BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JOSHUA HANAWALT, Claimant, vs. AMERICAN BOTTLING COMPANY/ KEURIG DR. PEPPER, Employer, and NEW HAMPSHIRE INSURANCE CO., Insurance Carrier, Defendants.	File No. 20008990.01 ARBITRATION DECISION Head Notes: 1801, 1803, 2501, 2701, 3003, 4000, 4000.2

STATEMENT OF THE CASE

Claimant, Joshua Hanawalt, filed a petition in arbitration seeking workers' compensation benefits from American Bottling Company/Keurig Dr. Pepper (American), employer, and New Hampshire Insurance Company, insurer, both as defendants. This matter was heard on February 16, 2022, with a final submission date of March 23, 2022.

The record in this case consists of Joint Exhibits 1 through 10, Claimant's Exhibits 1 through 12, Defendants' Exhibits A through J, and the testimony of claimant.

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.

ISSUES

1. Whether claimant is entitled 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. Commencement date of permanent partial disability benefits.

5. Rate.

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

7. Whether claimant is entitled to alternate medical care under Iowa Code section 85.27.

8. Credit.

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

10. Costs.

FINDINGS OF FACT

Claimant was 32 years old at the time of hearing. He graduated from high school. Claimant attended community college for a semester but did not get a certificate. He graduated from barber's college. (Defendants' Exhibit I, p. 29, depo, pp. 7-8)

Claimant has worked doing lawn care, window washing, and delivery and installation of appliances. (Ex. I, p. 30, depo p. 11) He has worked as a food delivery driver and in the Hy-Vee meat department. (Ex. H, p. 23; Hearing Transcript, pp. 13-19)

Claimant began working at American in 2019. (Ex. H, p. 25) Claimant's job duties included picking products, unloading products, loading route trucks, and completing inventory. Claimant's job required him to lift up to 50 pounds. (Ex. I, pp. 31-32, depo pp. 17-19)

Claimant's prior medical history is relevant. In March of 2017 claimant was treated for lower back pain after falling down stairs. Claimant was given a Toradol injection and prescribed medication. (Joint Exhibit 1, pp. 1-2)

In April of 2017, claimant treated with a chiropractor for back pain. Between April of 2017 and May of 2020, claimant attended 47 sessions for adjustments to his spine and pelvic area. (JE 2)

On May 5, 2020, claimant reported lower back pain. Claimant was given adjustments and told to do abdominal and core strengthening exercises three times a day. (JE 2, p. 54) At hearing, claimant testified he had not experienced any back symptoms prior to his June 25, 2020, injury. (Tr., p. 49)

On June 25, 2020, claimant was picking up an eight-pack of two liter bottles and felt a pinch in his back. Claimant continued to work. Claimant's pain increased and he notified his supervisor. (Tr., pp. 21-22)

Claimant testified he was sent to Concentra and given pain medication. (JE 3, pp. 1-2; Tr., p. 22)

From June 25, 2020, to July 20, 2020, claimant underwent physical therapy at Concentra. Records from July 20, 2020, note that claimant had limitations in his lumbar range of motion and that he was progressing slower than expected. (JE 3, pp. 24-25)

On July 22, 2020, claimant underwent an MRI of the lumbar spine. It showed an L5-S1 small disc bulge and a foraminal annular tear with a small disc herniation. (JE 4; JE 5, p. 2)

On August 6, 2020, claimant was evaluated by Thomas Klein, D.O., for low back pain radiating to the left posterior thigh and calf. Claimant was assessed as having a lumbosacral radiculopathy. He was prescribed medication. (JE 5, pp. 1-3)

Claimant returned to Dr. Klein on September 15, 2020. He was given an S1 transforaminal epidural steroid injection (ESI). (JE 5, p. 4)

On November 2, 2020, claimant underwent EMG/NCV testing. The study suggested an active S1 radiculopathy of the left lower extremity. (JE 6)

On December 10, 2020, claimant was evaluated by Todd Harbach, M.D. Claimant indicated his medication and physical therapy were not helping. Claimant was returned to work to ". . . see how he does." He was released to return to work without restrictions. Claimant was to follow up with Dr. Moe. (JE 5, pp. 9-11)

On December 17, 2020, claimant returned to Concentra for a recheck. Claimant had complaints of continued back pain. He was evaluated by Carlos Moe, D.O. Claimant was found to be at maximum medical improvement (MMI). Dr. Moe found that claimant had a 5 percent permanent impairment to the body as a whole. He was referred for a functional capacity evaluation (FCE). (JE 3, pp. 63-64)

On December 29, 2020, claimant was evaluated by Shawn Spooner, M.D. Claimant complained of back pain and pain radiating to the left lower extremity. He was assessed as having a lumbar radicular pain. He was prescribed medications. (JE 7, pp. 2-6)

On January 12, 2021, claimant returned to Dr. Klein with complaints of continued low back pain. An L3 through S1 radiofrequency ablation was discussed and chosen as the treatment option. (JE 5, pp. 12-13)

Claimant returned to Dr. Spooner on January 25, 2021. He was again assessed as having lumbar radicular pain. He was referred to pain management and prescribed medications. (JE 7, pp. 7-12) In a February 11, 2021, note written by defendants' counsel, Dr. Harbach opined claimant did not require any future medical care regarding the June 23, 2020, date of injury. (Ex. D, p. 15)

In a March 26, 2021, letter written by defendants' counsel, Dr. Moe indicated that claimant had completed his treatment for his June 25, 2020, date of injury, and that further care was not needed. (Ex. E)

On August 16, 2021, claimant was evaluated by Allen Eckhoff, M.D., at Pain Specialists of Iowa. Claimant indicated his pain was worsening and affected his ability to walk. Claimant was assessed as having lumbar radiculopathy. A left S1 transforaminal ESI was recommended. (JE 9, pp. 1-3)

On August 25, 2021, claimant underwent an SI interlaminar left injection. (JE 9, p. 4)

In an August 28, 2021, letter written by defense counsel, Dr. Spooner recommended workplace restrictions for claimant consisting of no repetitive bending or twisting, no lifting or carrying more than 25 pounds, and to avoid prolonged sitting. (Ex. 4)

Claimant returned to Dr. Eckhoff on September 29, 2021. Claimant had relief for two hours after the injection, but pain had returned. Claimant was referred to a surgeon for a second opinion. (JE 9, pp. 8-9)

On October 27, 2021, claimant had another lumbar MRI. When compared with the July 2020 MRI, it showed a stable left paracentral disc protrusion with an annular fissure, but no compression on the left S1 nerve root. (JE 11, p. 1; JE 10, p. 3)

On December 8, 2021, claimant was evaluated by Esmiralda Henderson, M.D., with MercyOne Neurosurgery. Claimant's MRI was reviewed. Surgery was discussed. Claimant was told surgery might fix radicular pain but would not fix his back pain. (JE 10)

On December 20, 2021, claimant underwent an FCE performed by Daryl Short, D.P.T. The FCE found claimant gave consistent effort. Claimant's capabilities were found to be in the light to lower medium category. Claimant was recommended to occasionally lift up to 20 pounds floor to waist, and 25 pounds with a front carry. He was recommended to limit elevated work or reaching above shoulder height. (Claimant Exhibit 2, pp. 4-9)

In a January 7, 2022 report, John Kuhnlein, D.O., gave his opinions of claimant's condition following an IME. Claimant had left-sided lower back pain radiating to his buttocks and legs. Claimant had problems with walking, sitting, and standing at his current job. Dr. Kuhnlein opined that claimant's June 23, 2020 work injury materially aggravated his pre-existing lower back pain causing radiculopathy. (Ex. 1, pp. 1-12)

Dr. Kuhnlein recommended claimant return to Dr. Eckhoff for further pain management. Barring further intervention, Dr. Kuhnlein found claimant at MMI as of December 20, 2021. Dr. Kuhnlein found that claimant fell in the DRE lumbar category III and had a 10 percent permanent impairment to the body as a whole. (Ex. 1, pp. 12-13)

Dr. Kuhnlein recommended claimant lift up to 30 pounds occasionally from floor to waist, and 25 pounds occasionally from waist to shoulder. He also recommended claimant be allowed to change positions as needed. (Ex. 1, pp. 12-13)

In a January 18, 2022, letter written by claimant's counsel, Dr. Spooner indicated the care he provided to claimant was for his June 23, 2020, work injury. He opined claimant's restrictions, detailed in August 2021, were still in place. He agreed with treatment recommendations made by Drs. Eckhoff and Henderson. He opined claimant had not yet reached MMI. (Ex. 4, p. 3)

Claimant returned to Dr. Eckhoff on January 24, 2022. He was assessed as having a lumbar radiculopathy. Claimant was recommended to have aqua therapy. Dr. Eckhoff found claimant at MMI. (Ex. 9, pp. 11-12)

In a February 16, 2022 letter, Dr. Harbach indicated that he had reviewed claimant's medical records and the IME report from Dr. Kuhnlein. He indicated his opinion had not changed, and he still believed claimant reached MMI as of December 10, 2020. (Ex. J, pp. 41-42)

Dr. Harbach also opined claimant could have returned to work full duty as of December 10, 2020. He noted claimant should have an FCE. He also opined claimant did not require any future medical care. Dr. Harbach did not disagree with the finding that claimant had a 10 percent permanent impairment to the body as a whole. (Ex. J, pp. 42-43)

Claimant requested, on numerous occasions, to be returned to work with American. He was not allowed to return to work after his injury. (Tr., pp. 27-29; Ex. 9, pp. 4, 6-9) Claimant testified he has applied for approximately 150 jobs since leaving American. He testified he did not believe he could return to work at American given his back pain. He said he could not return to work as a barber or a meat cutter. (Tr., pp. 39-40) At the time of hearing claimant worked approximately 6 hours per week as a crossing guard. (Tr., p. 41)

Claimant said he has difficulty with sleep due to back pain. He said his back pain limits his ability to drive. He said his back pain affects his ability to do activities of daily living. Claimant says his back pain also affects his ability to do household chores and recreational activities. (Tr., pp. 45-47)

CONCLUSION OF LAW

The first issue to be determined is whether claimant is entitled to a running award of temporary benefits.

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. 6.904(3).

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.

Defendants contend claimant reached MMI on December 10, 2020, when Dr. Harbach returned claimant to work with no permanent restrictions. (JE 5, pp. 11-13) Claimant contends he should receive a running award of temporary benefits.

Dr. Harbach appears to opine that claimant could have returned to work on December 10, 2020, with no permanent restrictions. (JE 5, pp. 11-13) There are a number of problems with having claimant's MMI date as of December 10, 2020.

First, Dr. Harbach returned claimant to work on December 10, 2020, with a note ". . . let's see how he does." Claimant still had symptoms as of that date. The note ". . . let's see how he does" suggests that Dr. Harbach merely wanted to test to see if claimant could handle work. There is no way of knowing if claimant could have returned to work as defendants did not allow claimant to return to work. The opinion of "let's see how he does" does not suggest that claimant had reached MMI. The record indicates that Dr. Harbach made little effort in analyzing claimant's condition, ability or job requirements. Following Dr. Harbach's "let's see how he does" method, claimant was recommended to have a radiofrequency ablation with Dr. Klein. He was given an epidural steroid injection in August of 2021. He underwent an FCE in December of 2021. He was also given work restrictions by Dr. Spooner in August of 2021, and by Dr. Klein in January of 2022. (Ex. 4, pp. 1-2; Ex. 1)

Dr. Harbach's return to work, given on December 10, 2020, appears to be a test and not a date of MMI. Claimant had an FCE after this opinion. He had an ESI after this opinion. He was recommended to have a neuroablation by an authorized treater after this opinion. He was given work restrictions by two experts based on the FCE after December 10, 2020. Given this record, it is found that Dr. Harbach's opinion that claimant was at MMI as of December 10, 2020, is not convincing.

Dr. Kuhnlein's opinion suggests claimant could use further care and that claimant was not yet at MMI. (Ex. 1, p. 12) Dr. Kuhnlein recommended claimant return to Dr. Eckhoff to consider facet injections. (Ex. 1, p. 12) However, in his January 24, 2022 visit, Dr. Eckhoff indicates that claimant ". . . has seen three pain providers of which we have not been able to help his pain. I do not feel there is much else that we can do from a conservative standpoint. From my point, he is at MMI." (JE 9, p. 12)

Dr. Kuhnlein recommended further treatment with Dr. Eckhoff. Dr. Eckhoff offers an opinion that there is not much to do other than conservative treatment. Based on this record, I cannot find that claimant has a running award of temporary benefits. In the alternative, Dr. Kuhnlein gave an opinion claimant was at MMI as of the date of his FCE, December 20, 2021. Based on this record, it is found that claimant is due additional temporary benefits from December 10, 2020, through December 19, 2021.

The next issue to be determined is whether claimant's injury resulted in a permanent disability.

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).

Approximately one and one-half years after the date of injury, claimant still has back and leg pain. Dr. Moe, an authorized provider, found claimant had a permanent impairment. Dr. Kuhnlein also found that claimant had a permanent impairment. Given issues with Dr. Harbach's opinion regarding MMI, it is found that his opinion regarding permanency is not convincing. Based on this record, claimant has carried his burden of proof he has a permanent impairment from his back injury.

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 Ry. Co. of Iowa, 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 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.

Claimant was 32 years old at the time of hearing. He graduated from high school. Claimant has worked doing lawn care, window washing and installing and delivering appliances. He has also worked as a food delivery driver and in a meat department.

Dr. Moe found that claimant had a 5 percent permanent impairment. Dr. Kuhnlein found that claimant had a 10 percent permanent impairment. Dr. Kuhnlein's opinions regarding permanency are far more detailed than those of Dr. Moe's. I am able to follow Dr. Kuhnlein's rationale as to his finding of the degree of permanency. Given this record, it is found that Dr. Kuhnlein's opinion that claimant has a permanent impairment of 10 percent is found to be more convincing than Dr. Moe's opinion.

As detailed above, the defendants have not returned claimant to work. (Tr., pp. 27-29; Ex. 9, pp. 4, 6-9) The refusal or inability of the employer to return a claimant to work in any capacity is, by itself, significant evidence of a lack of employability. Clinton v. All-American Homes, File No. 5032603 (App. April 17, 2013); Western v. Putco Inc., File Nos. 5005190, 5005191 (App. July 29, 2005); Pierson v. O'Bryan Brothers, File No. 951206 (App. January 20, 1995); Meeks v. Firestone Tire & Rubber Co., File No. 876894 (App. January 22, 1993); see also Larson's Workers' Compensation Law, Section 57.61, pp. 10-164.90-95; Sunbeam Corp. v. Bates, 271 Ark 385, 609 S.W.2d 102 (1980); Army & Air Force Exchange Service v. Neuman, 278 F.Supp. 865 (W.D. La 1967); Leonardo v. Uncas Manufacturing Co., 77 R.I. 245, 75 A.2d 188 (1950). An employer knows the demands that are placed on its workforce. Its determination that the worker is too disabled for it to employ is entitled to considerable weight. If the employer in whose employ the disability occurred is unwilling or unable to accommodate the disability, there is no reason to expect some other employer to have more incentive to do so.

Claimant had an FCE that found him to fall into the light to lower medium category of work. He was recommended to lift up to 20 pounds floor to waist and front carry up to 25 pounds. He was also recommended to limit elevated work or reaching above his shoulder. (Ex. 2, pp. 4-8)

The record indicates claimant made approximately 150 job inquiries. Claimant has not been hired by any of those employers. At the time of hearing, claimant was working as a crossing guard for 6 hours per week.

Given this record, it is found that claimant has a 30 percent loss of earning capacity or an industrial disability. He is due 150 weeks of permanent partial disability benefits (30 percent x 500 weeks).

The next issue to be determined is the commencement date of benefits. As detailed above, Dr. Kuhnlein found claimant at MMI as of the date of the FCE. Given

this record, permanent partial disability benefits shall commence as of December 20, 2021.

The next issue to be determined is rate. Section 85.36 states the basis of compensation is the weekly earnings of the employee at the time of the injury. The section defines weekly earnings as the gross salary, wages, or earnings to which an employee would have been entitled had the employee worked the customary hours for the full pay period in which the employee was injured as the employer regularly required for the work or employment. The various subsections of section 85.36 set forth methods of computing weekly earnings depending upon the type of earnings and employment.

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

The parties stipulate that claimant was single and was entitled to two exemptions. The parties disagree what claimant's average weekly wage is for the 13-week period prior to the injury.

Claimant testified he worked at least 50 hours per week. (Tr., p. 38) Claimant's post-hearing brief indicated claimant worked an average of 48.6 hours per week. (Claimant's Post-Hearing Brief, p. 14) Defendants' rate indicates claimant earned $20.56 per hour. (Ex. A, p. 1) Claimant's rate calculation indicates claimant earned $21.31 per hour. (Ex. 8, p. 1) Given the documentation from Exhibits 8 and A, I cannot tell what claimant's hourly earnings were. Claimant carries the burden of proof to show his average weekly wage was $1,035.71 per week as he contends. Because of the lack of evidence regarding claimant's hourly wage, claimant has failed to carry his burden of proof that his average weekly wage was $1,035.71 per week. Given this record, it is found that claimant's average weekly wage is $979.27 per week. As claimant is single with two exemptions, claimant's rate is $622.18 per week.

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

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

In late December of 2020, defendants denied claimant further benefits based, in large part, on Dr. Harbach's opinion claimant could return to work without restrictions. (Tr., p. 27; Ex. G, p, 21; Ex. 9, pp. 5-9)

Due to the denial of medical care, claimant sought his own care with Dr. Spooner and Dr. Eckhoff. The record indicates that injections may not have resolved claimant's symptoms. The record does indicate that the medications, physical therapy and other treatments have been beneficial to claimant's condition. (Tr., p. 35) The care claimant has sought and received, on his own, is certainly more beneficial than the denial of care from defendants. Given this record, claimant has carried his burden of proof that defendants are liable for the medical expenses as detailed in Exhibit 11.

The next issue to be determined is whether claimant is entitled to alternate medical care under Iowa Code section 85.27.

Claimant seeks alternate medical care consisting of continued treatment with Drs. Spooner, Eckhoff and Henderson. (Claimant's Post-Hearing Brief, p. 16)

On January 24, 2022, Dr. Eckhoff found claimant at MMI. He opined that he had nothing further to offer claimant for conservative treatment. Given this record, claimant has failed to carry his burden of proof he is entitled to alternate medical care with Dr. Eckhoff. (JE 9, p. 12)

Dr. Henderson indicated surgery might help with claimant's leg pain but would not help with his back pain. (JE 10, pp. 1-3) Claimant testified Dr. Henderson told him surgery may make his condition worse. At the time of hearing, claimant was unsure if he wanted surgery. (Tr., p. 33) Records from Dr. Eckhoff indicated claimant did not want surgery. (JE 9, p. 12) Given this record, claimant has failed to carry his burden of proof he is entitled to alternate medical care with Dr. Henderson.

Regarding Dr. Spooner, as detailed above, the record indicates defendants stopped authorizing claimant's medical care in late December 2020. Claimant testified that medications, epidurals and physical therapy provided by Dr. Spooner had been helpful for his back condition. (Tr., p. 35) Given this record, claimant has carried his burden of proof he is entitled to alternate medical care with Dr. Spooner.

The next issue to be determined is credit. Defendants paid claimant 25 weeks of permanent partial disability benefits after December 10, 2020. (Ex. B, p. 4) These benefits were based upon the 5 percent rating given by Dr. Moe. (JE 5, p. 11; JE 3, p. 59) Defendants appear to argue that this benefit should be used as a credit toward any permanent partial disability benefits. (Defendants' Post-Hearing Brief, p. 26)

As detailed above, claimant is due additional healing period benefits from December 10, 2020, through December 19, 2021. The 25 weeks of benefits paid to claimant after December 10, 2020, as shown in Defendants' Exhibit B, are to be credited to defendants' obligation to pay healing period benefits as detailed above.

The next issue to be determined is whether or not defendants are liable for a penalty under Iowa Code section 86.13.

An Auxier notice is required to be given 30 days before benefits are terminated. Defendants failed to give an Auxier notice as required by law. Failure to give an Auxier notice may result in an additional 30 days of benefits in a contested case. Auxier v. Woodward State Hospital-School, 266 N.W.2d 139, 142-43 (Iowa 1978); Nelson v. Fitzpatrick Auto Center, File No. 5039313 (Arbitration Decision March 20, 2013)

Defendants are already being required to pay claimant healing period benefits for the 30 days after December 10, 2020. Thirty days is approximately 4 weeks. Defendants are liable for a penalty of $1,244.36 for failure to give an Auxier notice (4 weeks x $622.18 x 50 percent).

Defendants stopped claimant's benefits as of December 7, 2020, with no notice and no explanation. Dr. Moe issued an impairment rating for claimant on December 23, 2020. Payment of those benefits was not made until on or about January 22, 2021. (JE 3, p. 59; Ex. B, p.4; Ex. 9, p. 9) The period of time between December 7, 2020, and January 21, 2021, is approximately 6 weeks. A 50 percent penalty is appropriate for this failure to make timely payments. Defendants are liable for a penalty of $1,866.54 for failure to pay claimant benefits between December 7, 2020, and January 21, 2021 ($622.18 x 6 weeks x 50 percent).

In total, defendants are liable for a penalty of $3,110.90 for failure to pay claimant benefits from December 7, 2020, through January 21, 2021, and for failure to give an Auxier notice.

The final issue to be determined is costs.

Claimant contends defendants should be required to pay for an FCE. Defendants argue that an FCE is not a cost under Rule 876 IAC 4.33. (Defendants' Post-Hearing Brief, p. 29) The record indicates that Dr. Moe requested authorization for an FCE in December of 2020. Dr. Harbach opined that an FCE was proper if claimant could not return to work. Claimant did not return to work. Dr. Harbach referred to the FCE findings in his rebuttal report.

Rule 876 IAC 4.33 allows for the taxation of reasonable costs associated with obtaining two reports from medical providers. The relevant requirement with regard to taxation of the FCE costs in question, is whether the FCE was required by a medical provider as necessary for the completion of a medical report. In this instance, if the FCE was ordered by a physician to evaluate claimant's permanent disability and need for restrictions, the cost is a reasonable cost under Rule 876 IAC 4.33. If it is not, taxation of costs of the FCE is inappropriate.

Dr. Moe requested claimant undergo an FCE for the assessment of claimant's abilities. (JE 3, pp. 63-64) Defendants did not authorize that FCE, thus forcing claimant to pay for the FCE. Given this record, claimant is entitled to reimbursement of the FCE as a cost.

ORDER

THEREFORE IT IS ORDERED:

That defendants shall pay claimant additional healing period benefits at the rate of six hundred twenty-two and 18/100 dollars ($622.18) per week from December 10, 2020, through December 19, 2021.

That defendants shall pay claimant one hundred fifty (150) weeks of permanent partial disability benefits at the rate of six hundred twenty-two and 18/100 dollars ($622.18) per week commencing on December 20, 2021.

That defendants shall pay accrued weekly benefits in a lump sum together with interest at an annual rate equal to the one-year treasury constant maturity published by the federal reserve in the most recent H15 report settled as of the date of injury, plus two percent.

That defendants shall pay a penalty of three thousand one hundred ten and 90/100 dollars ($3,110.90) as detailed above.

That defendants shall pay costs as detailed in Exhibit 11.

That defendants shall authorize Dr. Spooner for continued care and treatment of claimant.

That defendants shall be given a credit for benefits previously paid.

That defendants shall pay medical benefits as detailed above.

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

Signed and filed this _____2nd___ day of June, 2022.

JAMES F. CHRISTENSON
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Nick Platt (via WCES)

Kalli Gloudemans (via WCES)

Right to Appeal: This decision shall become final unless you or another interested party appeals within 20 days from the date above, pursuant to rule 876-4.27 (17A, 86) of the Iowa Administrative Code. The notice of appeal must be filed via Workers' Compensation Electronic System (WCES) unless the filing party has been granted permission by the Division of Workers' Compensation to file documents in paper form. If such permission has been granted, the notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 150 Des Moines Street, Des Moines, Iowa 50309-1836. The notice of appeal must be received by the Division of Workers' Compensation within 20 days from the date of the decision. The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or legal holiday.