BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

MIKE RUBY,

Claimant,

vs.

GANNETT PUBLISHING SERVICES, d/b/a DES MOINES REGISTER,

Employer,

and

NEW HAMPSHIRE INSURANCE COMPANY,

Insurance Carrier,
Defendants.

File No. 5058620

ARBITRATION

DECISION

Head Note Nos.: 1801; 2500; 3000; 4000

STATEMENT OF THE CASE

Mike Ruby, claimant, filed a petition in arbitration seeking workers' compensation benefits from Gannett Publishing Services and New Hampshire Insurance, the workers' compensation insurance carrier.

The matter proceeded to hearing on April 25, 2018. The parties submitted post-hearing briefs on June 4, 2018, and the matter was considered fully submitted on that date.

The evidentiary record includes: Joint Exhibits JE1 through JE18 and JE 20 through JE25. At the hearing, claimant, and Shawn Duminy, Assistant Pressroom Manager for Gannett Publishing Services, provided testimony.

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.

ISSUES

The parties submitted the following disputed issues for resolution:

1. Extent of temporary benefits.

2. Whether the work injury is the cause of permanent disability and if so, the extent.

3. Commencement date for permanent disability benefits, if any.

4. Rate, average weekly wage.

5. Medical expenses.

6. Penalty.

7. Costs.

FINDINGS OF FACT

After a review of the evidence presented, I find as follows:

At the time of the hearing, Mike Ruby, claimant, was 61 years old. (Transcript page 11) He graduated from high school in 1975. (Tr. p. 12) He took a few classes through a community college, but did not obtain a certificate or diploma. (Tr. p. 12; Ex. JE17, 189; Ex. JE22, p. 199)

Work History

Before working for the defendant employer, claimant worked as a laborer at Meredith Printing from 1977 through 1999, where he regularly handled 25 pound bundles of paper. (Tr. pp. 13-14; Ex. JE17, p. 189; Ex. JE22, p. 201) He then worked as a laborer at Edwards Graphic Arts for about 10 years. (Tr. p. 15; Ex. JE17, p. 189; Ex. JE22, p. 201)

In 2010, claimant began working for the Des Moines Register as a pressman. (Tr. pp. 15-16) Because of the timing of the work shifts, sometimes, Shawn Duminy was his supervisor. (Tr. pp. 70-71) Claimant's job required lifting and carrying up to 50 pounds, pulling up to 30 pounds and pushing up to 2,300 pounds (loading newsprint rolls). (Ex. JE20, p. 193) Claimant was hired with no physical restrictions and he was able to perform all of the physical requirements of the job. (Tr. pp. 16-17) He earned $18.38 per hour, plus $0.42 per hour shift differential for nightshift. (Tr. p. 17) Claimant last worked for the defendant on January 29, 2016, a few months after his injury. He was taken off work on that date by Terrance Kurtz, M.D., of Concentra. (Ex. JE3, p. 62) Claimant has not returned to work of any kind since January 29, 2016. (Tr. pp. 22-23) His employment with the defendant was terminated on August 24, 2017. (Ex. JE21, p. 195)

Pre-Injury Medical

On July 4, 2013, claimant was involved in a car accident and had low back pain. (Ex. 25, p. 14; Ex. JE1, p. 6) His pain was continuing to get worse four weeks post-

injury. (Ex. JE1, p. 10) Claimant felt that he had a lump on the right side of his lower back at that time. (Ex. JE1, p. 8) On August 13, 2013, claimant was "wondering what else can be done for the pain," and advised that his current meds were "not helping, and he doesn't want to take [them] forever." (Ex. JE1, p. 11) On August 14, 2013, claimant reported being in significant pain and he was to follow-up with sports medicine on August 21, 2013. (Ex. JE1, p. 12) There are no other records available concerning this incident and claimant testified at hearing that his back pain resolved and went away after a few weeks. (Tr. p. 33)

Claimant testified that he did not recall any other injuries to his low back before November 2015. (Tr. p. 33)

On July 5, 2015, claimant was seen by Scott Fackrell, D.O., his family doctor, primarily for hypertension. (Ex. JE1, p. 18) However, the record also mentions a diagnosis of low back pain. But, the record makes no mention of any back pain at the time of this appointment. (Ex. JE1, pp. 18-20) Defendants characterize this appointment as evidence of back pain in the months prior to the work injury. I disagree. The undersigned understands the diagnosis of low back pain to relate to his prior medical history, likely involving the motor vehicle accident. This conclusion is based on the fact that the record is clearly about claimant's concern regarding his home blood pressure checks not being within his target range. (Ex. JE1, p. 18) He was shown the proper procedure and posture for taking his blood pressure, which included sitting with his arm at the correct height, properly supported, and resting comfortably with his back supported. There is no indication that he was wearing a back support appliance as suggested by defendants in their brief, or that he reported any back pain at the time of the appointment. (Ex. JE1, p. 19) This is further supported by the notation under "musculoskeletal," which states: "negative" and within "[n]ormal range of motion." (Ex. JE1, p. 20)

The Injury

On November 23, 2015, claimant slipped at work on water near a sink and fell on his back. (Ex. JE14, p. 182) He had pain and soreness in multiple areas of his body from the fall, all of which resolved within a few weeks, except for the pain in his low back. (Ex. JE14, p. 182; Tr. p. 26) Claimant testified that his back pain never went away after the fall. (Tr. p. 26)

Post-Injury Medical Treatment

After the injury, claimant did not immediately request medical care. (Tr. p. 54) He later received medical care at Concentra on December 2, 2015. (Ex. JE3, p. 44) He presented with complaints of pain in multiple parts of his body from the work incident on November 23, 2015. His primary pain was in the right low back area and was described as intermittent and without radiation. (Ex. JE3, p. 44) He was referred to physical therapy for a low back sprain, and was returned to modified work duty. (Ex. JE3, pp. 46, 47)

Claimant stated that his low back pain persisted while the other symptoms resolved. (Tr. p. 26)

Claimant testified that his back pain has gotten progressively worse since the injury. (Tr. p. 37)

Claimant continued to treat at Concentra without notable improvement. On January 29, 2016, claimant's pain was getting worse and Terrance Kuntz, M.D., requested an MRI and took claimant off work. (Ex. JE3, pp. 62-63) As stated above, claimant has not worked anywhere since January 29, 2016. (Tr. pp. 22-23) The MRI was completed on February 1, 2016 and on February 9, 2016, claimant was continued off work until he could be seen by an orthopedic physician, concerning: L4-5 stenosis; reduction of the volume of thecal sac; and, a large hemangioma at L3. (Ex. JE3, pp. 66-67; Ex. JE5, p. 101)

Claimant was referred to Lynn Nelson, M.D., at Des Moines Orthopedic Surgeons, P.C. (Ex. JE6, p. 109) On March 3, 2016, claimant was seen by Dr. Nelson who did not recommend any injections or surgery based on a lack of radicular symptoms. (Ex. JE6, p. 110) Claimant was "encouraged to continue symptomatic treatment including consideration of possible additional therapies." (Ex. JE6, p. 110)

On March 22, 2016, claimant was seen at Concentra Urgent Care by Carlos Moe, D.O., who reported that claimant complained of continued neck and back pain since the work injury, but with no loss of feeling or coldness in his extremities. He also noted the mass in the lumbar area and wanted to rule out a hernia of the lumbar triangle. (Ex. JE3, pp. 71-72)

On May 2, 2016, claimant was sent to Mark Kirkland, D.O., by defendants for an independent medical evaluation (IME). (Ex. JE7, pp. 114-118) He reported right lower back pain and a "lump on his back near the sacroiliac joint ever since the injury." (Ex. JE7, pp. 115-116) However, at hearing, claimant was reminded that he had reported the lump in 2013. (Tr. pp. 56-58) Claimant agreed that he did not believe the lump was related to his work injury. (Tr. p. 58) When he was seen by Dr. Kirkland, claimant had no numbness, tingling or pain in his lower extremities and he had full active lumbar extension and side to side bending and no pain with trunk rotation. He was diagnosed with: right sacroiliac joint sprain; advanced lumbar spondylosis, and moderate to severe spondylosis at C5-6 and C6-7. (Ex. JE7, p. 117) Dr. Kirkland did not believe claimant had reached maximum medical improvement (MMI), but that he would "in approximately 2 months." (Id.) He also opined that the lump on claimant's low back was unrelated to his work injury. (Id.) A right sacroiliac joint injection was recommended for treatment and a functional capacity evaluation (FCE) was encouraged for the assessment of any permanent restrictions. (Ex. JE7, pp. 117-118) Dr. Kirkland, despite recommending an FCE, and recognizing his work restriction of "sedentary work," confusingly stated that claimant was "capable of working," but then also stated that "getting Mike back to work would be an achievement." (Id.)

In June, 2016, following a CT scan, claimant received a call from Dr. Moe and was told that he had pancreatic cancer and needed to see his own doctor immediately. (Tr. p. 25) This diagnosis was later determined to be incorrect and claimant was diagnosed with pancreatitis. (Ex. JE8, p. 126) Dr. Moe also opined that claimant's current back pain was not related to his fall at work, but was caused from his significantly enlarged pancreas. (Ex. JE3, p. 83) After receiving this opinion from Dr. Moe, defendants sent a letter to claimant on June 29, 2016, formally denying any further coverage. (Ex. JE15, p. 183)

After June 29, 2016, defendants did not authorize any medical treatment with any physician. (Ex. JE21, pp. 196)

Also on June 29, 2016, claimant was seen by Stacey Roberts, M.D., at Iowa Digestive Disease Center. Dr. Roberts opined that the problems with claimant's pancreas "certainly could represent alcohol-induced acute pancreatitis." (Ex. JE8, p. 124) Claimant agreed that he abused alcohol after his brother died in 2010 and he continued to do so until 2016. (Tr. p. 28) He stated that he stopped drinking hard liquor on the recommendation of his physicians, and that he now only occasionally drinks beer. (Tr. p. 29)

Dr. Roberts authored a letter on August 24, 2016, stating that claimant's "back pain is not in any way associated with his acute pancreatitis," and "I do not feel that his chronic back pain and right bulging flank are associated with this acute pancreatitis." (Ex. JE8, p. 126) Claimant's last visit with Dr. Roberts was on March 7, 2017. (Ex. JE8, p. 131)

Claimant was hospitalized for his pancreatitis and related concerns from November 21, 2016 through November 25, 2016. (Ex. JE2, p. 41) He returned to see Dr. Roberts on December 7, 2016 and with minimal improvement, a second opinion was recommended. (Ex. JE8, pp. 127-130) On January 30, 2017, claimant was seen at the Mayo Clinic, where it was concluded that his "pancreatitis has completely resolved." (Ex. JE11, p. 155)

After concluding treatment for his pancreatitis, claimant's low back pain persisted, and he sought additional treatment with his family doctor, Dr. Fackrell. (Tr. p. 29) He was referred to Shawn Spooner, M.D., who opined that claimant has underlying "degenerative disc disease," and "arthritis of the lower lumbar spine," and based on "his records and subjectively, this is an exacerbation of a previous condition secondary to work-related injury." (Ex. JE10, p. 141) He later stated in the same medical record that his lumbar spine pain "may have been exacerbated" by the work injury. (Id.) Also, Dr. Spooner clearly stated that "there is no evidence that his history of recent pancreatitis is related to his persistent lower lumbar back pain." (Id.) During his visit with Dr. Spooner, claimant demonstrated limited flexion to 45 degrees of his thoracolumbar spine and tenderness on palpation in the general bilateral lumbosacral area and mild bilateral lumbosacral muscle spasms. (Ex. JE10, p. 139) Dr. Spooner recommended pain management and epidural steroid injections. (Ex. JE10, p. 141)

Claimant received injections in his lumbar spine from Daniel Moyse, M.D., of Pain Specialists of Iowa on May 12, 2017 and May 26, 2017. (Ex. JE12, pp. 160, 162) Dr. Moyse recommended radio frequency ablation (RFA) following the results of the injections. However, claimant did not have that procedure done because, "[m]y insurance said they may or may not pay for it and I already owed Dr. Moyse money, and they wanted me to pay that before I could even do it." (Tr. p. 30) On July 5, 2017, Dr. Moyse confirmed that claimant's insurance carrier would not pre-approve the procedure, "but only evaluate claim once submitted." (Ex. 12, p. 165)

Claimant has not had any additional medical treatment since July 5, 2017. (Tr. pp. 30-31) Claimant stated that he has not pursued any additional treatment because "I don't have the money." (Tr. p. 31)

On September 12, 2017, Mark Taylor, M.D., of Medix, issued a report following an IME conducted on August 16, 2017. (Ex. JE13, p. 168-177) Dr. Taylor noted that "[d]espite the resolution of the pancreatitis, Mr. Ruby's back pain remained." (Ex. JE13, p. 171) Dr. Taylor was aware of claimant's 2013 motor vehicle accident and back pain related thereto, and the pre-existing lump on his right lower back. (Ex. JE13, p. 172) Dr. Taylor diagnosed claimant with "[c]hronic lumbago after a fall at work in November 2015." (Ex. JE13, p. 174) Dr. Taylor opined that claimant's "lumbar condition is directly and causally related to his November 23, 2015, incident at work." (Id.) Dr. Taylor stated that claimant had "radiographic findings that likely existed prior to the work injury, but he was not previously symptomatic. As such, the injury could also be viewed as an aggravation of a pre-existing condition." (Ex. JE13, p. 174) Dr. Taylor did not believe claimant had reached MMI based on his understanding that Dr. Moyse has recommended radiofrequency ablation, which had not yet occurred. However, if all other treatment was declined, Dr. Taylor would establish MMI as of the last appointment with Dr. Moyse, which was July 5, 2017. (Ex. JE12, p. 164) Dr. Taylor would then assign permanent impairment of 8 percent to the whole person based on placement in DRE Category II for the lumbar spine, from Table 15-3, page 384 of the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition. (Ex. JE13, p. 175). He would then also assign restrictions of no lifting over 20 pounds occasionally from knees to chest height, and no more than 10-15 pounds below knee level or overhead. He should alternate sitting, standing and walking as needed for comfort. He should squat and kneel rarely to occasionally; avoid ladders; and, climb stairs and travel occasionally.

Dr. Nelson responded to defense counsel by letter on November 30, 2017, and opined to a reasonable degree of medical certainty that claimant "sustained, at worse, a temporary aggravation of his preexisting back condition," and he has "[n]o permanent partial impairment," and "[n]o permanent work or activity restrictions are indicated." (Ex. JE6, p. 113) There is no indication that he saw or evaluated claimant again before issuing this opinion letter, over one and one-half years after he last saw claimant. Also, he provided no discussion or rational to support his opinions. I therefore, give little weight to Dr. Nelson's opinions concerning permanency and permanent restrictions.

Dr. Kirkland signed and dated a letter on December 17, 2017, which was prepared by defense counsel indicating his opinion that claimant had a preexisting low back condition with no radicular symptoms and that claimant may have occasional flare ups from time to time. He also indicated that the November 2015 work injury was merely a temporary flare up resulting in no permanent impairment or restrictions. (Ex. JE 7, pp. 120-121) There is no indication that Dr. Kirkland saw claimant again before signing the letter dated December 17, 2017. The letter was signed over one and one-half years after the IME. Dr. Kirkland indicated his opinion that the work incident was a temporary flare up and that claimant sustained no permanent impairment and no permanent restrictions were needed and any ongoing treatment was unrelated to the work incident. (Ex. JE 7, pp. 120-121) However, there is no explanation as to when claimant reached MMI, or why the FCE that was originally recommended in the IME, should now be disregarded as apparently unnecessary, despite claimant's testimony that his back pain has "continually gotten worse" since the injury. (Tr. p. 37) I give little weight to the Dr. Kirkland's opinion as he provides no rational for this shift in position.

On December 29, 2017, Dr. Moe signed and dated a letter prepared by defense counsel indicating his opinion that claimant reached maximum medical improvement (MMI) "no later than his last visit with Concentra, which was April, 20, 2016." (Ex. JE3, p. 88) He also indicated that any medical treatment after that date is not related to the work injury and that said work injury did not cause any permanent impairment or need for restrictions. (Id.) I note that the letter was signed about one and one-half years after Dr. Moe last saw claimant with no indication that he reevaluated claimant in the meantime. I reject Dr. Moe's opinion, which includes the notion that claimant's back pain was not work related and was caused from his pancreatitis.

Dr. Moyse signed and dated a letter on February 2, 2018, prepared by claimant's counsel, which indicated that he was aware of the November 23, 2015 fall at work and in his "opinion that there is a definite connection between that fall, Mr. Ruby's ongoing lumbar spine pain, and the treatment . . . [he has] been providing including the recommended ablations." (Ex. JE12, p. 167)

I find from the opinions of Dr. Spooner, Dr. Roberts and Dr. Taylor that claimant's pancreatitis was not the cause of his low back pain.

I find from the overwhelming expert medical opinions that claimant had an exacerbation of a pre-existing low back condition on November 23, 2015 when he slipped and fell at work.

Dr. Nelson, Dr. Kirkland and Dr. Moe concluded that claimant had no permanent impairment as a result of the work incident and Dr. Nelson and Dr. Kirkland specifically stated that it was a temporary exacerbation. I have rejected or given little weight to the opinions of Dr. Nelson, Dr. Kirkland and Dr. Moe as described above.

Dr. Moyse, saw claimant four times between May 10, 2017 and July 5, 2017. (Ex. JE12, pp. 157-165) Dr. Moyse provided treatment including two median nerve branch injections, which had good results. (Ex. JE12, pp. 160, 162) Dr. Moyse recommended RFA treatment, which was not completed due to financial constraints. (Ex. 12, p. 165; Tr. pp. 30-31) Although claimant testified that he was not very excited to have the procedure done, his primary reason for failing to get the procedure done was financial. (Tr. pp. 30-31; Ex. 12, p. 165) On February 2, 2018, Dr. Moyse signed and dated a letter prepared by claimant's counsel indicating his opinion that "there is a definite connection between that fall [of November 23, 2015], Mr. Ruby's ongoing lumbar spine pain, and the treatment [he has] been providing including the recommended ablations." (Ex. JE12, p. 167) There is no indication of MMI, permanency or permanent restrictions.

Dr. Taylor, on September 12, 2017, conducted a one-time evaluation of claimant and opined that claimant's lumbar condition was an aggravation of an underlying condition. He did not believe claimant had reached MMI.

I find the opinions of Dr. Moyse and Dr. Taylor more convincing and persuasive compared to the other medical opinions. Their causation opinions concerning claimant's current back pain are also supported by Dr. Spooner. I find their opinions are well reasoned and consistent with claimant's testimony regarding his progression of pain and symptoms and his medical history.

Having found the opinion of Dr. Moyse and Dr. Taylor most persuasive, I also find that claimant has not yet reached MMI. He has not yet undergone the radiofrequency ablations recommended by Dr. Moyse, the treating pain specialist. Claimant has testified that his back pain has gotten progressively worse since the injury. (Tr. p. 37)

Additional Findings

Claimant continued to work following the injury on November 23, 2015 with restrictions of reduced lifting and pushing. (Tr. pp. 21-22) Dr. Kuntz took claimant off work on January 29, 2016. (Ex. JE3, p. 62) Claimant received temporary weekly benefits from January 29, 2016, until June 28, 2016, the date upon which Dr. Moe stated that claimant's back pain was not related to his fall at work, but was caused from his pancreas condition. (Ex. JE3, p. 83; Ex. JE15, p. 183; Hearing Report, p. 2) I have rejected Dr. Moe's opinion concerning causation as stated above.

The parties agree that claimant was off work from June 29, 2016 through July 5, 2017. (Hearing Report, p. 1)

Claimant's employment was "officially terminated on August 24, 2017." (Ex. JE21, p. 195)

Defendants have provided no authorized care since the claim was denied following Dr. Moe's opinion on June 29, 2016. (Ex. JE21, p. 196)

Claimant has not had any medical care since July, 2017 because he could not afford it. (Tr. p. 30)

Claimant has calculated his average weekly wage to be $718.44, resulting in a weekly benefit amount of $441.28. (Ex. JE24, p. 215) Defendants calculated claimant's average weekly wage based on the hourly wage of $18.38 multiplied by the ordinary number of hours worked per week of 37.5, which is $689.25, resulting in a weekly benefit rate of $424.68. (Hearing Report, p. 1, Defendants' Brief, p. 21)

I find that the actual wages paid to claimant include a shift differential, which was not included in defendants' calculation. Using the shift differential and the actual hours worked as shown in Exhibit JE 24, I accept claimant's calculation of average weekly wage and subsequent rate of $441.28.

Concerning claimant's medical expenses attached to the hearing report for which he seeks reimbursement/payment, it was understood at hearing "that there may be some discussion between counsel," post-hearing concerning the claimed medical expenses and if defendants intended to pay any of them, they would address that in their post-hearing brief. (Tr. p. 6) Defendants have indicated in their post-hearing brief that the March 3, 2016 medical expense from DMOS in the amount of $447.00 either has been paid or will be paid by defendants, because Dr. Nelson was an authorized provider. (Defendants' Brief, p. 23) Therefore, this bill is not considered at this time, with the understanding that it has been or will be paid by defendants.

Concerning the remaining medical expenses, claimant makes no argument in his brief in support thereof and provides nothing beyond the list attached to the hearing report, which indicates the name of a medication or a medical provider, a date of service, and a cost. There are no medical bills provided in support of these disputed charges. There is no cross-reference to any particular exhibit number in the list or other medical record attached to the list from which the undersigned could determine the nature of the treatment provided and its relationship to the work injury, if any. However, even if the undersigned could correlate some of the charges to a particular medical record in the joint exhibits (some of which do have the same dates of service), there are still no medical bills in evidence from which the undersigned could determine the amount due, absent a stipulation, which does not exist. The only thing presented is claimant's list and bare assertion of an amount without supporting evidence. Defendants have not stipulated to the amounts alleged. Defendants argue in their brief that the bills should be denied based upon a lack of supporting documents. (Defendants' Brief, p. 23) I am unable to find from the evidence presented that claimant carried his burden of proof concerning the medical bills allegedly incurred.

The parties have stipulated that claimant was paid 21.571 weeks of benefits prior to the hearing at the rate of $424.68. (Hearing Report) The parties have also stipulated that defendants are entitled to a credit in the amount of $8,929.19 under section 85.38(2) for payment of short term disability benefits.

CONCLUSIONS OF LAW

1. Extent of temporary benefits.

The parties have stipulated that claimant is entitled to temporary benefits, but disagree as to the extent of those benefits.

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).

When an expert opinion is based upon an incomplete history, the opinion is not necessarily binding upon the commissioner. The commissioner as trier of fact has the duty to determine the credibility of the witnesses and to weigh the evidence, together with the other disclosed facts and circumstances, and then to accept or reject the opinion. Dunlavey v. Economy Fire & Casualty Co., 526 N.W.2d 845 (Iowa 1995).

Healing period benefits are payable to an employee who has sustained a permanent partial disability,

> [B]eginning on the first day of disability after the injury, and until the employee has returned to work or it is medically indicated that significant improvement from the injury is not anticipated or until the employee is medically capable of returning to employment substantially similar to the employment in which the employee was engaged at the time of injury, whichever occurs first.

Iowa Code section 85.34(1).

When an injured worker has been unable to work during a period of recuperation from an injury that did not produce permanent disability, the worker is entitled to temporary total disability benefits during the time the worker is disabled by the injury. Those benefits are payable until the employee has returned to work, or is medically capable of returning to work substantially similar to the work performed at the time of injury. Section 85.33(1).

I have accepted the opinions of Dr. Moyse and Dr. Taylor above and found that claimant has not yet reached MMI.

In support of the determination that claimant has not yet reached MMI, I note that claimant was taken off work by Dr. Kuntz, an authorized treating physician on January 29, 2016. Claimant remained off work through June 29, 2016, when defendants denied further coverage based on Dr. Moe's opinion. After June 29, 2016, defendants did not authorize any additional medical treatment with any physician and claimant sought treatment on his own. (Ex. JE21, pp. 196) Claimant eventually treated with Dr. Moyse who provided injections and recommended radiofrequency ablation, which claimant's health insurer would not pre-approve and he could not afford to pursue. (Tr. p. 30) Nowhere along the way did any physician return claimant to work without restrictions.

Also, I note that the last and only time that claimant was seen by Dr. Nelson on March 3, 2016, he was told to continue on his current work restrictions. (Ex. JE6 p. 110) The last time that claimant was seen by Dr. Moe, he was restricted to "desk work only." (Ex. JE3, p. 77) The last and only time that claimant was seen by Dr. Kirkland, he was not considered to be at MMI and Dr. Kirkland noted his work restriction of "sedentary" work. (Ex. JE7, pp. 117-118)

Claimant has not been released to return to full duty. He has not reached MMI and the above described restrictions, which have not been lifted, indicate that claimant is not yet capable of returning to the type of work that he was involved in at the time of the injury.

The parties agree that claimant was paid 21.571 weeks of temporary benefits from January 29, 2016, the date that claimant was taken off work by Dr. Kuntz, until June 28, 2016. Claimant is therefore owed running healing period benefits beginning on June 29, 2016 forward until the same are subject to termination under Iowa Code section 85.34(1).

2. Whether the work injury is the cause of permanent disability and if so, the extent and the commencement date for permanent disability benefits, if any.

Having found above that claimant is entitled to an award of running healing period, that he has not reached MMI, has not returned to work and has not been found to be medically capable of returning to the type of position that he held at the time of the

injury, the issue of permanent disability and the commencement date for such benefits is not yet ripe and may be addressed through a review-reopening petition filed at a later date.

3. Rate, average weekly wage.

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 Rule of Appellate Procedure 6.14(6).

Iowa Code section 85.36 sets forth the basis for determining an injured employee's compensation or rate. Mercy Med. Ctr. v. Healy, 801 N.W.2d 865, 870 (Iowa Ct. App. 2011). The statute expressly provides the determination is made using the last thirteen consecutive calendar weeks immediately preceding the injury. Iowa Code § 85.36(6). Under the statute,

> The basis of compensation shall be the weekly earnings of the injured employee at the time of the injury. Weekly earnings means gross salary, wages, or earnings of an employee to which such employee would have been entitled had the employee worked the customary hours for the full pay period in which the employee was injured, as regularly required by the employee's employer for the work or employment for which the employee was employed, computed or determined as follows and then rounded to the nearest dollar:
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> . . . .
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> 6. In the case of an employee who is paid on a daily or hourly basis, or by the output of the employee, the weekly earnings shall be computed by dividing by thirteen the earnings, **including shift differential pay** but not including overtime or premium pay, of the employee earned in the employ of the employer in the last completed period of thirteen consecutive calendar weeks immediately preceding the injury. If the employee was absent from employment for reasons personal to the employee during part of the thirteen calendar weeks preceding the injury, the employee's weekly earnings shall be the amount the employee would have earned had the employee worked when work was available to other employees of the employer in a similar occupation. A week which does not fairly reflect the employee's customary earnings shall be replaced by the closest previous week with earnings that fairly represent the employee's customary earnings.

Id.(emphasis added) The statute defines "gross earnings" as "recurring payments by employer to the employee for employment, before any authorized or lawfully required deduction or withholding of funds by the employer, excluding irregular bonuses, retroactive pay, overtime, penalty pay, reimbursement of expenses, expense

allowances, and the employer's contribution for welfare benefits," and "pay period" as "that period of employment for which the employer customarily or regularly makes payments to employees for work performed or services rendered." Id. § 85.61(3), (5).

I have accepted above, for the reasons there stated, claimant's rate calculation as the most accurate and reflective of claimant's actual hours worked and wages received, including the shift differential. I conclude that claimant's applicable rate in this case is $441.28, based on an average weekly gross earnings of $718.44.

4. Medical expenses.

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 Rule of Appellate Procedure 6.14(6).

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 16, 1975).

I have found above for the reasons there stated that claimant has failed to carry his burden of proof concerning the reimbursement/payment of the claimed medical expenses.

5. Penalty.

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.

In the case at bar, defendants paid weekly benefits until they received the opinion of Dr. Moe that claimant's current condition was not related to the work injury. Although I found above that Dr. Taylor's opinion was more persuasive than Dr. Moe's, defendants did not act unreasonably in their reliance on Dr. Moe's opinion.

However, defendants failed to correctly calculate the applicable rate despite having all relevant information in their possession. Defendants paid benefits at the rate of $424.68. I have found the correct rate to be $441.28. Claimant was underpaid $16.60 per week from the period of January 29, 2016 through June 28, 2016, which is 21.571 weeks. $16.60 multiplied by 21.571 weeks equals $358.08.

Considering the assessment of penalty, I consider the length of the delay, the number of delays and the history or prior penalties awarded against these defendants. Robbennolt v. Snap-On Tools Corp., 555 N.W.2d 229 (Iowa 1996) In the case at bar, the amount delayed was less than 4 percent of the amount due, however, the length of delay has been significant. There was no evidence presented concerning the history of penalties awarded against these defendants. I therefore find that penalty in the range of 25 percent is appropriate. $358.08 multiplied by 25 percent is roughly $90.00. Defendants are obligated to pay $90.00 in penalty benefits.

6. Costs.

The final issue is 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. 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. The parties have stipulated that the costs as reported have been paid. The costs are set forth in the itemization of costs attached to the hearing report and include: the filing fee, $100.00; service fee, $13.12; deposition transcript, $169.61; and, the cost of Dr. Moyse report, $350.00. These total $632.73 and defendants are ordered to pay the same.

ORDER

IT IS THEREFORE ORDERED:

Defendants shall pay claimant running healing period benefits commencing on June 29, 2016 forward until the same may be terminated per Iowa Code section 85.34(1). Defendants are entitled to the stipulated credit of eight thousand nine hundred twenty-nine and 19/100 ($8,929.19) for payment of short term disability benefits under Iowa Code section 85.38(2) against healing period benefits.

All weekly benefits shall be paid at the rate of four hundred forty one and 28/100 dollars ($441.28) per week.

Defendants shall pay accrued weekly benefits in a lump sum together with interest at the rate of ten percent for all weekly benefits payable and not paid when due which accrued before July 1, 2017, and all interest on past due weekly compensation benefits accruing on or after July 1, 2017, shall be payable at an annual rate equal to the one-year treasury constant maturity published by the federal reserve in the most recent H15 report settled as of the date of injury, plus two percent, See Gamble v. AG Leader Technology File No. 5054686 (App. Apr. 24, 2018)

Defendants shall pay penalty benefits in the amount of ninety dollars ($90.00).

Defendant shall pay costs in the amount of six hundred thirty two and 73/100 dollars ($632.73).

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 17th day of October, 2018.

TOBY J. GORDON
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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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.