about December 1991 to November 2004. (Hrg. Tr. p. 16; Def. Ex. B, p. 3) Cigna promoted him into supervisory and managerial jobs. (Hrg. Tr. p. 16; Def. Ex. B, p. 3) He earned around $60,000 annually as a manager, which included supervising between ten and twenty employees, reviewing subordinate employees' work product, giving performance reviews, and hiring and firing employees. (Hrg. Tr. pp. 64–65; Def. Ex. B, p. 3) After a merger, Simmons lost his job. (Hrg. Tr. p. 16)

Simmons then worked for Inventory Trading Company in sales. (Hrg. Tr. p. 16; Def. Ex. B, p. 3) He earned approximately $24,000 in annual salary. (Hrg. Tr. p. 17) In 2007, Simmons quit to go to work for Eagle Point Software in software sales. (Hrg. Tr. p. 18; Def. Ex. B, p. 3) Eagle Point discharged Simmons for performance in October 2007. (Hrg. Tr. p. 18)

In February 2008, Simmons went to work for Kurtz Communication. (Hrg. Tr. p. 18; Def. Ex. B, p. 3) At Kurtz, Simmons worked in sales peddling telephone services to businesses. (Hrg. Tr. p. 19; Def. Ex. B, p. 3) He earned around $34,000 in annualized salary. (Hrg. Tr. p. 19) Kurtz terminated his employment in July 2008 due to performance. (Hrg. Tr. p. 19)

The Kruse-Warthan car dealership hired Simmons as a car salesperson in August 2008. (Hrg. Tr. p. 19) Simmons has worked at the dealership as a salesperson since then, through multiple owners. (Hrg. Tr. pp. 20, 68) At the time of hearing, the dealership was known as Dubuque Auto Plaza (DAP).

DAP sells new Nissans and BMWs, as well as used vehicles. (Hrg. Tr. p. 21) It provides web-based training to salespeople such as Simmons on the vehicles they sell. (Hrg. Tr. p. 62) The job duties of a DAP salesperson include getting in and out of

vehicles that are various sizes, shoveling snow in the lots containing vehicles that are for sale, moving boxes of documents and supplies, cleaning snow off vehicles, and moving vehicles as needed. (Hrg. Tr. pp. 20–22) Simmons's typical work week consists of approximately 60 hours. (Hrg. Tr. pp. 59, 68)

Simmons was working for DAP on July 21, 2016. (Hrg. Tr. p. 24) He accompanied two customers on a test drive. (Hrg. Tr. p. 24) Simmons sat in the back, without buckling his seat belt, to allow him to demonstrate features to the customers. (Hrg. Tr. p. 25) Another vehicle struck their vehicle while they were traveling between 35 and 50 miles per hour. (Hrg. Tr. pp. 24–25)

The force of the collision threw Simmons about the inside of the vehicle. (Hrg. Tr. p. 25) He immediately felt pain in his shoulder and low back, most significantly in the latter. (Hrg. Tr. p. 26) After ensuring the other driver and his customers were okay, Simmons called DAP. (Hrg. Tr. p. 26) A coworker came to the crash site and took Simmons to the Mercy Hospital Emergency Room (ER) in Dubuque. (Hrg. Tr. p. 26)

At the Mercy ER, Simmons complained of "increased low back discomfort that [was] nonradiating." (Jt. Ex. 1, p. 3) Simmons had no numbness or tingling. (Jt. Ex. 1, p. 3) He rated his pain level at an eight out of ten. (Jt. Ex. 1, p. 3) Simmons underwent x-rays of his lumbar spine, which showed mild degenerative disc disease in the lower thoracic spine and disc space narrowing at L1-L2 and L2-L3. (Jt. Ex. 1, p. 5) The Mercy ER diagnosed him with a lumbar strain and prescribed Hydrocodone and Flexeril. (Jt. Ex. 1, pp. 4, 6) The Mercy ER released him from its care with instructions to follow up with his personal physician and a note to remain off work through July 23, 2016, with a return to regular duty on July 24, 2016. (Jt. Ex. 1, pp. 7, 10)

Simmons spent most of the day on July 22, 2016, in bed. (Hrg. Tr. p. 29; Jt. Ex. 2, p. 14) He went to Tri-State Occupational Health on July 26, 2016, complaining of pain in his low back. (Jt. Ex. 2, pp. 12–15) Simmons saw Emily Armstrong, PA-C, at Medical Associates clinic. (Jt. Ex. 2, p. 14) Simmons complained of ongoing back pain. (Jt. Ex. 2, p. 14) He again denied radiculopathy. (Jt. Ex. 2, p. 14) Armstrong diagnosed a lumbar strain and lumbar paraspinal muscle spasm. (Jt. Ex. 2, p. 15) She prescribed a Medrol Dosepak, Tylenol, hydrocodone, and Flexeril. (Jt. Ex. 2, p. 15) Armstrong assigned work restrictions of a 15-pounds lifting limit, no repetitive lifting, and advised that he be allowed to change positions as needed for comfort. (Jt. Ex. 2, p. 16)

Simmons followed up with Armstrong on August 2, 2016. (Hrg. Tr. p. 33) His left shoulder had improved. (Jt. Ex. 2, p. 17) Armstrong diagnosed Simmons with a contusion of the coccyx and sacral region and a lumbar strain. (Hrg. Tr. p. 33; Jt. Ex. 2, pp. 17–18) Armstrong again prescribed pain medication and work restrictions. (Jt. Ex. 2, p. 19) The work restrictions included no repetitive bending or lifting and sitting or standing as needed for comfort. (Jt. Ex. 2, p. 19)

On August 16, 2016, Simmons returned to see Armstrong. (Jt. Ex. 2, p. 20) While Simmons shared he was doing better since his last appointment, his coccyx and low back were still giving him issues. (Jt. Ex. 2, p. 20) Armstrong prescribed pain

medication, physical therapy, and work restrictions of limiting bending and twisting of his low back. (Jt. Ex. 2, p. 22)

The physical therapy helped to alleviate Simmons's shoulder pain. (Jt. Ex. 2, p. 23) It also helped to reduce his back pain, except when he sat for an extended period of time, as Simmons shared during a follow-up appointment in September. (Jt. Ex. 2, p. 23) However, Simmons's back pain returned after a busy day at work during which he could not rest, so he reported to Tri-State Occupational Health on October 10, 2016. (Hrg. Tr. pp. 25)

On October 21, 2016, PT discharged Simmons after he completed the full course of 12 visits. (Jt. Ex. 2, p. 27) Simmons shared he was feeling much better, though sitting for extended periods of time still caused him increased pain. (Jt. Ex. 2, p. 27) He also shared that he had taken it relatively easy with physical activities since the injury, but he attempted to clean out his gutters, which caused his low back pain to flare up. (Jt. Ex. 2, p. 27) Armstrong instructed him to continue to perform his home PT exercises and released him to work without restrictions. (Jt. Ex. 2, pp. 27–28)

Simmons reported for his follow-up appointment on January 17, 2017. (Jt. Ex. 2, p. 30) He informed Armstrong that he continued to feel low-back pain that sometimes woke him in the middle of the night, so he takes ibuprofen. (Jt. Ex. 2, p. 30) Armstrong referred him for magnetic resonance imaging (MRI) of his low back. (Jt. Ex. 2, p. 30) Armstrong assigned Simmons the work restriction of shoveling and brooming snow as tolerated. (Jt. Ex. 2, p. 32) Armstrong shared this information with the nurse case manager the defendants assigned to Simmons's workers' compensation claim. (Jt. Ex. 2, p. 29)

Simmons underwent an MRI and returned to see Armstrong on February 10, 2017. (Jt. Ex. 2, p. 33) His symptoms remained largely unchanged. (Jt. Ex. 2, p. 33) Armstrong shared that the MRI showed: "Mild disc []bulging a[t] L4-5 and L3-4. Multilevel degenerative disc disease, facet arthropathy, and neural foraminal encroachment (moderate at L4-5, mild at L3-4, L5-S1)." (Jt. Ex. 2, p. 33, Jt. Ex. 3, p. 35) Armstrong referred Simmons to pain management specialist Timothy Miller, M.D. (Jt. Ex. 2, p. 33) She assigned Simmons the work restrictions of bending and twisting of his back as tolerated. (Jt. Ex. 2, p. 34)

On February 22, 2017, Simmons saw Dr. Miller. (Jt. Ex. 4 p. 37) In advance of the appointment, the nurse case manager wrote Dr. Miller a letter with questions. (Jt. Ex. 4, p. 36) Dr. Miller addressed the questions from the letter in the medical records for the appointment. (Jt. Ex. 4, p. 38) On the question of MMI, Dr. Miller opined that it was unclear at that point and recommended moving forward with a diagnostic medial branch block and, if this caused relief, moving forward with radiofrequency lesioning on both sides, likely L3 through L5. (Jt. Ex. 4, p. 38) On work restrictions, Dr. Miller opined:

> The patient's opinion was that his job is being fairly understanding with him. Obviously, if he were going to a heavy lifting job, he might well need restrictions and it would not surprise me if he would fall somewhere into a

> moderate to light industrial capacity. However, within his current employment, he does not need any restriction since his job is fairly light and I do not think he will qualify as an industrial light duty-type activity. He is able to self pace to some degree when necessary. Therefore, I would not feel any specific restrictions are needed for his current job; however, if permanency for lifting restriction were needed, likely this would need to be under functional capacity evaluation to assess what is necessary.

(Jt. Ex. 4, p. 38) Thus, Dr. Miller did not feel compelled to prescribe work restrictions because DAP had accommodated Simmons's physical limitations.

In a check-box letter dated March 3, 2017, the nurse case manager sought clarification on whether Dr. Miller's diagnosis of "low back pain and lumbar spondylosis with evidence of facet syndrome" was related to Simmons's work injury. (Jt. Ex. 4, p. 39) Dr. Miller responded by indicating his diagnosis was the result of the work injury. (Jt. Ex. 4, p. 39) On April 5, 2017, Dr. Miller performed the diagnostic bilateral L3-L5 lumbar medial branch injection. (Jt. Ex. 4, p. 42) Because the procedure provided some symptom relief, Dr. Miller performed radiofrequency nerve ablation on April 19, 2017. (Jt. Ex. 4, pp. 45–46)

The procedure reduced the pain Simmons was feeling in his back. (Jt. Ex. 4, p. 48) However, it increased pain in his left leg. (Jt. Ex. 4, p. 48) Dr. Miller prescribed Gabapentin due to Simmons's left leg pain. (Jt. Ex. 4, p. 48)

Dr. Miller recommended additional PT. (Jt. Ex. 4, pp. 50–51) Simmons completed about 12 sessions of PT for his low back. (Cl. Ex. 3, p. 16) He felt the PT was beneficial. (Hrg. Tr. pp. 43–44)

In a letter dated July 19, 2017, the nurse case manager sought Dr. Miller's opinion following the follow-up appointment scheduled with Simmons for July 20, 2017, on whether Simmons required any further treatment for his work injury, if Simmons could work at full duty, and if he was at MMI. (Jt. Ex. 4, p. 52) After the July 20, 2017, exam, Dr. Miller found Simmons at MMI and opined that while no treatment was necessary at the time, it was "possible in the future the radiofrequency region would need to be done again . . . ." (Jt. Ex. 4, p. 54) Dr. Miller further opined he was releasing Simmons "without any restrictions from current job," though he likely could not perform a "very high lifting job." (Jt. Ex. 4, p. 54)

Westfield sent Dr. Miller a letter dated August 8, 2018. (Jt. Ex. 4, p. 55) The letter asked if Simmons was at MMI; in response to which Dr. Miller wrote, "Yes." (Jt. Ex. 4, p. 55) It also asked for the date on which Simmons reached MMI, which Dr. Miller indicated was July 20, 2017. (Jt. Ex. 4, p. 55) Westfield also asked for Dr. Miller's assessment of Simmons's permanent disability from the injury. (Jt. Ex. 4, p. 55) Dr. Miller assigned Simmons a 5 percent impairment to the whole body with an explanatory note that included, "No limitation current job." (Jt. Ex. 4, p. 55) Dr. Miller signed and dated his opinions August 15, 2018. (Jt. Ex. 4, p. 55)

Simmons felt Dr. Miller's permanent impairment rating was low, so he underwent an IME with Mark Taylor, MD. (Cl. Ex. 2) Dr. Taylor reviewed medical records and personally examined Simmons on December 17, 2018. (Cl. Ex. 2) Dr. Taylor's IME report is dated January 11, 2019. (Cl. Ex. 2, p. 5) In it, Dr. Taylor responds to questions submitted by Simmons's attorney in advance of the IME. (Cl. Ex. 2, pp. 2–4,)

Dr. Taylor addressed the question of when Simmons reached MMI. (Cl. Ex. 2, p. 10) He agreed with Dr. Miller's assigned date of July 20, 2017. (Cl. Ex. 2, p. 10) Neither Dr. Miller nor Dr. Taylor revisited his opinion on MMI due to Simmons undergoing a second radiofrequency ablation procedure.

On the subject of permanent impairment caused by the work injury, Dr. Taylor applied the Fifth Edition of the AMA Guides and opined:

> I agree with Dr. Miller as far as the use of Table 15-3, on page 384. I also agree that Mr. Simmons most appropriately fits within DRE Lumbar Category II and for which I would assign 7% whole person impairment.

(Cl. Ex. 2, p. 10)

Dr. Taylor also addressed the question of what, if any, permanent work restrictions are appropriate due to the work injury:

> Mr. Simmons has continued to experience persistent and chronic low back pain that worsens with certain activities and movements. As such, I would estimate no more than a 40-pound lifting limit on a rare to occasional basis at or near waist level, or at least between knee and chest level. Below knee level I would recommend 30 pounds or less on an occasional bas[i]s.
>
> He should have the ability to alternate sitting, standing and walking as needed for comfort. He has noticed increased problems as far as pain if he remains in one position for too long, which is a common complaint among individuals with chronic back conditions. He can squat, bend, and kneel on an occasional basis. I recommend rare crawling. He can climb stairs and ladders on an occasional basis. He can travel occasionally to frequently but should be afforded the opportunity to stop and get out of the vehicle whenever needed.

(Cl Ex. 2, p. 10)

Dr. Miller is Simmons's treating physician. However, Dr. Miller provided his opinion in response to a request from the insurance carrier after a gap in care of about a year. The letter Westfield sent Dr. Miller is dated August 8, 2018. Dr. Miller signed and dated his opinion August 15, 2018. It is unclear, based on the evidence, whether Dr. Miller performed a physical examination of Simmons after receiving the request for his opinion on permanent impairment and before issuing his opinion. It appears there is a gap of almost one year between when Dr. Miller last saw Simmons and when he opined on permanent disability.

Further, Dr. Miller did not directly answer whether Simmons's physical limitations necessitate work restrictions. Dr. Miller instead responded to the question by indicating that DAP was accommodating Simmons's injury. Dr. Miller did not opine on the objective need for work restrictions due to the work injury, independent of whether an employer is providing accommodations.

As part of the IME, Dr. Taylor performed a thorough physical examination of Simmons shortly before opining on the question of permanent impairment. He also reviewed all of Simmons's medical records and discussed Simmons's then-current physical condition and symptoms with him. The discussion in Dr. Taylor's IME report is in line with how Simmons described his symptoms at the time of hearing. For these reasons, Dr. Taylor's opinion on permanent impairment and work restrictions is more persuasive in this case. This decision adopts them.

Simmons experienced a return of his symptoms two years after the ablation. (Hrg. Tr. p. 48, Jt. Ex. 4, p. 57) He returned to Dr. Miller on February 27, 2019. (Jt. Ex. 4, p. 57) Simmons rated his pain as between a four and six on a scale of one to ten. (Jt. Ex. 4, p. 57) Dr. Miller recommended a second radiofrequency ablation, with the understanding that approval by the workers' compensation insurance carrier was needed. (Jt. Ex. 4, p. 58)

Simmons scheduled a second ablation procedure for April 17, 2019. (Jt. Ex. 4, p. 63) However, the scheduled procedure was only to Simmons's left side. (Jt. Ex. 4, p. 63–64) Simmons had previously had a bilateral ablation procedure and, while his symptoms were primarily occurring on his left side, he was also experiencing them on his right side. (Jt. Ex. 4, p. 63) Consequently, Simmons wanted to undergo a bilateral ablation procedure. (Jt. Ex. 4, p. 63; Hrg. Tr. p. 49) He refused to undergo one on only his left side. (Jt. Ex. 4, p. 63; Hrg. Tr. p. 49) Ultimately, the defendants authorized bilateral radiofrequency ablation and Dr. Miller performed the procedure on June 5, 2019. (Jt. Ex. 4, p. 64–65; Hrg. Tr. p. 50)

The second ablation procedure successfully reduced Simmons's symptoms. (Hrg. Tr. p. 50) While Simmons still experiences pain, it is at a reduced level. (Hrg. Tr. p. 50) Dr. Miller did not revisit his impairment rating following the recurrence of symptoms and second ablation.

In hearing testimony, Simmons described the symptoms he was experiencing at the time. His testimony on his symptoms at the time of hearing is credible. He feels a constant pain that he rates at a level of two on a scale of one to ten, with ten as the highest. (Hrg. Tr. p. 50) He also testified that he experiences pain levels as high as seven on bad days. (Hrg. Tr. pp. 50–51) Simmons will have a bad day with higher pain if he is physically active such as by getting in and out of a lot of cars, lifting items, or helping out around the house. (Hrg. Tr. p. 51)

To DAP's credit, it has accommodated Simmons's disability. (Hrg. Tr. p. 31) One way in which DAP has accommodated them is by allowing him to not perform the usual

work in the parking lot. (Hrg. Tr. p. 31) DAP's accommodations of Simmons's disability has allowed him to stay in his job as a car salesperson despite his functional limitations.

Simmons could physically perform the jobs he held as an accountant and telephone salesperson despite the physical and functional limitations caused by the work injury he sustained at DAP. Further, Simmons has remained in his position with DAP despite the physical limitations caused by the work injury. There is no indication in the evidence that those physical limitations in any way jeopardize his position with the employer.

The defendants took a deposition of Simmons on January 22, 2020. (Def. Ex. H) Simmons provided his 2016 tax returns to the defendants at that time. (Def. Ex. H, p. 5) They showed Simmons claimed his son as a dependent in 2016. (Def. Ex. H, pp. 5–6)

As a car salesperson, Simmons works on commission. (Hrg. Tr. pp. 69–70; Def. Ex. H, p. 16) He qualifies for bonuses from car manufacturers such as Nissan and BMW as well. (Hrg. Tr. p. 70; Def. Ex. H, p. 16) Such bonus payments come directly from the manufacturer, in the form of a check. (Def. Ex. H, pp. 16–17) They are reflected in Simmons's tax returns, but not his DAP paychecks or paystubs. (Hrg. Tr. p. 70; Def. Ex. D; Def. Ex. H, pp. 16–17)

Simmons is a skilled car salesman. His work injury has not impacted his earning ability with DAP. Simmons earned more in the years following his work injury than in 2016. (Def. Ex. D)

CONCLUSIONS OF LAW

1. HP Benefits

Iowa Code section 85.34(1) governs healing period benefits. The parties stipulated Simmons sustained a permanent disability from the work injury. Because the injury has caused a permanent disability, the benefits at issue from July 21, 2016, to July 26, 2016, are considered HP benefits under section 85.34(1).

The evidence establishes Simmons was off work during this time period due to the injury. However, Simmons states in his brief that the defendants voluntarily paid HP benefits for this time period after the hearing. (Cl. Brief, p. 5) And Simmons did not include a section in his brief on entitlement to HP benefits during this time period. (Cl. Brief) Consequently, this issue is no longer in dispute between the parties.

2. Industrial Disability

Permanent disabilities are divided into scheduled and unscheduled losses. See Iowa Code § 85.34(2). The parties stipulated that Simmons has sustained an unscheduled loss, which means that the question of permanency in this case is one of industrial disability. Clark v. Vicorp Restaurants, Inc., 696 N.W.2d 596, 605 (Iowa 2005) (citing Sherman v. Pella Corp., 576 N.W.2d 312, 320–21 (Iowa 1998)); see also Diederich v. Tri-City Ry. Co., 219 Iowa 587, 258 N.W.2d 899 (1935)). The factors

considered when determining industrial disability are "functional impairment, age, education, work experience, qualifications, ability to engage in similar employment, and adaptability to retraining to the extent that any factor affects the employee's prospects for relocation in the job market." Id. (citing Sherman, 576 N.W.2d at 321, and St. Luke's Hosp. v. Gray, 604 N.W.2d 646, 653 (Iowa 2000)).

"Industrial disability measures an employee's lost earning capacity." Id. (citing Sherman, 576 N.W.2d at 321. "'The focus is not solely on what the worker can or cannot do; industrial disability rests on the ability of the worker to be gainfully employed.'" Id. (quoting Myers v. F.C.A. Servs., Inc., 592 N.W.2d 354, 356 (Iowa 1999)). "Showing that the employee's actual earnings have decreased is not always necessary 'to determine an injury-caused reduction in earning capacity.'" Id. (quoting Gray, 604 N.W.2d at 653). The inquiry focuses on what an injured employee could earn before the work injury compared to after. Second Injury Fund of Iowa v. Nelson, 544 N.W.2d 201, 208 (Iowa 1995).

Here, Simmons has sustained a functional impairment of seven percent to the body as a whole. At the time of hearing, he was 50 years old with a career working in largely sedentary jobs such as accounting, office management, and sales. While Simmons is not necessarily the best candidate for new training or education at this stage of work life, there is no indication such retraining or learning is necessary for him to obtain gainful employment. This is because Simmons is college educated and has worked primarily in sedentary positions during his post-college career.

The evidence shows Simmons is physically able to return to the majority of the jobs he has held in his professional career despite the work restrictions relating to the work injury. Simmons could not return to the farm work he performed at his family farm. But he went to school and studied accounting. He has not worked in agriculture since then.

Simmons's first accounting job required a lot of driving, so he would likely be unable to perform it today due to his work injury. However, while Simmons has not worked in that field for many years, his functional limitations due to the work injury would not prevent him from doing accounting work if it did not require extensive driving. Simmons could also perform the duties of the sales and management jobs he held before starting at DAP.

Further, DAP has been able to accommodate Simmons's physical limitations since the work injury. Simmons has increased his earnings while working for DAP in each of the years following the work injury. Consequently, the work injury has not impacted Simmons's subsequent actual earnings.

Nonetheless, Simmons's injury and work restrictions do prevent him from performing some jobs, though not of the type he has worked during his adult life. This has a detrimental effect on his earning potential. After careful consideration of the factors used to determine industrial disability, the evidence establishes Simmons has

sustained industrial disability of ten percent. As the parties stipulated, the defendants are entitled to a credit of 25 weeks at the rate of $545.30 per week.

3. Penalty

Simmons contends the defendants' failure to timely pay him the proper benefit rate merits a penalty under Iowa Code section 86.13. The defendants disagree, arguing that Simmons had documents in his possession relevant to rate and that they only learned of it during his deposition. According to Simmons, the defendants had all of the information they needed to accurately calculate his rate at all material times.

"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. *See* Iowa Code § 86.13(4)(b). To do so, the employee must demonstrate 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).

The Iowa Supreme Court has held, "Included among the circumstances under which the statute was enacted was the recognition that too often employees were not receiving the full amount of the compensation payable to them under the statute. [Consequently,] section 86.13 is applicable when payment of compensation is not timely made or when the full amount of compensation is not paid." Robbennolt, 555 N.W.2d 229, 237 (Iowa 1996). Whether failure to pay the correct amount merits a penalty hinges on whether the defendants had a reasonable basis to pay the amount they paid to the claim. See 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"). Reasonableness "does not turn on whether the employer was right," but "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. 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 section 86.13. Robbennolt, 555 N.W.2d at 238.

Simmons contends the defendants had access to all of the information necessary to accurately correct his rate. But Simmons has not produced information showing that the defendants had access to the payments he received from the manufacturers. Based on the evidence in the record, it is more likely than not that the defendants learned of Simmons's total earnings, from DAP as well as the manufacturers, when they obtained his tax returns during his deposition. Put otherwise, the record establishes Simmons's weekly workers' compensation benefit rate was fairly debatable because the defendants had an incomplete picture of Simmons's earnings and exemptions. The record thus does not support a penalty under the Iowa Workers' Compensation Act.

4. Costs

"All costs incurred in the hearing before the commissioner shall be taxed in the discretion of the commissioner." Iowa Code § 86.40. "Fee-shifting statutes using 'all costs' language have been construed 'to limit reimbursement for litigation expenses to those allowed as taxable court costs.'" Des Moines Area Reg'l Transit Auth. v. Young, 867 N.W.2d 839, 846 (Iowa 2015) (quoting Riverdale v. Diercks, 806 N.W.2d 643, 660 (Iowa 2011)). Statutes and administrative rules providing for recovery of costs are strictly construed. Id. (quoting Hughes v. Burlington N. R.R., 545 N.W.2d 318, 321 (Iowa 1996)).

Under the administrative rules governing contested case proceedings before the Iowa workers' compensation commissioner, hearing costs shall include:

- Attendance of a certified shorthand reporter or presence of mechanical means at hearings and evidential depositions;
- Transcription costs when appropriate;
- Costs of service of the original notice and subpoenas; and
- Filing fees when appropriate, including convenience fees incurred by using the payment gateway on the Workers' Compensation Electronic System (WCES). 876 IAC 4.33.

Here, Simmons paid one hundred and 00/100 dollars ($100.00) as a filing fee for his petition. He also paid fifty-two and 50/100 dollars ($52.50) for a deposition transcription. Taxation of these costs to the defendants is appropriate under Iowa Code section 86.40 and rule 876 IAC 4.33.

CONCLUSION

IT IS THEREFORE ORDERED:

1) The defendants shall pay to the claimant 50 weeks of permanent partial disability benefits at the rate of six hundred forty-four and 76/100 dollars ($644.76) per week from the commencement date of July 25, 2016.

2) The defendants are entitled to a credit for 25 weeks of benefits previously paid at the rate of five hundred forty-five and 30/100 dollars ($545.30) per week.

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 shall pay to the claimant the following amounts for the following costs:

    a. One hundred and 00/100 dollars ($100.00) for the filing fee; and

    b. Fifty-two and 50/100 dollars ($52.50) for the cost of the deposition transcript.

6) The defendants shall pay no penalty.

7) The defendants shall file subsequent reports of injury as required by Rule 876 IAC 3.1(2).

Signed and filed this 15th day of April 2021.

BENJAMIN G. HUMPHREY
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Mark Sullivan (via WCES)

Mark Woollums (via WCES)

Lori Nichole Scardina Utsinger (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.