BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

TRAVIS BRYAN,	:	
Claimant,	:	File No. 1623473.01
vs.	:	
HY-VEE, INC.,	:	ARBITRATION DECISION
Employer,	:	
and	:	
EMC PROPERTY & CASUALTY CO.,	:	Head Note Nos.: 1803
Insurance Carrier, Defendants.	:	

STATEMENT OF THE CASE

Bryan seeks workers' compensation benefits from the defendants, employer Hy-Vee, Inc. (Hy-Vee) and insurance carrier EMC Property and Casualty Co. (EMC). The undersigned presided over an arbitration hearing on September 28, 2021, held by internet-based video under order of the Commissioner. Bryan participated personally and through attorney Randall P. Schueller. The defendants participated by and through attorney Lindsey E. Mills.

ISSUES

Under rule 876 IAC 4.149(3)(*f*), the parties jointly submitted a hearing report defining the claims, defenses, and issues submitted to the presiding deputy commissioner. The hearing report was approved and entered into the record via an order because it is a correct representation of the disputed issues and stipulations in this case. The parties identified the following disputed issues in the hearing report:

1) What is the extent of industrial disability caused by the alleged injury?

2) If permanent partial disability (PPD) benefits are awarded, what is the commencement date?

3) Is Bryan entitled to recover the cost of an independent medical examination (IME)?

4) Are the defendants entitled to a credit for one hundred seventy weeks of PPD benefits paid at the rate of one thousand one hundred one and 29/100 ($1,151.29) per week?

5) Is Bryan entitled to a penalty against the defendants?

STIPULATIONS

In the hearing report, the parties entered into the following stipulations:

1) An employer-employee relationship existed between Bryan and Hy-Vee at the time of the stipulated injury.

2) Bryan sustained an injury on October 8, 2016, which arose out of and in the course of his employment with Hy-Vee.

3) The stipulated injury is a cause of temporary disability during a period of recovery, but Bryan's entitlement to temporary or healing period benefits is no longer in dispute.

4) The alleged injury is a cause of industrial disability.

5) At the time of the stipulated injury:

    a) Bryan's gross earnings were one thousand eight hundred seventy-four and 47/100 dollars ($1,874.47) per week.

    b) Bryan was married.

    c) Bryan was entitled to five exemptions.

The parties' stipulations in the hearing report are accepted and incorporated into this arbitration decision. The parties are bound by their stipulations. This decision contains no discussion of any factual or legal issues relative to the parties' stipulations except as necessary for clarity with respect to disputed factual and legal issues.

FINDINGS OF FACTS

The evidentiary record in this case consists of the following:

- Joint Exhibits (Jt. Ex.) 1 through 11;
- Claimant's Exhibits (Cl. Ex.) 1 through 7;
- Defendants' Exhibits (Def. Ex.) A through I; and
- Hearing testimony by Bryan.

After careful consideration of the evidence and the parties' post-hearing briefs, the undersigned enters the following findings of fact.

Bryan was 34 years of age at the time of hearing. He graduated from Melcher Dallas High School in 2006. He has obtained two postsecondary degrees from Indian Hills Community College. (Testimony)

Bryan has worked in a meat locker and wood shop. (Cl. Ex. 5, p. 13) He started employment with Hy-Vee in June of 2006, shortly after graduating from high school. (Cl. Ex. 5, p. 13) Bryan worked exclusively for Hy-Vee during the 15 years prior to hearing. (Cl. Ex. 5, pp. 13–14; Testimony)

At Hy-Vee, Bryan started out as an order selector. He would load product onto pallets, lifting 50 to 100 pounds throughout the shift. Bryan then worked in receiving, where he would check the quality of product from other vendors and stock product. In receiving, he had to engage in heavy lifting on most loads. (Testimony)

Bryan sustained an injury to his lower back in 2013 while playing with his children at home. He decided to change jobs to put less strain on his body with the hope to improve his long-term quality of life. In 2015, Bryan started driving a truck for Hy-Vee. As a truck driver for Hy-Vee, Bryan performs a "pre-trip" of the tractor and trailer to ensure everything is in order. After that, he loads the truck using a power jack or manual jack to drop off loads. (Testimony)

On October 8, 2016, Bryan was making a delivery for Hy-Vee. (Testimony) He went to pull off a pallet, slipped, fell into the side of the trailer, and then to the floor. (Jt. Ex. 1, p. 1; Testimony) He continued to work that day and the following workday despite the injury, which caused weakness in his left arm and pain in his left elbow, left shoulder, and neck. (Testimony; Jt. Ex. 1, p. 1; Cl. Ex. 5, p. 15)

Bryan notified his supervisor. The defendants accepted Bryan's injury as arising out of and in the course of employment. They directed care for his injury under Iowa Code section 85.27. Bryan was off work from on or about October 12, 2016, through August 10, 2017. (Testimony)

The defendants first chose Lucas County Health Center to provide care for Bryan's injuries. (Ex. 1, p. 1) Bryan received conservative treatment, including physical therapy, injections, and medication. (Jt. Ex. 1, pp. 1–11; Jt. Ex. 2, pp. 12–35) After magnetic resonance imaging (MRI) on November 4, 2016, showed compression of the cervical cord at C5-6, Greg Cohen, D.O., referred him to an orthopedic specialist. (Jt. Ex. 2, pp. 30, 36)

Richard Holt, D.O., saw Bryan at Iowa Ortho on November 17, 2016. (Jt. Ex. 5, pp. 40–44) He recommended cervical epidural steroid injections. (Jt. Ex. 5, p. 44) These provided pain relief, but Bryan also experienced numbness in his left arm, hand, and fingers. (Jt. Ex. 5, p. 47) Because of Bryan's numbness, Dr. Holt ordered electromyograph (EMG) and nerve conduction velocity (NCV) testing that came back normal. (Jt. Ex. 4, pp. 47, 50, Jt. Ex. 6, p. 68)

Dr. Holt administered a third epidural steroid injection on February 6, 2017, which provided pain relief for a couple of days. (Jt. Ex. 5, pp. 57–58) On February 22, 2017, Bryan complained of "very severe" neck pain that limited his everyday function. (Jt. Ex. 5, p. 58) Dr. Holt recommended left C3-C6 medial branch nerve blocks to address Bryan's ongoing pain and performed the procedure on March 20, 2017. (Jt. Ex. 5, pp. 61–62) During Bryan's follow-up appointment with Dr. Holt on March 22, 2017, he reported no relief, increased pain, and swelling. (Jt. Ex. 5, p. 63) Consequently, Dr. Holt

had no additional care to offer Bryan and referred him for evaluation by a surgeon. (Jt. Ex. 5, p. 66)

On April 17, 2017, Bryan then saw Todd Harbach, M.D., at Iowa Ortho. (Jt. Ex. 7, p. 78) Dr. Harbach noted:

> The severity of the problem is moderate. The frequency of pain is constant. Location of pain is left lateral neck and left posterior neck. There is radiation of pain to the left upper arm, left elbow, left forearm, left interscapular, left hand, left thumb, left index finger, and left 5th finger. The patient describes the pain as aching, stabbing, tingling and numbness.

(Jt. Ex. 7, p. 78)

Dr. Harbach found Bryan "fairly normal" at C4-C5, had "severe stenosis at C5-C6," "a herniated distal left at C6-C7," and "stenosis at C3-C4 and a congenitally narrow canal." (Jt. Ex. 7, p. 81) They scheduled surgery, though Dr. Harbach wanted to discuss with another doctor the type of procedure. (Jt. Ex. 7, p. 81) On May 17, 2017, Dr. Harbach performed C5-6 and C6-7 anterior cervical decompression, diskectomy, and fusion. (Jt. Ex. 7, pp. 83–86)

Bryan followed up with Dr. Harbach and rehabilitated after the surgery. (Jt. Ex. 7, pp. 87–114) During his recovery, Bryan returned to work at Hy-Vee on August 11, 2017. (Testimony) On October 5, 2017, Dr. Harbach noted, "For work, I am going to put him on a lifting restriction of 50 pounds which in my opinion should be permanent after fusion anyway." (Jt. Ex. 7, p. 107) Dr. Harbach found Bryan at maximum medical improvement (MMI) on November 30, 2017, and released him from care despite ongoing pain complaints. (Jt. Ex. 7, pp. 107, 111, 113)

The defendants paid Bryan healing period (HP) benefits[1] from October 15, 2016, through August 10, 2017, the day before he returned to work as a truck driver for Hy-Vee. (Def. Ex. E, pp. 9–12) From August 11, 2017, through October 19, 2017, they paid Bryan eleven weeks of PPD benefits. (Def. Ex. E, p. 12) They stopped paying Bryan PPD benefits effective October 20, 2017. (Def. Ex. E, p. 12) It is unclear why.

EMC sent a letter dated December 4, 2017, to Dr. Harbach, with five questions about Bryan's injury and permanent impairment. (Def. Ex. A, p. 1) Dr. Harbach responded with a letter dated December 8, 2017. (Def. Ex. A) In it, he stated Bryan reached MMI on November 30, 2017, he should not require any additional care, and he did not have any permanent work restrictions. (Def. Ex. A, p. 1–2) On the question of permanent functional impairment, Dr. Harbach used the Fifth Edition of the American Medical Association (AMA) Guides to the Evaluation of Permanent Impairment (Guides) to opine:

[1] The exhibits show EMC classified these benefits at the time they were paid as temporary total disability (TTD) benefits. These benefits became HP benefits when Dr. Harbach determined the work injury had caused permanent disability. Bell Bros. Heating & Air Conditioning v. Gwinn, 779 N.W.2d 193, 200 (Iowa 2010) (citing Clark v. Vicorp Rests., Inc., 696 N.W.2d 596, 604–05 (Iowa 2005)). For clarity, this decision refers to them only as HP benefits.

> [Bryan] fits into DRE Cervical Category IV, which is found on Table 15-5 on page 392 of the [Guides]. In that category, he should receive a 28% permanent partial impairment of the whole person. He fits into that category, because he had a successful surgical arthrodesis at two separate cervical levels, which is a definite alteration in the structural integrity/motion of the level.

(Def. Ex. A, p. 1)

The defendants issued Bryan a payment of $15,160.01 for PPD benefits on January 23, 2018. (Def. Ex. E, p. 12) The payment was for thirteen weeks of benefits, from October 20, 2017, through January 18, 2018. (Def. Ex. A, p. 12) The defendants then resumed paying Bryan weekly PPD benefits with a check dated January 26, 2018, for the time period from January 19, 2018, through January 25, 2018. (Def. Ex. A, p. 13)

On May 31, 2018, Bryan went to Iowa Ortho for a follow-up examination. (Jt. Ex. 7, pp. 117–19) Dr. Harbach noted he had kyphosis from C2 through the C4-5 level. (Jt. Ex. 7, p. 118) He also noted Bryan complained of intermittent right upper extremity pain and intractable cervical pain. (Jt. Ex. 7, p. 118) Dr. Harbach prescribed a different nonsteroidal anti-inflammatory drug (NSAID) and directed Bryan to follow-up yearly or sooner if his neck pain does not improve. (Jt. Ex. 7, p. 118)

Bryan went back to Iowa Ortho on September 14, 2018, complaining of pain in his neck that radiated into his left shoulder and in his left arm. (Jt. Ex. 7, pp. 120–21) Dr. Harbach noted that, "if anything, [Bryan's symptoms] were worsening with time" and ordered an updated MRI and CMG and CVC testing. (Jt. Ex. 7, p. 121) After reviewing the updated MRI and testing, Dr. Harbach stated:

> He does have a nice wide open canal at C5-C6 and C6-C7 in the face of congenital cervical stenosis. The cord at those levels, however, do[es] have cerebrospinal fluid all of the way around it. At C3-C4 and C4-C5 above there are disk bulges/mild herniations that results in moderate central stenosis with deformation of the spinal cord slightly worse on the LEFT side which corresponds with the symptoms in his LEFT arm. His EMG/nerve conduction test came back as normal, however.

(Jt. Ex. 7, p. 124) They discussed surgical options with Dr. Harbach cautioning they may not eliminate all of Bryan's symptoms. (Jt. Ex. 7, p. 124)

EMC requested an explanation from Dr. Harbach about Bryan's ongoing care. (Jt. Ex. 7, p. 126) In a letter dated October 22, 2018, Dr. Harbach confirmed that Bryan sustained a cervical injury when he fell on October 8, 2016, and provided the requested information regarding his ongoing symptoms and need for care:

> He has a congenitally narrow cervical spinal canal, and on top of that he had a herniated disc at C5-C6 and C6-C7. I felt, at that time, that even though he had a congenitally narrow canal we could get adequate decompression of the levels going anteriorly. However, I discussed with the patient from the first day that if we did not get enough decompression anteriorly that we may have to come back and do a second surgery which

> would be a laminectomy or potentially a corpectomy from the front. After the patient's surgery, he has continued to have cervical pain and pain that radiates down his arm off and on for the entire first year after his surgery. He thought he was well enough that he could return to work and, in fact, as you know, he has done so. However, he continues to have symptoms and his symptoms have made him rather uncomfortable and made life very difficult for him. Therefore, because of his continued pain and the continued stenosis which was aggravated or irritated by his work-related injury, I have recommended a second surgery as described.

(Jt. Ex. 7, p. 126)

On November 28, 2018, Dr. Harbach performed a C3 through C6 posterior instrumented spinal fusion and a complete laminectomy for decompression of the spinal cord at the C3-4, C4-5, and C5-6 levels. (Jt. Ex. 7, p. 127–31) The defendants stopped PPD benefits effective November 30, 2018. (Def. Ex. E, p. 16) Instead, they began paying him HP benefits for the week of November 30, 2018, through December 6, 2018. (Def. Ex. E, p. 16)

Bryan participated in post-surgery rehabilitation, including physical therapy and follow-ups with Dr. Harbach. (Jt. Ex. 7, pp. 132–50) His symptoms improved with time. (Jt. Ex. 7, pp. 134, 136, 138, 142, 147, 150) Bryan returned to work part time and the defendants stopped paying him HP benefits effective March 10, 2019, and began to pay him temporary partial disability (TPD) benefits effective March 11, 2019, and through March 28, 2019. (Def. Ex. E, p. 17)

On March 29, 2019, Dr. Harbach authorized Bryan to return to work with restrictions. (Jt. Ex. 7, p. 147) The defendants stopped paying Bryan TPD benefits effective March 28, 2019. (Def. Ex. E, p. 17) They resumed paying Bryan PPD benefits with a check dated April 8, 2019, for time period from March 29, 2019, through April 7, 2019. (Def. Ex. E, p. 17)

Dr. Harbach released Bryan to work full duty as a truck driver on April 22, 2019. (Jt. Ex. 7, p. 150) Dr. Harbach noted, "I encouraged him to continue to stay aerobically fit and to try to avoid heavy work." (Jt. Ex. 7, p. 157) Dr. Harbach did not explain what type of heavy work Bryan should avoid or assign specific work restrictions. (Jt. Ex. 7, pp. 155–57)

EMC requested a second impairment rating from Dr. Harbach. (Def. Ex. B, p. 3) In a letter dated May 13, 2019, Dr. Harbach responded to the questions EMC posed to him regarding Bryan's injury and disability. (Def. Ex. B, p. 3) He opined Bryan did not require additional care, did not need any permanent work restrictions, and had reached MMI on April 22, 2019. (Def. Ex. B, pp. 3–4) Dr. Harbach did not mention his opinion from about six weeks earlier that Bryan needed to avoid heavy work. (Def. Ex. B, pp. 3–4) Dr. Harbach used the Guides to opine:

> I believe he still fits into DRE cervical category #4 which is found on Table 15-5 on page 392 of the book. Last time I put him at 28% permanent partial impairment of the whole person and I believe he still fits into that category and does not warrant any additional impairment.

> As far as apportionment, some of his problem is definitely related to his pre-existing congenital stenosis at this level. I believe that he more than likely would have had some issues throughout his life because of his congenitally-narrow canal and would feel that 50% of his total impairment or problems are related to this congenitally-narrow canal that he was born with.

(Def. Ex. A, p. 4)

After issuing Bryan a check dated July 22, 2019, the defendants ceased payment of PPD benefits. (Def. Ex. E, p. 18) EMC sent Bryan a letter dated July 26, 2019, stating the defendants would not pay Dr. Harbach's full impairment rating of twenty-eight percent because he attributed fifty percent of that rating to Bryan's pre-existing narrow canals. (Def. Ex. I, p. 32) Consequently, according to the EMC letter, the defendants were ending payment of PPD benefits because EMC determined that Bryan had been paid in full for industrial disability based on Dr. Harbach's reports. (Def. Ex. I, p. 32)

EMC's letter caused Bryan to obtain representation from an attorney. Claimant's counsel sent EMC an email and letter of representation dated August 14, 2019, requesting information regarding Bryan's claim, and asking whether the defendants intended to pay Dr. Harbach's permanent impairment rating of 28 percent in full. (Cl. Ex. 1, p. 1; Cl. Ex. 3, p. 7) After not hearing back from EMC, claimant's counsel sent a follow-up email and letter on August 27, 2019. (Cl. Ex. 2, p. 6; Cl. Ex. 3, p. 8–9) EMC provided the requested medical records but did not respond to claimant's counsel's inquiry regarding payment of permanent PPD benefits for Dr. Harbach's rating, so claimant's counsel sent a follow-up email on September 3, 2019, about the unpaid benefits. (Cl. Ex. 3, p. 10)

On September 11, 2019, EMC emailed claimant's counsel, informing him that they would be paying the full 28 percent functional impairment rating. (Cl. Ex. 4, p. 12) That same day, EMC issued Bryan a check for PPD benefits in the amount of $8,059.03 for seven weeks of PPD benefits from July 22, 2019, through September 8, 2019. (Cl. Ex. 6, p. 17)

Bryan had a follow-up exam with Dr. Harbach on November 8, 2019. (Jt. Ex. 7, p. 154–57) He reported some on-and-off pain and an inability to look down. (Jt. Ex. 7, pp. 154, 157) Bryan also shared he could move his head about forty-five degrees from side to side. (Jt. Ex. 7, p. 157)

Bryan saw Sunil Bansal, D.O., on July 27, 2021, for an IME arranged by his attorney. (Jt. Ex.11) Dr. Bansal reviewed Bryan's records and performed an examination of him. (Jt. Ex. 11, pp. 168–81) On causation, Dr. Bansal opined that Bryan's fall at work and immediate clinical presentation are "consistent with his cervical disc herniation at C6-C7 and aggravation of cervical spondylosis." (Jt. Ex. 11, p. 182) He agreed with Dr. Harbach that Bryan reached MMI on April 22, 2019. (Jt. Ex. 11, p. 182)

However, Dr. Bansal disagreed with Dr. Harbach's permanent impairment ratings because he used the DRE method. (Jt. Ex. 11, p. 183) He opined:

> Bryan presents with multi-level involvement in the same spinal region (cervical). In addition, he has had two surgeries involving fusions to that area. The [Guides] have two main methods for rating impairments of the spine, the DRE classification method and the range of motion method. The appropriate method in this case would be the range of motion method. To further clarify, I call attention to Section 15-2 of the [Guides] (Determining the Appropriate Method for Assessment). Under criteria #2, multi-level involvement clearly disqualifies the CRE Category from being used.

(Jt. Ex. 11, p. 183)

On the question of the extent of Bryan's permanent functional impairment, Dr. Bansal discussed the range of motion deficits of the spine he measured using inclinometers and used Tables 15-12, 15-13, and 15-14 to finding an eight percent whole-person impairment. (Jt. Ex. 11, p. 183) He then used Table 15-7 and concluded Bryan had a fifteen percent whole person impairment because he underwent a single-level cervical fusion with residual symptoms, had three additional levels fused, and underwent a second surgery. (Jt. Ex. 11, p. 184) Dr. Bansal then found a fifteen percent whole person impairment using Tables 15-15, 15-16, and 15-18 of the Guides due to his sensory and motor deficits. (Jt. Ex. 11, p. 184) Lastly, Dr. Bansal used the Combined Values Chart in the Guides to assign a thirty-four percent whole person impairment. (Jt. Ex. 11, p. 184)

Defense counsel wrote a letter to Dr. Harbach with questions regarding Dr. Bansal's IME report. (Def. Ex. C, p. 6) In a letter dated August 30, 2021, Dr. Harbach responded. (Def. Ex. C) He reiterated his opinion on MMI and Bryan not needing more care. (Def. Ex. C, p. 6) With respect to Dr. Bansal's opinion on Bryan's permanent functional impairment, Dr. Harbach stated:

> I believe that the way Dr. Bansal calculated the impairment rating is correct. I recently went to the American Academy of Independent Medical Examiners and took an extensive course on using the [Guides] and he is correct that once there is no more than 1 level fused, we need to do the range of motion method. I followed through his calculations and they are correct, so I would agree that the proper rating for this patient is 34% permanent partial impairment of the whole person instead of the 28% I used from a DRE category as previously. Using the DRE category was incorrect on my part in the past.

(Ex. C, p. 6) After receipt of Dr. Harbach's letter dated August 30, 2021, in which he adopted Dr. Bansal's opinion regarding Bryan's permanent functional impairment, EMC issued Bryan a second check in the amount of $35,241.63, dated September 3, 2021, for thirty weeks of PPD benefits from August 14, 2020, through March 11, 2021. (Cl. Ex. 7, p. 18).

Thus, the evidence shows Dr. Harbach used the incorrect method for determining Bryan's functional impairment. After that, he opined in conclusory fashion that fifty percent of that incorrect functional impairment rating was attributable to Bryan's congenitally narrow central cervical neural canal. Dr. Harbach did not explain how, if at

all, Bryan's congenital condition related to Dr. Bansal's impairment rating, which was based on Bryan's work injury and the surgery to address it. Consequently, Dr. Bansal's permanent impairment rating is most persuasive. The weight of the evidence shows Bryan sustained a thirty-four percent permanent functional impairment resulting from the stipulated work injury.

In Dr. Bansal's IME report, he assigned Bryan permanent work restrictions. (Jt. Ex. 11, p. 184) He noted that after Bryan's first surgery, Dr. Harbach assigned a permanent lifting restriction of fifty pounds and noted, "in my opinion, [it] should be permanent after a fusion anyway." (Jt. Ex. 11, p. 184; Jt. Ex. 7, p. 107) Dr. Bansal then opined:

> I am not sure why Dr. Harbach assigned no restrictions after the second surgery, even though a multi-level fusion was performed at the time rather than a single level after the first surgery. However, it would be even more important after this with the predilection for adjacent segment disease as a consideration.

(Jt. Ex. 11, p. 184) Dr. Bansal assigned Bryan permanent work restrictions of no lifting more than fifty pounds, no lifting overhead greater than twenty pounds, avoiding work activities that require repeated neck motion or him to put his neck in a posturally flexed position for greater than fifteen minutes. (Jt. Ex. 11, p. 184)

Dr. Harbach disagreed with Dr. Bansal's opinion regarding Bryan's ability to work and reiterated his earlier assessment that he could do so without restrictions:

> I do not know or understand how any physician can look at a patient and determine what they can or cannot do based on how they look. There are or have been players in the NFL with 2-level cervical fusions. The patient drives trucks and should be able to perform all the activities required of that job. If he cannot, the only objective way of determining what the patient is capable of doing on a regular basis is to obtain a functional capacity evaluation.

(Def. Ex. C, p. 6)

Dr. Harbach initially assigned a permanent work restriction of no lifting over fifty pounds as a post-fusion requirement. He then released Bryan to full-duty work after his second surgery without explaining why the fifty-pound lifting restriction no longer applied. The fact that unnamed NFL players may have returned to playing football is a non sequitur with respect to the question of why he opined a fifty-pound restriction should be imposed after spinal fusion but then released Bryan to full duty after his second surgery.

The rationale behind Dr. Bansal imposing permanent lifting restrictions is the risk of adjacent segment disease not physical ability. Dr. Harbach did not address this risk in his opinion. Instead, he opined that a functional capacity examination (FCE) would be required to objectively determine what Bryan is physically capable of doing. This misses the point. While an FCE is a tool used to measure a patient's functional capacity, the risk Bryan lives with after undergoing two surgeries is the primary reason Dr. Bansal

assigned lifting restrictions, not the limits of Bryan's physical ability. Put otherwise, Dr. Bansal's work restrictions are based on the increase in risk Bryan would cause by performing activities outside of them. Dr. Bansal's opinion on the risk that necessitates permanent work restrictions is compelling because Dr. Harbach did not refute it. Therefore, Dr. Bansal's opinion on permanent work restrictions is more persuasive in this case.

The record establishes Bryan returned to work as a truck driver for Hy-Vee after his first surgery and while subject to Dr. Harbach's initial assigned work restriction of no lifting over fifty pounds. (Testimony) It also shows that at the time of hearing, Bryan had not requested a reasonable accommodation from Hy-Vee that it allow him to work within Dr. Bansal's work restrictions. (Testimony) These two facts make it more likely than not Bryan is able to perform his duties as a truck driver within Dr. Bansal's work restrictions and without needing a reasonable accommodation. At the time of hearing, Bryan was earning more per mile in his truck driver job with Hy-Vee than he was earning at the time of the injury. (Testimony)

Bryan has experienced headaches due to the work injury. He would average between three and five per week before the 2017 surgery. After that procedure, Bryan experienced headaches less often. At the time of hearing, Bryan credibly testified he experiences two headaches per week on average, depending on how the week goes. (Testimony)

CONCLUSIONS OF LAW

In 2017, the Iowa legislature amended the Iowa Workers' Compensation Act. See 2017 Iowa Acts, ch. 23. The 2017 amendments apply to cases in which the date of an alleged injury is on or after July 1, 2017. Id. at § 24(1); see also Iowa Code § 3.7(1). Because the injury at issue in this case occurred before July 1, 2017, the Iowa Workers' Compensation Act in effect before the 2017 amendments applies. See Smidt v. JKB Restaurants, LC, File No. 5067766 (App. Dec. 11, 2020); but see (holding that the 2017 amendments apply to interest accrued on or after July 1, 2017, regardless of the date of injury).

1. Permanent Disability.

The parties agree Bryan sustained industrial disability but dispute the extent. "The amount of compensation for an unscheduled injury resulting in permanent partial disability is based on the employee's earning capacity." Neal v. Annett Holdings, Inc., 814 N.W.2d 512, 526 (Iowa 2012) (citing Broadlawns Med. Ctr. v. Sanders, 792 N.W.2d 302, 306 (Iowa 2010)). The assessment of a claimant's earning capacity is based on multiple factors: functional disability, age, education, qualifications, work experience, inability to engage in similar employment, earnings before and after the injury, motivation to work, personal characteristics of the claimant, the claimant's inability, because of the injury to engage in employment for which the claimant is fitted, and the employer's inability to accommodate the claimant's functional limitations. Id.; IBP, Inc. v. Al-Gharib, 604 N.W.2d 621, 632–33 (Iowa 2000); Ehlinger v. State, 237 N.W.2d 784, 792 (Iowa 1976).

As found above, the weight of the evidence establishes the stipulated work injury caused a permanent functional impairment of thirty-four percent. Dr. Bansal's opinion on permanent work restrictions are adopted. They impact the type of work he can physically perform.

Bryan was thirty-four years of age at the time of hearing. At his young age, he does not have a lot of professional experience. He has had success in postsecondary education, including obtaining a diesel mechanic certificate. There is an insufficient basis in the evidence from which to conclude he would be physically unable to perform work in this field because of functional limitations caused by the work injury.

It is unlikely Bryan could return to his first job at Hy-Vee because of his restrictions or other work with similar or greater physical demands. However, he has returned to his job as a truck driver without issue. At the time of hearing, was earning more than he was on the date of injury.

Based on consideration of the factors for determining the extent of lost earning capacity under the Iowa Workers' Compensation Act, Bryan has sustained an industrial disability of forty-five percent. Five hundred weeks multiplied by forty-five percent equals two hundred and twenty-five weeks. Bryan is entitled to two hundred and twenty-five weeks of PPD benefits.

2. Rate.

The parties stipulated Bryan's gross earnings on the stipulated injury date were one thousand eight hundred seventy-four and 47/100 dollars ($1,874.47) per week. They also stipulated he was married and entitled to five exemptions at the time. Based on the parties' stipulations, Bryan's workers' compensation rate is one thousand one hundred fifty-one and 29/100 dollars ($1,151.29) per week.

3. Commencement Date.

The parties dispute the commencement date for Bryan's PPD benefits because Dr. Harbach found him at MMI and rated his permanent impairment after his first surgery only for him to require a second procedure. The defendants believe the proper commencement date is August 11, 2017, the date Dr. Harbach found him at MMI after his first surgery. Bryan contends the proper commencement date is April 22, 2019, the date he reached MMI following his second surgery.

Iowa Code section 85.34(1) provides "alternative markers of the end of the healing period." Waldinger Corp. v. Mettler, 817 N.W.2d 1, 9 (Iowa 2012); see also Evenson v. Winnebago Indus., 881 N.W.2d 360, 372 (Iowa 2016). The alternative markers are when the injured employee:

1) Returns to work;

2) Reaches maximum medical improvement (MMI) for the injury; or

3) Is medically capable of returning to employment substantially similar to that which the employee was engaged at the time of injury. Iowa Code § 85.34(1); Evenson, 881 N.W.2d at 372.

The first of the alternative markers to occur ends a healing period. Id.; Evenson, 881 N.W.2d at 372 (Iowa 2012); Crabtree v. Tri-City Elec. Co., File No. 5059572 (App., Mar. 20, 2020). PPD benefits "begin at the termination of the healing period." Id. at § 85.34(2); Evenson, 881 N.W.2d at 372. Under Iowa Code section 85.34(2), PPD benefits must commence at the end of the first healing period if the employee's injury has caused more than one healing period. Evenson, 881 N.W.2d at 372; Crabtree File No. 5059572 (App., Mar. 20, 2020). Consequently, the commencement date in this case is August 11, 2017.

4. Credit.

The parties agree the defendants are entitled to a credit for PPD benefits paid but disagree as to the amount. The defendants argue they are entitled to a credit equal to one hundred seventy weeks worth of PPD benefits. Bryan contends that all benefits paid before the second MMI date of April 22, 2019, should be considered HP benefits and the defendants are entitled to a credit only for PPD benefits paid after that date.

An injured employee is entitled to HP benefits when the employee is unable to work during a period of convalescence caused by a work injury. Iowa Code §§ 85.33(1), 85.34(1); see also Evenson, 881 N.W.2d at 373. Temporary benefits compensate an employee for lost wages until the employee is able to return to work. Mannes v. Fleetguard, Travelers Ins. Co., 770 N.W.2d 826, 830 (Iowa 2009). The evidence shows Bryan returned to work after his first surgery, so the PPD benefits the defendants paid to him between surgeries based on Dr. Harbach's permanent impairment rating do not qualify as HP or HP benefits.

Further, as found above, the commencement date for PPD benefits is August 11, 2017. The defendants are consequently entitled to a credit for all PPD benefits paid after that date. Therefore, the defendants are entitled to a credit for 170 weeks of PPD benefits paid since Bryan first reached MMI.

5. Penalty.

"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 by establishing 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.

The evidence establishes the defendants paid Bryan PPD benefits after they were due. The defendants do not dispute that they did so. They contend the delays were reasonable under Iowa law and a penalty is therefore inappropriate. Bryan disagrees.

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. "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.

The first delay occurred when the defendants paid Bryan on September 11, 2019, PPD benefits for the time period from July 22, 2019, through September 8, 2019. EMC sent a letter to Bryan at the time of the denial of timely payment, stating it was based on Dr. Harbach's opinion that fifty percent of Bryan's permanent disability was attributable to a personal condition.

The defendants argue EMC based the denial on their interpretation of Iowa Code section 85.34(7)(*a*), which states in pertinent part, "An employer is not liable for compensating an employee's preexisting disability that arose . . . from causes unrelated to employment." (Def. Post-Hearing Brief, p. 14) They state they agreed to pay Dr. Harbach's full impairment rating "[a]fter additional investigation and consideration of applicable [a]gency case law and interpretation of [section] 85.34(7)." (Def. Post-Hearing Brief, p. 14) However, it is unreasonable to deny timely payment of benefits to a claimant based on a reading of a statutory provision without considering the caselaw construing it. Bryan is therefore entitled to a penalty for the late payment of these benefits.

If the employer establishes a "reasonable or probable cause or excuse," no penalty benefits are awarded. However, if the employer fails to meet its burden of proof, penalty benefits must be awarded. The following factors are used in determining the amount of penalty benefits:

- The length of the delay;
- The number of the delays;
- The information available to the employer regarding the employee's injuries and wages; and

- The prior penalties imposed against the employer under section 86.13. Robbennolt v. Snap-On Tools Corp., 555 N.W.2d at 238.

Bryan has presented no evidence of prior penalties against Hy-Vee. The defendants could have obtained a legal opinion from a lawyer versed in Iowa workers' compensation law but did not do so before ceasing the payment of Bryan's benefits. The decision to stop paying Bryan workers' compensation to which he was entitled led to a delay in paying him over eight thousand dollars in PPD benefits. A penalty of two thousand dollars is appropriate under the law.

The second delay for which Bryan seeks a penalty is between Dr. Bansal's opinion on his impairment rating and their payment of benefits. Before Dr. Bansal's opinion, the defendants had obtained an opinion from Dr. Harbach. The difference between Dr. Harbach's initial rating and Dr. Bansal's rating made the extent of Bryan's permanent functional impairment fairly debatable at the time Dr. Bansal issued his opinion.

After receiving Dr. Bansal's report, the defendants sought Dr. Harbach's assessment of it. Dr. Harbach issued a letter dated August 30, 2021, in which he agreed with Dr. Bansal's methodology and adopted the same impairment rating. The defendants responded by paying the benefits for the difference between Dr. Harbach's initial rating and Dr. Bansal's rating within three days of receiving Dr. Harbach's opinion agreeing with Dr. Bansal's impairment rating. Their actions were reasonable and a penalty is not due for this second lump sum payment of benefits.

ORDER

Based on the above findings of fact and conclusions of law, it is ordered:

1) The defendants shall pay to Bryan two hundred and twenty-five (225) weeks of permanent partial disability benefits at the rate of one thousand one hundred fifty-one and 29/100 dollars ($1,151.29) per week from the commencement date of August 11, 2017.

2) The defendants shall pay accrued weekly benefits in a lump sum.

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

4) The defendants shall be given credit for one hundred seventy (170) weeks of benefits previously paid at the rate of one thousand one hundred fifty-one and 29/100 dollars ($1,151.29) per week.

5) The defendants shall pay Bryan a penalty of two thousand and 00/100 dollars ($2,000.00).

6) The defendants shall file subsequent reports of injury as required by Rule 876 IAC 3.1(2).

7) The parties shall be responsible for paying their own hearing costs.

Signed and filed this 9th day of May, 2022.

BEN HUMPHREY
Deputy Workers' Compensation Commissioner

The parties have been served, as follows:

Randall P. Schueller (via WCES)

Lindsey E. Mills (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.