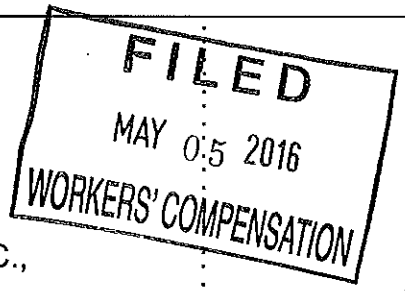
BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER



RODNEY SAVAGE, Claimant, vs. BARNEY'S SERVICES, INC., Employer, and TECHNOLOGY INSURANCE COMPANY, Insurance Carrier, Defendants.	File No. 5049391 ARBITRATION DECISION Head Note Nos.: 1402.30; 1802; 1803; 3003; 2501; 2907; 4000.2

STATEMENT OF THE CASE

Claimant, Rodney Savage, filed petitions in arbitration seeking workers' compensation benefits from Barney's Services, Inc. (Barney's), employer and Technology Insurance Company, insurer, both as defendants. This case was heard in Des Moines, Iowa, on January 12, 2016 with a final submission date of February 8, 2016.

The record in this case consists of claimant's exhibits 1 through 13, defendants exhibits A through Q, and the testimony of claimant.

ISSUES

1. Whether claimant sustained an injury that arose out of and in the course of employment to his left shoulder.

2. The extent of claimant's entitlement to temporary benefits.

3. The extent of claimant's entitlement to permanent partial disability benefits.

4. Rate.

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

6. Whether defendants are liable for a penalty under Iowa Code section 86.13.

7. Costs.

8. Whether apportionment applies under Iowa Code section 85.34(7).

FINDINGS OF FACT

Claimant was 55 years old at the time of the hearing. He graduated from high school. Claimant has worked at an auto parts store and a dairy farm. Claimant has worked as a mechanic and driven a wrecker truck. Claimant worked as a maintenance person in a retirement community. Claimant has also worked at a convenience store. (Exhibit J, page 118)

Claimant testified he first worked at Barney's for four years, before he worked as a maintenance person at the retirement community. He said most of his work life has been as a mechanic or in maintenance work.

Claimant's prior medical history is relevant. Claimant testified he had a work related injury to his left shoulder while working at the retirement community. Claimant underwent a left shoulder surgery with Delwin Quenzer, M.D., for that injury. Claimant said the surgery resolved his left shoulder problem. He said he believed he was given permanent restrictions regarding that injury, but he had no recollection what those restrictions were. Claimant said he returned to work full duty at the retirement center.

Records indicate claimant was given a 6 percent permanent impairment to the left shoulder. He was given work restrictions allowing him to lift 20 pounds occasionally. He was also restricted to lifting 20 pounds occasionally to the shoulder level. (Ex. N, pp. 151, 159; Ex. 2, pp. 1-3)

Claimant worked at Barney's a second period of time from approximately 2009 to 2013. Claimant worked as a mechanic. He testified he worked over 40 hours a week and earned $13.00 per hour. (Ex. J, p. 118)

On September 10, 2013, claimant was trying to remove a tire from a truck. He did this by hitting the tire with the sledge hammer. He said that at one point during the hammering, his right arm and hand became numb.

On September 11, 2013, claimant was evaluated by Steven Hill, M.D., for right shoulder pain occurring while slinging a sledge hammer. An MRI taken on September 12, 2013 of the cervical spine showed a disc protrusion at the C5-6 levels. Claimant was recommended to see a neurosurgeon. (Ex. 1, pp. 1-3)

On October 23, 2013, claimant was seen by David Hatfield, M.D., an orthopaedic surgeon. Dr. Hatfield recommended an evaluation of the neck and right shoulder. Claimant was treated conservatively and given a 10-pound lifting restriction. (Ex. 2, pp. 10-13)

An MRI of the right shoulder was done on November 7, 2013. It showed a full thickness tear of the subscapular with a medial dislocation of the bicep tendon. (Ex. 2, p. 14)

On November 26, 2013, claimant was seen by Jason Sullivan, M.D., an orthopaedic surgeon. Claimant was assessed as having a subscapularis and a supraspinatus tear with a dislocation of the bicep tendon of the right shoulder. Right shoulder surgery was recommended as soon as claimant had cervical surgery with Dr. Hatfield. (Ex. 2, pp. 16-18)

On January 9, 2014, claimant underwent a C5-6 fusion performed by Dr. Hatfield. (Ex. 2, pp. 20-21) On February 10, 2014, claimant underwent right shoulder surgery with Dr. Sullivan consisting of a rotator cuff repair, subscapular repair, bicep tendonesis, and a distal clavicle resection. (Ex. 2, pp. 32-33)

Claimant testified at hearing that during the period his right shoulder was being repaired, his left shoulder began to hurt. He said he discussed his left shoulder problems with the nurse case manager. He said he was told, by the nurse case manager, that once the right shoulder was taken care of, she would have the left shoulder also taken care of. Claimant said when he later tried to discuss treatment for his left shoulder, the nurse case manager ignored his requests.

Claimant said surgery on his right shoulder helped his right shoulder.

Claimant returned to Dr. Sullivan on February 18, 2014. He was kept off of work. (Ex. 2, pp. 36-38) Claimant was seen by Dr. Sullivan on March 27, 2014. Physical therapy was recommended. Claimant was continued off work. (Ex. 2, pp. 41-43)

Claimant returned to Dr. Sullivan on May 8, 2014. He was returned to work with restrictions of one-handed work only, no lifting with the right. (Ex. 2, pp. 44-46)

In a May 14, 2014 note, Dr. Hatfield found claimant at maximum medical improvement (MMI) regarding his neck. (Ex. 2, p. 47)

In a June 26, 2014 note, Christine Doorenbos, R.N., the nurse case manager for claimant, indicated claimant told her he had left shoulder pain. Claimant said the pain in the left shoulder began with the right shoulder pain, but he did not report it at that time. Nurse Doorenbos told claimant to report his left shoulder injury to the employer. (Ex. 4, p. 7)

On August 7, 2014, claimant was evaluated by Dr. Sullivan. Claimant was returned to work with no use of the right arm above chest level and light duty work only. (Ex. 2, pp. 51-53)

On August 14, 2014, claimant's job was eliminated at Barney's. Claimant testified he had intended to return to work at Barney's. (Ex. 4, p.10)

Claimant returned in follow up with Dr. Sullivan on October 14, 2014. Claimant was returned to work without restrictions. (Ex. 2, pp. 54-56)

In an October 29, 2014 noted, Dr. Sullivan found claimant had a 10 percent permanent impairment to the body as a whole under the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition. (Ex. 2, p. 57)

On January 5, 2015, claimant was evaluated by Dr. Hill. Claimant complained of left shoulder pain, and other health issues. Claimant's left shoulder pain was treated with medication. (Ex. 1, pp. 15-19)

On March 12, 2015, claimant underwent a functional capacity evaluation (FCE) performed by Charles Goodhue, MS, MPT. Claimant was found to have given maximal effort. Mr. Goodhue believed claimant fell into the lower end of the light work category. Mr. Goodhue limited claimant to occasionally lifting 35 pounds to the waist. He also limited claimant to occasionally lifting 10 pounds overhead and carrying 35 pounds occasionally. (Ex. 2, pp. 60-66)

On March 24, 2015, claimant underwent an MRI of the left shoulder. It showed a full thickness tear of the distal supraspinatus on the left. (Ex. 1, pp. 23-24)

In a March 30, 2015 letter, written by claimant's counsel, Dr. Sullivan indicated restrictions in the FCE were appropriate for claimant. (Ex. 2, p. 58)

In an April 22, 2015 letter, Dr. Hatfield found claimant had a 12 percent permanent impairment to the body as whole for his cervical condition. He also noted that while claimant indicated right upper extremity symptoms in his intake form, claimant did not indicate any problems with his left upper extremity. (Ex. 2, p. 78)

In a May 19, 2015 letter, written by claimant's counsel, Dr. Sullivan indicated claimant's left shoulder condition was caused or significantly aggravated by his work at Barney's. (Ex. 2, pp. 73-74)

In a July 6, 2015 letter, written by defense counsel, Dr. Hill indicated he examined claimant approximately nine times between September 2013 through January 2015. Dr. Hill indicated that not once during that period of time did claimant complain of left shoulder problems. He indicated the first time claimant indicated left shoulder problems was in January 2015. Dr. Hill did not relate claimant's left shoulder complaints to his work at Barney's. (Ex. A, pp. 35-37)

On July 15, 2015, claimant underwent a left shoulder surgery consisting of left arthroscopic rotator cuff repair, a bicep tenotomy. Surgery was performed by Dr. Sullivan. (Ex. 2, pp. 75-77)

In an August 17, 2015 letter, written by defense counsel, Dr. Sullivan indicated claimant did not complain, to him, of left shoulder problems until June 26, 2014, or approximately nine months after the date of injury. Dr. Sullivan could not causally relate claimant's left shoulder condition to the September 10, 2013 work injury. He was not able to say if claimant's work at Barney's caused or materially aggravated claimant's left shoulder condition. (Ex. E, pp. 75-77)

In a September 8, 2015 report, Robin Sassman, M.D., gave her opinions of claimant's condition following an independent medical evaluation (IME). Claimant had occasional popping and numbness in the right shoulder. Claimant also had a loss of range of motion. Claimant had left shoulder pain. Dr. Sassman found claimant's work injury in September 2013 was causally related to his neck, right, and left shoulder symptoms. Dr. Sassman found causation based on claimant's reporting of pain in both shoulders following the date of injury. (Ex. 5, pp. 1-8)

Dr. Sassman found claimant had a 25 percent permanent impairment to the neck, and an 11 percent permanent impairment to the right shoulder. This resulted in a combined value of 33 percent permanent impairment to the body as a whole under the Guides. Claimant's left shoulder was not at MMI and could not be assessed. She limited claimant to not lifting more than 20 pounds rarely from floor to waist. (Ex. 5, pp. 8-9)

In an October 28, 2015 report, Ronald Schmidt, M.S., CRC, gave his opinions regarding claimant's job opportunities. Mr. Schmidt believed claimant had a 33 percent loss of access to the labor market and a 10 percent loss of earning capacity. (Ex. H, pp. 92-98)

In a November 10, 2015 report, Lewis Vierling, M.S., gave his opinions of claimant's job opportunities. He opined claimant lost access to at least 80 percent of the jobs he was qualified for pre-injury. (Ex. 7, pp. 1-6)

In a November 5, 2015 report, Dr. Sassman gave her opinions of claimant's condition following a second IME. Dr. Sassman found claimant had a 5 percent permanent impairment to the left shoulder. When that impairment was combined to the permanent impairment to the right shoulder and neck, claimant was found to have a combined permanent impairment of 36 percent to the body as a whole. (Ex. 5, pp. 11-12)

In a November 10, 2015 note, written by defendants' counsel, Dr. Sullivan indicated he did not find claimant at maximum medical improvement as of October 15, 2015. (Ex. E, p. 78)

In a December 9, 2015 letter, Mr. Schmidt indicated he reviewed Mr. Vierling's report. Mr. Schmidt found fault with Mr. Vierling's opinions as Mr. Vierling applied the FCE in his assessment. He also found fault with Mr. Vierling's opinions as he did not indicate the methods used to assess claimant's ability to earn. (Ex. H, pp. 99-100)

Claimant testified on direct examination that the only prior job he could return to would be at the convenience store, and then only as a cashier. He testified on cross-examination, he believed he could return to work, in some limited capacity, to his job at the dairy, and the auto-parts store.

Claimant testified he has neck pain if he holds his neck in certain positions. He said his right shoulder will pop and get sore. Claimant said his right shoulder is worse

than his left. He said that due to his neck and shoulder problems, he cannot shovel snow and has to get his son to take care of his lawn. At the time of hearing, claimant was currently using over-the-counter medication for pain.

Claimant testified he looks for jobs on line, but has been unable to find work. He testified he only made one job application for employment. Claimant said he wants to return to work.

Claimant's earnings 18 weeks prior to his injury are as follows:

	Date	Hours
1	8/30/13 - 9/05/13	46.01
2	8/23/13 - 8/29/13	43.47
3	8/16/13 - 8/22/13	47.32
4	8/9/13 - 8/15/13	45.55
5	8/2/13 - 8/8/13	41.0
6	7/26/13 - 8/1/13	46.18
7	7/19/13 - 7/25/13	33.13*
8	7/12/13 - 7/18/13	43.11
9	7/5/13 - 7/11/13	33.28*
10	6/28/13 - 7/4/13	37.46
11	6/21/13 - 6/27/13	36.35
12	6/14/13 - 6/20/13	37.41*
13	6/7/13 - 6/13/13	31.18*
14	5/31/13 - 6/6/13	46.35
15	5/24/13 - 5/30/13	41.56
16	5/17/13 - 5/23/13	33.27*
17	5/10/13 - 5/16/13	46.04
18	5/3/13 - 5/9/13	46.01

(Ex. P, Q; Ex. 9)

CONCLUSIONS OF LAW

The first issue to be determined is if claimant sustained an injury to his left shoulder that arose out of and in the course of employment.

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

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" referred 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 Electric 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.

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).

Claimant contends he sustained a work-related injury to his left shoulder that arose out of and in the course of employment on September 10, 2013.

Claimant reported an injury occurring on November 10, 2013. He was evaluated by Dr. Hill nine times between September 2013 and January 2015. Claimant did not mention a left shoulder problem until January 5, 2015. (Ex. A, pp. 35-37)

The first orthopaedic surgeon seen by claimant was Dr. Hatfield. Claimant did not report a left shoulder injury to Dr. Hatfield on patient in-take forms. Medical records from Dr. Hatfield's office also make no reference to any left shoulder problems. (Ex. 2, pp. 6-7)

Dr. Sullivan performed surgery on both claimant's right and left shoulders. Dr. Sullivan indicates his records show claimant did not complain of left shoulder

problems until June 26, 2014, or approximately nine months after the date of injury in this matter. (Ex. E, p. 70)

Claimant testified he told his nurse case manager he had left shoulder problems that occurred around the time of his right shoulder treatment. Records from the case manager indicate claimant first complained of left shoulder problems on June 26, 2014, or approximately nine months after the date of injury in this matter. (Ex. 4, p. 7)

Three experts gave opinions regarding causation of claimant's left shoulder problems. Dr. Hill is claimant's family doctor and evaluated claimant shortly after the date of injury. Dr. Hill indicated he would not relate claimant's left shoulder condition to the September 2013 injury or work at Barney's. (Ex. A, p. 36)

Claimant treated for an extended period of time with Dr. Sullivan. Dr. Sullivan also performed surgery on both of claimant's shoulders. Dr. Sullivan initially opined claimant's left shoulder problems were causally related to his work. Dr. Sullivan recanted that opinion and indicated he could not say if claimant's left shoulder condition was causally related to the September 10, 2013 work injury. (Ex. E, p. 76)

Dr. Sassman opined claimant's left shoulder injury was causally related, or materially aggravated by his work at Barney's. (Ex. 5, p. 8) There are some problems with Dr. Sassman's causation opinion. Dr. Sassman indicates claimant had left shoulder and neck pain on September 10, 2013. (Ex. 5, p. 8) As noted above, the first mention of a left shoulder condition in the medical records does not appear until June 2014. (Ex. E, p. 70) Dr. Sassman gives no explanation or rationale why claimant had a left shoulder injury caused by the September 10, 2013 incident, when the first report of a left shoulder injury does not appear in the medical records until June 2014. Given this discrepancy, it is found that Dr. Sassman's opinion regarding causation of the left shoulder injury is found not convincing.

Dr. Hill's records indicate no left shoulder complaints until January 2015. Intake forms with Dr. Hatfield, completed by claimant, do not indicate a left shoulder injury. Dr. Sullivan's first indication of a left shoulder injury in his records occur nine months after the date of injury. Dr. Sullivan and Dr. Hill opine that claimant's September 2013 work accident did not cause or materially aggravate claimant's left shoulder. Dr. Sassman's opinions regarding causation are found not convincing. Given this record, claimant has failed to carry his burden of proof he sustained a left shoulder injury that arose out of and in the course of employment on September 10, 2013.

As claimant has failed to carry his burden of proof he sustained a left shoulder injury that arose out of and in the course of employment, all issues related to the left shoulder injury are moot. This includes, but is not limited to, claimant's claim for additional temporary benefits, and claimant's claim for payment of medical bills concerning the left shoulder. This also renders moot the defendants' claim that apportionment, under Iowa Code section 85.34(7) applies in this case.

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

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

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

Industrial disability can be equal to, less than, or greater than functional impairment. Taylor v. Hummel Insurance Agency, Inc., 2-2, Iowa Industrial Comm'r Dec. 736 (1985); Kroll v. Iowa Utilities, 1-4, Iowa Industrial Comm'r Dec. 937 (App. 1985); Birmingham v. Firestone Tire & Rubber Company, II, Iowa Industrial Comm'r Rep., 39, (App. 1981).

Claimant was 55 years old at the time of hearing. He graduated from high school. Most of claimant's work life has been spent in maintenance or as a mechanic.

Dr. Sullivan found claimant had a 10 percent permanent impairment to the body as a whole for the right shoulder. (Ex. 2, p. 57) Dr. Sassman found claimant had an 11 percent permanent impairment to the body as a whole for the right shoulder. As there is little difference between Dr. Sassman and Dr. Sullivan's ratings, I find it unnecessary to make a finding of fact as to which rating is more convincing. It is found claimant has between a 10-11 percent permanent impairment to the body as a whole for the right shoulder injury.

Dr. Hatfield found claimant had a 12 percent permanent impairment to the body as a whole for the cervical injury. Dr. Sassman found claimant had a 25 percent permanent impairment based on cervical injury. I respect the opinions of Dr. Hatfield. However, I am able to understand and follow how Dr. Sassman reached her findings of permanent impairment for the cervical injury using the Guides. Based on this, it is found claimant has a 25 percent permanent impairment for his cervical injury. Based on the combined values charts in the Guides, and an 11 percent permanent impairment

combined with the 25 percent permanent impairment results in a 33 percent permanent impairment to the body as a whole. It is found claimant has a 33 percent permanent impairment to the body as a whole regarding his injury.

Dr. Hatfield found claimant had no permanent restrictions regarding the cervical injury. (Ex. 2, pp. 47, 70) Dr. Hatfield did not adopt the findings of the FCE.

Dr. Sullivan found that claimant had a 10-pound overhead lifting restriction and a 25-pound lifting restriction to the waist. Dr. Sullivan's lifting restrictions are very similar to lifting restrictions given to claimant by Dr. Quenzer for his left shoulder injury. (Ex. N, pp. 151, 159)

Two vocational experts have opined regarding claimant's earning capacity. Mr. Vierling found claimant had a 70 percent loss for the access to the job market. When comparing pre-injury ability to his post-injury ability. (Ex. 7)

Mr. Schmidt found that claimant had a loss of access of 33 percent to the job market and 10 percent loss of earning capacity. (Ex. H)

Mr. Vierling used restrictions found in the FCE. (Ex. 7, p. 5) As noted above, none of claimant's treating physicians found the FCE restrictions were applicable. As noted, only Dr. Sullivan had any permanent restrictions. Mr. Vierling also makes no mention of claimant's permanent restrictions from his prior work injury given to him by Dr. Quenzer. (Ex. N, pp. 151-159) For these reasons, it is found that the vocational report of Mr. Schmidt are more convincing than that of Mr. Vierling.

Since being terminated from his employment at Barney's, claimant has only inquired about jobs at two places and has submitted only one job application. Claimant did not submit a job application until November 4, 2015. (Ex. 8)

Claimant had a cervical surgery and a shoulder surgery. He has a combined 33 percent permanent impairment to the body as a whole. He has lifting restrictions similar to those given to him in 1999. Claimant has made minimal effort to look for employment. Mr. Schmidt's opinion that claimant has a 33 percent loss of access to jobs is found to be more convincing. When all factors are considered, it is found claimant has a 40 percent loss of earning capacity or industrial disability.

The parties stipulated that claimant was at maximum medical improvement for the right shoulder and neck injury on October 14, 2014. Permanent partial disability benefits shall commence on that date.

The next issue to be determined is rate.

Section 85.36 states the basis of compensation is the weekly earnings of the employee at the time of the injury. The section defines weekly earnings as the gross salary, wages, or earnings to which an employee would have been entitled had the employee worked the customary hours for the full pay period in which injured as the employer regularly required for the work or employment. The various subsections of

section 85.36 set forth methods of computing weekly earnings depending upon the type of earnings and employment.

If the employee is paid on a daily or hourly basis or by output, weekly earnings are computed by dividing by 13 the earnings over the 13-week period immediately preceding the injury. Any week that does not fairly reflect the employee's customary earnings that fairly represent the employee's customary earnings, however. Section 85.36(6).

Claimant testified he usually worked more than 40 hours per week at Barney's. Claimant's rate calculation is found at Exhibit 9. It is unclear from claimant's rate calculation why, for example, the week of June 14, 2013, where claimant worked over 37 hours, is excluded as nonrepresentative, but the prior week, where claimant worked less than 37 hours, is included in the rate calculation. (Ex. 9, p. 1)

The record indicates claimant usually worked more than 40 hours week. There are 4 weeks in the 18 weeks prior to the injury, where claimant worked less than 35 hours per week. I find these weeks to be nonrepresentative of claimant's average weekly wages, and exclude those weeks from the calculation. Those weeks excluded are weeks beginning on July 19, 2013; July 5, 2013; June 7, 2013; and May 17, 2013. The representative 13 weeks prior to injury total $7,251.53 in earnings. This number divided by 13 equals $557.81. Claimant was single with two exemptions. His rate is $360.37 per week.

The next issue to be determined is whether there is a causal connection between the injury and the claimed medical expenses.

The employer shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance, and hospital services and supplies for all conditions compensable under the workers' compensation law. The employer shall also allow reasonable and necessary transportation expenses incurred for those services. The employer has the right to choose the provider of care, except where the employer has denied liability for the injury. Section 85.27. Holbert v. Townsend Engineering Co., Thirty-second Biennial Report of the Industrial Commissioner 78 (Review-Reopening October 1975).

Claimant contends that defendants are liable for payment of medical bills related to claimant's left shoulder injury. (Claimant's post-hearing brief, p. 17) As it is found that claimant failed to carry his burden of proof that the left shoulder injury arose out of and in the course of his employment, the defendants are not liable for medical charges related to claimant's left shoulder.

The next issue to be determined is if defendants' are liable for penalty under Iowa Code section 86.13.

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

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

The supreme court has stated:

> (1) If the employer has a reason for the delay and conveys that reason to the employee contemporaneously with the beginning of the delay, no penalty will be imposed if the reason is of such character that a reasonable fact-finder could conclude that it is a "reasonable or probable cause or excuse" under Iowa Code section 86.13. In that case, we will defer to the decision of the commissioner. See Christensen, 554 N.W.2d at 260 (substantial evidence found to support commissioner's finding of legitimate reason for delay pending receipt of medical report); Robbennolt, 555 N.W.2d at 236.
>
> (2) If no reason is given for the delay or if the "reason" is not one that a reasonable fact-finder could accept, we will hold that no such cause or excuse exists and remand to the commissioner for the sole purpose of assessing penalties under section 86.13. See Christensen, 554 N.W.2d at 261.
>
> (3) Reasonable causes or excuses include (a) a delay for the employer to investigate the claim, Christensen, 554 N.W.2d at 260; Kiesecker v. Webster City Meats, Inc., 528 N.W.2d at 109, 111 (Iowa 1995); or (b) the employer had a reasonable basis to contest the claim—the "fairly debatable" basis for delay. See Christensen, 554 N.W.2d at 260 (holding two-month delay to obtain employer's own medical report reasonable under the circumstances).
>
> (4) For the purpose of applying section 86.13, the benefits that are underpaid as well as late-paid benefits are subject to penalties, unless the employer establishes reasonable and probable cause or excuse. Robbennolt, 555 N.W.2d at 237 (underpayment resulting from application of wrong wage base; in absence of excuse, commissioner required to apply penalty).

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

Id.

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

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

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

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

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

Penalty is not imposed for delayed interest payments. Davidson v. Bruce, 593 N.W.2d 833, 840 (Iowa App. 1999). Schadendorf v. Snap-On Tools Corp., 757 N.W.2d 330, 338 (Iowa 2008).

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

In the hearing report, defendants contend that the correct rate in this case is $339.10 per week. See also defendants' post-hearing brief, pages 16-17.

Exhibits P and Q indicate claimant was paid temporary benefits and permanent partial disability benefits at various rates ranging from $282.83 per week to $339.10 per week. (Ex. P, Q) Defendants offered no rationale for the variance in the rates for the payment of benefits.

As detailed in this decision, the correct rate is found to be $360.37 per week. Even using defendants contested rate, claimant was underpaid nearly $2,000.00 in benefits. (Ex. P, Q) Defendants offer no explanation why claimant was under paid benefits even using defendants contended rate.

At the rate of $360.37 per week, according to Exhibits P and Q, defendants underpaid claimant approximately $3,200.00 in benefits. A penalty of 50 percent is appropriate in this case. Claimant is due penalties of $1,600.00 ($3,200 x 50 percent).

The final issue is costs. Claimant's costs are detailed in Exhibit 12.

Rule 876 IAC 4.33 provides:

> Costs taxed by the workers' compensation commissioner or a deputy commissioner shall be (1) attendance of a certified shorthand reporter or presence of mechanical means at hearings and evidential depositions, (2) transcription costs when appropriate, (3) costs of service of the original notice and subpoenas, (4) witness fees and expenses as provided by Iowa Code sections 622.69 and 622.72, (5) the costs of doctors' and practitioners' deposition testimony, provided that said costs do not exceed the amounts provided by Iowa Code sections 622.69 and 622.72, (6) the reasonable costs of obtaining no more than two doctors' or practitioners' reports, (7) filing fees when appropriate, (8) costs of persons reviewing health service disputes.

Defendants are liable for the costs of only one IME. Larson Mfg. Co., Inc. v. Thorson, 763 N.W.2d 842, 861-862 (Iowa 2009). Defendants are liable only for the costs of Dr. Sassman's first IME. Defendants are not liable for the costs of any other IME.

The record does not indicate that any physician, authorized or not authorized, ordered the FCE's at issue in this case. Under 876 IAC 4.33, an FCE does not appear to be a recoverable cost. Given this record, claimant has failed to prove he is entitled to reimbursement for the FCE.

The term "practitioner" is not proceeded by the qualifier "medical", and as a result, the agency's position has been that the reasonable cost of a vocational report falls under 876 IAC 4.33 and can be assessed as a practitioner report costs. Rodriguez v. JBS Swift, File No. 5029197 (Appeal May 8, 2012).

Based on the above, defendants shall pay only the cost of Dr. Sassman's first IME, dated September 8, 2015, and the costs associated with Mr. Vierling's

report. Defendants are not liable for the costs of the FCE, or for the second report from Dr. Sassman, dated November 5, 2015.

ORDER

THEREFORE IT IS ORDERED:

That defendants shall pay claimant all temporary benefits at the rate of three hundred sixty and 37/100 dollars ($360.37) per week.

That defendants shall pay claimant two hundred (200) weeks of permanent partial disability benefits at the rate of three hundred sixty and 37/100 dollars ($360.37) per week commencing October 14, 2014.

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

That defendants shall pay interest on unpaid weekly benefits as ordered above and as set forth in Iowa Code section 85.30.

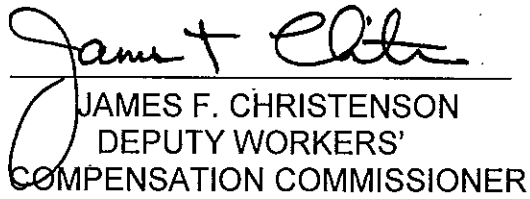
That defendants shall receive a credit for benefits previously paid.

That defendants shall pay claimant a penalty of one thousand six hundred and no/100 dollars ($1,600.00) for underpayment of benefits.

That defendants shall pay costs as detailed above.

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

Signed and filed this ____5th____ day of May, 2016.



JAMES F. CHRISTENSON
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

Copies To:

Joseph S. Powell
Attorney at Law
4900 University Ave.
Des Moines, IA 50311
jpowell@reillylawfirm.com

Andrew T. Tice
Attorney at Law
100 Court Ave., Ste. 600
Des Moines, IA 50309
atice@ahlerslaw.com

JFC/kjw

Right to Appeal: This decision shall become final unless you or another interested party appeals within 20 days from the date above, pursuant to rule 876-4.27 (17A, 86) of the Iowa Administrative Code. The notice of appeal must be in writing and received by the commissioner's office within 20 days from the date of the decision. The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday. The notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 1000 E. Grand Avenue, Des Moines, Iowa 50319-0209.