BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

MARCUS POE, Claimant, vs. CAPITAL EXPRESS, INC./IA, Employer, and GREAT AMERICAN INSURANCE CO., Insurance Carrier, and SECOND INJURY FUND OF IOWA, Defendants.	File No. 22004117.01 ARBITRATION DECISION Head Note Nos: 1100, 1108, 1402, 1803, 3200, 4000.2

STATEMENT OF THE CASE

The claimant, Marcus Poe, filed a petition and seeks workers' compensation benefits from Capital Express, Inc./IA, employer, and Great American Insurance Company, insurance carrier, in addition to the Second Injury Fund of Iowa. The claimant was represented by Randall Schueller. The defendant employer and insurance carrier were represented by Bryan Brooks. The Fund was represented by Jennifer Beckman.

The matter came on for hearing on June 26, 2023, before Deputy Workers' Compensation Commissioner Joe Walsh in Des Moines, Iowa via Zoom videoconferencing system. The record in the case consists of Joint Exhibits 1 through 8; Claimant's Exhibits 1 through 11; Defense Exhibits A through F; and Fund Exhibits AA through BB. The claimant testified at hearing. Delayne Johnson served as court reporter for the proceeding. The matter was fully submitted on July 31, 2023, after helpful briefing by the parties.

The parties submitted a Hearing Report outlining issues and stipulations.

ISSUES & STIPULATIONS

Claimant alleges he sustained an injury to his left leg which arose out of and in the course of his employment on April 4, 2022. The defendants dispute this. The defendants further dispute that the alleged injury is a cause of any temporary or permanent disability. Claimant is seeking temporary disability benefits from the date of his injury through August 21, 2022. While the defendants dispute his entitlement to benefits during this period, there is a stipulation that claimant was, in fact, off work during this timeframe. The claimant is seeking permanency benefits for his alleged impairment to his left knee/leg. While the defendants dispute he is entitled to any benefits, there is a stipulation that if any benefits are owed, the disability from this injury is scheduled. The claimant further alleges entitlement to industrial disability benefits from the combined effects of the current injury along with his alleged prior qualifying loss to his right hand on August 1, 2016. The Fund disputes his entitlement to any benefits under Iowa Code Section 85.64. Claimant is also seeking medical expenses under Section 85.27 and an IME under Section 85.39, which are disputed in every way allowed.

The parties have stipulated to the elements comprising the rate of compensation and assert a rate of $462.36 per week. Affirmative defenses are waived. The parties all agree that no benefits have been paid to the claimant and credit is not an issue in this case. The claimant is seeking a penalty for delayed/late payment of benefits, and failure to contemporaneously assert a basis for the denial of the claim.

FINDINGS OF FACT

Claimant Marcus Poe was 25 years old at the date of hearing. Mr. Poe testified live and under oath in the video hearing. His testimony is highly credible. It was consistent with the remainder of the record and there was nothing about his demeanor which caused any concern for his truthfulness. In fact, I find the opposite is true.

Mr. Poe graduated high school in 2017 and has worked manual labor or service sector jobs since then. He has taken some community college classes and worked in a variety of labor jobs, such as delivery, cooking and some customer service. He began working for the defendant employer, Capital Express, Inc., in February 2022. His position was delivering office supplies throughout the state of Iowa.

While in high school, Mr. Poe sustained two medical conditions which are relevant to his claim here. First, he sustained some type of injury in the fall of 2015, which resulted in surgery to his left knee in May 2016. (Joint Exhibit 1, page 1) Mr. Poe testified that following the surgery, he really did not have further problems with his left knee, and he was having no symptoms at all when he began working at Capital Express. (Transcript, page 22) Mr. Poe was also in a car accident in August 2016, wherein he broke his wrist. He had surgery and other treatment for this condition. (Jt. Exs. 2, 3 and 4) Ultimately, he made a good recovery from this accident.

I find that on April 4, 2022, Mr. Poe sustained an injury which arose out of and in

the course of his employment with Capital Express. While the defendants have technically and legally disputed this injury, all of the evidence in this record strongly suggests that it did, in fact, occur.

Mr. Poe testified that on April 4, 2022, he loaded and climbed into his work van when he experienced significant pain in his left knee. "I was going to climb into the van. I put my right leg up into it, into the van, and as I did that, my left knee buckled underneath of me. I landed on the hard concrete floor inside of the warehouse, and all my weight was on top of my knee that was buckled, and then I fell down and had the injury." (Tr., p. 15) He testified to this, and I believe him. He reported the injury to his supervisor immediately. All of this is well documented. (Defendants' Exhibit A, pages 13-14) The employer completed an "incident report" which included a hand-written, eyewitness statement. (Def. Ex. A, p. 14) The employer directed Mr. Poe's medical care, sending him to UnityPoint Urgent Care. The following is documented at his first visit.

> Marcus B Poe is a 24 y.o. male who presents with left knee injury and pain, which occurred 2 hours ago. The circumstances of the injury were as follows: He was getting into his van in which he had his left foot planted onto the ground. He reports that his left knee gave out and he heard a 'pop'. He felt pain immediately after the injury. Patient now has pain located in the medial aspect of the knee. He rates his pain as a 5 out of 10 while sitting and a 7 out of 10 with movement. … History of arthroscopic surgery of the left knee.

(Jt. Ex. 5, p. 1) The knee was examined and x-rays taken. He was diagnosed with a ligament injury or meniscal tear. He was given Tylenol, placed in a brace, and instructed to ice it until pain and swelling improved. (Jt. Ex. 5, p. 3) He followed up the following day at UnityPoint Sports Medicine. The physician suspected a meniscal injury and referred him for physical therapy and an MRI. The MRI was performed in May, 2022 and showed a grade 1 MCL sprain. (Jt. Ex. 7, p. 2) Mr. Poe testified that he also had some physical therapy.

As stated above, while Capital Express formally denied the injury in the hearing report, there is absolutely no evidence or facts for this proposition in this record. The fact that a work injury occurred on April 4, 2022, is not actually contested with any actual evidence whatsoever. Moreover, there is no evidence that Mr. Poe was having any symptoms of any sort until the work injury occurred. Based upon the record before the agency, it is conclusively proven that Mr. Poe injured his left knee on April 4, 2022. He reported it immediately and the employer directed him to medical treatment the same day.

As set forth above, Mr. Poe had a prior surgery in May 2016 on his left knee from a high school football injury. (Jt. Ex. 1, p. 1) Mr. Poe had reported this immediately to the authorized treating physician. (Jt. Ex. 5, p. 1) The record reflects the employer was aware of the prior treatment. (Def. Ex. A, p. 15)

The employer, thereafter, continued to direct and authorize his treatment. It was, however, delayed. Mr. Poe went off work immediately due to his medical restrictions and was in an unpaid status. He testified he asked for light-duty work, treatment and benefit payments for his time off.

A number of internal communications between the employer and insurance carrier (or it's representative) are in evidence. On April 20, 2022, Nick Babberl, the operations manager, inquired to the human resources manager, Kim Gracey, asking whether Mr. Poe could perform office work on light-duty for the employer. (Def. Ex. A, p. 22) Ms. Gracey responded that they would need to know his exact restrictions. Mr. Babberl wrote back the following:

> Unfortunately, WC is not getting him through his recovery very quickly. This is the 3rd week he has been out and they still haven't scheduled an MRI for him. By this time anything that was badly damaged could be healing incorrectly or making his recovery and therapy take longer than it normally would.

(Def. Ex. A, p. 21)

Ms. Gracey took appropriate action and immediately emailed Sandra Kang of Johnston and Associates, who was apparently processing the claim on behalf of the insurance carrier. "Do you have an update on Marcus Poe? He says his MRI has not been approved and it's going on 3 weeks." (Def. Ex. A, p. 18) Ms. Kang responded that she approved the MRI for his left knee. (Def. Ex. A, p. 17) Ms. Gracey then inquired as to whether Mr. Poe would be paid temporary disability for his time off. (Def. Ex. A, p. 17) Ms. Kang responded this was still "pending investigation" without further details. (Def. Ex. A, p. 17) There is no contemporaneous documentation about what type of investigation was happening. Ms. Gracey followed up a week later, asking if someone could give Mr. Poe a call to let him know what was going on with his claim. (Def. Ex. A, p. 19)

On May 3, 2022, a person named Kevin Casey with Capital Express emailed Ms. Gracey and Mr. Babberl the following:

> It's been almost a month (April 4th) with Marcus knee injury. I'm being told Marcus has still not had an MRI or current diagnosis of his knee. Nick said Marcus told him he "has it scheduled".
>
> Soon as he released back to work, or sooner, we need to find a replacement.

(Def. Ex. A, pp. 20-21) Mr. Babberl responded:

> Just heard from Marcus he had his MRI and has a condition called Patella Tendonopathy. "The plan is to meet with a specialist at DMOS to see discuss treatment options. They're supposed to be calling (Marcus) to get

> that set up by next week."
>
> This is the latest I have for him, also Kim, he is wondering about his WC pay again as he hasn't receive anything yet and he said he is running out of money. I told him I would ask you to see if there is anything we can do to speed up WC from our end.

(Def. Ex. A, p. 20) On May 4, 2022, Ms. Kang wrote the following to Ms. Gracey:

> We finally got all medical records prior and post injury. So now we are setting Mr. Poe up with an IME which should be this week or next. We also explained to him every week the status of the claim and that no decision has been made on the compensability as the claim was still under investigation.

(Def. Ex. A, p. 23)

In this record, the only evidence of any investigation is some references to securing his medical records and setting up an appointment with a specialist or an IME. It was apparently around this time that Mr. Poe sought an attorney. Mr. Poe filed his petition in this case on May 10, 2022. His attorney wrote to defense counsel on May 19, 2022, the day she appeared on the case, requesting payment for his time off work. (Cl. Ex. 1, p. 1) On May 23, 2022, defense counsel responded, stating that "the investigation of the claim is ongoing." (Cl. Ex. 2, p. 1) No other details were provided. On May 24, 2022, claimant's counsel demanded an answer by the end of the day and filed an application for alternate medical care, stating that authorization for medical care had been denied. (Cl. Ex. 3, pp. 1-4) Prior to the alternate care hearing the defendants refused to accept liability stating the following:

> By way of further answer and response, Defendants state that liability of the employer is currently an issue (Iowa Administrative Rule 4.48(7)), as this claim remains under investigation. Independent medical evaluation is pending with Dr. Vinyard on 06/06/2022 to assess medical causation and whether Claimant's claimed injury is causally related to his employment with Defendant Employer. Defendants reserve the right to admit or deny injury in the future, or admit or deny causal connection of Claimant's alleged neck injury at such time as the additional information is provided for review. Defendants affirmatively state this lack of denial or admission shall not constitute an admission of liability, litigation of the issue of liability, issue preclusion, res judicata, nor shall Defendants' lack of admission or denial constitute the law of the case in any contested case action filed in the future. See Brewer-Strong v. HNI Corp., 913 N.W.2d 235 (2018).

(Cl. Ex. 10, p. 1) On June 3, 2022, I dismissed the application for alternate care since the defendants had refused to accept liability.

Claimant's counsel continued to press defense counsel on June 6, 2022, requesting time off benefits again. Defense counsel wrote her most detailed response stating:

> Given Mr. Poe's preexisting medical issues, my client has been in the process of obtaining prior medical records to aid in the evaluation of causation. As you stated, they have paid for care while continuing to investigate the claim. We had him initially scheduled for the IME with Dr. Vinyard today, but he called and rescheduled it for 6/8. Pending the doctor's opinion on causation, my client will issue payment of indemnity benefits plus interest for any accrued benefits owed. However, if your client refuses to attend the IME, my client will not be able to make a causation determination, and as you are aware, Mr. Poe's refusal to submit to the examination will result in forfeiture of his rights to any compensation for the period of refusal pursuant to Iowa Code section 85.39.

(Cl. Ex. 5, p. 1) At this point, claimant, through his attorney, chose to play a game of chicken with defendants. "We need some direction here. Your client is not accepting this claim so we deserve and need to know why? Cancel all medical appointments you have for Marcus until you let me know what is happening here." (Cl. Ex. 5, p. 2) Defendants accepted the game of chicken approximately 3 minutes later. "Once he is evaluated, my client will promptly make a determination on claim compensability." (Cl. Ex. 5, p. 2)

It is noteworthy here that the defendants apparently made a conscious choice to cease all treatment for Mr. Poe. (*Compare* Def. Ex. A, pp. 20-21 *with* Cl. Ex. 5, p. 1) The defendants had already actively directed medical treatment and internal communications indicated they were going to send him to a specialist for treatment options. (Def. Ex. A, p. 20) They could have simply referred him to a specialist at DMOS for treatment and requested the medical causation opinion they sought. Instead, they chose to continue to pay no benefits and send Mr. Poe for an IME at Iowa Ortho. No explanation for this is provided in the record. The defendants also chose not to file a motion to compel Mr. Poe to attend the IME after he refused. Again, there is no explanation for this decision in the record.

The only other treatment Mr. Poe had for his April 2022, work injury, after his May 2022 MRI, was some physical therapy that he arranged on his own. Mr. Poe testified he started that treatment in July 2022, and it ran through sometime in September 2022. (Tr., pp. 24-25) He testified this treatment helped, however, his knee never recovered fully. Mr. Poe remained off work from Capital Express from the date of his injury through August 21, 2022. He was officially terminated by Capital Express on August 19, 2022. No reason was provided. (Cl. Ex. 6, p. 1) He secured employment performing custodial work with a school district on August 22, 2022. He testified he earns $20.00 per hour and the work is lighter.

It appears that once Mr. Poe refused to attend the defense IME on June 8, 2022,

the defendants stopped investigating the claim. At least there is no evidence in this record that the defendants took any further action to continue its investigation. There is no evidence that there was further communication between the parties after this.

In preparation for hearing, claimant's counsel directed Mr. Poe to an evaluation under Iowa Code section 85.39 with Sunil Bansal, M.D. Dr. Bansal examined Mr. Poe on April 26, 2023. (Jt. Ex. 8, p. 1) He reviewed and summarized all medical records, including the records related to his 2016 football injury, took history and thoroughly examined Mr. Poe's left knee and right wrist and hand. (Jt. Ex. 8, pp. 1-18) He described his current status as follows:

> Presently, Mr. Poe experiences weakness and stiffness in his left knee. He finds it challenging to kneel and squat, and prolonged periods of sitting, especially in confined spaces, tend to exacerbate his discomfort. Notably, he has observed no swelling in his knee, and ascending stairs doesn't present a significant issue; he resides in a townhouse requiring him to negotiate stairs frequently.

(Jt. Ex. 8, p. 16) Dr. Bansal diagnosed patellar tendinopathy (MCL) sprain and aggravation of chondromalacia. (Jt. Ex. 8, p. 18) He related this to the work injury on April 4, 2022. (Jt. Ex. 8, p. 19) This is the only expert medical opinion in the record and it is believable and otherwise credible. Dr. Bansal's expert medical opinions are entirely consistent with the undisputed lay evidence in the record. He assigned a 6 percent rating for the left leg pursuant to the AMA Guides, Fifth Edition. (Jt. Ex. 8, p. 19) He further evaluated Mr. Poe's 2016 wrist/hand condition and assigned a 2 percent upper extremity rating for this. (Jt. Ex. 8, p. 19) He recommended permanent restrictions and suggested some potential treatment. (Jt. Ex. 8, p. 20)

CONCLUSIONS OF LAW

There are numerous factual and legal questions presented for determination.

The first issue is whether Mr. Poe sustained an injury which arose out of and in the course of his employment on April 4, 2022.

The claimant has the burden of proving by a preponderance of the evidence that the alleged injury actually occurred and that it both arose out of and in the course of the employment. Quaker Oats Co. v. Ciha, 552 N.W.2d 143 (Iowa 1996); Miedema v. Dial Corp., 551 N.W.2d 309 (Iowa 1996). The words "arising out of" refer to the cause or source of the injury. The words "in the course of" refer to the time, place, and circumstances of the injury. 2800 Corp. v. Fernandez, 528 N.W.2d 124 (Iowa 1995). An injury arises out of the employment when a causal relationship exists between the injury and the employment. Miedema, 551 N.W.2d 309. The injury must be a rational consequence of a hazard connected with the employment and not merely incidental to the employment. Koehler Elec. v. Wills, 608 N.W.2d 1 (Iowa 2000); Miedema, 551 N.W.2d 309. An injury occurs "in the course of" employment when it happens within a period of employment at a place where the employee reasonably may be when

performing employment duties and while the employee is fulfilling those duties or doing an activity incidental to them. Ciha, 552 N.W.2d 143.

A personal injury contemplated by the workers' compensation law means an injury, the impairment of health or a disease resulting from an injury which comes about, not through the natural building up and tearing down of the human body, but because of trauma. The injury must be something that acts extraneously to the natural processes of nature and thereby impairs the health, interrupts or otherwise destroys or damages a part or all of the body. Although many injuries have a traumatic onset, there is no requirement for a special incident or an unusual occurrence. Injuries which result from cumulative trauma are compensable. Increased disability from a prior injury, even if brought about by further work, does not constitute a new injury, however. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); Ellingson v. Fleetguard, Inc., 599 N.W.2d 440 (Iowa 1999); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995); McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985).

All of the evidence in the record confirms that Mr. Poe sustained an injury which arose out of and in the course of his employment on April 4, 2022. There is not a scintilla of evidence in this file that he did not. He testified under oath that he sustained the injury. The injury itself is well documented and includes an eyewitness account. In their brief defendants did not present any type of argument that claimant failed to sustain his burden on this issue.[1] I find that Mr. Poe did, in fact, sustain an injury which arose out of and in the course of his employment on April 4, 2022, while attempting to step into his work vehicle.

The next issue is whether the claimant's left knee condition is causally related to this work injury.

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.

[1] See Defendants' Brief. Whether claimant sustained an injury which arose out of and in the course of his employment was not even listed as an issue.

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).

The only expert to offer an opinion on medical causation in this case is Dr. Bansal. I find his opinion is logical, reasonable and entirely consistent with the underlying record. I find that the claimant's ongoing knee condition since April 4, 2022, is causally connected to his work injury. Moreover, all of the non-medical evidence in the record bolsters and supports this medical causation opinion. The evidence is that Mr. Poe had knee surgery in 2016. Since the time of his recovery, he has had fairly normal function of his knee. He was not having any significant symptoms in his knee while working for the employer until the work injury occurred. Since the time of the work injury, he has had significant symptoms which caused him to be unable to bear weight for a period of time while he was healing. All of this information was available to the defendants at the time they were processing and investigating the claim between the date of injury through June 8, 2022. In other words, there were no known facts, even at that time, which provided a legitimate or valid basis for the denial of the claim.

The defendants argue that the only reason there is no other evidence in the record regarding medical causation is that the claimant refused to attend the IME. This, however, is not true. The defendants directed Mr. Poe's medical treatment between April 4, 2022, through May 2022. The defendants directed treatment with at least two different physicians during this period and considered sending him to a specialist at DMOS. Instead of just doing this, the defendants chose a riskier option to defend the claim. Defendants chose to not accept the claim (even though it was directing treatment) and ask him to attend an IME (without filing a motion to compel). The defendants then stopped investigating the claim. Therefore, the only reason the defendants were unable to secure an opinion regarding medical causation is because they did not ask their chosen physicians to provide the same.

The next question is whether the claimant is entitled to temporary disability benefits for his time off work following the injury.

> Except as provided in subsection 2 of this section, the employer shall pay to an employee for injury producing temporary total disability weekly compensation benefits, as provided in section 85.32, until the employee has returned to work or 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 85.33(1) (2021). Benefits must commence "beginning on the eleventh day after the injury, and each week thereafter during the period for which compensation is payable, …" Iowa Code section 85.30 (2021).

Mr. Poe reported his work injury immediately and was quickly directed to attend

medical treatment the same day. Benefits should have begun on the eleventh day after his injury, April 15, 2022. In this record, I find that it was entirely unreasonable for the defendants to fail to commence benefits on April 15, 2022. Mr. Poe was initially unable to do any weight bearing on his leg. (Jt. Ex. 5, p. 5) He was not allowed to return to work, despite requesting the same. After his MRI in May 2022, the employer stopped providing treatment. He was finally terminated on or about August 19, 2022. He secured alternate employment on August 22, 2022, earning more money for lighter work.

The employer's entire defense to claimant's healing period claim is that he refused to attend an IME appointment, scheduled by the defendants for June 8, 2022. Iowa Code section 85.39(1) (2021) states:

> 85.39 Examination of injured employees.
> 1. After an injury, the employee, if requested by the employer, shall submit for examination at some reasonable time and place and as often as reasonably requested, to a physician or physicians authorized to practice under the laws of this state or another state, without cost to the employee; but if the employee requests, the employee, at the employee's own cost, is entitled to have a physician or physicians of the employee's own selection present to participate in the examination. If an employee is required to leave work for which the employee is being paid wages to attend the requested examination, the employee shall be compensated at the employee's regular rate for the time the employee is required to leave work, and the employee shall be furnished transportation to and from the place of examination, or the employer may elect to pay the employee the reasonable cost of the transportation. The refusal of the employee to submit to the examination shall forfeit the employee's right to any compensation for the period of refusal. Compensation shall not be payable for the period of refusal.

The question, therefore, is whether the defendants can use this code section to claim a forfeiture of benefits under the circumstances presented herein. This appears to be a case of first impression, meaning I am unaware of any agency or judicial determination specifically interpreting this provision of the statute as amended in 2017.

As an initial matter, the forfeiture, even if this defense were allowed, would only apply to benefits after June 8, 2022, during "the period of refusal." In other words, in this record, there is absolutely no question that the defendants are responsible for all temporary benefits from the date of injury through the date of the refusal, which I find to be June 8, 2022.

The question presented therefore is whether healing period benefits are forfeited from June 8, 2022, through August 21, 2022. This requires me to interpret the 2017 amendments to Iowa Code section 85.39(1). As mentioned, this statute was amended in 2017, adding a forfeiture remedy. The remainder of section 85.39(1) is unchanged.

There are a number of guidelines for statutory construction which are important here. On the one hand, the statute is to be interpreted liberally for the benefit of the injured worker and their family.

Workers' compensation statutes are to be liberally construed in favor of the worker and the worker's dependents. Caterpillar Tractor Co. v. Shook, 313 N.W.2d 503 (Iowa 1981); McSpadden v. Big Ben Coal Co., 288 N.W.2d 181, 192 (Iowa 1980). The statute's beneficent purpose is not to be defeated by reading something into the statute that is not there. Cedar Rapids Community School v. Cady, 278 N.W.2d 298 (Iowa 1979).

Speaking on behalf of the Iowa Supreme Court, Justice Lavorato stated the following in regard to interpreting the Iowa Workers' Compensation law:

> Our review of this unusual case is controlled by the principles set forth in Iowa Code sections 4.1(2), 4.2, 4.4, 4.6, and 17A.19(8), which we have applied to the workers' compensation act. Foremost is that which acknowledges the act is to be liberally construed in the employee's favor. Cf. Doerfer Division of CCA v. Nicol, 407 N.W.2d 428, 434 (Iowa 1984). *Any doubt in its construction is thus resolved in favor of the employee*. Usgaard v. Silver Crest Golf Club, 256 Iowa 453, 459, 127 N.W.2d 636, 639 (1964).

Teel v. McCord, 395 N.W.2d 405, 406-07 (Iowa 1986) (e*mphasis added*).

On the other hand, the statute is to be interpreted in a simple, untechnical fashion.

The fundamental reason for the enactment of [the workers' compensation act] is to avoid litigation, lessen the expense incident thereto, minimize appeals, and afford an efficient and speedy tribunal to determine and award compensation under the terms of this act.

> 'It was the purpose of the legislature to create a tribunal to do rough justice — speedy, summary, informal, untechnical. With this scheme of the legislature we must not interfere; for, if we trench in the slightest degree upon the prerogatives of the commission, one encroachment will breed another, until finally simplicity will give way to complexity, and informality to technicality.'

Zomer v. West River Farms, Inc., 666 N.W.2d 130, 133 (Iowa 2003) (*quoting* Flint v. City of Eldon, 191 Iowa 845, 847, 183 N.W. 344, 345 (1921)).

More generally, Iowa statutes are to be interpreted as a whole, not in part. Doe v. State, 943 N.W.2d 608, 610 (Iowa 2020). When interpreting the text of a provision in the Iowa Code, courts and the agency must take into consideration the language's relationship to other provisions of the same statute and other provisions of related

statutes. Id. In this case, I conclude that section 85.39(1) must be interpreted in conjunction with section 86.13(4) and section 85.30, which requires the timely payment of benefits to an injured worker.

Section 85.39 is an important provision in implementing the legislative purpose as set forth in detail above. "When an injury is sustained by a worker covered by our system of workers' compensation, a statutory process exists that not only directs the treatment and care for the worker, but also the future examination for any disability resulting from the injury following the healing period." Des Moines Area Reg'l Transit Auth. v. Young, 867 N.W.2d 839, 843 (Iowa 2015). The purpose of section 85.39(1) "was to require an employee to appear for 'examination' at the instance of the employer, doubtless for the purpose of enabling the employer to ascertain the extent and character of the injury." Daugherty v. Scandia Coal Co., 206 Iowa 120, 219 N.W. 65, 67 (1928). This includes investigating questions of causation and disability. City of Davenport v. Newcomb, 820 N.W.2d 882, 892-93 (Iowa Ct. App. 2012).

In Newcomb, the claimant alleged that he sustained a work injury. The claimant was provided light-duty work. The employer ultimately denied the claim and did not direct medical treatment. Id. at 884. After the claimant recovered, he obtained an evaluation and report from his treating neurosurgeon. Id. at 885. The employer then sought to obtain (using a motion to compel) an evaluation with its own neurosurgeon to elicit opinions on causation and disability. The agency denied this. Id. at 886. This decision was affirmed in the District Court, holding that 85.39 only applied to accepted claims. Id. at 893. The Court of Appeals ultimately held that this was an abuse of the agency's discretion as it impeded the employer's ability to develop its own evidence related to claimant's alleged disability. Id.

The legal question presented here is significant and it is significantly distinguished from Newcomb: Does an employer's request for an IME under section 85.39(1) have to be reasonable in order to invoke the forfeiture provision? I conclude that it does.

I find the defendants request for an IME in this case was unreasonable and cannot provide a basis for forfeiture. I concluded that only a reasonable request for an IME can provide a basis for the forfeiture provisions set forth in Section 85.39(1). I further conclude that the test to determine the "reasonableness" of the request is the same test as whether the agency would have compelled the claimant to attend the IME in the first place. In this case, I would not have ordered his attendance at the IME (under Section 85.39(1)) if defendants had sought to compel it prior to hearing because it was not reasonable at that time.

In this case, the employer had no facts or evidence at their disposal to refuse to commence payments to Mr. Poe on April 15, 2021. After a two-month delay, the employer finally arranged an IME for the claimant but was holding up payment of any benefits to him. During this time, the claimant was without income. If allowed, this would effectively authorize an employer to circumvent the requirement to timely pay workers' compensation benefits to an injured worker under section 86.13(4) and section

85.30. Stated another way, section 85.39(1) is not, by itself, a reasonable basis to refuse to pay benefits to an injured worker. The employer must have some other facts which justify its' demand for an IME. To allow the defendants to use section 85.39(1) as an offensive procedural tactic would be contrary to the other aforementioned sections of the statute, but also the most basic, self-effectuating tenets of the purpose of the workers' compensation act. In this case, unlike the facts of Newcomb, the employer had numerous other options to conduct a reasonable investigation and secure the evidence it needed to properly investigate and ultimately defend the claim. The employer instead chose to attempt to force Mr. Poe to attend the IME and then argue forfeiture when he declined.

The next issue is permanency. Mr. Poe has sustained permanent functional impairment to his left leg.

Having concluded that the disability is a scheduled member evaluated under Section 85.34(2)(p), the next issue is to assess the degree of disability to the claimant's left leg.

> In all cases of permanent partial disability described in paragraphs "a" through "t", or paragraph "u" when determining functional disability and not loss of earning capacity, the extent of loss or percentage of permanent impairment shall be determined solely by utilizing the guides to the evaluation of permanent impairment, published by the American Medical Association, as adopted by the workers' compensation commissioner by rule pursuant to chapter 17A. Lay testimony or agency expertise shall not be utilized in determining loss or percentage of permanent impairment pursuant to paragraphs "a" through "t", or paragraph "u" when determining functional impairment and not loss of earning capacity.

Iowa Code section 85.34(2)(x) (2019).

Having reviewed the report of Dr. Bansal, which is the sole evidence in the record related to impairment, I find that Mr. Poe has sustained a 6 percent impairment to his left leg. I conclude this entitles him to 13.2 weeks of compensation (220 x .06 = 13.2). Benefits shall commence on April 26, 2023, the date Dr. Bansal was able to rate his permanency. Iowa Code Section 85.34(2) (2021).

The next issue to be addressed is whether the defendants unreasonably denied and delayed benefits to Mr. Poe.

"Because penalty benefits are a creature of statute, our discussion begins with an examination of the statutory parameters for such benefits." Keystone Nursing Care Ctr. v. Craddock, 705 N.W.2d 299, 307 (Iowa 2005). Under Iowa Code section 86.13(4)(a)

> If a denial, a delay in payment, or a termination of benefits occurs without reasonable or probable cause or excuse known to the employer or

> insurance carrier at the time of the denial, delay in payment, or termination of benefits, the workers' compensation commissioner shall award benefits in addition to those benefits payable under this chapter, or chapter 85, 85A, or 85B, up to fifty percent of the amount of benefits that were denied, delayed, or terminated without reasonable or probable cause or excuse.

This provision "codifies, in the workers' compensation insurance context, the common law rule that insurers with good faith disputes over the legal or factual validity of claims can challenge them, if their arguments for doing so present fairly debatable issues." Covia v. Robinson, 507 N.W.2d 411, 412 (Iowa 1993) (citing Dirks v. Farm Bureau Mut. Ins. Co., 465 N.W.2d 857, 861 (Iowa 1991) and Dolan v. Aid Ins. Co., 431 N.W.2d 790, 794 (Iowa 1988)). "The purpose or goal of the statute is both punishment and deterrence." Robbennolt v. Snap-On Tools Corp., 555 N.W.2d 229, 237 (Iowa 1996).

The legislature established in Iowa Code section 86.13(4)(b) a burden-shifting framework for determining whether penalty benefits must be awarded in a workers' compensation case. See 2009 Iowa Acts ch. 179, § 110 (codified at Iowa Code § 86.13(4)(b)); see also Pettengill v. Am. Blue Ribbon Holdings, LLC, 875 N.W.2d 740, 746–47 (Iowa App. 2015) as amended (Feb. 16, 2016) (discussing the burden-shifting required by the two-factor statutory test). The employee bears the burden to establish a prima facie case for penalty benefits. See Iowa Code § 86.13(4)(b). To do so, the employee must demonstrate a denial, delay in payment, or termination of workers' compensation benefits. Iowa Code § 86.13(4)(b)(1). If the employee fails to prove a denial, delay, or termination, there can be no award of penalty benefits and the analysis stops. See id. at § 86.13(4)(b); see also Pettengill, 875 N.W.2d at 747. However, if the employee makes the requisite showing, the burden of proof shifts to the employer. See id. at § 86.13(4)(b); see also Pettengill, 875 N.W.2d at 747.

To avoid an award of penalty benefits, the employer must "prove a reasonable or probable cause or excuse for the denial, delay in payment, or termination of benefits." Iowa Code§ 86.13(4)(b)(2). An excuse must meet all of the following criteria to be "a reasonable or probable cause or excuse" under the statute:

> (1) The excuse was preceded by a reasonable investigation and evaluation by the employer or insurance carrier into whether benefits were owed to the employee.
>
> (2) The results of the reasonable investigation and evaluation were the actual basis upon which the employer or insurance carrier contemporaneously relied to deny, delay payment of, or terminate benefits.
>
> (3) The employer or insurance carrier contemporaneously conveyed the basis for the denial, delay in payment, or termination of benefits to the employee at the time of the denial, delay, or termination of benefits.

Id. § 86.13(4)(c).

> This paragraph creates a mandatory timeline for the employer to follow in showing it had a "reasonable or probable cause or excuse" for the termination of benefits. Iowa Code § 86.13(4)(c)(1)-(3). First, the employer's excuse for the termination must have been *preceded* by an investigation. *Id.* § 86.13(4)(c)(1). Second, the results of the investigation were "*the actual basis ... contemporaneously*" relied on by the employer in terminating the benefits. Third, the employer "*contemporaneously* conveyed the basis for the ... termination of benefits to the employee *at the time of the ... termination.*" *Id.* § 86.13(4)(c)(3)

Pettengill, 875 N.W.2d at 747 (emphasis in original). "An employer cannot unilaterally decide to terminate an employee's benefits without adhering to Iowa Code section 86.13; to allow otherwise would contradict the language of that section." Id.

"A 'reasonable basis' for denial of the claim exists if the claim is 'fairly debatable.'" Keystone Nursing Care Ctr., 705 N.W.2d at 307 (quoting Christensen v. Snap-On Tools Corp., 554 N.W.2d 254, 260 (Iowa 1996)). A claim may be fairly debatable because of a good faith legal or factual dispute. See Covia, 507 N.W.2d at 416 (finding a jurisdictional issue fairly debatable because there were "viable arguments in favor of either party"). "[T]he reasonableness of the employer's denial or termination of benefits does not turn on whether the employer was right. The issue is whether there was a reasonable basis for the employer's position that no benefits were owing." Keystone Nursing Care Ctr., 705 N.W.2d at 307–08.

For the reasons set forth above, I find that the defendants' handling of this claim was unreasonable, including the denial. I find the evidence is overwhelming. Mr. Poe sustained a clear-cut injury, eyewitnessed by a co-worker. He was working normally without limitations one minute, and then after the injury, he could no longer bear any weight on his left leg. This injury resulted in Mr. Poe being off work from the date of his injury up through his termination (which was undoubtedly a natural result of the carrier's poor claims handling) and his subsequent reemployment through a new employer on August 22, 2022. These are the undisputed facts of this case in this record of evidence.

At hearing, the only excuse articulated by the defendants was that it needed time to investigate the claim. (Def. Brief, p. 7) This was somewhat contemporaneously conveyed to Mr. Poe's attorney on June 6, 2022 when defense counsel wrote: "Given Mr. Poe's preexisting medical issues, my client has been in the process of obtaining prior medical records to aid in the evaluation of causation." (Cl. Ex. 5, p. 1) None of the facts obtained in the investigation, though, justified refusal of payment of benefits to the claimant at that time. In fact, as set forth above, these facts did not even warrant further medical opinion. To the extent that the defendants wished to have it reviewed in any event, which is their right, they had already selected two physicians who could have done this. Or if the defendants truly thought a specialist was needed, they could have timely referred him for such an evaluation for treatment purposes.

While a claimant is not entitled to compensation for the results of a preexisting injury or disease, its mere existence at the time of a subsequent injury is not a defense.

Rose v. John Deere Ottumwa Works, 247 Iowa 900, 76 N.W.2d 756 (1956). If the claimant had a preexisting condition or disability that is materially aggravated, accelerated, worsened or lighted up so that it results in disability, claimant is entitled to recover. Nicks v. Davenport Produce Co., 254 Iowa 130, 115 N.W.2d 812 (1962); Yeager v. Firestone Tire & Rubber Co., 253 Iowa 369, 112 N.W.2d 299 (1961).

Simply stated, the defendants had a legal duty to process this claim timely and begin paying benefits to the claimant. The employer itself was obviously uncomfortable and discouraged by the insurance carrier's handling of the claim as evidenced in internal emails. (See Def. Ex. A) The employer was frustrated by the lack of timely treatment which would have enabled Mr. Poe to get back to work. The employer complained on Mr. Poe's behalf that he was "running out of money."

The insurance carrier, who was nevertheless acting on behalf of the employer, responded essentially by saying "prove it." Even though all of the facts obtained in the investigation pointed toward a compensable injury, they simply chose to deny making any indemnity payments pending the conclusion of its investigation which they decided could only be concluded with an IME. I find the defendants made a conscious decision that the only investigation, at least that is evident in this record, it was going to perform was to send Mr. Poe for an IME to determine medical causation. Of course, as set forth above, this could have been done numerous different ways. Instead of taking any reasonable actions to investigate the claim, the employer decided to not pay any benefits, cut off treatment and attempted to force him to go to an IME. This is unreasonable.

Moreover, once the claimant refused to attend the IME, the employer stopped investigating the claim altogether.

The defendants shall pay a full 50 percent penalty on all healing period benefits from the date of injury through August 21, 2022.

The final issue is IME expenses and other costs.

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

Defendants are responsible only for reasonable fees associated with claimant's independent medical examination. Claimant has the burden of proving the reasonableness of the expenses incurred for the examination. See Schintgen v. Economy Fire & Casualty Co., File No. 855298 (App. April 26, 1991).

I find that the defendants are responsible for 80 percent of the IME costs of Dr. Bansal. Defendants are responsible for IME costs in the amount of $2,784.80.

The next issue is the applicability of the Second Injury Fund Act and whether the claimant has proven a first qualifying injury and disability such that Second Injury Fund liability is triggered.

The first unnumbered paragraph of section 85.64 states:

> If an employee who has previously lost, or lost the use of, one hand, one arm, one foot, one leg, or one eye, becomes permanently disabled by a compensable injury which has resulted in the loss of or loss of use of another such member or organ, the employer shall be liable only for the degree of disability which would have resulted from the latter injury if there had been no preexisting disability. In addition to such compensation, and after the expiration of the full period provided by law for the payments thereof by the employer, the employee shall be paid out of the "Second Injury Fund" created by this division the remainder of such compensation as would be payable for the degree of permanent disability involved after first deducting from such remainder the compensable value of the previously lost member or organ.

Iowa Code section 85.64 governs Second Injury Fund liability. Before liability of the Fund is triggered, three requirements must be met. First, the employee must have lost or lost the use of a hand, arm, foot, leg, or eye. Second, the employee must sustain a loss or loss of use of another specified member or organ through a compensable injury. Third, permanent disability must exist as to both the initial injury and the second injury.

The Second Injury Fund Act exists to encourage the hiring of workers with disabilities by making a current employer responsible only for the amount of disability related to an injury occurring while that employer employed the individual as if the individual had had no preexisting disability. See Anderson v. Second Injury Fund, 262 N.W.2d 789 (Iowa 1978).

The Fund is responsible only for the industrial disability present after the second injury that exceeds the disability attributable to the first and second injuries. Section 85.64. Second Injury Fund of Iowa v. Braden, 459 N.W.2d 467 (Iowa 1990); Second Injury Fund v. Neelans, 436 N.W.2d 355 (Iowa 1989); Second Injury Fund v. Mich Coal Co., 274 N.W.2d 300 (Iowa 1979).

The unrebutted evidence in this case demonstrates that Mr. Poe sustained a first qualifying loss to his right arm from an auto accident in 2016, which resulted in a 2 percent upper extremity impairment, and a second qualifying loss from this work injury, which resulted in a 6 percent left leg impairment. I find these qualifying losses invoke the application of the Second Injury Fund.

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 Ry. Co. of Iowa, 219 Iowa 587, 258 N.W. 899 (1935) as follows: "It is therefore plain that the

Legislature intended the term 'disability' to mean 'industrial disability' or loss of earning capacity and not a mere 'functional disability' to be computed in 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 Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963); Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961).

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.

Mr. Poe is only 25 years old. He is bright and employable. He has a number of community college credits and is well suited for work in the modern economy. He has a two percent impairment to his right arm which has a negligible impact on his employability. He has a 6 percent impairment from his knee, which also has a negligible impact on his employability, although it undoubtedly has some impact on his ability to perform delivery work, particularly long-term. While Dr. Bansal suggested some permanent restrictions, these appear to be more suggestions rather than formal restrictions. Once he was terminated from Capital Express, he quickly secured higher paying work, which was lighter in nature. He is undoubtedly slightly less employable in the competitive job market as a result of his combined disabilities. Having reviewed all of the evidence relating to industrial disability, I find claimant sustained a 10 percent loss of earning capacity. I conclude this entitles him to 50 weeks of compensation.

The Fund is entitled to a credit of 18.2 weeks of compensation. The Fund's liability commences at the conclusion of the credit (18.2 weeks after the benefit commencement date of April 26, 2023).

ORDER

THEREFORE IT IS ORDERED

All benefits shall be paid at the rate of four hundred sixty-two and 36/100 dollars ($462.36).

Defendant employer and insurance carrier shall pay healing period benefits from April 4, 2022, through August 21, 2022.

Defendant employer and insurance carrier shall pay the claimant thirteen and two-tenths (13.2) weeks of permanent partial disability benefits commencing April 26, 2023.

Defendant employer and insurance carrier shall pay accrued weekly benefits in a lump sum, including interest on unpaid weekly benefits as set forth in Iowa Code section 85.30.

Defendant employer and insurance carrier shall pay a 50 percent penalty on all accrued benefits, excluding interest.

Defendant employer and insurance carrier shall file subsequent reports of injury as required by this agency pursuant to rule 876 IAC 3.1(2).

Costs are taxed to defendant employer and insurance carrier.

The Fund shall pay claimant thirty-one and eight-tenths (31.8) weeks of benefits commencing eighteen and two-tenths (18.2) weeks after the commencement of permanency benefits.

Signed and filed this ___8th___ day of December, 2023.

JOSEPH L. WALSH
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Randall Schueller (via WCES)

Bryan Brooks (via WCES)

Jennifer Beckman (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.