BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

TRACY L. MELVILLE, Claimant, vs. SMOKEY, INC., Employer, and FIREMAN'S FUND INSURANCE Insurance Carrier, Defendants.	: : : : : : : : : : : : : : :	File No. 5002470 A R B I T R A T I O N D E C I S I O N HEAD NOTE NOS: 1402.40; 1802; 1803; 2501; 4000.2

STATEMENT OF THE CASE

Claimant, Tracy Melville, has filed a petition in arbitration seeking workers' compensation benefits from Smokey, Inc. (Smokey), employer, and Fireman's Fund Insurance, insurance carrier, defendants, for an injury occurring on December 29, 1999.

This matter was heard by deputy workers' compensation commissioner, James F. Christenson on April 13, 2004 in Burlington, Iowa. The record in this case consists of the joint exhibits 1 through 34 and the testimony of claimant.

ISSUES

The parties submitted the following issues for determination:

1. The extent of claimant's entitlement to temporary total/healing period benefits;

2. The extent of entitlement to permanent partial disability benefits pursuant to Iowa Code 85.34(2)(u);

3. Whether there is a causal connection between claimant's injury and the medical expenses claimed by claimant;

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

FINDINGS OF FACT

The deputy workers' compensation commissioner, having heard the testimony of the witness and considered the evidence in the record, finds that:

Tracy Melville was 29 years old at the time of the hearing. Claimant left high school after the 10th grade. He earned a GED. Claimant has an EMT certificate and attended Kirkwood Community College in 2003 and 2004.

Claimant's primary occupation has been as a truck driver. He has also worked as an EMT, a bartender and a roofer.

Claimant began his employment with Smokey in the summer of 1999. Claimant was employed with Smokey as an over-the-road truck driver and made deliveries in Iowa, Illinois and Wisconsin.

On December 29, 1999, claimant was working for defendant, Smokey, when the truck he was driving was rear-ended by another truck in Illinois. Claimant testified he delivered his load in Peoria, Illinois and returned to his employer. Claimant testified when he returned home that evening, his wife indicated he made no sense. Claimant testified he has no recollection of this episode.

On December 30, 1999, claimant treated with his family doctor, James McCabe, M.D. At that time claimant complained of a stiff neck. Claimant was diagnosed as having a cervical neck strain. He was prescribed Skelaxin and Advil and taken off of work. (Exhibit 1-5)

On January 3, 2000, claimant returned to treat with Dr. McCabe with continued complaints of cervical pain and headaches. Claimant was diagnosed as having a cervical strain and was continued to be taken off of work. On January 12, 2000, claimant returned to treat with Dr. McCabe. Claimant indicated his neck problem had improved 50 percent. Dr. McCabe returned claimant to work. (Ex. 1-6)

Claimant testified after his return to work, he had constant headaches. He testified occasionally, when driving, he would feel shaky, dizzy and felt he would "black out." He testified when these spells occurred, he would lie in the bunk of his truck and sleep for two to six hours with no recollection of what had happened. He testified these "black outs" happened two to three times a week. He testified he did not report these incidents to his employer, wife, or doctor for fear of losing his job.

Claimant returned to treat with Dr. McCabe on May 4, 2000 complaining of headaches. Claimant complained of severe pain in the back of his head and episodes of "shakiness" with "anxiety-like episodes." Dr. McCabe prescribed Midrin and Norpramin for headaches. A CT scan was advised. (Ex. 1-6)

On May 11, 1990 and May 25, 1990, claimant returned to treat with Dr. McCabe with continued complaints of headaches. Dr. McCabe diagnosed claimant as having suspected vascular headaches and prescribed Inderal. (Ex. 1-7)

On June 16, 2000, claimant returned to Dr. McCabe with continued complaints of headaches that made him feel as if he would pass out. Dr. McCabe again diagnosed claimant as having vascular headaches. Dr. McCabe prescribed Inderal and Anaprox. On June 22, 2000, claimant returned to Dr. McCabe for a DOT exam. Dr. McCabe found claimant to have a normal DOT exam. (Ex. 1-8)

Claimant testified in the summer of 2000, when he and his wife were driving back from Kansas City, he felt a "black out" coming on and asked his wife to drive. Claimant testified when he awoke, he was in Jefferson County Hospital in Fairfield, Iowa. Records from Jefferson County Hospital indicate claimant was "slightly dazed" when admitted on July 23, 2000. Claimant was released and transferred by ambulance to Burlington Medical Center. (Ex. 5)

Medical records from the Great River Medical Center in Burlington, also known as Burlington Medical Center, indicate when claimant had his wife drive, claimant was unresponsive to "any kind of stimulation" while in the car. Records indicate claimant was only revived at the Jefferson County Hospital with a sternal rub. An EEG performed at the time was borderline normal. All other tests were normal. Claimant was diagnosed as having possible atypical post traumatic migraine with possibility of a seizure. A subsequent EEG was found to be normal. (Ex. 3-8 through 3-12)

On August 14, 2000, claimant was seen by Anil Dhuna, M.D. Dr. Dhuna is board certified in psychiatry and neurology. Claimant presented Dr. Dhuna with a history of increasing headaches, dizziness and near syncope. Dr. Dhuna related claimant's problems to complicated migraines from his head injury. Dr. Dhuna prescribed Desipramine, Indomethacin and over-the-counter headache medication. (Ex. 2-1)

Claimant returned to treat with Dr. Dhuna on August 31, 2000. At that time claimant still complained of headaches, dizziness and lightheadedness but with improvement in his headaches. Dr. Dhuna diagnosed claimant as having complicated migraines related to a neck and head injury. He prescribed continued use of Desipramine. Claimant was released to return to work after Labor Day. (Ex. 2-3)

Claimant testified he returned to work on September 5, 2000. He testified if he did not take prescription medication, he would black out. He testified he continued to have migraines on the job and would pull over and rest until his migraines passed. He testified this made him repeatedly late on scheduled runs.

On May 27, 2000, claimant was seen at the Neurology Clinic at the University of Iowa Hospitals and Clinics and treated by Jon Tippin, M.D. Claimant noted improvement with his "spells" but still complained of persistent headaches occipital in nature. He also complained of continued periods of lightheadedness. All exams were

normal. Dr. Tippin found the nature of claimant's "spells" unclear, and did not believe the "spells" were seizures. Dr. Tippin hypothesized that the headaches were chronic daily headaches with analgesic rebounds rather than migraines. Dr. Tippin recommended discontinued use of Indocin and over-the-counter analgesics. He also recommended use of Nortriptyline. (Ex. 7-1 through 7-2)

Claimant returned to treat with Dr. Dhuna on October 17, 2000 with continued complaints of headaches. Dr. Dhuna diagnosed claimant as having traumatic complicated migraines and recommended continued use of Verapamil and Desipramine. (Ex. 2-4)

Claimant continued to treat with Dr. Dhuna through 2001 for post traumatic migraines. (Ex. 2-5 through 2-10)

On March 12, 2001, claimant was examined by Richard Neiman, M.D. Dr. Neiman diagnosed claimant as still suffering from posttraumatic migraines and prescribed Topiramate. (Ex. 6-1 through 6-3) On June 26, 2001, Dr. Neiman notes claimant continued to suffer from headaches two to three times a week with intense headaches every two to three weeks that incapacitated claimant. Dr. Neiman also noted various treatment options he and Dr. Dhuna tried had failed. Dr. Neiman found claimant to have a 10 percent permanency of the whole person, based on claimant's complaints of pain, pursuant to the AMA Guides to the Evaluation of Permanent Impairment. Dr. Neiman noted claimant continued to function well as a truck driver in between times of headaches, but during headaches, he was incapacitated. (Ex. 6-7 through 6-8)

On August 6, 2001, claimant returned to treat with Dr. Dhuna with continued complaints of headaches and new problems with depression and irritability. (Ex. 2-7) Dr. Dhuna referred claimant to Great River Mental Health Center. On August 30, 2001, claimant saw Frank Jones, M.D., complaining of problems with his home life and concerns over losing his job. Dr. Jones diagnosed claimant as having an adjustment disorder with a depressed mood and migraine headaches. He prescribed Celexa. (Ex. 8-1 through 8-6)

On November 29, 2001, claimant returned to treat with Dr. Jones showing signs of mania. Dr. Jones attributed claimant's hyperactive moods to medication. (Ex. 8-9 through 8-10)

On December 28, 2001, claimant returned to treat with Dr. Dhuna with continued complaints of headaches several times a week. Claimant also noted that once every few weeks he continued to have severe headaches that required him to nap, resulting in missed scheduled stops on long distance runs. At that time Dr. Dhuna took claimant off work for several weeks due to the severity of his headaches. (Ex. 2-10)

On January 22, 2002, claimant returned to treat with Dr. Dhuna. Dr. Dhuna noted claimant suffered a chronic increase in headaches difficult to control with medication. He also noted that:

> He can not return back to his previous job which is a long distance heavy goods truck driver because of the frequency of headaches and difficulty in doing his scheduled route when he has pain because he then usually has to take a nap any where from 1/2 hour to 3 hours until his headache resolves.

(Ex. 2-12)

At that time, Dr. Dhuna prescribed OxyContin for claimant's headaches.

Claimant returned to treat with Dr. Dhuna on March 11, 2002. Dr. Dhuna noted claimant suffered from a traumatic brain injury resulting in intractable posttraumatic migraines. Claimant was using both Verapamil and OxyContin to conrol his headaches. Dr. Dhuna noted claimant was unable to return to his job driving trucks since his commercial license required him not to take narcotic medications that impair his senses. Dr. Dhuna also noted: "It is unlikely that he will be able to get off Oxy Contin for months to perhaps indefinite. The patient has been cautioned that he probably should look into an alternate career." (Ex. 2-14 through 2-15)

Claimant continued to treat with Dr. Dhuna for the rest of 2002 for problems with headaches. During this time, notes reflect Dr. Dhuna tried a number of combinations of medications to control claimant's headaches, which continued to defy treatment. Dr. Dhuna also reiterated claimant could not return to his previous occupation as a truck driver. Notes from Dr. Dhuna dated November 12, 2002 indicate claimant was being treated for depression related to stress due to headaches, loss of job and a divorce from his wife. (Ex. 2-16 through 2-18)

Medical records from Dr. Jones and Greg Szymula, Ph.D. during 2002, reflect claimant's frustration at being unable to return to work and difficulties with manic behavior due to medication. Records from Great River Mental Health Center also indicate claimant's divorce from his wife was due, in part, to claimant's difficulty in "communication" with his wife and relationships with others outside the marriage. (Ex. 8-13 through 8-20) (Ex. 8-21)

On July 23, 2002, at the request of defendants, claimant underwent a neurological exam with Brian Anseeuw, D.C., M.D. Dr. Anseeuw is board certified in neurology and psychiatry. Dr. Anseeuw opined claimant suffered from a mixed headache disorder and the possibility of analgesic rebound headaches as a result of use of OxyContin. Dr. Anseeuw believed claimant's depression "may be" related to his marital problems. Dr. Anseeuw also opined claimant would not be restricted from returning to driving a truck and the claimant met maximum medical improvement (MMI) on or about December 2001. (Ex. 10-1 through 10-5)

On November 20, 2002, defendants' counsel asked Dr. Anseeuw, among other things, if claimant had any functional impairment as a result of his December 29, 1999 work injury. (Ex. 10-6) Dr. Anseeuw opined claimant sustained no functional impairment. Dr. Anseeuw also indicated claimant's neurological testing showed no underlying functional abnormalities. Dr. Anseeuw noted he believed claimant suffered, in part, migraines with analgesic rebound headaches and that claimant needed to be taken off of medication causing the rebound headaches. He also noted claimant needed to seek treatment for depression, and claimant's depression was caused by marital problems and not the work injury. (Ex. 10-7)

In a letter dated January 12, 2003, Dr. Dhuna opined claimant had reached maximum medical improvement as of January 22, 2002. Dr. Dhuna also opined claimant would continue to experience chronic headaches with mild cognitive deficits as a result of his work-related injury. Dr. Dhuna also noted because of concerns with analgesic rebound headaches, he was tapering claimant off of OxyContin. (Ex. 2-21 through 2-22)

On January 12, 2003, Dr. Dhuna also included restrictions based on claimant's recent functional capacity tests. They indicate claimant do: no lifting over 15 pounds occasionally and 10 pounds frequently, standing or walking for 30 minutes without interruption and total standing or walking in eight-hour days for four hours. If severe headaches occur, claimant needed to rest and take medications that caused sedation. Claimant may need to lie down if he has a headache. Claimant can never climb or crawl, can occasionally crouch, balance, kneel, stoop or reach overhead. Claimant can use upper extremities and hands for repetitive motions for 30 minutes. Claimant is totally restricted from heights, chemicals, dust, noise, vibration, fumes, moving machinery, temperature extremes. (Ex. 2-23 through 2-28)

On January 31, 2003, and March 5, 2003, claimant underwent a neuropsychological evaluation with Frank Gersh, Ph.D. Dr. Gersh found claimant to have dementia secondary to a closed head injury and a major depressive disorder secondary to a closed head injury. Dr. Gersh noted claimant was completely disabled with respect to truck driving and that his use of pain medications and headaches made it impossible for him to drive consistently. (Ex. 11-1 through 11-6)

Claimant continued to treat with Dr. Dhuna in 2003. In May of 2003, Dr. Dhuna prescribed an occipital block for claimant's headaches. (Ex. 2-35 through 2-36) On September 2, 2003, Dr. Dhuna again found claimant at MMI noting claimant was incapable of working a job as a long distance trucker and was undergoing retraining. Dr. Dhuna found claimant to have a 15 percent permanency of the whole person based upon the AMA Guides to the Evaluation of Permanent Impairment. He also noted claimant was unlikely to be headache-free given a four-year history of chronic headaches. (Ex. 2-36 through 2-39)

On May 20 and 21, 2003, claimant underwent a neuropsychological evaluation with David Tranel, Ph.D. After extensive testing, Dr. Tranel found "there is no

compelling neurologic explanation for the patient's current cognitive complaints." (Ex. 12-17) Dr. Tranel noted claimant lacked any indicator of brain trauma and that "A minor injury of the type sustained by the patient would be expected to result in, at most, mild postconcussive sequelae that would be predicted to resolve within weeks to months after the event." (Ex. 12-18) Dr. Tranel goes on to state:

> [T]he temporal course of the patient's problems is not typical for traumatic brain injury. . . . There is no documentation in the large quantity of records from an array of treating professionals that the patient had additional cognitive complaints until he was seen for a neuropsychological screening evaluation with Dr. Szymula, over two years after the event . . . . The typical course following traumatic brain injury is one of recovery and improvement, not deterioration. The patient's apparent severely decompensating course over the last several years again highlights the necessity of investigating nonneurologic etiologies for his problems. . . . Other factors such as depression and effort, that are well known to adversely affect cognitive performances, are clearly playing a role in the current examination.

(Ex. 12-18)

Dr. Tranel opined claimant suffered a minor injury to his head and emotional distress, combined with a degree of conscious or unconscious symptom magnification for secondary gains, is the reason for any appearance of disability. (Ex. 12-18)

On January 7, 2004, Dr. Dhuna referred claimant to Nidal Alkurdy, M.D. for Botox injections. (Ex. 2-40) On January 21, 2004, claimant indicated his headaches were 80 percent better. Dr. Alkurdy noted claimant had no severe intractable headaches since the Botox injections. (Ex. 2-41) Claimant testified at hearing that he had Botox injections in January and March of 2004. He testified that while he has had severe headaches since that time, the pain is now manageable.

On April 6, 2004, claimant's counsel wrote Dr. Dhuna. In that letter, claimant's counsel indicated Dr. Dhuna believed claimant achieved MMI as of March 1, 2004. Dr. Dhuna approved the letter but offered no explanation why claimant's MMI should be changed from January 2002 to March 1, 2004. (Ex. 2-43 through 2-44)

Claimant testified in December 2002 he was convicted of operating a vehicle while intoxicated. He testified as part of his sentencing, he was required to clean the grounds of a hospital for community service approximately 20 hours a week. At hearing, claimant was still performing this duty. Claimant testified he volunteers with the West Burlington Fire Department. He testified he worked for approximately one week with Vector Marketing selling cutlery but quit due to

scheduling disputes. He testified he applied for jobs with Wal-Mart and Fareway grocery stores but was not hired because he could not keep scheduled hours due to his headaches. Claimant has been awarded Social Security Disability benefits effective June of 2002. (Ex. 16)

Claimant testified he attended Kirkwood Community College in 2003. He testified for his first semester he took computer-aided drafting and did well in his classes. He testified he switched to a surgical technician program the second semester and ultimately dropped out of school because of difficulty with material. He testified he again enrolled in community college in the spring of 2004 but again dropped out because of difficulty with classes. He testified he intends to attend community college in Mason City.

Claimant testified the recent Botox injections have improved his headaches. He testified his depression has improved. He testified when he does not have headaches, he is capable of performing any duty. Claimant testified in February 2003 he moved himself into a house in Washington, Iowa and performed work around the house.

CONCLUSIONS OF LAW

The first issue to be determined is if the injury of December 29, 1999 is the cause of any alleged temporary disability.

The party who would suffer loss if an issue were not established has the burden of proving that issue by a preponderance of the evidence. Iowa R. of App. P. 6.14(6).

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

Anticipated improvement in continuing pain or depression, if medically indicated, may extend length of healing period if substantial change in industrial disability is also expected to resolve. If it is not likely that future treatment of continuing pain, however soothing to claimant, will decrease the extent of permanent industrial disability, then continued pain management should not prolong healing period. Pitzer v. Rowley Interstate, 507 N.W.2d 389, 392 (Iowa 1993). Medical treatment designed to relieve claimant's persistent complaints of pain does not prove entitlement to additional healing period benefits. Phillips v. Iowa Methodist Medical Center, File No. 765826 (App. July 30, 1990).

Claimant seeks healing period benefits from December 30, 1999 through January 5, 2000; from July 23, 2000 through September 4, 2000; and from December 28, 2001 through March 1, 2004.

Medical records indicate claimant was taken off work due to his injury of December 29, 1999 from December 30, 1999 through January 5, 2000; and from July 23, 2000 through September 4, 2000. (Ex. 1-1, 1-5, 1-6, 2-2, 2-3, and 3-14)

Claimant was found by Dr. Neiman as having reached MMI on June 26, 2001. Claimant was found by Dr. Anseeuw on July 23, 2002, as having reached MMI on or about December 2001. (Ex. 10-5) Dr. Dhuna has been claimant's primary treating physician since August of 2000. At the time of hearing, Dr. Dhuna was still treating claimant. Dr. Dhuna has far more experience with claimant's medical history and condition than either Dr. Anseeuw or Dr. Neiman, both who saw claimant for limited periods of time. For these reasons, I find Dr. Dhuna's first opinion regarding claimant's MMI more convincing.

Dr. Dhuna took claimant off of work on December 28, 2001. (Ex. 2-10) On January 22, 2002, Dr. Dhuna opined claimant could not return back to his prior position as a truck driver. (Ex. 2-12) On January 12, 2003, Dr. Dhuna opined that claimant had reached MMI on January 22, 2002. (Ex. 2-21)

On April 6, 2004, approximately two weeks prior to hearing, claimant's counsel wrote Dr. Dhuna. Claimant's counsel indicates Dr. Dhuna has changed his opinion regarding the date of MMI and that date should now be March 1, 2004. Claimant's counsel also indicates that the previous impairment given by Dr. Dhuna has now "more than likely diminished." No new impairment is given. Dr. Dhuna has merely signed claimant's counsel's letter noting approval. (Ex. 2-44)

Claimant's counsel writes the claimant's previous functional impairment is "more than likely" to diminish, yet no new functional rating has been given. Claimant testified while he was hopeful Botox treatments would improve his headaches, he is also concerned improvement would be short-term. There was little testimony claimant's Botox treatments resulted in a substantial change in claimant's industrial disability. Even though Dr. Dhuna's first opinion regarding claimant's MMI is more convincing, Dr. Dhuna, Dr. Neiman, and Dr. Anseeuw all find claimant's date of MMI to have occurred sometime in late 2001 or early 2002. For these reasons, it is found that a letter, sent two weeks before hearing, written by claimant's counsel and merely signed by Dr. Dhuna, is unsubstantial evidence to extend healing period for an additional two years.

For these reasons and the others detailed above, it is concluded that claimant is due healing period benefits from December 30, 1999 through January 5, 2000; from July 23, 2000 through September 4, 2000; and from December 28, 2001 through January 22, 2002. (Ex. 2-21)

The next issue to be determined is the extent of claimant's entitlement to permanent partial disability benefits.

Since claimant has an impairment to the body as a whole, an industrial disability has been sustained. Industrial disability was defined in Diederich v. Tri-City R. Co., 219 Iowa 587, 258 N.W.2d 899 (1935) as follows: "It is therefore plain that the legislature intended the term 'disability' to mean 'industrial disability' or loss of earning capacity and not a mere 'functional disability' to be computed in the terms of percentages of the total physical and mental ability of a normal man."

Functional impairment is an element to be considered in determining industrial disability which is the reduction of earning capacity, but consideration must also be given to the injured employee's age, education, qualifications, experience, motivation, loss of earnings, severity and situs of the injury, work restrictions, inability to engage in employment for which the employee is fitted and the employer's offer of work or failure to so offer. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Olson v. Goodyear Serv. Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963); Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961).

Compensation for permanent partial disability shall begin at the termination of the healing period. Compensation shall be paid in relation to 500 weeks as the disability bears to the body as a whole. Section 85.34.

Claimant was 29 years old at the time of the hearing. He has a GED. He has been certified as an EMT. He has worked previously as a truck driver. His treating physician, Dr. Dhuna, opines claimant is unable to return to work as a long haul trucker. Claimant's W-2 for 1999 indicates that claimant's earnings for the last six months of 1999 to be approximately $19,000.00. Since losing his employment with Smokey's, claimant has had little success in finding other work. Claimant has made a number of attempts to retrain himself for other jobs and at the time of the hearing was planning on attending community college.

Three physicians have opined regarding claimant's functional impairment. Dr. Neiman found claimant to have a 10 percent permanent partial impairment to the "whole person" due to post traumatic migraines. (Ex. 6-8) Dr. Anseeuw opined claimant has a zero percent functional impairment. (Ex. 10-7) Dr. Dhuna opined claimant has a 15 percent functional impairment to the "whole person." (Ex. 2-37) For the reasons detailed above, I find Dr. Dhuna's opinions regarding claimant's functional disability more convincing.

Dr. Neiman opined claimant is "totally incapacitated" during times he has headaches. (Ex. 6-8) Dr. Dhuna has given claimant work restrictions detailed above.

In July of 2002, Dr. Anseeuw found claimant's neurological testing showed no underlying functional abnormality. A neurological exam by Dr. Tranel in May of 2003 noted there was no compelling neurological explanation for the claimant's current

cognitive complaints. It goes on to state: "Neurologic dysfunction cannot explain his current cognitive difficulties." (Ex. 12-18)

At the time of hearing claimant was having good responses to Botox treatments. It is unclear how long lasting those improvements will be. Claimant has suffered from chronic headaches that have defied most treatments. The cause of claimant's persistent chronic headaches is unclear and have no neurological explanation. There is no indication claimant suffered from chronic headaches prior to his injury of December 29, 1999. Since January 22, 2002, claimant has been unable to return to work as a long haul trucker. When all factors are concluded, claimant has an industrial disability of 40 percent as a result of his December 29, 1999 injury with Smokey's.

The next issue to be determined is whether there is a causal connection between claimant's injury and the medical expenses claimed by claimant. Specifically, claimant seeks unpaid medical expenses relating to treatment by Great River Mental Health Center. (Claimant's Prehearing Brief, pages 12 through 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-reopen 1975).

When a designated physician refers a patient to another physician, that physician acts as the defendant employer's agent. Permission for the referral from defendant is not necessary. Kittrell v. Allen Memorial Hospital, Thirty-fourth Biennial Report of the Industrial Commissioner, 164 (Arb. November 1, 1979) (aff'd by industrial commissioner). See also Limoges v. Meier Auto Salvage, I Iowa Industrial Commissioner Reports 207 (1981).

Dr. Dhuna, the authorized treating physician, referred claimant to the Great River Mental Health Center for depression. (Ex. 2-7) Medical records from Great River indicate claimant's depression was due, in part, to his inability to control his headaches, fear of losing his job with Smokey's, his concerns with being able to provide for his family, and his reaction to medications. (Ex. 8-6, 8-7, 8-12, 8-13, and 8-15) For these reasons, it is concluded that defendants are liable for all expenses incurred relative to treatment with Great River Mental Health Center.

The final issue to be determined is whether claimant is entitled to penalty benefits under Iowa Code section 86.13. Specifically, claimant seeks penalties for the delay in healing period and permanent partial disability benefits and for defendants' failure to pay permanent partial disability benefits beyond the 10 percent rating assigned by Dr. Neiman. (Claimant's Prehearing Brief, pp. 14 through 16)

Section 86.13 permits an award of up to 50 percent of the amount of benefits delayed or denied if a delay in commencement or termination of benefits occurs without reasonable or probable cause or excuse. The standard for evaluating the reasonableness of defendants' delay in commencement or termination is whether the claim is fairly debatable. Where a claim is shown to be fairly debatable, defendants do not act unreasonably in denying payment. See Stanley v. Wilson Foods Corp., File No. 753405 (App. August 23, 1990); Seydel v. Univ. of Iowa Physical Plant, File No. 818849 (App. November 1, 1989). Imposition is mandatory when there has been any unexplained delay or denial. The burden of showing cause for any delay or denial is on the employer. Christensen v. Snap-On Tools Corp., 554 N.W.2d 254 (Iowa 1996).

In Christensen v. Snap-on Tools Corp., 554 N.W.2d 254 (Iowa 1996), and Robbennolt v. Snap-on Tools Corp., 555 N.W.2d 229 (Iowa 1996), the supreme court said:

> Based on the plain language of section 86.13, we hold an employee is entitled to penalty benefits if there has been a delay in payment unless the employer proves a reasonable cause or excuse. A reasonable cause or excuse exists if either (1) the delay was necessary for the insurer to investigate the claim or (2) the employer had a reasonable basis to contest the employee's entitlement to benefits. A "reasonable basis" for denial of the claim exists if the claim is "fairly debatable."
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> Christensen, 554 N.W.2d at 260.

The supreme court has stated:

> (1) If the employer has a reason for the delay and conveys that reason to the employee contemporaneously with the beginning of the delay, no penalty will be imposed if the reason is of such character that a reasonable fact-finder could conclude that it is a "reasonable or probable cause or excuse" under Iowa Code section 86.13. In that case, we will defer to the decision of the commissioner. See Christensen, 554 N.W.2d at 260 (substantial evidence found to support commissioner's finding of legitimate reason for delay pending receipt of medical report); Robbennolt, 555 N.W.2d at 236.
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> (2) If no reason is given for the delay or if the "reason" is not one that a reasonable fact-finder could accept, we will hold that no such cause or excuse exists and remand to the commissioner for the sole purpose of assessing penalties under section 86.13. See Christensen, 554 N.W.2d at 261.
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> (3) Reasonable causes or excuses include (a) a delay for the employer to investigate the claim, Christensen, 554 N.W.2d at 260; Kiesecker v. Webster City Custom Meats, Inc., 528 N.W.2d at 109, 111

(Iowa 1995); or (b) the employer had a reasonable basis to contest the claim—the "fairly debatable" basis for delay. See Christensen, 554 N.W.2d at 260 (holding two-month delay to obtain employer's own medical report reasonable under the circumstances).

(4) For the purpose of applying section 86.13, the benefits that are underpaid as well as late-paid benefits are subject to penalties, unless the employer establishes reasonable and probable cause or excuse. Robbennolt, 555 N.W.2d at 237 (underpayment resulting from application of wrong wage base; in absence of excuse, commissioner required to apply penalty).

> If we were to construe [section 86.13] to permit the avoidance of penalty if any amount of compensation benefits are paid, the purpose of the penalty statute would be frustrated. For these reasons, we conclude section 86.13 is applicable when payment of compensation is not timely . . . or when the full amount of compensation is not paid.

Id.

(5) For purposes of determining whether there has been a delay, payments are "made" when (a) the check addressed to a claimant is mailed (Robbennolt, 555 N.W.2d at 236; Kiesecker, 528 N.W.2d at 112), or (b) the check is delivered personally to the claimant by the employer or its workers' compensation insurer. Robbennolt, 555 N.W.2d at 235.

(6) In determining the amount of penalty, the commissioner is to consider factors such as the length of the delay, the number of delays, the information available to the employer regarding the employee's injury and wages, and the employer's past record of penalties. Robbennolt, 555 N.W.2d at 238.

(7) An employer's bare assertion that a claim is "fairly debatable" does not make it so. A fair reading of Christensen and Robbennolt, makes it clear that the employer must assert facts upon which the commissioner could reasonably find that the claim was "fairly debatable." See Christensen, 554 N.W.2d at 260.

Meyers v. Holiday Express Corp., 557 N.W.2d 502 (Iowa 1996).

Weekly compensation payments are due at the end of the compensation week. Robbennolt, 555 N.W.2d 229, 235.

Penalty is not imposed for delayed interest payments. Davidson v. Bruce, 593 N.W.2d 833, 840 (Iowa 1999).

When an employee's claim for benefits is fairly debatable based on a good faith dispute over the employee's factual or legal entitlement to benefits, an award of penalty benefits is not appropriate under the statute. Whether the issue was fairly debatable turns on whether there was a disputed factual dispute that, if resolved in favor of the employer, would have supported the employer's denial of compensability. Gilbert v. USF Holland, Inc., 637 N.W.2d 194 (Iowa 2001).

In determining the amount of penalty, it is appropriate to consider the length of the delay, the number of delays, the information available to the employer regarding the employee's injuries and wages, and any prior penalties imposed under section 86.13. Robbennolt, 555 N.W.2d 229, 238.

Claimant alleges defendants failed to pay healing period from December 30, 1999 through January 1, 2000. (Ex. 17-1) Claimant also alleges healing period benefits for January 2, 2000 through January 5, 2000; July 23, 2000 through September 4, 2000; January 18, 2002 through January 31, 2002; June 12, 2002 through June 18, 2002; August 23, 2002 through August 29, 2002; and September 20, 2002 through September 26, 2002 were all paid late.

As detailed above, it is concluded that claimant is due healing period benefits from December 30, 1999 through January 5, 2000; from July 23, 2000 through September 4, 2000; and from December 28, 2001 through January 22, 2002. Because defendants did not owe healing period benefits after January 22, 2002, it is concluded that defendants are not liable for penalties for any alleged late payment of healing period occurring after January 22, 2002.

Defendants offer no explanation for late payment of healing period other than to indicate that claimant was overpaid weekly benefits which should mitigate the impact of any late payments. (Defendants' Description of Disputes, page 6) For these reasons, it is concluded a penalty of 50 percent is appropriate based on the following healing periods:

Period	Benefit Payable	Penalty
12/30/99 – 1/1/00	$227.58	$113.79
1/2/00 – 1/5/00	$303.44	$151.72
7/23/00 – 9/4/00	$3,337.84	$1,668.92
TOTAL		$1,934.43

(Exs. 17 and 18)

Claimant also alleges defendants did not pay the 10 percent rating assigned by Dr. Neiman until eight weeks after the rating was delivered to defendants. (Claimant's Prehearing Brief, page 15) Defendants offered no rationale why permanent partial disability benefits, based on Dr. Neiman's rating of June 26, 2001, was not paid for eight weeks. For this reason it is concluded defendants are also liable for a penalty for the

eight weeks of late payment of permanent partial disability benefits of $2,124.08 (531.02 x 8 weeks x 50%).

Finally, claimant alleges defendants are liable for penalty benefits for their failure to pay permanent partial disability benefits above the 10 percent functional rating assigned by Dr. Neiman. (Claimant's Prehearing Brief, pages 15 through 16)

Functional impairment is just one element to be considered in determining claimant's industrial disability. Industrial disability can be greater than, equal to, or less than functional impairment. Dowell v. Wagler d/b/a Ed's Super Value, File No. 880145 (App. May 26, 1994) As noted, Dr. Anseeuw opined claimant had no functional impairment. Dr. Neiman found claimant to have a 10 percent impairment to the body as a whole, and Dr. Dhuna found claimant to have a 15 percent functional impairment. Because of the indefinite nature of claimant's injury, the different functional ratings assigned, and because functional impairment is merely one factor to be considered in determining industrial disability, it is concluded defendants' decision to pay permanent partial disability benefits based on Dr. Neiman's rating is not unreasonable. For that reason, defendants are not liable for penalty for failure to pay permanent partial disability benefits greater than the functional rating assigned by Dr. Neiman.

ORDER

THEREFORE, IT IS ORDERED:

That defendants shall pay claimant healing period benefits for December 30, 1999 through January 5, 2000; July 23, 2000 through September 4, 2000; and December 28, 2001 through January 22, 2002.

That defendants shall pay claimant two hundred (200) weeks of permanent partial disability benefits at the rate of five hundred thirty-one and 02/100 dollars ($531.02) per week from January 23, 2002.

That defendants are to pay penalty benefits to claimant of four thousand fifty-eight and 51/100 dollars ($4,058.51) ($1,934.43 for late payment of healing period and $2,124.08 late payment for permanent partial disability benefits).

That defendants shall pay all costs associated with claimant's treatment at Great River Mental Health Center.

That defendants shall be given credit for benefits previously paid.

That defendants shall pay accrued weekly benefits in a lump sum.

That defendants shall pay interest on unpaid weekly benefits.

That defendants shall file subsequent reports of injury as required by this agency pursuant to 876 IAC 3.1(2).

Signed and filed this _____30th____ day of June, 2004.

_____
JAMES F. CHRISTENSON.
DEPUTY WORKERS' COMPENSATION
COMMISSIONER

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