BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

MERIS REKIC,

Claimant,

vs.

SEEHASE MASONRY,

Employer,

and

GRINNELL SELECT INSURANCE COMPANY,

Insurance Carrier,
Defendants.

File No. 5059846

ARBITRATION

DECISION

Head Note Nos.: 1402.30, 2502, 2907

STATEMENT OF THE CASE

Meris Rekic, claimant, filed a petition for arbitration against Seehase Masonry, as the employer, and Grinnell Select Insurance Company, as the insurance carrier. This case was heard on January 4, 2019, in Des Moines.

The parties filed a hearing report at the commencement of the hearing. On the hearing report, the parties entered into numerous stipulations. Those stipulations were accepted and no factual or legal issues relative to the parties' stipulations will be made or discussed. The parties are now bound by their stipulations.

The evidentiary record includes Claimant's Exhibits 1 through 5 and Defendants' Exhibits A through J. Claimant testified on his own behalf. Defendants called Mark Seehase to testify, though his testimony was rendered unnecessary as a result of stipulations offered by claimant. The evidentiary record closed at the conclusion of the arbitration hearing.

However, counsel for the parties requested the opportunity to file post-hearing briefs. Their request was granted. The parties were given until March 4, 2019 to file their post-hearing briefs. Claimant filed his brief on that date. Defendants requested an extension. The undersigned granted a short extension through March 6, 2019. Defendants filed a post-hearing brief on March 6, 2019, at which time the case was fully submitted to the undersigned.

ISSUES

The parties submitted the following disputed issues for resolution:

1. Whether claimant is entitled to an award of healing period benefits from December 20, 2016 through October 18, 2017.

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

3. The proper weekly rate at which benefits should be awarded, including disputes as to the average gross weekly earnings as well as claimant's entitlement to exemptions and marital status.

4. The credit to which defendants are entitled for payment of benefits and salary in lieu of compensation.

5. Whether claimant is entitled to full reimbursement of his independent medical evaluation fees.

6. Whether claimant's filing fee should be assessed as a cost of this contested case.

FINDINGS OF FACT

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

Meris Rekic began working for Seehase Masonry in October 2016. (Claimant's Exhibit 2, page 22) He worked as a laborer for the company. On December 20, 2016, he arrived for work. He was instructed to remove a blanket they placed over a forklift. As he was attempting to accomplish that task, he slipped and fell. He injured his right knee in the process. (Defendants' Ex. I, pp. 25-27)

Defendants accepted the injury as compensable and provided medical care for claimant's condition. Mr. Rekic was ultimately referred to an orthopaedic surgeon, Robert B. Bartelt, M.D. Dr. Bartelt performed two surgeries on claimant's right knee. The first occurred on February 6, 2017. Dr. Bartelt performed a right knee arthroscopy, performing some debridement. However, he also identified a high-grade partial tear of the anterior cruciate ligament. (Claimant's Ex. 1, p.4)

On April 5, 2017, Dr. Bartelt again took claimant to surgery and performed a right knee arthroscopy, performing an anterior cruciate ligament reconstruction. (Claimant's Ex. 1, p. 4) Claimant performed physical therapy thereafter and experienced some improvement. However, he continued to complain of symptoms. Dr. Bartelt recommended a functional capacity evaluation (FCE) before releasing claimant to return to work.

The FCE was performed in late September or early October 2017. (Defendants' Ex. A, pp. 9-10) Unfortunately, the FCE was interpreted by the therapist to be invalid due to lack of consistent effort by claimant. Dr. Bartelt declared maximum medical improvement on October 18, 2017, and released claimant to return to work without formal work restrictions given the invalid FCE. (Defendants' Ex. A, p. 9) In a report dated October 20, 2017, Dr. Bartelt opined that claimant sustained a seven percent permanent impairment of the right lower extremity. (Defendants' Ex. A, p. 5)

Claimant sought an independent medical evaluation, performed by Jacqueline M. Stoken, D.O. on April 9, 2018. Dr. Stoken identified a 10 percent right knee flexion contracture and opined that claimant sustained a 20 percent permanent impairment of the right lower extremity as a result of the December 20, 2016 work injury. (Claimant's Ex. 1, p. 6)

The initial disputed issue is claimant's entitlement to healing period benefits from December 20, 2016 through October 18, 2017. I find that Mr. Rekic was off work from December 20, 2016 through October 18, 2017. (Hearing Report; Claimant's testimony) In reality, there is no dispute as to this entitlement to healing period benefits. Defendants stipulated that the injury occurred. They stipulated that the injury caused temporary disability, and they stipulated that claimant is entitled to healing period benefits from December 20, 2016 through October 18, 2017. (Hearing Report)

Defendants contend they are entitled to a credit for salary continuation they paid after the injury date. Claimant's Exhibit 2, page 22 demonstrates that the employer paid Mr. Rekic wages in lieu of worker's compensation benefits from December 26, 2016 through February 3, 2017.

Mr. Rekic seeks an award of permanent disability for his right knee. Claimant asserts that I should award at least 20 percent of the lower extremity pursuant to Dr. Stoken's impairment rating. Claimant asserts that Dr. Bartelt became dismissive of him after the therapist declared his FCE to be invalid. Therefore, claimant contends that Dr. Bartelt rendered an inaccurate impairment rating and released claimant from his care.

Defendants contend that Dr. Bartelt had the best perspective to render the impairment rating. Defendants accurately point out that Dr. Stoken evaluated claimant only one time. By contrast, Dr. Bartelt treated claimant for an extended period and inspected claimant's knee joint twice intra-operatively. Defendants contend that Dr. Bartelt renders the most accurate and credible impairment rating. Defendants contend that I should award seven percent permanent disability of the right leg.

Reviewing both experts' impairment ratings, I find strengths and weaknesses in each. Clearly, Dr. Bartelt is an orthopaedic surgeon and had the chance to evaluate claimant several times over an extended period of time. This lends to his credibility.

However, review of Dr. Bartelt's impairment rating provides very little explanation for his rating. He cites Table 17-33 on page 546 of the AMA Guides to the Evaluation of

Permanent Impairment, Fifth Edition, as the basis for his impairment. Review of that table discloses that there are two apparent diagnoses that could result in an award of permanent impairment.

Pursuant to Table 17-33, it is possible to award a seven percent permanent impairment of the leg for a total medial or lateral meniscectomy. Yet, Dr. Bartelt's medical records do not suggest that he performed a total meniscectomy in claimant's right knee.

Table 17-33 also awards seven percent impairment of the leg for mild cruciate ligament laxity. However, review of Dr. Bartelt's impairment rating report indicates that he found claimant's right knee was "stable to ligamentous testing." (Defendants' Ex. A, p. 10) I find no other potentially applicable impairment ratings for claimant's right knee in Table 17-33. I am not clear as to how or why Dr. Bartelt imposed a permanent impairment. This lack of clarity reduces the credibility and persuasiveness of Dr. Bartelt's impairment rating.

Dr. Stoken's impairment rating gives me pause as well. She awards a 20 percent permanent impairment of the right lower extremity as a result of a 10 percent flexion contracture in claimant's right knee. This impairment rating is clearly permitted in Table 17-10 of the AMA Guides, which Dr. Stoken cites. This gives the impairment rating credibility in that I can specifically identify how Dr. Stoken reaches this rating.

However, Dr. Stoken's finding of a flexion contracture is contrary to the findings of Dr. Bartelt, who recorded that claimant had "full extension of the knee" as of his rating letter of October 20, 2017. (Defendants' Ex. A, p. 10) There is no explanation by Dr. Stoken how claimant could have full extension of the knee in October 2017 and later have a 10 degree flexion contracture when she evaluated claimant in April 2018. This causes me some concern about the plausibility and accuracy of Dr. Stoken's impairment rating.

As I ponder both impairment ratings, I note that both physicians record subjective symptoms being reported by claimant. Mr. Rekic obtained employment as a truck driver after his injury with this employer and has worked as a truck driver since October 2017. However, he testified that he has "no touch" loads and his physical requirements do not appear to be terribly strenuous.

Mr. Rekic testified credibly that he has continued to have problems with his knee, even after his release from care by Dr. Bartelt. Claimant testified that the right knee is stiff in the mornings, and he has to walk for a few minutes just to warm-up the knee in the morning. He testified that he has significant increases in symptoms with weather changes and that the symptoms make it difficult to sleep.

Mr. Rekic has a subjective feeling of decreased strength and decreased range of motion in his right knee and leg. He testified that he does not believe, in spite of Dr. Bartelt's release, that he could return to work in masonry. He testified that he could not

stand for 10 or more hours per day and that he does not believe he could climb or crawl with his right knee condition. Mr. Rekic also indicated that he experiences increased pain in his right knee when he walks for more than 30 minutes and that he believes it is more difficult to lift after his right knee injury.

Considering claimant's testimony about his symptoms, his change in profession with reduced physical demands on his knee after the injury, his perceived inabilities, as well as the fact that Dr. Stoken provides a very specific range of motion finding that is identifiable in the AMA Guides, I find that Mr. Rekic has proven he sustained a 20 percent permanent impairment and 20 percent permanent disability of his right leg as a result of the December 20, 2016 work injury.

Although defendants did not specifically brief the rate issue, they disputed claimant's marital status, entitlement to exemptions and his gross weekly earnings on the hearing report. With respect to the issue of marital status, claimant testified that he is married and was married on the date of injury. No contrary evidence was introduced into this evidentiary record. I find that Mr. Rekic was married on the date of injury.

It appears that the issue pertaining to exemptions is whether claimant is entitled to claim a child as an exemption. Mr. Rekic has one child that lives with him and his wife. He is clearly entitled to claim the child that lives with he and his wife as an exemption for tax purposes. However, Mr. Rekic has a child from a prior marriage as well.

Defendants appear to dispute whether claimant can claim the child from the prior marriage as an exemption. Mr. Rekic testified that he pays child support on the disputed child. However, Mr. Rekic conceded that he does not claim this child on his tax returns. I find that the child from a prior marriage is not calculated or factored into the calculation of claimant's weekly spendable earnings after taxes.

Finally, the parties dispute claimant's gross weekly earnings as of the date of injury. Mr. Rekic worked for the employer only eight weeks and one day prior to the date of injury. No evidence was introduced of the earnings of a substantially similar employee that would permit calculation of claimant's weekly earnings. All parties appear to concede that I should utilize the actual earnings of Mr. Rekic prior to the injury date.

The dispute is whether some of the "short" weeks should be excluded when calculating the gross earnings. Although he testified that he was hired to work full-time at 40 hours per week, Mr. Rekic conceded during his testimony at trial that he did not actually work 40 hours per week immediately prior to the injury date. Mr. Rekic conceded that these "short" weeks are the result of inclement weather that precluded construction work. This would be true for Mr. Rekic and all similarly situated workers. I find that claimant's earnings prior to the injury date fairly represent his weekly earnings leading up to the injury date because any "short" weeks were caused by weather issues that are common to construction work such as that performed by claimant.

Utilizing the wages identified on Claimant's Exhibit 2, page 22, I calculate the average gross weekly earnings as follows:

Pay Period End Date	Gross Earnings
12/16/16	$564.34
12/9/16	$746.07
12/2/16	$822.60
11/25/16	$468.69
11/18/16	$851.30
11/11/16	$836.95
11/4/16	$172.96
10/21/16	$344.34
TOTAL EARNINGS:	$4,807.25

Claimant worked eight weeks and one day prior to the injury date. He earned an additional $153.04 in his additional day of work reflected on week ending December 23, 2016. Including those wages, claimant's total wages prior to the date of injury were $4,960.29. Dividing the total earnings ($4,960.29) by eight weeks and one day of work (8.143), I find that Mr. Rekic had average gross weekly earnings of $609.15 on the date of injury.

Mr. Rekic seeks an order requiring defendants to reimburse his independent medical evaluation fee. Dr. Stoken charged $2,200.00 for her evaluation and report. I find these charges to be reasonable and comparable to other independent medical evaluation fees I have seen in similar cases.

Defendants paid $1,000.00 of Dr. Stoken's charges, but contend that the remainder of the charges are unreasonable. Defendants contend that they are not obligated to pay for Dr. Stoken's review of medical records or any of her examination or report pertaining to causation of the injury, restrictions, or recommendations for future medical treatment. I find that Dr. Stoken's independent medical evaluation and report were reasonable and consistent with other similar evaluations and reports that have been ordered by this agency in the past.

Mr. Rekic contends that the defendants unreasonably denied or delayed benefits in this case and requests that penalty benefits be imposed. Claimant asserts two bases for imposition of penalty benefits. The first is that defendants underpaid the applicable weekly rate. As I consider this request, I note that neither claimant nor defendants

calculated the weekly rate in the same way that I found it should be calculated. Claimant worked for the employer for less than 13 weeks. The manner in which the gross earnings should be calculated were not obvious in this case and neither party ultimately asserted the proper weekly rate in their contentions.

There is correspondence between counsel in this file, demonstrating the exchange of information and clarification of the weekly rate. I find that the employer did not properly calculate the average gross weekly earnings. However, I find that defendants did provide contemporaneous notice of the basis for their denial. I specifically find that the issue of the average gross weekly wages and applicable weekly benefit rate were fairly debatable in this case. I find that defendants acted reasonably in their initial calculations of the weekly rate.

The second basis claimant asserts for imposition of weekly benefits is an unreasonable delay in payment of permanent partial disability benefits. Initially, defendants took the position that they continued claimant's salary and paid healing period benefits simultaneously. As noted above, the employer did continue claimant's salary from December 26, 2016 through February 3, 2017. However, claimant was not paid healing period benefits by the insurance carrier during this period of time.

In fact, the employer's representative, Mark Seehase, testified that the employer continued paying claimant's salary rather than turn in the claim to its insurance carrier. He testified that the employer did not report the injury until February 2017. Therefore, it is clear that the employer knew the claimant was not simultaneously paid salary and healing period benefits between December 26, 2016 and February 3, 2017.

When defendants took the position that claimant was paid both salary and healing period benefits simultaneously, that assertion was factually inaccurate. With proper and thorough investigation, this information was available to defendants.

As noted above, Dr. Bartelt issued a permanent impairment rating on October 20, 2017. On January 24, 2018, claimant's counsel formally requested payment of that impairment rating. (Claimant's Ex. 5, p. 38) Payment was not forthcoming.

Claimant's counsel again formally requested payment of the permanent impairment rating via correspondence dated February 13, 2018. (Claimant's Ex. 5, p. 37) Again, payment was not forthcoming from defendants.

Instead, in an e-mail dated March 1, 2019, defendants took the position that they had overpaid by making simultaneous wage and healing period payments, as well as an overpayment of the weekly rate, such that they had a credit that fully satisfied the permanent partial disability obligations. (Defendants' Ex. E, p. 1) Again, this was clearly incorrect.

Claimant's counsel responded via correspondence dated March 13, 2018. In that letter, claimant's counsel specifically challenged whether Mr. Rekic received

simultaneous wage payments and healing period benefits. As Mr. Drew noted in his correspondence:

> My client maintains, that he was not receiving duplicate payments from the Employer and Worker's Compensation. This appears to be consistent with the records that I have received. After his injury it appears that the Employer voluntarily continued his salary for six weeks. It does not appear to me that Worker's Compensation commenced benefits until approximately February 3, 2017.

(Claimant's Ex. 5, p. 36)

Mr. Drew clearly understood there was not an overlap of wages and healing period benefits upon review of documentation provided by the defendants. His correspondence clearly put defendants on notice of the issue. In fact, defendants ultimately conceded the accuracy of claimant's assertions but not until May 14, 2018. (Claimant's Ex. 2, p. 11) The required check to pay Dr. Bartelt's permanent impairment rating was not issued until May 14, 2018 and paid at a lesser rate than is now awarded. (Claimant's Ex. 2, p. 10)

I find that the defendants had all the necessary information to determine that Mr. Rekic was not overpaid and was not paid in duplicate while the employer continued his salary. The defendants' error on this issue was due to lack of a reasonable investigation. However, the employer knew that it had not turned in the claim until February 2017. Clearly, without turning in the claim, there is no way that claimant was paid both salary and healing period before the claim was turned into the insurance carrier.

I find that the defendants' investigation of this issue was unreasonable. Defendants relied upon erroneous, yet verifiable, information. They failed to provide a reasonable explanation of why they delayed permanent disability benefits. In fact, even if it could be argued that there was a reasonable delay due to confusion, I would find that the delay between Mr. Drew's March 13, 2018 correspondence clarifying the issue and the May 14, 2018 issuance of permanent disability benefits was unreasonable. It should not take 60 days to verify this issue and make a payment that is due. Defendants' delay in payment of permanent disability benefits required by Dr. Bartelt's impairment rating was unreasonable.

If defendants had paid Dr. Bartelt's impairment rating promptly, they would have paid 15.4 weeks of permanent disability benefits at the rate of $414.82, or $6,388.23. This amount was unreasonably delayed or denied. Defendants possessed a reasonable basis to refuse payment of anything more than Dr. Bartelt's impairment rating.

I acknowledge that there were ongoing communications between the parties as to the benefits owed. There was some responsiveness by defendants to clarify the

issue. Yet, even after the issue appeared to be resolved and clarified, it took an additional two months to finalize the investigation and issue a check for permanent disability benefits. This is not reasonable conduct. It justifies a fairly significant penalty to discourage similar conduct in the future and as penalty for this delay.

On the other hand, I elect not to impose the maximum penalty permitted by law. There were ongoing discussions held by counsel. Defendants ultimately did acknowledge their error and voluntarily paid some permanent disability benefits. This conduct the law wishes to encourage. Therefore, considering the purposes for the penalty benefit statute, I find that a penalty totaling $2,500.00 is sufficient under the facts of this case to serve as a penalty for past conduct and a deterrent against similar conduct into the future.

CONCLUSIONS OF LAW

The initial disputed issue is claimant's entitlement to healing period benefits from December 20, 2016 through October 18, 2017. Having found that defendants stipulated to claimant's entitlement to healing period benefits for this period, I conclude claimant has established entitlement to healing period benefits from December 20, 2016 through October 18, 2017.

Defendants contend they are entitled to credit for wages paid to claimant after the injury date, despite claimant being off work. Claimant disputes entitlement to this credit. (Hearing Report) Agency rule 876 IAC 8.4 provides, "The excess payment made by an employer in lieu of compensation which exceeds the applicable weekly compensation rate shall not be construed as advance payment with respect to either future temporary disability, healing period, permanent partial disability, permanent total disability or death." It is implicit in rule 8.4 that the employer's election to continue salary does result in a credit and eliminate any need to pay healing period during the period of salary continuation.

Having found that the employer did pay wages to claimant from December 26, 2016 through February 3, 2017, I conclude that defendants are entitled to a credit for those wages up to the amount of weekly benefits that would have otherwise been due during that period of time. Defendants do not get a credit for overpayment for any amount that claimant's salary continuation exceeded the amount of weekly benefits that would have otherwise been due between December 26, 2016 and February 3, 2017. 876 IAC 8.4.

Mr. Rekic also seeks an award of permanent disability benefits. The parties stipulate that this claim is a scheduled member injury to the right leg and that it should be compensated pursuant to Iowa Code section 85.34(2)(o). (Hearing Report)

Under the Iowa Workers' Compensation Act, permanent partial disability is compensated either for a loss or loss of use of a scheduled member under Iowa Code section 85.34(2)(a)-(t) or for loss of earning capacity under section 85.34(2)(u). The

extent of scheduled member disability benefits to which an injured worker is entitled is determined by using the functional method. Functional disability is "limited to the loss of the physiological capacity of the body or body part." Mortimer v. Fruehauf Corp., 502 N.W.2d 12, 15 (Iowa 1993); Sherman v. Pella Corp., 576 N.W.2d 312 (Iowa 1998). The fact finder must consider both medical and lay evidence relating to the extent of the functional loss in determining permanent disability resulting from an injury to a scheduled member. Terwilliger v. Snap-On Tools Corp., 529 N.W.2d 267, 272-273 (Iowa 1995); Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417, 420 (Iowa 1994).

I found that claimant sustained a 20 percent loss of function in his right leg as a result of the December 20, 2016 work injury. The Iowa legislature has established a 220-week schedule for leg injuries. Iowa Code section 85.34(2)(o). Claimant is entitled to an award of permanent partial disability benefits equivalent to the proportional loss of his leg. Iowa Code section 84.34(2)(v). Twenty (20) percent of 220 weeks equals 44 weeks. Claimant is, therefore, entitled to an award of 44 weeks of permanent partial disability benefits against the employer. Iowa Code section 85.34(2)(o), (v); Blizek v. Eagle Signal Company, 164 N.W.2d 84 (Iowa 1969).

The parties dispute the proper rate at which weekly benefits should be paid. Claimant contends that he is entitled to four exemptions and has a gross average weekly wage of $765.20. Claimant contends the applicable weekly rate should be $516.39.

Defendants do not delineate their arguments in their post-hearing brief. However, it appears from records in evidence that defendants contend claimant is only entitled to two exemptions and that the applicable gross weekly earnings are $548.93. In Claimant's Exhibit 2, page 14, defense counsel asserts on behalf of his clients that the applicable weekly rate is $371.68.

The initial dispute pertaining to the weekly rate is claimant's marital status. Mr. Rekic testified that he is married. No contrary evidence exists in this record. Therefore, having found that Mr. Rekic is married, I conclude his weekly benefits should be calculated for Mr. Rekic under the assumption that he was married at the time of this work injury.

The second dispute pertaining to weekly rate is Mr. Rekic's entitlement to exemptions. Having found that Mr. Rekic is married and that he has a child living with him and his wife, he is clearly entitled to three exemptions. Mr. Rekic is seeking to claim a child from a prior marriage as a fourth exemption to increase his weekly benefit rate. 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 weekly benefit amount payable to an employee shall be based upon 80 percent of the employee's weekly spendable earnings, but shall not exceed an amount, rounded to the nearest dollar, equal to 66-2/3 percent of the statewide average weekly

wage paid employees as determined by the Department of Workforce Development. Iowa Code section 85.37.

Spendable weekly earnings are defined by Iowa Code section 85.61(9) as "that amount remaining after payroll taxes are deducted from gross weekly earnings." Typically, because the weekly rate is based upon spendable weekly earnings, the claimant is bound by the number of exemptions to which she is entitled to claim on tax returns. Deraad v. Fred's Plumbing & Heating, File No. 1134532 (Appeal January 2002); Kolls v. Lowe's Home Centers, Inc., File No. 5062056 (Arbitration December 2017).

Having concluded that Mr. Rekic failed to prove that the child from his prior marriage is an exemption claimed on his tax returns or considered in calculating his spendable weekly earnings, I conclude that Mr. Rekic cannot claim this child as an exemption for purposes of calculating his weekly rate. Instead, I conclude that Mr. Rekic has established entitlement to three exemptions for purposes of calculating weekly rate.

The parties also dispute claimant's average gross weekly wages at the time of this work injury. 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 the employee was 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 is excluded, however. Section 85.36(6).

Under section 85.36(7), the gross weekly earnings of an employee who has worked for the employer for less than the full 13 calendar weeks immediately preceding the injury are determined by looking at the earnings of other similarly situated employees employed over that full period, but if earnings of similar employees cannot be determined, by averaging the employee's weekly earnings computed for the number of weeks that the employee has been in the employ of the employer.

Having found that Mr. Rekic worked for the employer less than 13 weeks before this injury occurred, I conclude that Iowa Code section 85.36(7) would be applicable in calculating claimant's average gross weekly earnings. However, this record contains no evidence demonstrating the wages of a similarly situated employee. Therefore, I conclude that claimant's actual earnings prior to the date of injury should be averaged based upon the number of weeks actually worked by claimant. Iowa Code section 85.36(7).

The initial disputed issue is whether certain "short" weeks should be included within the calculation of claimant's weekly wages. Pursuant to Iowa Code section 85.36(6), clearly any weeks that do not fairly reflect the employee's customary earnings should be replaced by the closest previous week with earnings that fairly represent claimant's customary earnings. It is first noted that Iowa Code section 85.36(7) does not contain a similar provision that permits exclusion of "short" weeks in the situation in which the claimant worked less than 13 weeks before the injury date. The literal language of the statute provides, "If the earnings of other employees cannot be determined, the employee's weekly earnings shall be the average computed for the number of weeks the employee has been in the employ of the employer." Iowa Code section 85.36(7).

A literal reading and application of Iowa Code section 85.36(7) requires inclusion of all weeks of actual earnings and an averaging of those wages since no similarly situated employee's earning records are available in this record. However, even if "short" weeks could be excluded, I found that any "short" weeks of earnings for claimant prior to the date of injury are the result of weather. Claimant worked in a construction position, and work could not be performed during inclement weather. Therefore, I found that the earnings reflected in claimant's pay for the weeks immediately preceding the date of injury fairly reflected his earnings during periods of time when work would be available to other similarly situated employees. I conclude that all of claimant's weekly earnings with this employer prior to the date of injury should be included and averaged in calculating his gross weekly earnings on the date of injury.

As noted previously, the weekly benefit amount payable to an employee shall be based upon 80 percent of the employee's weekly spendable earnings, but shall not exceed an amount, rounded to the nearest dollar, equal to 66-2/3 percent of the statewide average weekly wage paid employees as determined by the Department of Workforce Development. Iowa Code section 85.37.

The weekly benefit amount is determined under the above Code section by referring to the Iowa Workers' Compensation Manual in effect on the applicable injury date. Having found that claimant's gross average weekly wage was $609.15, that claimant was married and entitled to three exemptions, and using the Iowa Workers' Compensation Manual (p. 99) with effective dates of July 1, 2016 through June 30, 2017, I determine that the applicable weekly rate is $414.82.

Mr. Rekic also seeks an order requiring defendants to reimburse his independent medical evaluation fees pursuant to Iowa Code section 85.39. Prior to the time of hearing, defendants conceded that reimbursement in some amount was due pursuant to Iowa Code section 85.39. However, defendants reimbursed only $1,000.00 of Dr. Stoken's charges. It is not obvious from the physician's charges how defendants determined that $1,000.00 was due and owed.

Claimant contends that he should receive the remaining $1,200.00 of Dr. Stoken's charges pursuant to Iowa Code section 85.39. Defendants contend in their

post-hearing brief that Iowa Code section 85.39 does not permit reimbursement of any independent medical evaluation fees required to review prior medical records, or to address causation, restrictions, or future medical treatment. Rather, defendants appear to ask me to apportion or estimate the total amount of fees of Dr. Stoken's evaluation that are solely for purposes of examining claimant and rendering a permanent impairment rating.

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 1991). Claimant need not ultimately prove the injury arose out of and in the course of employment to qualify for reimbursement under section 85.39. See Dodd v. Fleetguard, Inc., 759 N.W.2d 133, 140 (Iowa App. 2008).

Claimant clearly demonstrated the pre-requisites of Iowa Code section 85.39 were met and that he is entitled to reimbursement of Dr. Stoken's independent medical evaluation fees pursuant to Iowa Code section 85.39. Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839 (Iowa 2015). This agency has long awarded the full cost of an independent medical evaluation, including review of medical records and opinions pertaining to causation, restrictions, and future medical care. Often, these issues are of vital importance in determining compensability and the extent of disability.

In Young, 867 N.W.2d at 846, the Iowa Supreme Court concluded, "a physician's written report and evaluation under section 85.39 would be a reimbursable expense under section 85.39." The Court appears to disagree with defendants' contention that the only part of an independent medical evaluation that can be compensable under Iowa Code section 85.39 is the actual examination. I conclude that defendants' attempt to parse out various aspects of the independent medical evaluation is contrary to Young. Having found Dr. Stoken's charges to be reasonable and consistent with evaluations I have seen in similar cases, I conclude that claimant is entitled to reimbursement of the full amount of Dr. Stoken's charges.

Mr. Rekic asserts that penalty benefits should be assessed against defendants for their delay in paying permanent partial disability benefits. Claimant also contends that penalty benefits should be assessed for defendants' underpayment and miscalculation of the applicable weekly rate.

If weekly compensation benefits are not fully paid when due, section 86.13 requires that additional benefits be awarded unless the employer shows reasonable cause or excuse for the delay or denial. Robbennolt v. Snap-on Tools Corp., 555 N.W.2d 229 (Iowa 1996).

Delay attributable to the time required to perform a reasonable investigation is not unreasonable. Kiesecker v. Webster City Meats, Inc., 528 N.W.2d 109 (Iowa 1995).

It also is not unreasonable to deny a claim when a good faith issue of law or fact makes the employer's liability fairly debatable. An issue of law is fairly debatable if viable arguments exist in favor of each party. Covia v. Robinson, 507 N.W.2d 411 (Iowa 1993). An issue of fact is fairly debatable if substantial evidence exists which would support a finding favorable to the employer. Gilbert v. USF Holland, Inc., 637 N.W.2d 194 (Iowa 2001).

An employer's bare assertion that a claim is fairly debatable is insufficient to avoid imposition of a penalty. The employer must assert facts upon which the commissioner could reasonably find that the claim was "fairly debatable." Meyers v. Holiday Express Corp., 557 N.W.2d 502 (Iowa 1996).

If the employer fails to show reasonable cause or excuse for the delay or denial, the commissioner shall impose a penalty in an amount up to 50 percent of the amount unreasonably delayed or denied. Christensen v. Snap-on Tools Corp., 554 N.W.2d 254 (Iowa 1996). The factors to be considered in determining the amount of the penalty include the length of the delay, the number of delays, the information available to the employer and the employer's past record of penalties. Robbennolt, 555 N.W.2d at 238.

Having found that defendants possessed a reasonable basis to challenge claimant's weekly rate and that there were ongoing communications between counsel about the issue, I conclude that penalty benefits are not appropriate for the underpayment of the weekly rate.

However, I found that defendants did not offer a reasonable excuse for the delay in payment of permanent partial disability benefits. Iowa Code section 86.13(4)(b)(2). Defendants did not contemporaneously convey their bases for delay of permanent disability benefits. Iowa Code section 86.13(4)(c)(3). Even after counsel for claimant inquired about the issue, defendants did not further investigate and clarify the issue to pay benefits promptly. Defendants bore the burden to establish a reasonable basis, or excuse, and to prove the contemporaneous conveyance of those bases to the claimant. Defendants failed to carry their burden of proof on the penalty issues, and a penalty award is appropriate. Iowa Code section 86.13.

The purpose of Iowa Code section 86.13 is both punishment for unreasonable conduct but also deterrence for future cases. Id. at 237. In this regard, the Commission is given discretion to determine the amount of the penalty imposed with a maximum

penalty of 50 percent of the amount of the delayed, or denied, benefits. Christensen v. Snap-On Tools Corp., 554 N.W.2d 254, 261 (Iowa 1996).

In exercising its discretion, the agency must consider factors such as the length of the delays, 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. Meyers v. Holiday Express Corp., 557 N.W.2d 502, 505 (Iowa 1996). Having considered the relevant factors and the purposes of the penalty statute, I conclude that a section 86.13 penalty in the amount of $2,500.00 is appropriate in this case. I found that such an amount is appropriate to punish the employer for delays in payment of benefits under these facts and should serve as a deterrent against future conduct. However, the facts of this case are not of such an egregious nature that an additional penalty is warranted.

Finally, claimant seeks an award of his filing fee as a cost of this contested case proceeding. Costs are assessed at the discretion of the agency. Iowa Code section 86.40. Claimant has prevailed in obtaining an award of permanent disability and penalty benefits in this case. I conclude it is appropriate to assess claimant's filing fee ($100.00) pursuant to 876 IAC 4.33(7).

ORDER

THEREFORE, IT IS ORDERED:

Defendants shall pay claimant healing period benefits from December 20, 2016 through October 18, 2017.

Defendants shall pay claimant forty-four (44) weeks of permanent partial disability benefits commencing on October 19, 2017.

All weekly benefits shall be paid at the rate of four hundred fourteen and 82/100 dollars ($414.82) per week.

The employer and insurance carrier shall pay accrued weekly benefits in a lump sum together with interest payable at an annual rate equal to the one-year treasury constant maturity published by the federal reserve in the most recent H15 report settled as of the date of injury, plus two percent, as required by Iowa Code section 85.30.

The employer and insurance carrier shall be entitled to a credit for all weekly benefits paid to date, including credit for salary in lieu of benefits from December 26, 2016 through February 3, 2017.

However, any credit for salary in lieu of benefits is limited to the extent of the applicable weekly rate on any given week. Defendants receive no credit for salary paid above the weekly rate due on any given week after the injury date.

Defendants shall reimburse claimant an additional one thousand two hundred dollars ($1,200.00) representing the remainder of Dr. Stoken's independent medical evaluation fees.

Defendants shall pay claimant penalty benefits in the amount of two thousand five hundred dollars ($2,500.00).

The employer and insurance carrier shall reimburse claimant costs totaling one hundred dollars ($100.00).

The employer and insurance carrier shall file subsequent reports of injury (SROI) as required by this agency pursuant to rules 876 IAC 3.1(2) and 876 IAC 11.7.

Signed and filed this 19th day of March, 2019.

WILLIAM H. GRELL
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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WHG/sam

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.