BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

NATHANIEL R. CHRISTIANSEN,	FILED	
Claimant,	MAR 23 2017	
vs.	WORKERS COMPENSATION	File No. 5054776
L.A. CARLSON CONTRACTING, INC.,		ARBITRATION
Employer,		DECISION
and		
AUTO-OWNERS INSURANCE COMPANY,		
Insurance Carrier, Defendants.		Head Notes: 1108.50, 1402, 4100, 1803.1, 2204, 2501, 2502, 2907, 4000.2

STATEMENT OF THE CASE

Nathaniel Christiansen, claimant, filed a petition in arbitration seeking workers' compensation benefits from L.A. Carlson Contracting, Inc., employer and Auto-Owners Insurance Company, insurance carrier, both as defendants. Hearing was held on November 29, 2016, in Sioux City, Iowa.

Nathaniel Christiansen and Rick Ostrander testified live at trial. The evidentiary record also includes claimant's Exhibits 1-13, Exhibit 14, pp. 1-34, and Exhibits 15-31 and defendant's Exhibits A-H. It should be noted that claimant's Exhibit 1, page 1 was admitted for the limited purposes allowed under Iowa Code section 86.11.

The 2007 deposition transcript of Marcus Witter, P.T. in an unrelated workers' compensation claim, was offered by claimant as Exhibit 14, pages 35-63. Defendants objected to this exhibit on the basis that claimant failed to provide defendants with notice that he intended to offer this as an exhibit and failure to exchange the offered exhibits in a timely fashion. At the time of hearing, claimant's counsel did not have his entire file with him and requested additional time to respond to the objection. Claimant's counsel was given additional time to demonstrate that he had complied with the rules. The undersigned reserved ruling on the objection. The objection will now be considered.

Defendants objected to admission of this exhibit because a copy of the deposition from an unrelated matter had not been exchanged at least 30 days before

hearing as required by 876 IAC 4.19(3)(d). Since the time of hearing, claimant's counsel has provided additional information regarding the exchange of this exhibit. Claimant's counsel submitted a copy of a service of medical records and report and notice of intent to offer with a proof of service dated December 3, 2015 ("notice of service"). This notice of service is 22 pages long and is primarily single-spaced. On approximately page 21 of the notice of service, the deposition of Marcus Sitter dated October 27, 2007 is listed. However, the notice of service fails to indicate whether the deposition transcript itself was actually produced to the defendant at that time. Defendants state that the first time they received a copy of the transcript was on a CD of trial exhibits overnighted with correspondence dated November 21, 2016. I find that claimant has failed to demonstrate that he complied with the prehearing procedure to properly exchange all exhibits at least 30 days before hearing. Therefore, Exhibit 14, pages 35-63 are not admitted because those pages were not provided to defendants at least 30 days prior to hearing.

The parties filed a hearing report at the commencement of the arbitration hearing. On the hearing report, the parties entered into various stipulations. All of those stipulations were accepted and are hereby incorporated into this arbitration decision and no factual or legal issues relative to the parties' stipulations will be raised or discussed in this decision. The parties are now bound by their stipulations.

The parties requested the opportunity for post-hearing briefs, which were submitted on February 6, 2017.

ISSUES

The parties submitted the following issues for resolution:

1. Whether claimant's entitlement to permanent disability is scheduled or unscheduled in nature and the extent of claimant's entitlement?

2. Whether claimant is entitled to past medical benefits?

3. Whether claimant is entitled to an IME pursuant to section 85.39?

4. Whether claimant is entitled to medical care under section 85.27?

5. Whether penalty should be assessed against the defendant?

6. Assessment of costs.

FINDINGS OF FACT

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

Claimant, Nathaniel Christiansen, sustained a traumatic injury on October 4, 2012, while working as a flagger and laborer for L.A. Carlson Contracting, Inc.

Christiansen was working in an eight by twelve feet wide ditch when the ditch collapsed; he was trapped up to his shoulders. (Exhibit 1, page 2) Christiansen said he lost consciousness and when he regained consciousness he was still buried up to his waist. Emergency crews and co-workers were digging him out with their hands. According to the police report, it took approximately 30 minutes to dig him out; Christiansen estimates he was conscious about half of the time. Christiansen testified that as a result of the work injury he sustained a broken jaw, broke both bones in his left arm, and injured his neck and back. He also testified that his nose was pretty much taken off and he sustained a head injury. (Testimony)

Christiansen was taken via ambulance to the Sioux Center Hospital and was then life-flighted to Mercy Medical Center is Sioux City. He underwent surgery at Mercy that same day. He had plates put into his left arm, three sections of his jaw were put into place and wired shut, and he underwent nose reconstruction. David W. Wagner, M.D. performed the facial surgery. Darrel Baker, D.D.S operated on Christiansen's jaw. Wade Jensen, M.D. operated on his left upper extremity. Christiansen did not select any of these doctors. Christiansen was in the hospital from October 4, 2012 until October 7, 2012. He was discharged from the hospital with diagnoses of a closed head injury, open mandible fracture, soft tissue injury to the nose, and left forearm fracture. (Ex. 2, Ex. 3,pp. 1-25; Testimony)

Christiansen's jaw remained wired shut for approximately six weeks. He broke his left arm a second time while performing light duty work for the employer. His arm was placed in a splint and Dr. Jensen performed a second operation to replace the plate on February 5, 2013. Bone graft from Christiansen's hip was used in the operation to help his arm heal faster. At the time of the hearing he still has plates in his left arm, but testified that they may need to be removed at some point because they do still cause him some pain when the weather changes or when he uses his wrist. (Ex. 11; Testimony)

As set forth in the medical exhibits, Christiansen underwent extensive medical treatment for his injuries. It is not necessary to summarize all of his treatment herein. Rather, the focus will be on whether Christiansen sustained any permanent impairment to his body as a whole as a result of the work injury. In other words, does claimant's injury extend beyond the schedule?

Claimant contends that his injuries extend into the body as a whole because he sustained permanent injury to his neck and/or lumbar spine. Several medical experts have offered their opinions regarding claimant's neck and back.

Dr. Jensen treated Christiansen for his left arm, low back, and neck. Dr. Jensen saw the claimant on numerous occasions. In December of 2013, Christiansen presented to Dr. Jensen's office with lower back and left leg pain. Dr. Jensen noted that a standing MRI performed after the work injury revealed three disc herniations. Christiansen reported to Dr. Jensen that his back pain had been gradually getting worse. He also reported toe numbness on the left side and pain that radiated down from his lower back into the buttock and hip on the left side and into the top of his thigh.

The diagnosis was low back pain with radiation down the left side, which could follow an L3 versus L4 radiculopathy. An MRI was ordered. (Ex. 6, pp. 43-44)

Christiansen returned to Dr. Jensen's office after he underwent the MRI. The lumbar MRI suggested some facet hypertrophy at L2-3, mild on the right. It also revealed small disk bulges at L5-S1, L4-5, T11-12, T12-L1, L1-2. However, none of those seemed to be causing any impairment or contact to the nerve root. There was a disk bulge at L2-3 which seemed to be causing some thecal sac contact. However, the patient had left symptoms, not right. The option of injections was discussed with Christiansen but he wanted time to think it over due to possible side effects. (Ex. 6, pp. 46-48)

On March 6, 2014, Christiansen returned to see Dr. Jensen for his low back pain. Dr. Jensen's diagnoses included low back pain with intermittent L3 radiculopathy and previous forearm fracture, healed. The doctor noted that Christiansen was currently performing a job that was less strenuous than the one he was performing at the time of the injury. Dr. Jensen placed him at maximum medical improvement (MMI). The doctor recommended no restrictions, and going to school to get an education so that Christiansen can have a job that did not require manual labor. (Ex. 6, p. 48)

Christiansen underwent a functional capacity evaluation (FCE) on June 6, 2013 with Mark Witter, P.T. (Ex. 14) According to the report, Christiansen only passed 17 of the 39 validity criteria which suggested overall very poor effort; the results of the FCE were considered to be invalid. Therefore, the therapist looked to other data to assess his true functional abilities. The therapist estimated that Christiansen should be able to work at the medium physical demand level. When questioned about the invalid test results, Christiansen explained that the therapist told him to stop if he experienced pain so that is what he did. (Ex. 14; testimony) I find the therapist's estimation on Christiansen's ability to work in the medium physical demand level to be persuasive.

Christiansen returned to Dr. Jensen's office in May of 2015, for reevaluation of left arm pain over the distal ulnar aspect and over the forearm of his surgical site. Over the prior 1 to 2 months he noticed an increase in symptoms. There was a discussion about possibly removing the hardware but the patient wanted to avoid that because he could not afford to stop working. (Ex. 6, pp. 50-51, 71)

On August 31, 2015, Christiansen returned to Dr. Jensen's office with continued low back pain with occasional left leg symptoms. He also reported occasional pain with numbness down his buttocks to his calf. It was noted that he had been placed at MMI and had undergone an FCE. Christiansen was advised that with regard to work he would have to follow the FCE recommendations. Christiansen was told to follow up with his primary care doctor for a referral to a doctor that could assist him with his post-traumatic stress disorder (PTSD). (Ex. 6, pp. 52-53)

Dr. Kuhnlein performed an independent medical examination (IME) at the request of claimant's counsel on June 30, 2014; his diagnoses of the clamant included complaints of nonradicular neck and low back pain. Dr. Kuhnlein noted that at the time

of the injury Christiansen was struck in the face by a pipe and a dirt trench wall collapsed on top of him. Christiansen was buried in the trench up to his shoulders and he sustained significant facial trauma when he was hit in the head by a large culvert; he was struck with enough force to fracture his jaw. Dr. Kuhnlein opined that with such significant force it was more reasonable than not that the musculoskeletal structures of his neck were also subjected to significant force as well. Dr. Kuhnlein pointed out that one week after the accident Dr. Jensen noted neck complaints. Dr. Kuhnlein stated, "[g]iven the mechanism of injury, with the culvert hitting him in the head while he was buried up to his shoulders, it would be reasonable that significant force was translated to his head, and the fact that his head after all connected to his neck, it is more reasonable than not that the musculoskeletal neck pain is also directly and casually related to the October 4, 2012, work injury." (Ex. 16, pp. 40-41) Ultimately, Dr. Kuhnlein was not able to connect the muscle contraction cephalgia to the work injury.

Dr. Kuhnlein also addressed claimant's low back complaints. He noted that Christiansen was buried for about 15 minutes before he was dug out. Dr. Kuhnlein stated, "As such, significant forces were applied to the body during this accident. Back pain complaints were noted in Dr. Jensen's October 15, 2012, note. Given the severity of the trauma and the force of the injury, it is more reasonable than not that his musculoskeletal low back complaints would be related to the October 4, 2012, injury, although clearly there were other factors involved in his low back complaints." (Ex. 16, p. 41) Dr. Kuhnlein opined claimant had reached MMI for all his injuries on June 11, 2013. Dr. Kuhnlein placed Christiansen between the DRE categories I and II and assigned 2 percent permanent partial disability to the whole person for his lumbar injury. As a result of the work injuries, Dr. Kuhnlein recommended restrictions of lifting 30 pounds occasionally from floor to waist, 40 pounds occasionally from waist to shoulder, and 20 pounds occasionally over the shoulder. He could sit, stand, or walk on an as needed basis, changing position for comfort. He could work occasionally at or above shoulder height, including with vibratory or power tools. (Ex. 16, p. 43)

Defendants rely on the opinions of Dr. Martin to deny that Christiansen sustained any permanent injury to his lumbar spine as a result of the work injury. Christiansen reported his ongoing back complaints to Dr. Martin from March of 2013 through his last appointment in June, of 2013. In June of 2013, Christiansen reported that his symptoms were getting worse. He described a variety of tingling sensations in the legs as well as persistent pain. Dr. Martin assessed Christiansen with mechanical upper lumbar pain and placed him at MMI. Dr. Martin opined that Christiansen's subjective complaints far outweighed any objective abnormalities. He felt that Christiansen should be released to regular job activities without any permanent restrictions. Dr. Martin placed Christiansen into the DRE Lumbar category I and assigned zero percent permanent impairment. Dr. Martin noted DRE lumbar category I was reserved for individuals with subjective reports, but no objective abnormalities. (Ex. A) It is noteworthy that the last time Dr. Martin saw Christiansen was June 11, 2013.

Dr. Martin reviewed the opinions of Dr. Kuhnlein and authored a missive to defendants' attorney. Dr. Martin felt that Dr. Kuhnlein had misapplied the DRE methodology in his assessment of claimant's impairment for his lumbar spine. Dr. Martin also stated that there was nothing in Dr. Kuhnlein's report that would allow Christiansen to be placed in a DRE Lumbar Category II level. Dr. Martin stood by his opinion that Christiansen should be placed in DRE category I. (Ex. A, pp. 20-24)

After Dr. Kuhnlein was provided the opportunity to review the opinions of Dr. Martin he issued a letter to claimant's counsel. Dr. Kuhnlein noted that Dr. Martin had the right to his opinions but Dr. Kuhnlein stood by his prior opinions; he felt his opinions were reasonable and correct, regardless of Dr. Martin's criticisms. (Ex. 16, p. 47)

With regard to the functional rating of the lumbar spine, I find the opinions of Dr. Martin to be more persuasive than those of Dr. Kuhnlein. The AMA Guides state that the DRE method is the principal methodology used to evaluate an individual who has had a distinct injury. However, the ROM method is be used in several situations including when an individual cannot be easily categorized in a DRE class. AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, p. 379. Because Dr. Kuhnlein did not follow the appropriate method for assessment of impairment I do not find his opinion regarding the functional impairment to the lumbar spine to be persuasive.

However, I find that Christiansen does have permanent restrictions as a result of the work injury to his low back. I find that Christiansen is restricted to work within the medium physical demand level. This finding is supported by the records from the physical therapist and from the records of Dr. Jensen's office. Additionally, these restrictions are consistent with the restrictions set forth in Dr. Kuhnlein's report. Thus, I find that claimant has carried his burden of proof to show by a preponderance of the evidence that he sustained permanent disability to his back as a result of the work injury.

Claimant also contends that he sustained an injury to the body as a whole due to a physical/mental claim. Since early in his post-injury treatment Christiansen indicated he was experiencing symptoms of nervousness, mood changes, sleep disturbances, and agitation. (Ex. 6, p. 1) In early December of 2012, Dr. Jensen diagnosed Christiansen with, "posttraumatic stress disorder, though he likely does not meet criteria for this." (Ex. 6, p. 7) Dr. Jensen felt Christiansen should be evaluated by a counselor for treatment.

On December 4, 2012, Christiansen saw Beth E. Harms, LISW, at Associates for Psychiatric Services. She diagnosed him with PTSD. She assessed his global assessment functioning at 50. Christiansen continued to see LISW Harms. She added the diagnoses of agoraphobia with panic attacks. His care was transferred to Philip J. Muller, D.O., a treating psychiatrist who first saw Christiansen on January 14, 2016. Dr. Muller diagnosed Christiansen with PTSD and panic disorder with agoraphobia. He placed his GAF at 60 and noted this was the highest it had been over the past year. Christiansen was then allowed to return to see LISW Harms. (Ex. 9)

Dr. Muller saw Christiansen again on November 23, 2016, just before the arbitration hearing. Dr. Muller stated that all of the treatment at his facility from 2012 and forward was related to the work injury. He opined that Christiansen's residual symptoms were related to the work injury. Dr. Muller then completed a Mental Residual Functional Capacity Assessment regarding Christiansen. This was completed approximately four years after the original injury; claimant was still experiencing symptoms at that time. The form denotes numerous problems that Christiansen continued to experience. These include, but are not limited to, problems with concentration, ability to work in coordination or proximity with others, ability to interact appropriately with the general public, ability to respond to changes in the work setting, ability to travel in unfamiliar places, and ability to function independently outside his home. (Ex. 9, pp. 38-55)

Over fears after the accident Christiansen credibly testified that he still experiences emotional problems due to the work injury. At the hearing describing how the injury occurred was difficult for him; he became emotional. He testified that he becomes very anxious and nervous in new places. He cannot drive in a new area. For example, his father had to drive him to Ankeny for an appointment with Dr. Kuhnlein. Being around construction sites bother him. Things that remind him of the accident can cause him to have flashbacks. He cries frequently since the accident. As a result of the accident, Christiansen had to have facial reconstruction. He testified that his nose appears different than it did before the accident. Simply seeing his own face and how his appearance has changed causes him to remember the accident. He testified that the breathing techniques that his counselor, Beth Harms, introduced him to do help some. However, he had to stop seeing her because her bills were not being paid by defendants. Christiansen said that although he would like to continue seeing her he needs to pay the family bills before he can pay her bills.

The opinions of Dr. Muller and LISW Harms are unrebutted. The opinions are also consistent with Dr. Martin's notations that Christiansen has presumptive PTSD. I find that Christiansen's PTSD and ongoing mental symptoms are a result of the work injury. Further, I find that claimant has sustained his burden of proof to show that he has sustained permanent disability as a result of the PTSD.

Thus, because Christiansen has sustained an injury to his low back and a physical/mental injury he has sustained an injury to his body as a whole and should be compensated on an industrial basis.

Christiansen also sustained serious injury to his face. However, defendants deny that he sustained any permanent impairment as a result of his work injury.

Dr. Wagner treated Christiansen's face injuries. He assigned nine percent permanent functional impairment because some scarring "would be visible to the public eye" and noticeable at the distance of a handshake. (Ex. 4, p. 17) However, Dr. Wagner went on to say that Christiansen had "no limitations in his performance of activities of daily living" due to the facial injuries. (Id.) Thus, he did not have any work restrictions and had returned to baseline normal function. (Ex. 4, pp. 12, 18)

Dr. Kuhnlein addressed the issue of permanency with regard to claimant's facial injuries. He assigned two percent whole person impairment for facial scarring. However, he also noted there was no impact on his activities of daily living. (Ex. A, p. 23)

Defendants sought the opinions of Dr. Martin. Dr. Martin felt that Dr. Wagner's impairment rating was inflated and inaccurate. Under the AMA Guides, a zero percent impairment rating was required if there was no impact on one's activities of daily living. Because Dr. Wagner acknowledged that Christiansen experienced no limitations of his activities of daily living, his assignment of nine percent impairment is not accurate. (Ex. A)

When the expert opinions are considered as a whole I find that Christiansen has failed to carry his burden of proof to show that any face or head disfigurement he has impairs future usefulness and earnings in the occupation in which he was working at the time of the injury. Thus, I find claimant is not entitled to permanent partial disability benefits for the injuries he sustained to his face.

Claimant did sustain permanent impairment to his left upper extremity as a result of the work injury. Dr. Jensen was the surgeon who provided treatment to Christiansen's left arm. He ultimately placed claimant at MMI on May 22, 2013 and released Christiansen without any restrictions for his left arm. (Ex. 6)

Dr. Martin also rendered an opinion regarding Christiansen's left arm. He opined that Christiansen had sustained a loss of range of motion within his left wrist and this resulted in a four percent functional impairment rating of the left upper extremity. Dr. Martin felt that Christiansen should be considered to have no restrictions going forward permanently. (Ex. A, p. 12)

Dr. Kuhnlein opined that Christiansen had sustained 3 percent impairment to his left upper extremity. He recommended claimant have restrictions for his neck, back, and left wrist. The restrictions were to limit lift 30 pounds occasionally from floor to waist, 40 pounds occasionally from waist to shoulder, and 20 pounds occasionally over the shoulder. (Ex. 16)

Christiansen testified that he continues to experience problems with his left arm. He still has hardware in his left upper extremity. The hardware causes him pain from time to time and may have to eventually be removed. He also experiences pain when the weather changes. His pain is also affected by his activities. For example, keyboarding for an extended period of time causes him pain in his wrist. (Testimony)

Claimant relies on the opinions of Rick Ostrander and contends that he is 100 percent disabled and is an odd-lot claimant. I do not find the opinions of Rick Ostrander to be helpful. Despite the fact that Christiansen has found employment with a new employer and maintained full-time employment for over three years Mr. Ostrander opines that Christiansen cannot find and maintain employment. This

opinion is not consistent with the facts of this case. I give no weight to the opinions of Mr. Ostrander.

Based on the record as a whole, I find that claimant has sustained permanent disability to his body as a whole. Christiansen worked in the construction industry for approximately ten weeks prior to his injury; he was paid $10/hour. Christianson's only other prior work was as a car wash attendant and detailer where he earned $8.50 per hour. He has a high school education. Prior to the work injury, claimant did not have any restrictions placed on his activities. He now has restrictions and limitations placed on his activities as a result of the work injury. At the time of hearing, Christiansen was in his mid-twenties. To his credit, Christiansen sought and secured full-time employment at Convergys (f/k/a Stream Global). He has been working there full-time for the last three years. While he is currently earning more annually than he would have at his based hourly rate of $10.00 per hour at L.A. Carlson, he has lost access to a portion of the labor market. Based on claimant's physical capabilities as estimated by physical therapist Witter and on the limitations noted by Dr. Muller, I find that claimant has lost access to a portion of the labor market due to the work injury. Considering Christiansen's age, educational background, employment history, ability to retrain, lack of motivation to obtain a job, length of healing period, permanent impairment, and permanent restrictions, and the other industrial disability factors set forth by the Iowa Supreme Court, I find that he has sustained a 20 percent loss of future earning capacity as a result of his work injury. Thus, I find claimant has sustained 20 percent industrial disability as a result of the work injury.

The next issue is whether defendants are responsible for the medical expenses set forth in Exhibit 19.

Claimant is seeking payment for the date of service of December 10, 2012 at CNOS. Defendants concede that the treatment they rendered on December 10, 2012 totaling $215.00 is related and if they have not already paid the bill they will do so. Therefore, that issue is moot.

Claimant is also seeking payment for $94.00 for services rendered at Family Health Care on September 7, 2015. Christiansen was seen for back pain, which I concluded is related to the work injury. Sara H. Karpuk, PA-C recommended physical therapy and medications. (Ex. 15, pp. 5-8) Christiansen is seeking payment in the amount of $941.16 for services rendered on October 18, 2015 at Mercy Hospital. (Ex. 3, pp. 26-28) Claimant is also seeking payment for $302.00 for services rendered at NW Iowa ER Physicians on October 18, 2015. (Ex. 19, p. 10)

Defendants contend that none of the medical expenses sought are for authorized treatment and therefore are not the responsibility of the defendants. However, in Iowa defendants can be held responsible for unauthorized treatment. Claimant testified that in September and October of 2015, his back pain flared up greatly. He was in severe pain every day. Claimant testified that the treatment he sought was beneficial. Defendants have not produced any evidence to show that they offered claimant any

treatment for his back at that time. I find that the unauthorized care was beneficial to the claimant. Thus, I find defendants are responsible for this medical treatment.

Christiansen is also seeking reimbursement of out-of-pocket expenses in the amount of $534.39. These expenses are set forth in Exhibit 19. I find that these expenses were incurred for treatment related to the work injury and that said treatment was beneficial to the claimant. Thus, defendants are responsible to reimburse claimant for his out-of-pocket expenses.

Claimant is seeking reimbursement for his IME expenses pursuant to Iowa Code 85.39. At defendants' request Dr. Martin issued an impairment rating for the left arm on June 11, 2013. With regard to claimant's remaining complaints, Dr. Martin stated, "this would be the only ratable impairment that would be something other than zero percent." (Ex. A, p. 12) On June 30, 2014, Christiansen saw Dr. Kuhnlein for an IME. Claimant is seeking reimbursement for that IME pursuant to section 85.39. I find that the prerequisites of section 85.39 were met and claimant is entitled to reimbursement. Thus, defendants shall reimburse claimant the cost of Dr. Kuhnlein's IME in the amount of $2,256.25. (Ex. 20)

Claimant is also seeking an order for continued care with Dr. Muller and authorization of the prescriptions. Defendants chose Dr. Muller to treat claimant on December 22, 2015. Dr. Muller has causally connected the care he has provided to claimant to the work injury. Defendants authorized Christiansen to see Dr. Muller on January 14, 2016. However, Christiansen was unable to obtain the prescriptions suggested by Dr. Muller. Claimant is requesting that he be allowed to return to Dr. Muller and that defendants be ordered to provide a pharmacy card to Christiansen to pay for any care suggested by Dr. Muller. Because I found that Christiansen's ongoing mental complaints are causally connected to the work injury, defendants are therefore responsible for promptly providing reasonable and necessary care to the claimant; this includes prescriptions. I find that defendants are responsible for prompt, reasonable and necessary treatment for claimant's causally connected, ongoing work-related mental symptoms.

Claimant is also seeking penalty against the defendants for underpayment of the weekly rate, late payment of TTD, and failure to pay any industrial disability.

Claimant contends defendants underpaid the weekly workers' compensation rate. On January 8, 2016, Christiansen served his answers to the interrogatories propounded by defendants. Christiansen stated he could not determine the rate because he did not have his personnel and wage records. (Ex. 22, p. 17) Defendants began paying benefits at the rate of $422.79. (Ex. 21, p. 1) Claimant contends that shortly before the hearing, the defendants produced additional payroll records and then calculated the rate as $459.87. (Ex. 30) Claimant contends that penalty is appropriate because the record is void of any evidence to explain why the rate was not properly calculated until over four years post-injury.

Defendants deny that penalty is appropriate in this case. On December 4, 2012, the insurance adjuster sent claimant's counsel a letter with the wage information and calculation of the appropriate weekly rate. (Ex. 21, p. 1; Ex. 23, pp. 11-17) Claimant's counsel did not raise any concerns about claimant's rate until November 11, 2016, nearly four years after he had received the wage information. Upon receiving claimant's counsel's letter raising concerns about the accuracy of the rate defendants reassessed claimant's rate calculation and adjusted the rate. (Ex. 21, p. 29) Thus, claimant's counsel was in possession of the defendants' rate calculation in early December of 2012 but waited almost four years to raise any concerns about the rate calculation to the defendants.

A review of the evidence demonstrates that defendants' original rate calculation was based on a payroll summary spanning from August 1, 2012 through October 11, 2012. (Ex. 23, pp. 15-16) The summary erroneously did not include all the days necessary to calculate the rate and it covered a week after the injury in which claimant remained on salary. I find that defendants' actions do not give rise to a penalty claim. Defendants calculated the rate, provided the rate and their rate calculation to claimant's counsel. Approximately four years later claimant's counsel raised a question about the rate and defendants promptly recalculated the rate. I find defendants' actions were reasonable.

Claimant is also seeking penalty benefits for a late payment of temporary total disability (TTD) from November 18, 2012 through December 2, 2012; this payment was made on December 4, 2012. Defendants do not deny the date of the payment. Defendants explained that benefits were shifting from continued salary in lieu of benefits to weekly workers' compensation benefits and that this is a time consuming process. I find that this is not a reasonable basis for delayed payment of the benefits. I find that one week of benefits were paid late and that defendants did not contemporaneously convey the reason for the delay to the claimant. I find that penalty is appropriate in this situation. Given the relatively short delay in the payment and that this delay was not repeated throughout the claim I find that a penalty in the amount of fifty and no/100 dollars ($50.00) is appropriate.

Finally, claimant asserts penalty is appropriate for failure to voluntarily pay industrial disability. Claimant argues that even though claimant has sustained injuries to his face, neck, back, and has a diagnosis of PTSD, defendants have taken the position that the injury in this case is contained to the arm. In December of 2015 defendants selected Dr. Muller. However, the record is void of any evidence that defendants ever asked Dr. Muller if the conditions he found on January 14, 2016 were permanent. (Ex. 9, pp. 7-10) Claimant's counsel wrote to Dr. Muller on December 23, 2016 and obtained his opinion regarding causation. (Ex. 9, pp. 34-38) Even after this opinion from Dr. Muller defendants did not seek his opinion regarding permanency. Weekly benefits were last paid to the claimant on September 19, 2013. Claimant asserts a penalty should be assessed on all amounts of industrial disability due thereafter because the defendants lacked any reasonable basis to continue denial of his industrial disability claim.

Defendants assert that penalty is not appropriate because the opinions of Dr. Martin provided the defendants with a reasonable basis to dispute claimant's entitlement to any additional permanent impairment. Defendants argue that Dr. Martin consistently opined that claimant only sustained permanent functional impairment to his left upper extremity and requires no permanent restrictions. Defendants further argue that given the state of the medical record, claimant's entitlement to any additional benefits is fairly debatable as a matter of law and therefore penalty is not appropriate. Furthermore, the defendants' decision was frequently conveyed to the claimant. (Ex. 21, pp. 4, 11, 14) I find defendants' argument to be persuasive. Dr. Martin included presumptive PTSD as a diagnosis in his notes. He also repeatedly told the defendants that the only functional impairment claimant sustained was to his left arm. Furthermore, Dr. Martin was of the opinion that permanent restrictions were not necessary. Defendants conveyed their position to the claimant. I find that defendants had a reasonable basis for their denial of benefits and that penalty is not appropriate.

Finally, claimant is seeking an assessment of costs. First, he is seeking the filing fee in the amount of $100.00. I find this is an appropriate cost under 876 IAC 4.33(7). Second, claimant is seeking reimbursement of $21.81 for service of the petition. I find this is an appropriate cost under 876 IAC 4.33(3). Third claimant is seeking payment for Dr. Muller's report in the amount of $235.00. I find this is an appropriate cost under 876 IAC 4.33(6). Fourth, claimant is seeking reimbursement for the vocational report of Rick Ostrander. I did not find this report to be helpful or persuasive. Therefore, I exercise my discretion and find that this is not an appropriate cost. Thus, defendants are assessed costs in the amount of $356.81.

CONCLUSIONS OF LAW

The party who would suffer loss if an issue were not established ordinarily has the burden of proving that issue by a preponderance of the evidence. Iowa Rule of Appellate Procedure 6.14(6)(e).

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 Guyton v. Irving Jensen Co., 373 N.W.2d 101 (Iowa 1985), the Iowa court formally adopted the "odd-lot doctrine." Under that doctrine a worker becomes an odd-lot employee when an injury makes the worker incapable of obtaining employment in any well-known branch of the labor market. An odd-lot worker is thus totally disabled if the only services the worker can perform are "so limited in quality, dependability, or quantity that a reasonably stable market for them does not exist." Id., at 105.

Under the odd-lot doctrine, the burden of persuasion on the issue of industrial disability always remains with the worker. Nevertheless, when a worker makes a prima facie case of total disability by producing substantial evidence that the worker is not employable in the competitive labor market, the burden to produce evidence showing availability of suitable employment shifts to the employer. If the employer fails to produce such evidence and the trier of facts finds the worker does fall in the odd-lot category, the worker is entitled to a finding of total disability. Guyton, 373 N.W.2d at 106. Factors to be considered in determining whether a worker is an odd-lot employee include the worker's reasonable but unsuccessful effort to find steady employment, vocational or other expert evidence demonstrating suitable work is not available for the worker, the extent of the worker's physical impairment, intelligence, education, age, training, and potential for retraining. No factor is necessarily dispositive on the issue. Second Injury Fund of Iowa v. Nelson, 544 N.W.2d 258 (Iowa 1995). Even under the odd-lot doctrine, the trier of fact is free to determine the weight and credibility of evidence in determining whether the worker's burden of persuasion has been carried, and only in an exceptional case would evidence be sufficiently strong as to compel a finding of total disability as a matter of law. Guyton, 373 N.W.2d at 106.

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).

Based on the above findings of fact, I conclude that Christiansen failed to make a prima facie case of total disability by producing substantial evidence that he is not employable in the competitive labor market, thus, the burden to produce evidence showing availability of suitable employment did not shift to the defendants. Since claimant's employment with the defendant employer ended he has successfully obtained and maintained full-time employment with another employer for over three years. Thus, I concluded claimant is not an odd-lot employee.

However, I did conclude that claimant has sustained permanent disability and has loss access to a portion of the workforce due to his injury. Considering all of the industrial disability factors set forth by the Iowa Supreme Court I concluded that Christiansen sustained 20 percent industrial disability as a result of the work injury. Thus, he is entitled to 100 weeks of permanent partial disability benefits.

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. In the present case, the parties have stipulated that permanent partial disability benefits shall commence on June 12, 2013.

Claimant is also seeking medical benefits. 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).

Based on the above findings of fact, I conclude the expenses incurred by claimant were for conditions related to the work injury. I further conclude that the

treatment was reasonable and necessary. Additionally, I conclude that the treatment was beneficial to the claimant. Thus, defendants are responsible for the medical expenses set forth in Exhibit 19; this includes claimant's out-of-pocket expenses in the amount of $534.39.

Christiansen is seeking ongoing care with Dr. Muller. Dr. Muller was originally selected by the defendants. He causally connected claimant's ongoing problems to the work injury. I found that the conditions Dr. Muller treated Christiansen for are related to the work injury. Because claimant's ongoing conditions are related to the work injury he is entitled to ongoing medical treatment. I conclude defendants are responsible for reasonable and necessary treatment for claimant's causally connected, ongoing work-related mental symptoms.

Claimant is seeking an award of penalty benefits. 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).

For purposes of determining whether an employer has delayed in making payments, payments are "made" either 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 when (b) the check is delivered personally to the claimant by the employer or its workers' compensation insurer. Robbennolt, 555 N.W.2d at 235. Weekly compensation payments are due at the end of the compensation week. Robbennolt, 555 N.W.2d 229, 235.

Based on the above findings of fact, I conclude that a penalty in the amount of fifty and no/100 dollars ($50.00) is appropriate.

Finally, claimant is seeking an assessment of costs. Costs taxed by the workers' compensation commissioner or a deputy commissioner shall be (1) attendance of a certified shorthand reporter or presence of mechanical means at hearings and evidential depositions, (2) transcription costs when appropriate, (3) costs of service of the original notice and subpoenas, (4) witness fees and expenses as provided by Iowa Code sections 622.69 and 622.72, (5) the costs of doctors' and practitioners' deposition testimony, provided that said costs do not exceed the amounts provided by Iowa Code sections 622.69 and 622.72, (6) the reasonable costs of obtaining no more than two doctors' or practitioners' reports, (7) filing fees when appropriate, (8) costs of persons reviewing health service disputes. Costs of service of notice and subpoenas shall be paid initially to the serving person or agency by the party utilizing the service. Expenses and fees of witnesses or of obtaining doctors' or practitioners' reports initially shall be paid to the witnesses, doctors or practitioners by the party on whose behalf the witness is called or by whom the report is requested. Witness fees shall be paid in accordance with Iowa Code section 622.74. Proof of payment of any cost shall be filed with the workers' compensation commissioner before it is taxed. The party initially paying the expense shall be reimbursed by the party taxed with the cost. If the expense is unpaid, it shall be paid by the party taxed with the cost. Costs are to be assessed at the discretion of the deputy commissioner or workers' compensation commissioner hearing the case unless otherwise required by the rules of civil procedure governing discovery. This rule is intended to implement Iowa Code section 86.40.

Based on the above findings of fact, I exercised my discretion and assessed costs as noted above.

ORDER

THEREFORE, IT IS ORDERED:

All weekly benefits shall be paid at the rate of four hundred fifty-two and 22/100 dollars ($452.22).

Defendants shall pay claimant one hundred (100) weeks of permanent partial disability benefits commencing on the stipulated commencement date of June 12, 2013.

Defendants shall be entitled to credit for all weekly benefits paid to date.

All past due weekly benefits shall be paid in lump sum with applicable interest pursuant to Iowa Code section 85.30.

Defendants shall pay medical expenses as set forth above.

Defendants shall reimburse claimant for Dr. Kuhnlein's independent medical evaluation fee.

Defendants shall reimburse claimant's costs as set forth above.

Defendants shall pay penalty benefits in the amount of fifty and no/10 dollars ($50.00).

Defendants 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 23rd day of March, 2017.

ERIN Q. PALS
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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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.