BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

FILED
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WORKERS' COMPENSATION

BRANDON RAYMIE, Claimant, vs. JB SCHOTT FAMILY FARMS, Employer, and GRINNELL MUTUAL, Insurance Carrier, Defendants.	File No. 5041943 ARBITRATION DECISION
BRANDON RAYMIE, Claimant, vs. GLAZER'S DISTRIBUTORS OF IOWA, INC., Employer, and NEW HAMPSHIRE INSURANCE CO., Insurance Carrier, Defendants.	File Nos. 5046167, 5046169 Head Note Nos.: 1402.30, 1802, 1803, 2501, 4000.2, 4200

STATEMENT OF THE CASE

Claimant, Brandon Raymie, filed petitions in arbitration seeking workers' compensation benefits from JB Schott Family Farms (Schott) employer, Grinnell Mutual (Grinnell), insurer, Glazer's Distributors of Iowa, Inc. (Glazer's) employer, and New

Hampshire Insurance Company (New Hampshire), insurer, all as defendants. This case was heard in Cedar Rapids, Iowa on November 6, 2014 with a final submission date of January 7, 2015.

At hearing claimant made a motion to dismiss File No. 5046170 (date of injury September 13, 2011) and File No. 5046168 (date of injury July 13, 2012). The motion was granted, and those files are dismissed without prejudice.

At the time of hearing, claimant moved to amend the date of injury for File No. 5046167 to July 6, 2012. Defendants did not object. That amendment was taken under advisement. As defendants did not object to the amendment and no prejudice appears on the record, claimant's motion to amend is granted, and File No. 5046167 shall have the date of injury of July 6, 2012.

The record in these cases consists of claimant's Exhibits 1-10, defendants Schott and Grinnell's Exhibits A-D, defendants Glazer's and New Hampshire's Exhibits AA-MM, and the testimony of claimant and Amy Burgess.

ISSUES

For File No. 5041943 (date of injury August 9, 2011):

1. The extent of claimant's entitlement to permanent partial disability benefits.
2. The commencement date of benefits.
3. Credit.
4. Whether reimbursement for benefits should be ordered under Iowa Code section 85.21.
5. Whether defendants are liable for penalty under Iowa Code section 86.13.
6. Costs.

For File No. 5046167 (date of injury July 6, 2012):

1. Whether claimant sustained an injury that arose out of and in the course of employment on July 6, 2012.
2. Whether the injury resulted in a temporary disability.
3. Whether the injury resulted in a permanent disability; and if so
4. The extent of claimant's entitlement to permanent partial disability benefits.

5. The commencement date of benefits.

6. Whether there is a causal connection between the injury and the claimed medical expenses.

7. Whether reimbursement for benefits should be ordered under Iowa Code section 85.21.

8. Costs.

For File No. 5046169 (date of injury July 17, 2012):

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

2. Whether the injury resulted in a permanent disability; and if so

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

4. The commencement date of benefits.

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

6. Whether reimbursement of benefits should be ordered under Iowa Code section 85.21.

7. Costs.

FINDINGS OF FACT

Claimant was 27 years old at the time of hearing. Claimant graduated from high school. Claimant has worked as a farm hand, laborer, and as a driver/delivery person. Claimant has also worked in a warehouse. (Exhibit 3, pages 5-6)

Claimant began with Schott in April of 2011. Schott runs a hog confinement operation. As an employee with Schott claimant fed, weaned and gave medication to pigs. He also separated dead piglets from litters. Claimant generally took care of piglets. He also used a power washer.

Claimant testified that on August 9, 2011 he was moving a power washer and felt a sting in his back. Claimant testified he also felt some left leg pain.

On August 10, 2011 claimant was evaluated by Thomas Drahos, PA-C for back pain. Claimant was assessed as having lower back pain. He was treated with medications. (Ex. 2, pp. 1-2)

Claimant testified he returned to work at Schott after the treatment.

Claimant testified that on September 13, 2011 he was carrying a piglet, when he jerked and felt another sting in his back. On September 13, 2011 claimant returned in followup care with Physician's Assistant Drahos with complaints of continuing lower back pain. An MRI was recommended. (Ex. 2, pp. 4-6)

An MRI taken September 21, 2011 showed a small L5-S1 disc protrusion. (Ex. 2, p. 9)

On October 7, 2011 claimant was evaluated by Chad Abernathey, M.D., an orthopedic surgeon. Claimant had lower back pain radiating to the left leg. Surgery was discussed and chosen as a treatment option. (Ex. 2, p. 13)

On November 15, 2011 claimant underwent an L5-S1 partial hemilaminectomy and diskectomy. Surgery was performed by Dr. Abernathey. (Ex. 2, p. 14)

Claimant returned in followup with Dr. Abernathey. Claimant reported excellent relief. (Ex. 2, p. 15) On January 4, 2012 claimant was returned to work on January 23, 2012. (Ex. 2, p. 5)

Claimant testified he returned to work at Schott and continued to work in the hog confinement operation. He said Dr. Abernathey did not give him any permanent restrictions. Claimant said he did not think he should continue to carry 50-pound bags of feed or pull 200-pound dead pigs after his surgery. Claimant said he began looking for other work.

On January 30, 2012 claimant passed his DOT commercial driver's license physical with no restrictions. (Ex. 2, p. 19)

On February 6, 2012 claimant began working for Glazer's. Claimant's job with Glazer's was to drive a truck and deliver wine and beer to grocery stores, restaurants, bars and gas stations.

In a May 11, 2012 letter Dr. Abernathey indicated claimant had recovered from his surgery. No additional treatment was recommended. Claimant was found to be at maximum medical improvement (MMI) as of May 11, 2012. He had no permanent restrictions. Dr. Abernathey found claimant had a seven percent permanent impairment to the body as a whole. (Ex. 2, p. 23)

In July of 2012 claimant drove a route from Cedar Rapids to Davenport. Claimant worked Tuesday through Friday. He did not work Saturday, Sunday, or Monday. Claimant usually began work at 4:00 to 4:30 a.m. and worked approximately 10-12 hours a day.

Claimant testified Glazer uses a biometric login system. Claimant had to use his thumbprint to log in and out of Glazer's time clock.

Claimant testified that before the July 4, 2012 holiday, he was making deliveries to a bar in North Liberty called "Red's." Claimant said he had about 30 kegs to bring down steps at Red's with a two-wheel dolly or hand truck. Claimant said he stood behind the dolly and lowered the dolly down stairs. He said moving the 30 kegs down stairs by a dolly made his back sore. Claimant said this would have occurred before the July 4, 2012 holiday. (Transcript pp. 31-32) Claimant testified he believed he made deliveries before July 4, 2012. He said the deliveries probably would have been made on July 3, 2012, or sometime late in June of 2012. (Tr. p. 66)

On July 10, 2012 claimant was evaluated by Physician's Assistant Drahos. Claimant had pain beginning last week. Claimant indicated he lifted kegs for work. Claimant had lower back pain shooting into his leg. Claimant was assessed as having lower back pain. He was treated with medications. (Ex. 2, pp. 25-26)

Claimant testified at hearing that on July 17, 2012 he traveled from Cedar Rapids to Davenport. He said that at his first stop, he was moving cases out of the way of a pallet, when he felt a similar sting in his back. Claimant testified that before he delivered any product at his first stop, he decided to stop and head back to Cedar Rapids before further hurting his back. Claimant testified he called his boss and returned to Cedar Rapids without making any deliveries. Claimant said he arrived back in Cedar Rapids around 10:00 to 11:00 a.m. on July 17, 2012. (Tr. pp. 58, 119)

Claimant also testified in his deposition, prior to hearing, that he hurt his back on July 17, 2012 before he made any deliveries on that date. (Ex. D, deposition pp. 67-69)

Claimant testified on rebuttal that he made only one stop, on July 17, 2012 and made no deliveries on that date. He testified he did not make any deliveries shown in Exhibit KK.

Time cards indicate that claimant clocked in at 4:12 on the morning of July 17, 2012 and clocked out at 2:09 that afternoon. (Ex. GG, p. 20) Invoice and delivery records for July 17, 2012 also show claimant made deliveries to customers on the Cedar Rapids to Davenport route. (Ex. JJ, KK) Claimant also filled out stubs indicating he received collections and returns from clients on July 17, 2012 at various route stops. (Ex. JJ, pp. 35-36)

Based on stipulations made between the parties, found at Exhibit 10, claimant made phone calls, on the morning of July 17, 2012 with a supervisor and other Glazer's employees. (Ex. 10, pp. 2-3) He also made two phone calls to Grinnell, the insurer for his work injury with Schott. (Ex. 10, pp. 2-3) Claimant also made phone calls with Mercy Care in North Liberty. (Ex. 10, p. 3) Mercy Care is the clinic where PA Drahos works.

Amy Burgess testified at hearing that she is a finance manager for Glazer's. In that capacity she is familiar with the logs and delivery records kept by Glazer's. Ms. Burgess testified she is also familiar with claimant's workers' compensation claim.

Ms. Burgess testified she was told by claimant's operation's manager, Stan Hurst, claimant told Mr. Hurst his back pain was related to another injury he had with a prior employer. (Tr. pp. 1-5, 106)

Ms. Burgess testified she reviewed claimant's work records for July 17, 2012. Ms. Burgess testified records indicate claimant worked a full shift on July 17, 2012 and clocked out around 2:09 in the afternoon of that day. Ms. Burgess testified there was nothing in the record indicating someone else, other than claimant, clocked in and out on his time logs.

Claimant was evaluated by Physician's Assistant Drahos on July 17, 2012. Claimant indicated he bent over to pick up some beer and had severe pain in his lower back. Claimant was assessed as having severe lower back pain and treated with medication. Claimant was taken off work from July 17, 2012 through July 20, 2012 and returned with no lifting on July 21, 2012. (Ex. 2, pp. 28-31)

On July 23, 2012 claimant was evaluated by Dr. Abernathey with a history of one week of hurting from lower back pain. Claimant's symptoms began when lifting cases of beer. An MRI was recommended. Claimant was kept off work until his next appointment. (Ex. 2, p. 24)

In an August 2, 2012 letter Dr. Abernathey opined claimant's complaint of lower back pain and bilateral leg pain was associated with his previous injury. (Ex. 2, p. 32)

Claimant had an MRI on August 22, 2012 showing mild degenerative changes and post-surgical changes. Dr. Abernathey opined the MRI did not show significant neural compromise and recommended claimant pursue conservative, rather than surgical, treatment. Claimant was allowed to return to work on August 27, 2012. (Ex. 2, pp. 33-35)

Effective August 23, 2012 claimant was terminated from Glazer's for personal reasons. (Ex. CC) Defendant Glazer's indicated in answers to interrogatories that claimant was terminated because he stopped going to work. (Ex. DD, p. 14)

On September 26, 2012 claimant was evaluated by Jeffrey Westpheling, M.D. Claimant indicated he was fired from Glazer's for not being able to physically perform his work. He was assessed as having recurrent lower back pain and left lumbar radiculitis. Dr. Westpheling recommended claimant have a 10-pound lifting restriction and undergo physical therapy. (Ex. 2, pp. 28-42)

Claimant returned to Physician's Assistant Drahos on September 26, 2012 with complaints of lower back pain. Claimant was treated with medication. (Ex. 2, pp. 44-45)

Claimant was evaluated by Darin Smith, M.D. on October 17, 2012. Claimant had continued lower back pain and left leg tingling. Dr. Smith assessed claimant as

having pain recurring from a lifting incident in July of 2012. An MRI showed an L5-S1 protrusion on the left. (Ex. 2, pp. 51-54) Dr. Smith later opined claimant's back pain was likely related to the L5-S1 disc. Surgery was recommended and chosen as a treatment option. (Ex. 2, pp. 57-60)

In a November 26, 2012 letter Dr. Abernathey opined that a fusion at the L5-S1 level would have a limited effect on claimant's pain. He recommended against a fusion surgery. (Ex. MM, p. 119)

On January 15, 2013 claimant underwent a lumbar fusion at the L5-S1 levels. Surgery was performed by Dr. Smith. (Ex. 2, pp. 61-62)

Claimant returned to Dr. Smith on March 20, 2013. Claimant indicated increased back pain. Dr. Smith indicated claimant might benefit from less strenuous physical therapy. (Ex. 2, p. 65) A return visit in April of 2013 found claimant having increased back pain. An MRI was recommended. (Ex. 2, pp. 67-68)

An MRI showed claimant had an L5 foraminal cyst. Drainage of the cyst was recommended. (Ex. 2, pp. 69-70) Claimant's cyst was drained, and it was determined that the surgical site had an MRSA infection. (Ex. 2, pp. 71-75)

In June of 2013 claimant was receiving antibiotics through a PICC line. Claimant still had ongoing back pain. (Ex. 2, pp. 76-77) In a June 12, 2013 note Dr. Abernathey opined that claimant's alleged injury of July 17, 2012 was not a material and substantial cause of claimant's back symptoms that lead to the fusion surgery. He opined claimant's need for current back treatment was not related to the July 17, 2012 injury. (Ex. A, pp. 1-2)

On August 22, 2013 claimant was evaluated by Grant Shumaker, M.D. Dr. Shumaker recommended surgery due to epidural abscesses. (Ex. 2, p. 82)

On September 11, 2013 claimant underwent another back surgery consisting of a screw removal at the L5-S1 levels and replacement of some hardware. (Ex. 2, pp. 89-90) On September 13, 2013 claimant was discharged from the hospital and was continued on the PICC line for six more weeks. (Ex. 2, pp. 93-96)

In a September 17, 2013 note Dr. Abernathey opined that claimant's medical treatment was related to a work injury of July 17, 2012 and not the work incident of August 11, 2011. He opined that all medical treatment after the injury of July 17, 2012 would be associated with the July 17, 2012 injury. (Ex. A, pp. 3-4)

On September 19, 2013 claimant returned in followup care with Dr. Shumaker. Claimant indicated nearly 100 percent improvement. He was continued on physical therapy. (Ex. 2, pp. 97-101)

On January 14, 2014 claimant underwent a functional capacity evaluation (FCE) performed by Timothy Saulsbury, PT. Claimant was found to have given good effort. He was found to be able to work in the light to medium category of work. (Ex. 2, pp. 117-142)

In a note dated March 21, 2014 Dr. Shumaker found claimant had an additional 16 percent permanent impairment in relation to the lumbar fusion. When combined with a 7 percent permanent impairment from the prior surgery, claimant had a combined 23 percent permanent impairment to the body as a whole. (Ex. 2, p. 143)

In a May 27, 2014 report, Douglas Martin, M.D., gave his opinions of claimant's condition following an independent medical evaluation (IME). Claimant indicated he went to pick up a case of beer on July 17, 2012 and felt back pain and left leg discomfort. He indicated he did not have left leg symptoms following surgery, but claimant still had lower back pain. Dr. Martin had no additional recommendations of care for claimant. (Ex. 2, pp. 143-150)

Dr. Martin opined that based on his review of the records claimant had a herniated disc syndrome that occurred in August 2011. Claimant had excellent response to surgery and was found to be at MMI in May of 2012. Dr. Martin believed the event that occurred in July of 2012, caused by lifting cases of beer, created a recurrent S1 radiculopathy on the left. Dr. Martin did not see any evidence-based indication claimant should have had a fusion, performed by Dr. Smith. He believed a microdiskectomy should have been performed. (Ex. 2, pp. 150-152)

Dr. Martin opined claimant should have a 10 percent permanent impairment to the body as a whole for the August 2011 injury. He opined claimant would have a 9 percent permanent impairment to the body as a whole for the July of 2012 incident. When combined, claimant had a total of a 19 percent permanent impairment to the body as a whole. He found claimant's current complaints of lower back pain were due to the July of 2012 incident. (Ex. 2, pp. 153-157)

In a May 30, 2014 report, Robin Sassman, M.D., gave her opinion of claimant's condition following an IME. Claimant indicated that he hurt his back on July 17, 2012 while lifting and moving cases of beer and wine. Dr. Sassman found claimant was at MMI on June 24, 2012. (Ex. 1, pp. 5-10)

Dr. Sassman found claimant would have had a 10 percent permanent impairment to the body as a whole as a result of the injury he incurred while employed at Schott's. She also found claimant would have had a 14 percent permanent impairment to the body as a whole from the July of 2012 injury. Claimant had a combined value of 24 percent permanent impairment to the body as a whole. Dr. Sassman gave claimant permanent restrictions of only lifting, pushing, pulling or carrying up to 20 pounds from the floor to the waist. (Ex. 1, pp. 10-16)

In a September 29, 2014 letter Dr. Abernathey gave his opinions regarding claimant. He found claimant's July of 2012 incident was a temporary aggravation of a preexisting back problem. He opined that any permanent impairment claimant now has was not due to a July of 2012 incident. (Ex. MM, p. 122)

In a November 3, 2014 note Dr. Abernathey opined the work incident of July 17, 2012 at Glazer's could have been a permanent or material and substantial aggravation of his prior back injury sustained in August 2011. (Ex. A, pp. 5-6)

In an October 29, 2014 letter Dr. Smith opined claimant's July of 2012 injuries were a material and substantial cause of the January 2013 surgery and subsequent care. (Ex. B)

Claimant testified he still has daily lower back pain. He said he has no pain in his legs. He testified he could not return to work to most of his prior jobs due to his back pain. He said he still could return to work on a prior job where he delivered light fixtures.

At the time of hearing, claimant was not employed. Claimant testified he did bookkeeping work for his father-in-law in exchange for free rent. Claimant said he is comfortable, at present, financially. He said he has not looked for work since leaving Glazer's. He said he has not applied for work or vocational training.

Claimant says he does household chores, but has difficulty performing those chores due to lower back pain.

Records indicate that defendants Schott and Grinnell paid claimant temporary total disability benefits from December 13, 2011 to January 22, 2012, and from July 27, 2012 through January 21, 2014 totaling $46,790.41. Defendants Grinnell and Schott also paid claimant permanent partial disability benefits from June 3, 2012 to July 16, 2012, and from January 22, 2014 through September 17, 2014 for a total of $18,304.35. Defendants Schott and Grinnell also paid a total of $198,401.83 in medical benefits. (Ex. C)

CONCLUSIONS OF LAW

The first issue to be determined is if claimant sustained an injury that arose out of and in the course of employment on July 6, 2012.

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).

In his amended petition, claimant contends he was injured on June 6, 2012. The injury occurred when claimant was moving approximately 30 kegs down stairs with a two-wheeler hand truck or dolly at a bar called "Red's." Claimant indicated the injury occurred while making deliveries in preparation for the July 4, 2012 weekend. (Tr. 30-33)

Claimant testified at the hearing as follows:

> Q. You talked about being around the July 4th holiday. As you sit here today do you have any recollection about whether or not that would have been before the July 4th holiday, after the July 4th holiday?

A. It would have been before. We had to get all of the orders in before that day before they - - they stocked up just before the holiday.

(Tr. 32)

On cross exam, claimant reiterated that any deliveries made to Red's would have occurred before July 4th. (Tr. 65-66)

Claimant alleges in his petition, he sustained a traumatic incident occurring on July 6, 2012. At hearing claimant testified the alleged incident actually happened before July 4, 2012 and not on July 6, 2012. Given this record, claimant has failed to carry his burden of proof he sustained an injury arising out of and in the course of employment on July 6, 2012.

As claimant has failed to carry his burden of proof he sustained an injury that arose out of and in the course of employment on July 6, 2012, all other issues related to File No. 5046167 are moot. In addition, defendants Schott and Grinnell's petition under 85.21 is also dismissed in regards to this file.

Regarding File No. 5046169 (date of injury July 17, 2012), claimant contends he injured his back at the beginning of his shift and returned to Cedar Rapids without making any deliveries. (Tr. 33-34, 58, 113-118) Claimant testified to this same sequence in his deposition. (Ex. D, depo. pp. 68-69)

Work records from Glazer's indicate claimant worked a full shift on July 17, 2012. (Ex. GG, p. 20) Invoice records also indicate claimant made deliveries on July 17, 2012. (Ex. JJ, pp. 35-36) These records include delivery receipts. Claimant testified at hearing his signature was on delivery receipts for July 17, 2012. (Tr. 114; Ex. KK, pp. 38, 40-41, 44, 47, 48-50, 52-53)

However, the parties stipulated in hearing, and on the hearing report, that claimant sustained an injury that arose out of and in the course of employment on July 17, 2012. I do not believe I have the discretion to ignore that stipulation based upon these contradictory records.

Therefore, it is found that claimant did sustain an injury on July 17, 2012 that arose out of and in the course of employment based upon the stipulations of the parties.

The next issue to be determined is the extent of claimant's entitlement to temporary benefits regarding the July 17, 2012 injury.

Healing period compensation describes temporary workers' compensation weekly benefits that precede an allowance of permanent partial disability benefits. Ellingson v. Fleetguard, Inc., 599 N.W.2d 440 (Iowa 1999). Section 85.34(1) provides that healing period benefits are payable to an injured worker who has suffered permanent partial disability until the first to occur of three events. These are: (1) the

worker has returned to work; (2) the worker medically is capable of returning to substantially similar employment; or (3) the worker has achieved maximum medical recovery. Maximum medical recovery is achieved when healing is complete and the extent of permanent disability can be determined. Armstrong Tire & Rubber Co. v. Kubli, Iowa App., 312 N.W.2d 60 (Iowa 1981). Neither maintenance medical care nor an employee's continuing to have pain or other symptoms necessarily prolongs the healing period.

The record indicates claimant was taken off work on July 17, 2012 by Physician's Assistant Drahos. (Ex. 2, p. 31) He was allowed to return to work on August 27, 2012. (Ex. 2, pp. 33-35) Claimant was terminated, as he stopped coming to work. (Ex. CC; Ex. DD, p. 14; Ex. D, p. 108) No doctor told claimant he could not continue to work at Glazer's. Claimant simply stopped coming to work. Agency case law has held that quitting a job is similar to refusing to perform suitable employment. Zapata v. IBP, File No. 1056904 (Appeal Decision April 27, 1998); Fillin v. Good Neighbor Home, 108 8490 (Appeal Decision September 8, 1998); Swan v. Industrial Engineering Equipment Co., IV Iowa Industrial Comm'r Report 353 (1984). Based on this, claimant is due healing period benefits from July 18, 2012 through August 27, 2012.

The next issue to be determined is whether the injury resulted in a permanent disability.

Claimant testified he had a sting in his back after moving a few cases of beer on July 17, 2012. As noted, there is a discrepancy between claimant's testimony and work records maintained by Glazer's. However, as also noted, the parties stipulated that claimant sustained an injury on July 17, 2012.

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 underwent two surgeries following his July 17, 2012 injury. An FCE found claimant can only work in the light to medium level occupation. Drs. Shumaker, Martin and Sassman all opined that the July 17, 2012 incident resulted in a permanent impairment. Dr. Abernathey opined that claimant's 2012 injury was only a temporary aggravation of a preexisting condition. Given that claimant has two back surgeries following the July 17, 2012 incident, it is difficult to understand Dr. Abernathey's opinions that claimant's July 2012 incident is only a temporary aggravation.

Given this record, claimant has carried his burden of proof that his July 17, 2012 injury resulted in a permanent disability.

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.

Loss of earning capacity due to voluntary choice or lack of motivation to return to work is not compensable. Copeland v. Boones Book and Bible Store, File No. 1059319 (App. November 6, 1997); Snow v. Chevron Phillips Chemical Co., File No. 5016619 (App. October 25, 2007).

Regarding claimant's August 9, 2011 injury (File No. 5041943), claimant was 27 years old at the time of hearing. Claimant graduated from high school. He has worked on a farm, as a laborer, and as a driver/delivery person. He has also worked in warehouses.

Four experts have opined regarding the extent of claimant's permanent impairment regarding the 2011 injury. Dr. Abernathey found claimant had a 7 percent permanent impairment for the 2011 injury. (Ex. MM, p. 112) Dr. Shumaker found claimant had a 7 percent permanent impairment from the 2011 injury. (Ex. 2, p. 143) Dr. Martin found that claimant had a 10 percent permanent impairment for the 2011 injury. (Ex. 2, pp. 153-157) Dr. Sassman found that claimant had a 10 percent permanent impairment from the 2011 injury. (Ex. 1, p. 15)

Dr. Martin found that Dr. Abernathey's assessment was inconsistent with the Guides, Fifth Edition. (Ex. 2, p. 153) Dr. Martin found that claimant fell into the DRE lumbar category III finding that claimant had a 10 percent permanent impairment. Dr. Sassman agrees with Dr. Martin's finding of permanent impairment. (Ex. 1, p. 15)

I am able to follow both Drs. Sassman and Martin's opinions regarding claimant's 10 percent permanent impairment for the 2011 injury. Dr. Martin's opinions are supported by Dr. Sassman. Given this record, it is found that claimant has a 10 percent permanent impairment to the body as a whole for the 2011 injury.

When claimant returned to work after his 2011 injury, he had no work restrictions. Claimant credibly testified he had lower back pain after that injury. Claimant testified he has not looked for work since leaving Glazer. No doctor has told claimant he cannot work. Claimant took a course in real estate in 2012 but chose not to complete the course. Claimant has not submitted any applications for any jobs.

When all relevant factors are considered, it is found claimant has a 15 percent loss of earning capacity or industrial disability regarding the August 9, 2011 work injury.

Regarding claimant's injury of July 17, 2012 (File No. 5046169), claimant underwent two fusion surgeries. The first surgery resulted in claimant contracting MRSA. Records indicate claimant had a PICC line in his arm for several months for antibiotics to fight the infection.

Three physicians have opined regarding claimant's permanent impairment from his July 17, 2012 injury. Dr. Shumaker found claimant had a 16 percent permanent impairment from the 2012 injury. (Ex. 2, p. 143) Dr. Martin found claimant had a 9 percent permanent impairment from the 2012 injury. (Ex. 2, pp. 153-157) Dr. Sassman found claimant had a 14 percent permanent impairment to the body as a whole from the 2012 injury. (Ex. 1, p. 15)

Dr. Shumaker gives little rationale as to why he found claimant had a 16 percent permanent impairment to the body as a whole, and I am unable to understand how he arrives at this figure. Based on this, it is found that Dr. Shumaker's opinions regarding claimant's permanent impairment for the 2012 injury is not convincing.

Dr. Sassman attempted to evaluate each injury individually to arrive at a permanent impairment rating for the 2012 injury. Dr. Martin arrived at his permanent

impairment rating for the 2012 injury by apportionment. As Dr. Sassman tried to evaluate permanent impairment for each injury individually, it is found claimant had a 14 percent permanent impairment for the 2012 injury.

An FCE found claimant could work in the light to medium work category.

As detailed above, claimant testified he has not looked for work. Claimant has not submitted any applications for jobs or vocational training. No doctor has told claimant he could not return to work. Claimant did take classes in real estate in 2012 but chose not to complete them.

When all relevant factors are considered, it is found claimant has a 30 percent loss of earning capacity or industrial disability due to the July 2012 injury.

The next issue to be determined is the date of commencement of permanent partial disability benefits.

Healing period compensation describes temporary workers' compensation weekly benefits that precede an allowance of permanent partial disability benefits. Ellingson v. Fleetguard, Inc., 599 N.W.2d 440 (Iowa 1999). Section 85.34(1) provides that healing period benefits are payable to an injured worker who has suffered permanent partial disability until the first to occur of three events. These are: (1) the worker has returned to work; (2) the worker medically is capable of returning to substantially similar employment; or (3) the worker has achieved maximum medical recovery. Maximum medical recovery is achieved when healing is complete and the extent of permanent disability can be determined. Armstrong Tire & Rubber Co. v. Kubli, Iowa App., 312 N.W.2d 60 (Iowa 1981). Neither maintenance medical care nor an employee's continuing to have pain or other symptoms necessarily prolongs the healing period.

Regarding the 2011 injury, claimant was released to return to work by Dr. Abernathey on July 23, 2012. (Ex. 2, p. 15) Permanent partial disability benefits regarding this injury shall commence on that date.

Dr. Sassman, claimant's expert, found claimant was at maximum medical improvement regarding his second injury on June 24, 2014. Benefits for the 2012 injury shall commence on June 24, 2014.

The next issue to be determined, regarding File No. 5046169 (date of injury July 17, 2012) is if 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 received treatment for his July of 2012 work-related accident. Records indicate costs detailed in the medical bills related to care and treatment the claimant received for that injury. There is no evidence that the bills detailed in the records are not causally connected to claimant's July of 2012 accident. There is no evidence that the costs related to this treatment are not fair and reasonable. Based on this, defendants are liable for the claimed medical expenses for the July of 2012 work injury.

The next issue to be determined is if defendants Schott and Glazer's are liable for penalty benefits 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).

Iowa Code section 86.13(4)(c) requires that if a delay in payment of benefits occurs without reasonable or probable cause or excuse, the workers' compensation commissioner shall award additional weekly benefits in an amount not to exceed 50 percent of the amount of benefits that were unreasonably delayed or denied. A reasonable or probable cause or excuse must satisfy the following requirements:

> (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 benefit:
>
> (3) The employer or insurance carrier contemporaneously conveyed the basis of the denial, delay in payment, or termination of benefits to the employee at the time of the denial, delay or termination of benefits.

Claimant contends he is due a penalty for alleged numerous late permanent partial disability benefits paid by defendants Schott and Grinnell. Claimant alleges defendants are liable for the late payment of permanent partial disability benefits for the period of January 23, 2012 through May 27, 2012. Claimant returned to work at Schott on January 23, 2012 with no permanent restrictions. (Ex. C, pp. 7-11) It was not until May 11, 2012 that Dr. Abernathey opined claimant had any permanent impairment. (Ex. 2, p. 23) As Schott and Grinnell were not aware of any obligation to pay permanent partial disability benefits until after May 11, 2012, a penalty is not appropriate for the period of January 23, 2012 through May 27, 2012.

Claimant also alleges that defendants Schott and Grinnell are liable for a penalty for one-week delays in payment of permanent partial disability benefits for the following alleged payable dates:

Date Issued		Amount
08/14/2012	07/27/2012 – 08/09/2012	$794.02 (2 weeks)
12/26/2012	12/19/2012 – 12/25/2012	$397.01 (1 week)
03/27/2013	03/20/2013 – 03/26/2013	$397.01 (1 week)
05/01/2013	04/24/2013 – 04/30/2013	$397.01 (1 week)
05/08/2013	05/01/2013 – 05/07/2013	$397.01 (1 week)
07/26/2013	07/17/2013 – 07/23/2013	$397.01 (1 week)
08/14/2013	08/07/2013 – 08/13/2013	$397.01 (1 week)
11/07/2013	10/30/2013 – 11/05/2013	$397.01 (1 week)
12/09/2013	12/04/2013 – 12/08/2013	$283.47 (5 days)
12/16/2013	12/09/2013 – 12/15/2013	$397.01 (1 week)
12/23/2013	12/16/2013 – 12/22/2013	$397.01 (1 week)
12/30/2013	12/23/2013 – 12/29/2013	$397.01 (1 week)
04/07/2014	03/25/2014 – 03/31-2014	$397.01 (1 week)
06/17/2014	04/02/2014 – 06/18/2014	$4,409.00 (includes interest) (11 weeks)

As noted above, it is found claimant is due 75 weeks of permanent partial disability benefits commencing on January 23, 2012. Seventy-five weeks from January 23, 2012 is approximately December 23, 2013. Given that I find claimant is due 75 weeks of permanent partial disability benefits, I find it is unfair to consider any penalty claim beyond December 23, 2013.

Defendants were late with permanent partial disability benefits for checks issued August 14, 2012; December 26, 2012, March 27, 2013, May 1, 2013; May 8, 2013; July 26, 2013; August 14, 2013; November 11, 2013; December 9, 2013, and December 16, 2013.

The total amount of benefits paid late during this period of time was $4,650.58.

Defendants contend in their brief that a penalty is not appropriate in this case, as claimant had little or no industrial disability because he returned to work with Schott with no permanent restrictions. (Defendants Schott and Grinnell's brief, p. 21-22) However, there is no evidence in the record that this rationale was the reason for the lateness of permanent partial disability benefit payments. There is no evidence in the record that this rationale was conveyed to claimant at any time. Based on this record, a penalty is appropriate. Because claimant did return to work at Schott's with no permanent restrictions, and defendants did pay claimant approximately 70 weeks of permanent partial disability benefits, a 20 percent penalty is appropriate in this case. Defendants are liable for a penalty of $930.12 ($4,650.58 x 20%) for the late payments detailed above.

The next issue to be determined is costs. In the request for costs, claimant seeks reimbursement for mileage against all defendants for both the 2011 and the 2012 injury. Defendants Schott and Grinnell shall pay mileage associated with the 2011 injury claim. Defendants Glazer's and New Hampshire shall pay mileage related to the July of 2012 injury. Defendants Glazer's/New Hampshire shall also pay one half of the IME costs under Iowa Code section 85.39 regarding the IME with Dr. Sassman.

The last issue to be resolved is whether Grinnell is entitled to be reimbursed by New Hampshire for payment of weekly and medical benefits and independent medical exam costs paid for claimant's injury of July 17, 2012.

Iowa Code section 85.21(3) provides:

> When liability is finally determined by the workers' compensation commissioner, the commissioner shall order the carriers or employers liable to the employee or to the employee's dependent or legal representative to reimburse the carriers or employers which are not liable but were required to pay benefits. Benefits paid or reimbursed pursuant to an order authorized by this section do not require the filing of a

> memorandum of agreement. However, a contested case for benefits under this chapter or under chapter 85A or 85B shall not be maintained against a party to a case or dispute resulting in an order authorized by this section unless the contested case is commenced within three years from the date of the last benefit payment under the order. The commissioner may determine liability for the payment of workers' compensation benefits under this section.

As detailed above, claimant sustained an injury on July 17, 2012 that arose out of and in the course of employment with Glazer's. Grinnell paid medical benefits regarding claimant's July of 2012 injury. (Ex. C)

Defendants Glazer's and New Hampshire note, in their post-hearing brief, that Grinnell paid $5,787.28 in medical management services to Alaris. This is not a reimbursable charge under Iowa Code section 85.21. Exhibit C indicates that defendants Schott and Grinnell also paid fees to a Global Infectious Disease, and a Neural Watch. Defendants Glazer's/New Hampshire indicate there have been no records exchanged for either entity. No records for Global Infectious Disease or Neural Watch are in the record. Based on this, defendants Glazer's/New Hampshire, shall reimburse Grinnell for all medical costs associated with the July 17, 2012 injury, less bills associated with Alaris, Global Infectious Disease, and Neural Watch.

Grinnell also paid temporary benefits to claimant beginning on July 27, 2012 to January 21, 2014. As noted above, Glazer's/New Hampshire is only liable for temporary benefits from July 18, 2012 through August 27, 2012. Defendants Glazer's/New Hampshire shall reimburse Grinnell for temporary benefits paid during this time.

ORDER

THEREFORE IT IS ORDERED:

Regarding File No. 5041943 (date of injury August 9, 2011):

That defendants shall pay claimant seventy-five (75) weeks of permanent partial disability benefits at the rate of three-hundred eighty-seven and 01/100 dollars ($387.01) per week commencing on January 23, 2012.

That defendants shall pay accrued 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 $930.12 in penalty, as detailed above.

That defendants shall pay claimant's medical mileage as it pertains only to File No. 5041943.

Regarding File No. 5046167 (date of injury, July 6, 2012):

That claimant shall take nothing in the way of benefits from this file.

That both parties shall pay their own costs regarding this file.

Regarding File No. 5046169 (date of injury, July 17, 2012):

That defendants shall pay claimant healing period benefits at the rate of three-hundred seventy-six and 29/100 dollars ($376.29) per week from July 18, 2012 through August 27, 2012.

That defendants shall pay claimant one-hundred fifty (150) weeks of permanent partial disability benefits at the rate of three-hundred seventy-six and 29/100 dollars ($376.29) per week commencing on June 24, 2014.

That defendants shall pay accrued 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 pay claimant's medical expenses.

That defendants shall reimburse Schott/Grinnell for medical expenses as detailed above.

That defendants shall reimburse Schott/Grinnell for temporary benefits as detailed above.

That defendants shall pay claimant's mileage only as it pertains to File No. 5046169.

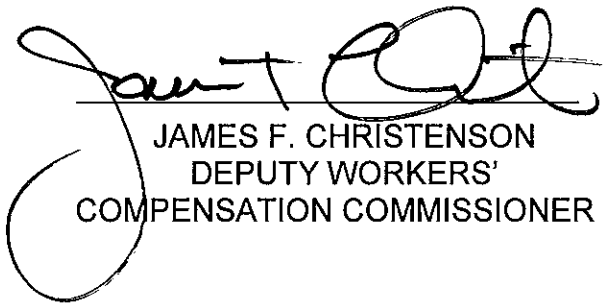
That defendants shall pay claimant for one half of the costs associated with Dr. Sassman's IME.

Regarding both File Nos. 5041943 and 5046169:

That defendants shall pay the costs of these matters.

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

Signed and filed this 25th day of February, 2015.



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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.