BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

DANNY DANFORTH, Claimant, vs. COMMONWEALTH ELECTRIC COMPANY OF THE MIDWEST, Employer, and LIBERTY INSURANCE, Insurance Carrier, Defendants.	:	File No. 5063132 ARBITRATION DECISION Head Note Nos.: 1402.40, 1803.1, 4000

STATEMENT OF THE CASE

Claimant, Danny Danforth, filed a petition in arbitration seeking workers' compensation benefits from Commonwealth Electric Company of the Midwest, employer, and Liberty Insurance Corp., insurance carrier, both as defendants, as a result of a stipulated injury sustained on August 3, 2016. This matter came on for hearing before Deputy Workers' Compensation Commissioner Erica J. Fitch. The record in this case consists of Joint Exhibits 1 through 7, Claimant's Exhibits 1 through 3, Defendants' Exhibits A through L, and the testimony of the claimant.

ISSUES

The parties submitted the following issues for determination:

1. Whether claimant's permanent disability is a scheduled member disability or an unscheduled disability;

2. Extent of permanent disability; and

3. Whether claimant is entitled to penalty benefits under Iowa Code section 86.13 and, if so, how much.

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.

FINDINGS OF FACT

The undersigned, having considered all of the evidence and testimony in the record, finds:

Claimant's testimony was largely consistent as compared to the evidentiary record and claimant frequently deferred to facts contained in the written records. While there are examples where claimant's testimony did not comport with the record, those instances appear to reflect emotional reactions and potential exaggerations to scenarios, as opposed to intentional statements designed to mislead. Claimant's demeanor at the time of evidentiary hearing was acceptable and gave the undersigned no reason to doubt claimant's veracity. While the totality of the record indicates claimant may be difficult to deal with, I do not find sufficient grounds to find his testimony lacks credibility.

Claimant was 66 years of age at the time of hearing. He is a resident of Wildwood, Florida. (Claimant's testimony; CE2, page 7) Claimant earned a GED and later became a journeyman electrician. He has worked in the electrical trade since age 17. Claimant travelled to Iowa from Florida to work at defendant-employer as a journeyman electrician. (Claimant's testimony; JE2, p. 13) On July 20, 2016, claimant acknowledged receipt of the employee handbook. (DEA, p. 3) The employee handbook states employees must use tools to manufacturer's recommendation and should not alter tools. (DEA, p. 2)

Claimant suffered a stipulated work-related injury on August 3, 2016. (Hearing Report) Claimant used a modified drill to wind jetline, a nylon and fiberglass string. Claimant testified he modified the drill, but his foreman cleared it for use in winding jetline. While winding, the jetline became tangled around claimant's left small finger and deeply cut the digit. (Claimant's testimony)

Following the incident, claimant was transported to Methodist Medical Center, where he was examined by Melissa Young-Szalay, M.D. (Young). Dr. Young assessed a near complete amputation of the left small finger, with very questionable circulation. Dr. Young reviewed claimant's case with the on-call hand surgeon at Mayo Clinic. Thereafter, Dr. Young performed surgery, consisting of left small finger irrigation and debridement of the wound and revision amputation at the level of the PIP joint. (JE1, pp. 2, 4-5) Claimant was removed from work pending follow up appointment and was advised to keep the wound clean and dry. (JE2, p. 6)

Claimant returned to Dr. Young on August 16, 2016. Dr. Young identified an anticipated recovery period of approximately two months. Dr. Young prescribed ibuprofen 800 mg, Benicar, and metformin, as well as occupational therapy for range of motion exercises and fabrication of a fingertip protector. (JE2, pp. 7-8, 10) Claimant expressed reservation about returning to work; Dr. Young assured claimant he would not cause additional damage by performing light duty work. Claimant ultimately agreed to a return to work date of August 22, 2016, under restrictions of limited use of the left hand: a 5-pound frequent lift with both hands; and avoidance of repetitive vigorous grasping, pinching, pushing, pulling, and twisting. (JE2, pp. 8, 12) Dr. Young also noted it would be best for claimant to personally call her office with any questions or concerns, due to poor interactions between claimant's wife and Dr. Young's secretary. Dr. Young addressed these interactions with claimant's wife, who denied any wrong-doing or rudeness on her part. (JE2, p. 8) Claimant acknowledged the possibility of disputes between his wife and Dr. Young's staff. (Claimant's testimony)

Claimant returned to light duty work, performed in defendant-employer's shop. (Claimant's testimony)

On September 13, 2016, claimant presented to Dr. Young in follow up. He expressed complaints of a very sensitive finger, pain with lifting and gripping, occasional purplish coloration of the finger, swelling readily, and interrupted sleep. Dr. Young increased claimant's gabapentin dosage due to nerve pain complaints. She also prescribed physical therapy, a home exercise program and work hardening. (JE2, pp. 13-14) Restrictions were identified as a 10-pound lift, with increased activity as tolerated. (JE2, p. 15)

On September 21, 2016, a meeting took place at defendant-employer, with claimant, Michael Price, Ruben Bera, David Oliver, and Ashley Huinker, as participants. Thereafter, a memorandum was drafted by a representative of defendant-employer to commemorate the discussion. The memorandum noted claimant had been performing light duty in defendant-employer's shop, beginning August 22, 2016. However, due to a lack of light duty work, claimant would no longer be provided such work and effective that date, would be transitioned to "workman's comp." Claimant inquired if he had been terminated or laid off. The memorandum noted Mr. Price replied that claimant had not been terminated and would be able to return to work in the field as soon as he received a full medical release, without restrictions. (DEF, p. 12)

Defendants commenced payment of weekly healing period benefits. (DEJ, p. 21)

Claimant returned to Dr. Young on October 7, 2016, at which time he represented he would likely return home to Florida soon. Claimant reported he had not been working, as defendant-employer did not have light duty to offer. He complained of: swelling; "dark blue" coloration in the morning; notable sensitivity, to even light touch; and a primary complaint of nighttime pain. Claimant reported relief with gabapentin, ice, and the prescribed compression sleeve. (JE2, p. 16) On examination,

Dr. Young noted: limitation in active motion at the MP joint, but full passive motion; grip strength of about 50 percent of that seen in the right hand; mild swelling; tenderness over both digital nerves; and tenderness in the palm over the hypothenar eminence. (JE2, p. 17)

Dr. Young assessed: a well-healed surgical site; numerous subjective complaints of sensitivity and pain; and anxiety related to the injury, likely a posttraumatic stress-type reaction. Dr. Young increased claimant's gabapentin dosage, prescribed further therapy, and opined claimant would benefit from psychological evaluation for anxiety. (JE2, pp. 17-18) She opined she would typically release a patient with a full duty release approximately eight weeks post-injury. However, as claimant felt unready, Dr. Young agreed to restrict claimant to a 20-pound lift for an additional four weeks. At the conclusion of this period, on November 7, 2016, Dr. Young noted claimant would be released to full duty release. (JE2, pp. 17, 19)

On October 11, 2016, Dr. Young altered claimant's work restrictions. In addition to the 20-pound lift, Dr. Young added a restriction of avoidance of repetitive vigorous grasping, pinching, pushing, pulling, and twisting. She also postponed the date of claimant's full duty release to December 5, 2016. (JE2, p. 20)

As he was no longer working, claimant returned to Florida. (Claimant's testimony) Defendants authorized physical therapy at CORA; claimant participated in sessions from November 4, 2016 through December 7, 2016. (JE3, pp. 23-34)

Upon claimant's return to Florida, defendants authorized treatment with Rodger Powell, M.D. Claimant presented to Dr. Powell on December 5, 2016. Dr. Powell reviewed claimant's records and opined Dr. Young made the correct choice in proceeding with amputation. Dr. Powell noted the wound healed following surgery, but claimant reported continued pain and ongoing discussion of revision. (JE4, p. 63) At the time of examination, claimant wore a finger wrap due to hypersensitivity. After removal of the wrap, Dr. Powell noted moderate to marked tenderness over the radial condyle, minimal tenderness ulnarly, and a lack of full flexion. Dr. Powell assessed a left small finger amputation with neuroma. (JE4, p. 64) He recommended gabapentin and courses of therapy for desensitization and range of motion of the MP joint. Dr. Powell removed claimant from work until such time as the finger had been desensitized and some motion regained. (JE4, p. 65)

Claimant missed a scheduled follow up appointment with Dr. Young on December 7, 2016. Dr. Young reviewed claimant's chart and recommended he follow up with a physician in Florida. (JE2, p. 21)

The assigned claim adjuster, Ms. Vargas, authored a letter to claimant dated December 21, 2016. Thereby, Ms. Vargas noted claimant was last seen on December 5, 2016. She stated claimant's restrictions as no use of ladders and no lifting over five pounds with the left hand. Ms. Vargas represented defendant-employer could

accommodate those restrictions and claimant should present to work on January 3, 2017. (DEH, p. 15)

Claimant resumed physical therapy sessions at CORA on December 29, 2016. (JE3, p. 35)

On January 3, 2017, claimant returned to Dr. Powell and reported a severe onset of phantom pain and color changes. Dr. Powell noted these symptoms had arisen due to a combination of therapy and cold weather. On examination, claimant's finger appeared purple in comparison to his other digits. Dr. Powell assessed significant onset of phantom pain and poor tolerance to cold exposure. He recommended continued therapy and in order to not jeopardize the remaining portion of the finger, ordered claimant not to work, remain in a warm environment, and wear gloves when outdoors. (JE4, p. 68)

On January 3, 2017, Ms. Vargas authored a letter to claimant and thereby indicated claimant's weekly benefits had been suspended as of that date. She noted claimant had been advised to return to work and failed to do so, despite warnings that failure would result in suspension of benefits. (DEC1, p. 3)

Claimant's employment with defendant-employer was terminated on January 3, 2017. The separation notice, which appears to bear the signature of Mr. Price, noted the reason for termination of employment as claimant's failure to present to work. (DEG, p. 13)

Claimant authored a letter to Mr. Price, Mr. Bera, and Ms. Vargas, dated January 9, 2017. Claimant indicated Dr. Powell had removed claimant from work and indicated he was getting assistance for what he described as phantom pain. Claimant further indicated he had returned to Florida after Mr. Price indicated he would not be permitted to return to work until he procured a full duty release. (CE1, p. 2)

On January 17, 2017, claimant's physical therapist noted a lack of participation in a desensitization home exercise program, as well as difficulty on claimant's part of maintaining a set therapy schedule. (JE3, p. 42) At a session on January 18, 2017, the therapist noted claimant had been on his phone a lot and the two discussed claimant's need to leave his phone out front and not leave sessions early. (JE3, p. 44)

A physical therapy progress note of January 31, 2017 describes claimant as progressing, having met the majority of short-term goals and moving toward long-term goals. The therapist noted claimant continued to report significant phantom pain that interfered with function. Claimant was advised to speak with his physician regarding such complaints. (JE3, p. 48)

Claimant returned to Dr. Powell on February 6, 2017. Dr. Powell indicated therapy had helped significantly in decreasing hypersensitivity and increasing motion.

He recommended continued therapy and use of gabapentin. Dr. Powell released claimant to light duty work, with restrictions of: 25-pound lift; no ladders; and no crawling. (JE4, pp. 71-73)

Following nine sessions of therapy for desensitization, claimant was discharged from occupational therapy on February 9, 2017. His prognosis was noted as good, provided he followed a home exercise program. (JE3, p. 50)

On February 15, 2017, a representative from the office of claimant's attorney emailed Ms. Vargas and advised that claimant had not received weekly indemnity checks since January 20, 2017. The representative asked why claimant's checks had ceased, given he remained in therapy, under restrictions, and had not met maximum medical improvement (MMI). (CE3, p. 34)

Due to continued complaints, claimant returned to Dr. Powell on March 8, 2017. At that visit, Dr. Powell assessed a painful bony spur and recommended revision surgery. (JE4, p. 74) Revision of the left small finger amputation was performed by Dr. Powell on June 13, 2017. (JE5, pp. 94-95)

Following surgery, claimant returned to Dr. Powell on June 21, 2017. At that time, claimant asked a number of questions regarding Dr. Powell's choice in surgical procedure. Claimant admitted his finger was less tender following surgery; Dr. Powell recommended commencement of scar massage. Claimant was left in off-work status. (JE4, p. 78)

On July 12, 2017, claimant returned to Dr. Powell and reported improvement. Specifically, claimant indicated he experienced much less tenderness and no longer waking from pain. Dr. Powell noted full MP joint motion. Dr. Powell recommended progression into increasingly normal use of the finger and ordered a course of therapy. (JE4, pp. 79-80)

On July 15, 2017, claimant's counsel emailed defendants' counsel and advised that claimant had not received his weekly benefit check, due July 10, 2017. He asked if counsel would look into the delay. (CE3, p. 35) Claimant's counsel followed up with an email on July 24, 2017, advising that claimant had not received a check since July 5, 2017 and again requested counsel investigate the delay. (CE3, p. 36) Defendants' counsel contacted the claim representative, as did claimant's attorney. On July 26, 2017, the representative advised that claimant should receive a check in the next day or so. (CE3, pp. 37-38) Claimant did not receive the check on July 27, 2017; the representative indicated she would look into the issue. (CE3, p. 39)

The payment logs in evidence denote defendant-insurance carrier issued a check on July 21, 2017, for weekly benefits covering the period of June 30, 2017 through July 20, 2017. (DEJ, p. 20)

On July 28, 2017, claimant presented to Lake Centre for Rehabilitation (Lake Centre). At that visit, a problem list included: phantom pain; impaired light touch sensation; paresthesias; weakness of the hand and arm; and impaired ability to do work tasks. (JE6, p. 97) A plan of care was completed and sent to Dr. Powell. (JE6, p. 98)

At a follow up appointment with Dr. Powell on August 28, 2017, Dr. Powell ordered a course of work hardening prior to claimant's return to work. (JE4, p. 82)

Defendants obtained video surveillance of claimant on September 22 and September 23, 2017. The video depicts claimant moving small branches and lifting a bag of landscaping material. At times, claimant used his bilateral hands in these tasks; he did not wear gloves. (DEL) Claimant testified a hurricane had recently struck Florida and residents needed to clean up following the damage. He testified lifting sticks did not require fine motor skills, with which he struggles, and the observed bag, containing peat moss, weighed approximately 8 pounds. (Claimant's testimony)

On October 18, 2017, claimant underwent a work conditioning evaluation at CORA with Kathryn Boyer, PT. Ms. Boyer opined claimant was deconditioned, with decreased muscular endurance. She noted claimant was not working and would benefit from a work conditioning program to increase his overall strength and endurance, to allow a safe return to work. (JE3, p. 52) Thereafter, claimant began a course of work-hardening. (JE3, pp. 56-62)

On October 23, 2017, legal assistant to claimant's counsel emailed defendants' attorney and advised claimant had not received a benefit check since the week of October 9, 2017. (CE3, pp. 40-41) On October 26, 2017, defendants' counsel responded and advised he received a message indicating a check would be sent for benefits accrued through October 30, 2017. (CE3, p. 42) On October 26, 2017, claimant was issued a check for weekly benefits for the period of October 6 through October 26, 2017. (DEJ, p. 20)

The therapist at Lake Centre authored a progress note dated October 30, 2017. Thereby, the therapist indicated further treatment was not recommended, as claimant's irregular attendance prevented him from making anticipated progress. (JE6, pp. 102-103)

Claimant completed a final occupational therapy session for strengthening on November 3, 2017. The therapist at Lake Centre described the appointment as the last of the 12 sessions authorized and begun on July 28, 2017. Claimant's absences were identified as the reason for the extended period required for completion of these 12 sessions. Claimant was discharged from care. (JE6, p. 104)

On November 8, 2017, claimant presented to Dr. Powell. Dr. Powell noted continued hypersensitivity on the ulnar side, for which claimant received relief with use of gabapentin. Dr. Powell noted claimant remained in work hardening and had

improved, but commented claimant could "probably do more than he [was] saying." As claimant required the ability to lift 50 pounds in order to return to work, Dr. Powell recommended progressing toward this goal in work hardening. (JE4, p. 83)

On December 27, 2017, claimant returned to Dr. Powell in follow up. At that time, claimant complained of pain when the finger was struck, as well as a small prominence of bone. Claimant expressed frustration with his progress and inquired about a ray amputation. Dr. Powell explained a ray amputation would be "setting [claimant] up for neuroma of the palm," that may make grasping more difficult. (JE4, p. 84) Dr. Powell ordered continued gabapentin and lidocaine ointment. He also recommended continued therapy and expressed hope claimant would begin rehabilitation work at home as well. Claimant complained his therapy sessions did not provide enough core exercises; Dr. Powell recommend he look up core exercises online and perform them daily. (JE4, pp. 84-85)

Following a session on January 16, 2018, the therapist opined claimant was capable of lifting and carrying to the work-required, medium physical demand, levels. The therapist described claimant's recent gains as minimal and discharged claimant from care, to return to his physician for further guidance. (JE3, pp. 60-62)

Claimant presented to Dr. Powell on January 17, 2018. Dr. Powell noted claimant had previously had an unpleasant interaction with Dr. Powell's assistant, during which claimant falsely accused the assistant of not prescribing lidocaine ointment. Dr. Powell noted the interaction involved "heated words" and such behavior would not be tolerated. Dr. Powell reviewed claimant's work hardening records and noted he had been discharged following the prescribed 12 sessions due to lack of progress. He engaged claimant in "frank" discussion regarding claimant's need to return to work; claimant promised he would return to work if he were provided with 6 additional work hardening sessions. (JE4, p. 87)

Dr. Young authored correspondence to defendants' counsel on January 31, 2018. Thereby, Dr. Young opined claimant's recovery was without complication and noted claimant's subjective complaints were out of proportion with objective findings. She opined claimant had exhibited significant anxiety, prompting her to recommend psychological evaluation, but claimant was reportedly not receptive to such care. Dr. Young opined claimant had sustained an 80 percent loss of his left small finger and deferred to the practitioners who performed the work hardening program to objectively evaluate claimant's need for permanent restrictions. (JE2, p. 22)

Dr. Young was provided with surveillance video clips of claimant dated September 22 and September 23, 2017. Following review, Dr. Young opined the activities observed were not consistent with someone "truly" experiencing phantom or neuropathic pain. Dr. Young opined the activity on the videos did not suggest claimant was experiencing significant pain that resulted in limitation of functional use of claimant's hand. Dr. Young expressed belief it was very unusual for a patient to

experience phantom pain as a result of digit amputation. She opined it was possible for patients to experience heightened sensitivity and phantom sensation, but not pain, after a digit amputation. (JE2, p. 22)

On February 14, 2018, Dr. Powell placed claimant at MMI and discharged him from care. He imposed work restrictions consistent with claimant's abilities as demonstrated in the final work hardening session. Dr. Powell rated claimant's permanent impairment in accordance with the Florida Impairment Guidelines, with an amputation of the PIP joint of the small finger corresponding to an 80 percent loss of the finger. (JE4, pp. 90, 92)

On March 12, 2018, the adjuster assigned to claimant's claim authored correspondence to claimant, care of his attorney. By one letter, the adjuster noted he had recently taken over the file and reviewed the rate calculation. He noted it appeared claimant's weekly rate had been overpaid and had been corrected to $879.63. (DEH, p. 18) By a separate letter, the adjuster noted Dr. Powell placed claimant at MMI on February 14, 2018 and opined a permanent impairment of 80 percent of the left small finger, which corresponded to 16 weeks of permanent partial disability benefits. He noted claimant's weekly benefits converted to permanent disability benefits effective February 14, 2018 and would continue at a weekly rate of $879.63. Due to prior rate overpayment, the adjuster determined a credit of $2,331.00 ($33.70 per week x 70 weeks) and accordingly, determined permanent partial disability benefits would cease on May 18, 2018. (DEH, p. 16)

On April 3, 2018, claimant presented to orthopedic surgeon, Jose Torres, M.D., for claimant's independent medical examination (IME). Claimant complained of constant pain, level 5 on a 10-point scale at the time of evaluation, but reaching a level 10 with activities. He reported benefit with gabapentin and lidocaine cream. (JE7, p. 105) Dr. Torres performed a records review. (JE7, pp. 105-107) On examination, Dr. Torres noted a well-healed stump; active motion of approximately 50 degrees at the MP joint; significantly diminished grip strength as compared to the right hand; tip sensitivity to light touch and percussion; tenderness along the volar surface; and mild visible swelling. He and claimant discussed the presence of continued sensitivity at the fingertip, without obvious neuroma. (JE7, pp. 107-108)

Dr. Torres opined claimant had achieved MMI and claimant's hypersensitivity was permanent in nature. Based upon amputation level, impaired sensation, and motion loss, Dr. Torres opined claimant had sustained a 91 percent impairment of the left small finger. Dr. Torres referred to the AMA Guidelines in his written report, but did not specify the specific edition utilized. He recommended permanent restrictions of: no lifting more than 35 pounds total; and no repetitive lifting or gripping with the left hand. Dr. Torres opined claimant's further care would be palliative in nature, consisting of: physician appointments; medication such as gabapentin; and potentially surgery, if a neuroma were to develop. (JE7, p. 108)

Defendants' counsel engaged in a phone conference with Dr. Powell, following which, Dr. Powell authored a note dated January 23, 2019. Dr. Powell noted counsel had inquired whether claimant had presented with any evidence of neuropathic pain or phantom pain. Dr. Powell reviewed his notes and opined claimant had complained of pain with heavy use, but opined there was never an indication from claimant or on examination of neuropathic pain or phantom pain. (JE4, p. 93)

At the time of hearing, claimant worked as an electrician at an assisted living facility, earning $24.25 per hour. Claimant testified he is restricted in his actions, specifically, lifting of 25 to 35 pounds maximum and a lack of strength and grip in the left hand. Claimant testified he is dispatched through the union hall and has held a number of jobs since his injury; he is afraid employers do not keep him employed due to his limitations. Claimant explained he experiences difficulty working in tight spaces while holding devices and screws for mounting, as well as difficulty making components. Claimant testified the "nub" of his finger interferes with his work, catches on equipment, and has been impacted and cut. (Claimant's testimony)

Claimant testified he suffers with daily pain. Claimant relayed pain with impact of the finger, nerve pain, and phantom pain where the remainder of his finger had once been. Claimant described the nerve pain as an electrical sensation. Claimant testified cold conditions worsen his complaints significantly. He testified he uses gabapentin as often as three times per day, but the medication can cause bad dreams. Claimant testified he obtains the medication from his personal medical provider; he acknowledged no medical records from this provider are in evidence. (Claimant's testimony)

CONCLUSIONS OF LAW

The first issue for determination is whether claimant's permanent disability is a scheduled member disability or an unscheduled 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 Rule of Appellate Procedure 6.14(6).

The claimant has the burden of proving by a preponderance of the evidence that the injury is a proximate cause of the disability on which the claim is based. A cause is proximate if it is a substantial factor in bringing about the result; it need not be the only cause. A preponderance of the evidence exists when the causal connection is probable rather than merely possible. George A. Hormel & Co. v. Jordan, 569 N.W.2d 148 (Iowa 1997); Frye v. Smith-Doyle Contractors, 569 N.W.2d 154 (Iowa App. 1997); Sanchez v. Blue Bird Midwest, 554 N.W.2d 283 (Iowa App. 1996).

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).

Under the Iowa Workers' Compensation Act, permanent partial disability is compensated either for a loss or loss of use of a scheduled member under Iowa Code section 85.34(2)(a)-(t) or for loss of earning capacity under section 85.34(2)(u). The extent of scheduled member disability benefits to which an injured worker is entitled is determined by using the functional method. Functional disability is "limited to the loss of the physiological capacity of the body or body part." Mortimer v. Fruehauf Corp., 502 N.W.2d 12, 15 (Iowa 1993); Sherman v. Pella Corp., 576 N.W.2d 312 (Iowa 1998). The fact finder must consider both medical and lay evidence relating to the extent of the functional loss in determining permanent disability resulting from an injury to a scheduled member. Terwilliger v. Snap-On Tools Corp., 529 N.W.2d 267, 272-273 (Iowa 1995); Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417, 420 (Iowa 1994).

Claimant contends he has suffered permanent disability to his left small finger, as well as an industrial loss due to development of phantom pain. Defendants counter that claimant's permanent disability is confined to his left small finger.

When considering issues of causation related to medical conditions, the opinions of medical providers are of paramount importance. While claimant has testified to sensations he describes as phantom pain, no medical provider has diagnosed claimant with a permanent phantom pain condition.

Drs. Young, Powell, and Torres all offered opinions regarding the extent of claimant's permanent impairment. Each of the physicians issued opinions that claimant sustained ratable permanent impairment to his left small finger as a result of the digit amputation; none specifically opined claimant suffered with permanent phantom pain or that any such complaints were ratable to the whole body. Drs. Young and Powell each opined claimant suffered an 80 percent loss of the small finger as a result of the amputation. Dr. Torres rated claimant's permanent impairment as 91 percent of the small finger, based upon the amputation level, as well as impaired sensation and motion loss.

These unrebutted medical opinions establish claimant's permanent impairment is limited to the left small finger. Claimant's testimony of what he describes as phantom

pain is not a substitute for the professional judgment of medical providers. Dr. Young opined it would be very unusual to experience phantom pain as a result of digit amputation; she differentiated phantom pain from heightened sensitivity and phantom sensation, which are possible. She further opined the surveillance video depiction of claimant was not consistent with someone truly experiencing phantom or neuropathic pain. Similarly, over the course of his care of claimant, Dr. Powell opined he found no indication of neuropathic or phantom pain. During his IME, Dr. Torres opined claimant's hypersensitivity was permanent; he made no mention of phantom pain. Claimant's description of phantom pain does not constitute a medical diagnosis and no medical provider has opined claimant suffers from a permanent phantom pain condition.

Upon review of the entirety of the record, it is determined claimant has failed to carry his burden of establishing the work injury is a cause of permanent phantom pain. As claimant has failed to establish a work-related phantom pain condition, claimant's permanent impairment is limited to the left small finger.

The next issue for determination is the extent of claimant's permanent disability.

Where an injury is limited to scheduled member the loss is measured functionally, not industrially. Graves v. Eagle Iron Works, 331 N.W.2d 116 (Iowa 1983). When the result of an injury is loss to a scheduled member, the compensation payable is limited to that set forth in the appropriate subdivision of Code section 85.34(2). Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961). "Loss of use" of a member is equivalent to "loss" of the member. Moses v. National Union C. M. Co., 194 Iowa 819, 184 N.W. 746 (1921). Consideration is not given to what effect the scheduled loss has on claimant's earning capacity. The scheduled loss system created by the legislature is presumed to include compensation for reduced capacity to labor and to earn. Schell v. Central Engineering Co., 232 Iowa 421, 4 N.W.2d 399 (1942).

Claimant's treating surgeons, Drs. Young and Powell, both opined claimant suffered an 80 percent loss of the left small finger, based upon amputation at the PIP joint. This rating methodology is consistent with the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, Table 16-4, page 440. Both Drs. Young and Powell deferred to the work hardening evaluations for consideration of permanent restrictions. As of January 16, 2018, the therapist noted claimant was capable of lifting and carrying to the work-required, medium physical demand, level. Thereafter, claimant returned to work as a journeyman electrician, dispatched through the union hall.

Dr. Torres, claimant's IME physician, opined claimant suffered a 91 percent impairment of the left small finger, based upon amputation level, impaired sensation, and motion loss. Dr. Torres opined he rated claimant's permanent impairment by the AMA Guides, but did not specify the edition utilized. Dr. Torres recommended permanent restrictions of a 35-pound maximum lift and no repetitive lifting or gripping with the left hand.

Following review of the entirety of the record, I award greatest weight to the consistent opinions of Drs. Young and Powell. These physicians served as claimant's treating surgeons, with the opportunity to observe claimant on multiple occasions, including intraoperatively. Each physician was able to observe claimant's physical condition on multiple occasions over a course of treatment. The identical impairment ratings comport with the rating methodology for amputations set forth in the AMA Guides, Fifth Edition, while the methodology used by Dr. Torres is unclear.

It is therefore determined claimant has sustained an 80 percent impairment of the left small finger as a result of the work injury of August 3, 2016. The award of 80 percent impairment of the left small finger entitles claimant to 16 weeks (80 percent x 20 weeks = 16 weeks) of permanent partial disability benefits, commencing on the stipulated date of February 14, 2018. The parties stipulated at the time of the injury, claimant's gross earnings were $1,436.07 and claimant was married and entitled to two exemptions. The proper rate of compensation is therefore, $879.63.

The final issue for determination is whether claimant is entitled to penalty benefits under Iowa Code section 86.13 and, if so, how much.

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. Robbennolt v. Snap-on Tools Corp., 555 N.W.2d 229 (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 also 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 commissioner shall 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.

Iowa Code 86.13, as amended effective July 1, 2009, states:

> 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.
>
> b. The workers' compensation commissioner shall award benefits under this subsection if the commissioner finds both of the following facts:
>
> (1) The employee has demonstrated a denial, delay in payment, or termination of benefits.
>
> (2) The employer has failed to prove a reasonable or probable cause or excuse for the denial, delay in payment, or termination of benefits.
>
> c. In order to be considered a reasonable or probable cause or excuse under paragraph *"b"*, an excuse shall satisfy all of the following criteria:
>
> (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.

A log of indemnity benefits paid to claimant is in evidence at Defendants' Exhibit J. Review of the log reveals defendants paid indemnity benefits from September 23, 2016 through May 17, 2018, a period of approximately 86 weeks. During that period, defendants issued claimant's individual weekly benefit check 3 days late on 2 occasions, 4 days late on 2 occasions, 6 days late on 1 occasion, and 8 days late on 1 occasion. During two separate three-week periods, claimant's indemnity checks were notably late. On July 21, 2017, defendants issued a check for the period of June 30,

2017 through July 20, 2017, resulting in late payment of two weeks of benefits (June 30, 2017 through July 6, 2017 and July 7, 2017 through July 13, 2017). On October 26, 2017, defendants issued payment for benefits from October 6, 2017 through October 26, 2017, resulting in late payment of two weeks of benefits (October 6, 2017 through October 12, 2017 and October 13 through October 19, 2017).

Claimant has established a delay in payment of weekly benefits during 10 weeks. The burden therefore shifts to defendants to establish a reasonable or probable cause or excuse for the delay. In order to meet its burden, defendants must demonstrate that the basis for the delay was contemporaneously conveyed to claimant. On only one occasion was this requirement met, during the failed light duty offer of January 3, 2017. However, even if claimant's entitlement to temporary disability benefits was fairly debatable from January 3 through January 5, 2017, benefits would have been timely owed for the period of December 20, 2016 through January 3, 2017. Accordingly, I find defendants have failed to establish a reasonable or probable cause or excuse for the delay, as defendants failed to provide the statutorily-required notice to claimant.

An award of penalty benefits is warranted. Benefits were paid late during 10 weeks; during the remaining 76 weeks, benefits were timely paid. Of the 10 delayed weeks, 5 were delayed by under one week and the other 5 were delayed by more than a week. An award of up to 50 percent of the amount of benefits delayed in these 10 weeks may be imposed. Based upon the above and all other relevant factors, I find an award of $1,500.00 in penalty benefits is warranted.

ORDER

THEREFORE, IT IS ORDERED:

The parties are ordered to comply with all stipulations that have been accepted by this agency.

Defendants shall pay unto claimant sixteen (16) weeks of permanent partial disability benefits commencing February 14, 2018 at the weekly rate of eight hundred seventy-nine and 63/100 dollars ($879.63).

Defendants shall receive credit for benefits paid.

Defendants shall pay accrued weekly benefits in a lump sum.

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

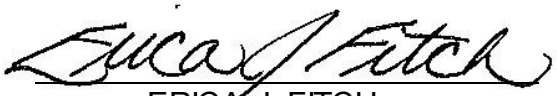
Defendants shall pay penalty benefits in the amount of one thousand five hundred and 00/100 dollars ($1,500.00).

Defendants shall pay interest on the penalty benefits from the date of this decision. See Schadendorf v. Snap On Tools, 757 N.W.2d 330, 339 (Iowa 2008).

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

Costs are taxed to defendants pursuant to 876 IAC 4.33.

Signed and filed this 27th day of May, 2020.



ERICA J. FITCH
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Mark Pennington (via WCES)

Aaron Oliver (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.