BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

DANIEL KVIDAHL,

Claimant,

vs.

SKILLED TRADES, INC.,

Employer,

and

ZURICH AMERICAN INS. CO.,

Insurance Carrier,
Defendants.

File No. 5063647

ARBITRATION

DECISION

Head Note Nos.: 1801, 1804, 4000.2

STATEMENT OF THE CASE

Daniel Kvidahl, claimant, filed a petition in arbitration seeking workers' compensation benefits from Skilled Trades Inc. (Skilled Trades) and its insurer, Zurich American Insurance Company (Zurich) as a result of an injury he sustained on January 17, 2017 that arose out of and in the course of his employment. This case was heard in Cedar Rapids, Iowa and fully submitted on June 16, 2018. The evidence in this case consists of the testimony of claimant's wife and guardian/conservator Christina Kvidahl, Joint Exhibits 1 -6, Defendants' Exhibits A – G and Claimant's Exhibits 1 – 8. Both parties submitted briefs.

ISSUES

1. Whether claimant is entitled to a continuation of temporary total benefits, a running award, and if not;
2. The extent of claimant's permanent disability.
3. The commencement date for any permanent disability benefits.
4. Claimant's gross earnings and resulting workers' compensation weekly rate.
5. Whether claimant is entitled to penalty.
6. Assessment of costs.

STIPULATIONS

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.

FINDINGS OF FACT

The deputy workers' compensation commissioner having heard the testimony and considered the evidence in the record finds that:

Daniel Kvidahl, claimant, had a severe injury while working for Skilled Trades on January17, 2017. Claimant was 41 years old at the time of the injury. Claimant had a crush injury involving a scissor lift and an I-beam. Claimant was first seen at Mercy Medical Center. The history note states that claimant was pulseless approximately 15 minutes with CPR applied in approximately five minutes. (Joint Exhibit 1, p. 1) Mercy Medical Center did not have neurosurgical staff that could care for claimant's multiple injuries and claimant was transferred to the University of Iowa Hospitals and Clinics (UIHC). (JEx. 1, p. 3; JEx. 2, p. 1)

Claimant was at the UIHC from January 17, 2017 through January 27, 2017 including five days in the ICU. The UIHC discharge summary described his treatment and prognosis.

> **Hospital Course**: Patient was admitted to the SICU after his crush injury with PEA arrest at the scene. He remained intubated with L chest tube due to poor neuro exam (GCS 3 at admission) and small L pneumothorax. GCS steadily improved and the patient was extubated without complications. His neuro exam continued to improve slowly. He was disoriented and confused in the ICU and required restraints with sedating medication at [sic] time as to not harm himself. His speech was unintelligible once he began to speak. Slowly his exam improved until he was carrying on conversations although he was still confused and disoriented. His cognitive evaluation showed gross deficits in recent memory and in functional skills. He worked with PT, OT, and speech path for cognitive functioning while inpatient and showed signs of improvement. He did not have a bowel movement for the first 7 days of admission despite heavy bowel regimens. He continued to require an aggressive bowel regiment with suppositories and enemas during his admission to produce regular bowel movements but never had a distended bowel or nausea/vomiting. This slow transit constipation seems to be related to his traumatic injury. His pain is well controlled without opioids. He remained stable medically on the floor as his neuro deficits were treated with PT/OT/speech path and was discharged in stable condition but requiring

> ongoing aggressive therapy to maximize neuro improvements. These therapies will be required long term to maximize functioning.

(JEx. 2, p. 3)

Claimant was transferred to inpatient rehabilitation treatment at St. Luke's Hospital in Cedar Rapids on January 27, 2017. (JEx. 3, p. 1) Stanley Mathew, M.D. began to care for claimant at this time. (JEx. 3, p. 6) Claimant was admitted to receive comprehensive inpatient rehabilitation for the recovery from anoxic brain injury with impaired mobility, ADL's transfer and endurance. Claimant's main issues were cognitive. (JEx. 3, p. 7)

Claimant was transferred to another rehabilitation program in Cedar Rapids, Neuro Restorative, on January 27, 2017. (JEx. 4, p. 1) Claimant was in this program until he was transferred to QLI program in Omaha on October 24, 2017. Claimant was discharged on December 18, 2017. (JEx. 5, p. 1) The history admitting note stated that claimant had stopped receiving outpatient services form St. Luke's in July 2017 due to lack of progress. The note stated that claimant's program at Neuro Restorative was unstructured and claimant often slept until the afternoon. (JEx. 5, p. 1) QLI records reflect,

> Throughout his stay at QLI, Dan struggled with consistent participation in his therapy program. The team attempted many strategies to get him up and out of bed for the day prior to 12pm and adjusted his therapy schedule to capitalize on afternoon times when he was initially naturally more alert. Given the limited success of these interventions, the team consulted our psychiatrist, Dr. Sorrell, to determine if medicinal intervention was appropriate. Following medication changes ordered by Dr. Sorrell (see Nursing report below for additional information), a dramatic increase in alertness and aggressive behavior was noted. This behavior included verbal and physical threats of harm towards staff and other residents at QLI, as well as the physical assault of a staff member. Out of necessity for keeping our clientele in the residential, campus style set up of QLI's Active Rehab program safe, discharge planning was escalated with the intent to transition Dan to a 24 hour facility specializing in neurobehavioral management and care. Dan was assessed by Brookhaven (Tulsa, OK) on 12/12/17. They accepted him for admission in the days following. Referral information was also forwarded to Neuro-Restorative, and they indicated a preference for consideration within their Carbondale facility. By the time of discharge, Neuro-Restorative had not officially accepted Dan for admission into their program, though did still have him under consideration.
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> During this process, Dan's wife and guardian, Christina, indicated that she preferred to take Dan home with 24 hour in-home care, versus transitioning him to another facility. Staff reviewed our recommendation

> with her that Dan not transition home until his behaviors were better controlled. This recommendation was reviewed with Dan's worker's compensation team as well. Christina affirmed her desire to take Dan home despite this recommendation, and QLI worked with Dan's worker's compensation case manager to locate an agency that could provide 24 hour care within the home setting. An agency was identified and was able to staff services beginning 12/18/17. Two QLI staff members transported Dan home upon discharge and provided general education and recommendations to the new caregivers present at the home. Information regarding facility options, should Dan's care needs become unmanageable in the home setting, was reviewed with Christina upon discharge.

(JEx. 5, pp. 1, 2)

On August 27, 2018 claimant had a second neuropsychology evaluation by Megan Adams Rieck, Ph.D. (JEx. 3, pp. 21 – 26) This evaluation found,

> Mr. Kvidahl continues to demonstrate substantial cognitive impairments as a result of his anoxic brain injury. The slight improvements noted in this evaluation likely represent resolution of acute encephalopathy secondary to medication effects, acute medical concerns, inflammation/edema, and sustained sobriety. Unfortunately, the remainder of Mr. Kvidahl's cognitive impairments and personality/behavioral changes are expected to be chronic. Impairments on testing are consistent with expected consequences of acute, severe anoxia (correlated with suspected injury/neuronal loss in the hippocampus, basal ganglia, and watershed zones of the cortex).

(JEx. 3, p. 23) Dr. Adams Rieck noted that claimant may be able to make some decisions; however, a wise precaution would be for a family member to co-sign any legal documents. (JEx. 3, p. 24) Dr. Adams Rieck recommended that claimant be provided assistance to help him day and night. She said, "The significance of Mr. Kvidahl's cognitive impairments and behavioral change due to anoxic brain injury preclude a return to work. Disability resources should be considered." (JEx. 3, p. 24)

Claimant was evaluated for his cognitive linguistic deficits. Claimant was not aware of why he was being evaluated. (JEx. 3, p. 28) Claimant exhibited a lack of motivation to work with speech therapy and no treatment was recommended. (JEx. 3, pp. 30, 31)

On March 7, 2018 Dr. Mathew sent claimant's counsel a note concerning the condition of the claimant. Dr. Mathew wrote:

> Daniel has completed outpatient physical and occupational therapy and speech therapies. Though from a physical standpoint, his arms and

> legs and balance have improved, his cognition is so impaired that he continues to require 24x7 care.
>
> At his last speech therapy, the patient continues to have moderate to severe cognitive deficits in areas recall [sic], reasoning with minimal changes. There is severe lack of drive. The patient on testing continues to have moderate impairment in the areas of recall, reasoning.
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> On his last neuropsychologic testing which occurred in August of 2017, this patient had impaired self awareness. Recommendations included that the family members cosign all legal documents. His cognitive impairments were so severe that he would be unable to return to work. No driving was recommended. Medication responsibility should be assumed by caregiver. Money management should be assumed by caregiver.
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> It is my opinion that due to the severity of his anoxic brain injury, he is totally disabled from any form of gainful employment. He will require 24-hour care in most areas in regards to money management, decision-making capacity, medication management, nutrition and cooking. He is over one year post brain injury and has showed minimal recovery.
>
> I do feel he is totally disabled. If you have any further questions, please feel free to contact my office.

(Claimant's Ex. 1, pp. 1, 2) I find that these are claimant's restrictions and limitations. I also find that claimant has shown minimal recovery from his injury, and based upon Dr. Mathew's opinion is not expected to improve.

Dr. Mathew provided a "To Whom It May Concern" letter on March 21, 2018 that Mr. Kvidahl may return to work on his next appointment. (Ex. E, p. 25) And there is another "To Whom It May Concern" letter dated March 22, 2018 that claimant should remain off work and will be reevaluated at his next appointment on May 29, 2018. (Ex. F, p. 26)

Claimant started to receive hyperbaric oxygen therapy (HBOT) through Sunny Kim, M.D. It appears the first treatment was on January 8, 2018. (JEx. 6, p. 3) On February 27, 2018 Dr. Kim noted that claimant and Ms. Kvidahl had not noticed significant changes in claimant's behavior. (JEx. 6, p. 5) On March 8, 2018 Dr. Kim wrote a statement that claimant would benefit from having less people take care of him. (JEx. 6, p. 7) Presumably, that statement was directed to the agency that was managing the 24/7 care claimant was receiving at home. On April 10, 2018, Dr. Kim wrote that claimant had shown improvement in his overall mood and cognitive status over the course of the HBOT and recommended an additional 40 hours of treatment. (Ex. G, p. 27)

The indemnity payment log submitted by defendants show the check for the period 1/18/2017 – 1/31/2017 was stopped. (Ex. A, p. 4) For a brief period of time claimant's adult children retained an attorney to represent the claimant. This attorney stopped her representation and returned payments to the defendants. On February 15 defendants sent a check to claimant's counsel in the amount of $1,036.04 and on March 16, 2017 defendants sent another check in the amount of $497.26. There is no indication on either letter as to what dates these payments are for. (Ex. C, p. 23: Ex. D, p. 24) The $1036.04 check appears to be two payments of $518.02 with no child support withheld. The $497.26 appears to be claimant's weekly payment with child support withheld.

Ms. Kvidahl said that for a brief time claimant's weekly checks were sent to an attorney representing claimant's adult children. (Tr. p. 31) Ms. Kvidahl said that the attorney sent the checks back to the insurance company and she has never received the checks. (Tr. p. 31).

Defendants submitted an exhibit showing how they calculated claimant's weekly wage. (Ex. B, p. 21) Defendants used each of the 13 weeks preceding claimant's injury, except for the week ending November 26, 2016. Defendants included the pay period ending October 15, 2016 which had 33.5 hours worked in their calculation. (Ex. B, p. 21) Defendants added the total number of hours worked, multiplied by claimant's hourly rate of $20.00 per hour and divided by 13 to reach the average weekly wage of $853.08. Claimant was single and entitled to one exemption. (Defendants' brief, p. 4) Defendants' brief incorrectly stated that the claimant's weekly wages of $853.03 resulted in claimant's weekly workers' compensation rate of $853.03.

The actual rate defendants are paying is not on the Hearing Report or in the briefs. Combining the claimant's indemnity payment and CSRU payment defendants paid $511.10[1] for seven weeks [first 7 payments in Ex. A, p. 5] and the rest of the payments have been at $518.02. (Ex. A, pp. 5-7) According to the rate book in effect for the time of the injury, $518.02 is the weekly rate, if claimant's average gross income is $853.03.

Wage records from pay periods ending February 20, 2016 through January 14, 2017 (46 weeks) show six weeks where claimant did not work more than 35 hours. Twenty-six of the forty-six weeks claimant worked at least forty hours per week. (Ex. B, pp. 21, 22) I find that claimant customarily worked at least 35 hours per week and any week that is less than 35 hours is unrepresentative of his earnings.

Claimant applied for and is receiving Social Security Disability benefits. The Social Security Administration found that the onset date of his permanent disability was January 17, 2017. (Ex. 4, p.1)

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[1]. Claimant's payments were $497.26. CSRU was sent $13.84 for 7 payments, and after the 7 payments the amount to CSRU was increased to $20.76. (Ex. A, p. 5)

Ms. Kvidahl was appointed guardian of the claimant by the Iowa District Court on October 9, 2017. Ms. Kvidahl was claimant's legal guardian at the time of the hearing. (Ex. 5, p. 1; Tr. p. 9) The district court found the ward (claimant) was incompetent to vote pursuant to Iowa Code section 633.556. (Ex. 5, p. 1)

Claimant submitted accounting records as to the payments made to claimant by the defendants. The claimant's financial records and affidavit of Ms. Kvidahl show that they have not received a payment of benefits from January 18, 2017 through January 31, 2017. (Ex. 8, pp. 1–13) The claimant asserts the amount that is past due is $1,786.90. (Tr. p. 19)

The claimant was not called to testify in this case. Ms. Kvidahl testified as claimant's spouse and guardian. Ms. Kvidahl and claimant have been living together since 2007. After claimant's accident they were married. (Tr. p. 8) Ms. Kvidahl had a power of attorney for claimant before she was appointed guardian. (Tr. p. 18)

Ms. Kvidahl said claimant was in intensive care for five days at UIHC after his accident. (Tr. p. 10) After staying at UIHC for about two weeks claimant transferred to St. Luke's Hospital. Ms. Kvidahl said that Dr. Mathew became claimant's primary physician at that time. (Tr. p. 13) Claimant then spent about six months in Neuro Restorative in Cedar Rapids and then transferred to QLI in Omaha. Ms. Kvidahl said that QLI wanted to transfer claimant to another facility, but she thought he deserved to come home. Ms. Kvidahl said that he has had 24-hour care since then with a service called Homewatch Caregivers. (Tr. pp. 12, 13) Ms. Kvidahl said that claimant worked full time at Skilled Trades and that she would take him to work each day. (Tr. p. 14)

Ms. Kvidahl said that before the injury claimant was very active. He would go to the YMCA to work out every day. (Tr. p. 15) Ms. Kvidahl said that claimant was motivated and always busy before the injury. Since the injury it can take Ms. Kvidahl two hours to get claimant up in the morning. (Tr. p. 16) Claimant cannot remember to take his medication. Claimant does not have enough attention to wash dishes. Claimant has difficulty being in public and in bright lights. (Tr. p. 20) Claimant needs help in ADLs such as brushing his teeth, and picking out clothes. Claimant has to be reminded to drink liquids and eat. (Tr. pp. 21, 24) Claimant is taken out to the community such as to the mall for short periods or the YMCA. At the YMCA claimant will at times just sit and not do a workout. (Tr. p. 22) Ms. Kvidahl described that claimant has to be instructed every day on how to use a TV remote and how to use his phone. (Tr. pp. 34, 35)

Ms. Kvidahl said that claimant cannot drive and would not be able to work. At the time of the hearing claimant was receiving a hyperbaric treatment. Ms. Kvidahl said it helped a little bit concerning his agitation, but his memory is still a problem, that claimant had not got much good out of the treatment. (Tr. pp. 25, 26) Claimant attends speech therapy, however is not doing well. (Tr. p. 26) Ms. Kvidahl said that the physical injuries, other than claimant's brain, have healed after the injury. (Tr. p. 31)

Ms. Kvidahl's testimony was consistent as compared to the evidentiary record. Her demeanor at the time of evidentiary hearing was excellent and gave the undersigned no reason to doubt Ms. Kvidahl's veracity. Ms. Kvidahl is found credible.

Claimant has requested costs in the total amount of $394.88. Claimant is asking for $116.68 for filing and service fees and $275.20 for a report of Dr. Mathew. (Ex. 6, p. 1) I find the costs are reasonable.

RATIONALE AND CONCLUSIONS OF LAW

The defendants admit that claimant has an injury that arose out of and in the course of his employment with Skilled Trades. The parties dispute whether claimant is entitled to temporary total disability (TTD) or permanent total disability (PTD). Claimant also asserts that defendants' failure to timely answer the request for admissions forecloses defendants' positions in this case

Request for Admissions

Claimant argues that the defendants did not timely respond to the request for admissions and therefore those matters are deemed admitted. The admission included the fact that claimant was permanently and totally disabled, claimant's rate was $528.97, and defendants failed to pay healing period benefits from January 18, 2017 through January 31, 2017.

Iowa Rules of Civil Procedure 1.502-1.517, governing discovery, are made authoritative by rule 876 IAC 4.35. Iowa Rule of Civil Procedure 1.501 provides in part:

> **1.510(2)** *Time for and content of responses.* The matter is admitted unless, within 30 days after service of the request, or within such shorter or longer time as the court may on motion allow, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by the party's attorney, but, unless the court shortens the time, a defendant shall not be required to serve answers or objections before the expiration of 60 days after service of the original notice upon defendant.
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> If objection is made, the reasons therefor shall be stated. The answer shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify the party's answer or deny only a part of the matter of which an admission is requested, the party shall specify so much of it as is true and qualify or deny the remainder. An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless the party states that the party has made reasonable inquiry and that the information known or readily obtainable by the party is insufficient to enable the party to admit or deny. A party who

> considers that a matter of which an admission has been requested presents a genuine issue for trial may not, on that ground alone, object to the request; the party may, subject to the provisions of rule 1.517(3) deny the matter or set forth reasons why the party cannot admit or deny it.

Iowa R. Civ. P. 1.510

Iowa Rule of Civil Procedure 1.511 states that any matter admitted under rule 1.510 is conclusively established in the pending action unless the court on motion permits withdrawal or amendment of the admission.

Iowa Rule of Civil Procedure 1.511 states:

> The court may permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice that party in maintaining that party's action or defense on the merits.

"Iowa law has clearly stated there is no right to file a late response to a request for admissions." Id. at 549. See also Allied Gas v. Federated Mut. Ins. Co., 332 N.W.2d 877, 879 (Iowa 1983). This agency is under no obligation to allow late filing of a response to request for admissions Double D Land and Cattle Co. v. Brown, 541 N.W.2d 547,549-550. Rather, this agency has discretion to determine whether the proposed late responses will be allowed. Allied Gas, 332 N.W.2d at 879; Brown, 541 N.W.2d at 550.

"[D]iscovery should be liberally construed to effectuate disclosure of all relevant and material information to the parties." In re Marriage of Meredith, 394 N.W.2d 336, 338 (Iowa 1986). In general; however, the Iowa Supreme Court has emphasized its preference that legal disputes be resolved on their merits, rather than pursuant to a procedural technicality. MC Holdings v. Davis County Bd. of Review, 830 N.W.2d 325, 328 (Iowa 2013). "Mistakes and inadvertence ordinarily do not become roadblocks to this goal. A party is usually permitted to correct mistakes when prejudice does not result." Id. at 329.

In determining whether to permit a withdrawal or amendment of requests for admissions, the Iowa Supreme Court has mandated the use of a two-prong standard. First, the agency must determine whether the presentation of the merits would be subserved by a late filing. Second, this agency must consider whether claimant has established he would be prejudiced by allowing the late withdrawal or amendment of a response to request for admissions. Allied Gas, 332 N.W.2d 877 (Iowa 1983); Brown, 541 N.W.2d 547, 551 (Iowa App. 1995).

Claimant served the request for admissions on November 21, 2017. (Ex. 3, p. 4) The record shows the defendants answered the request for admissions and filled out a

proof of service for December 29, 2017. (Ex. 3, p. 9) The postmark on the envelope sending the answer to the request for admission is January 3, 2018. (Ex. 3, p, 10)

The defendants did not timely file the response to the request for admissions. While I could hold that all the requests for admissions are deemed admitted I will not do so in this case. The defendants filed the answers to the request for admissions a few days after they were due. There did not appear to be any prejudice to the claimant in this case. Had the defendants been later in responding to the request for admissions or if it was closer to the hearing date I would have deemed all the requests for admissions admitted. However, as claimant had ample notice of defendants' positions and time to prepare and has not alleged any prejudice, I will allow the answers to the requests for admissions served on December 29, 2017 to be the defendants' answer to the request for admissions.

TTD, PPD or PTD

Defendants have argued that claimant is not at maximum medical improvement and that the temporary total disability should continue. Claimant has argued that claimant is at maximum medical improvement (MMI) and is permanently and totally disabled.

Section 85.34(1) provides that healing period benefits are payable to an injured worker who has suffered permanent partial disability until (1) the worker has returned to work; (2) the worker is medically capable of returning to substantially similar employment; or (3) the worker has achieved maximum medical recovery. The healing period can be considered the period during which there is a reasonable expectation of improvement of the disabling condition. See Armstrong Tire & Rubber Co. v. Kubli, 312 N.W.2d 60 (Iowa App. 1981). Healing period benefits can be interrupted or intermittent. Teel v. McCord, 394 N.W.2d 405 (Iowa 1986)

Based upon the medical evidence and testimony of Ms. Kvidahl I find there is no reasonable expectation that there will be any significant improvement in claimant's medical condition.

The neuropsychological testing in August of 2017 by Dr. Adams Rieck is sufficient to show claimant has a permanent disability that will prevent him from being able to engage in regular work activities.

There are two letters in Dr. Mathew's records that defendants have asserted show that claimant is not at MMI and not entitled to permanent benefits. Those records are a slender reed to base the assertion that claimant does not have a permanent impairment. The return to work letters of March 21, 2016 and March 26, 2018 are scrivener's errors or office system errors that were generated without reflecting on claimant's condition. Those two letters look like standard letters that got into the claimant's records that do not match reality. Dr. Mathew's letter of March 8, 2018 that supports a finding of total disability is clearly the medical conclusion of claimant's

condition. When asked about the claimant's ability to work, Dr. Mathew states claimant is totally disabled. Dr. Mathew states claimant needs 24/7 care, that claimant is totally disabled from any form of gainful employment, and that he was over one year out from the brain injury and showed minimal recovery. I agree with that conclusion.

I do not believe that the hope that HBOT treatments might help claimant to be convincing and therefore that claimant is not at MMI. Ms. Kvidahl credibly testified that the HBOT only provided minimal help. Claimant will need various forms of treatments and therapies throughout his life, and his condition may wax and wane, but even if it showed significant improvement he would still be totally and permanently disabled, absent a medical miracle. Claimant's primary physician believes claimant is permanently disabled. Dr. Adams Rieck's opinions support permanent total disability as well as the finding of entitlement to Social Security Disability[2].

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.

In assessing an unscheduled, whole-body injury case, the claimant's loss of earning capacity is determined as of the time of the hearing based upon industrial disability factors then existing. The commissioner does not determine permanent disability, or industrial disability, based upon anticipated future developments. Kohlhaas v. Hog Slat, Inc., 777 N.W.2d 387, 392 (Iowa 2009).

Total disability does not mean a state of absolute helplessness. Permanent total disability occurs where the injury wholly disables the employee from performing work that the employee's experience, training, education, intelligence, and physical capacities

[2] Findings of the Social Security Administration are not binding on this agency. I do consider the Social Security's finding along with the other evidence in the record.

would otherwise permit the employee to perform. See McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Diederich v. Tri-City R. Co., 219 Iowa 587, 258 N.W. 899 (1935).

A finding that claimant could perform some work despite claimant's physical and educational limitations does not foreclose a finding of permanent total disability, however. See Chamberlin v. Ralston Purina, File No. 661698 (App. October 1987); Eastman v. Westway Trading Corp., II Iowa Industrial Commissioner Report 134 (App. May 1982).

> The commissioner may award permanent total disability benefits pursuant to Iowa Code section 85.34(3). Total industrial disability occurs when an injury "wholly disables the employee from performing work that the employee's experience, training, intelligence, and physical capacities would otherwise permit the employee to perform." IBP, Inc. v. Al–Gharib, 604 N.W.2d 621, 633 (Iowa 2000). Total disability does not require a state of absolute helplessness. Acuity Ins. v. Foreman, 684 N.W.2d 212, 219 (Iowa 2004). The issue is whether there are jobs in the community the employee can do for which the employee can realistically compete. Second Injury Fund of Iowa v. Shank, 516 N.W.2d 808, 815 (Iowa 1994).
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> Industrial disability means reduced earning capacity. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181, 182 (Iowa 1980). Many factors are considered in determining industrial disability, including the employee's age, intelligence, education, qualifications, experience, bodily impairment, and the injury's effect on the employee's ability to find suitable work. Wal–Mart Stores, Inc. v. Caselman, 657 N.W.2d 493, 495 (Iowa 2003). A worker with only a partial functional disability has a total industrial disability, when the combination of factors precludes the worker from obtaining regular employment to earn a living. Guyton v. Irving Jensen Co., 373 N.W.2d 101, 103 (Iowa 1985); *see also* Second Injury Fund of Iowa v. Nelson, 544 N.W.2d 258, 266 (Iowa 1996) ("[T]he focus is not solely on what the worker can and cannot do; the focus is on the ability of the worker to be gainfully employed.").

W. Ridge Care Ctr. v. Johnson, 776 N.W.2d 302 (Table) 2009 WL 3337601, p. 3 (Iowa Ct. App. 2009).

Claimant is receiving care 24/7 due to his work injury. He has significant cognitive impairments. His injury made him incapable of working. The evidence is overwhelming that claimant is permanently and totally disabled. Claimant cannot be gainfully employed.

Claimant is permanently and totally disabled under 85.34(3).

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)

I previously found that any week less than 35 hours did not fairly represent claimant's earnings. Defendants' inclusion of the week ending October 15, 2016 (33.5 hours) is not correct.

I found that defendants used one week that was not typical for the claimant at 33.5 hours. Contrary to claimant's argument, the defendants did not use the one week where claimant only worked 24 hours. The week ending October 8, 2016 (38.25 hours: $765.00 at $20.00 per hour) should be included. And the week ending October 15, 2016 should be excluded. Substituting these weeks results in an average weekly wage of $860.38. Using the rate book in effect at the time of the injury claimant's weekly workers' compensation rate is $521.50. Defendants have underpaid claimant weekly benefits. Defendants shall pay claimant at the correct rate for all weekly benefits due in the future and in the past with interest as set forth in the Order section of this decision.

Costs

Claimant has requested costs for filing fee, service costs and the report of Dr. Mathew. I award claimant these costs under 876 IAC 4.33. Defendants shall pay claimant $398.88 for costs.

Penalty

The next issue for determination is whether claimant is entitled to penalty benefits under Iowa Code section 86.13 and, if so, how much.

Iowa Code 86.13, as amended effective July 1, 2009, states:

> 4. a. If a denial, a delay in payment, or a termination of benefits occurs without reasonable or probable cause or excuse known to the employer or insurance carrier at the time of the denial, delay in payment, or termination of benefits, the workers' compensation commissioner shall

award benefits in addition to those benefits payable under this chapter, or chapter 85, 85A, or 85B, up to fifty percent of the amount of benefits that were denied, delayed, or terminated without reasonable or probable cause or excuse.

b. The workers' compensation commissioner shall award benefits under this subsection if the commissioner finds both of the following facts:

(1) The employee has demonstrated a denial, delay in payment, or termination of benefits.

(2) The employer has failed to prove a reasonable or probable cause or excuse for the denial, delay in payment, or termination of benefits.

c. In order to be considered a reasonable or probable cause or excuse under paragraph *"b"*, an excuse shall satisfy all of the following criteria:

(1) The excuse was preceded by a reasonable investigation and evaluation by the employer or insurance carrier into whether benefits were owed to the employee.

(2) The results of the reasonable investigation and evaluation were the actual basis upon which the employer or insurance carrier contemporaneously relied to deny, delay payment of, or terminate benefits.

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

If weekly compensation benefits are not fully paid when due, section 86.13 requires that additional benefits be awarded unless the employer shows reasonable cause or excuse for the delay or denial. Robbennolt v. Snap-on Tools Corp., 555 N.W.2d 229 (Iowa 1996). Delay attributable to the time required to perform a reasonable investigation is not unreasonable. Kiesecker v. Webster City Meats, Inc., 528 N.W.2d 109 (Iowa 1995).

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

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

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

The claimant has shown that there was a denial or delay of payment for the period of January 18 through January 31, 2017. I find the testimony of Ms. Kvidahl that no payment was received for that time period to be credible.

Defendants did send a payment for that time period to an attorney representing the claimant's adult children. Those payments were returned to defendants. The initial delay in making payment is reasonable. However, it is not reasonable to continue to fail to pay claimant benefits for January 18, 2017 through January 31, 2018.

Defendants' evidence on payments to claimant, Exhibit A, is of little value, as the way it was printed and the values shown are not explained. Likewise, claimant's spread sheet does not explain how interest was calculated for any alleged late payments. The claimant's spread sheet assumed a weekly benefit amount of $508.21; an amount differing than my finding as to claimant's weekly benefit amount. It is not the duty of the agency to scour the record to come up with a possible explanation as to when and how the payments were made.

The record shows that $1,043.00 of benefits has not been paid. I find that the failure to pay these benefits was unreasonable.

I award $260.00 in penalty, approximately 25 percent of the past due amount. The two missed payments do not indicate a larger pattern of failing to pay claimant, so a penalty of 50 percent was not imposed. The penalty is sufficient to alert defendants to pay benefits timely in the future.

ORDER

Defendants shall pay to claimant permanent total disability benefits at the rate of five hundred twenty-one and 50/100 dollars ($521.50) per week commencing January 18, 2017 and continuing thereafter during the period of disability.

Defendants shall have a credit for the indemnity benefits previously paid.

Defendants shall pay claimant a penalty of two hundred sixty and 00/100 dollars ($260.00).

Defendants shall pay claimant costs in the amount of three hundred ninety-eight and 88/100 dollars ($398.88).

Defendants shall pay accrued weekly benefits in a lump sum together with interest at the rate of ten percent for all weekly benefits payable and not paid when due which accrued before July 1, 2017, and all interest on past due weekly compensation benefits accruing on or after July 1, 2017, shall be payable at an annual rate equal to the one-year treasury constant maturity published by the federal reserve in the most recent H15 report settled as of the date of injury, plus two percent. See Gamble v. AG Leader Technology File No. 5054686 (App. Apr. 24, 2018).

Defendants shall file subsequent reports of injury as required by this agency pursuant to rule 876 IAC 3.1(2).

Signed and filed this 24th day of January, 2019.

JAMES F. ELLIOTT
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.