BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

ERIC ZALAZNIK, Claimant, vs. JOHN DEERE DUBUQUE WORKS, Employer, Self-Insured, Defendant.	:	File No. 5066386.02 REVIEW-REOPENING DECISION Headnotes: 1703, 2905, 2501, 2502, 2907, 4000.2

STATEMENT OF THE CASE

Claimant, Eric Zalaznik, filed a petition in review-reopening against John Deere Dubuque Works (Deere), a self-insured employer. This case was heard on July 12, 2022, with a final submission date of August 2, 2022.

The record in this case consists of Joint Exhibits 1 through 10, Claimant's Exhibits 1 through 7, Defendant's Exhibits A through N, and the testimony of claimant.

The parties filed a hearing report at the commencement of the review-reopening hearing. On the hearing report, the parties entered into various stipulations. All of those stipulations were accepted and are hereby incorporated into this review-reopening 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 has had a change in condition entitling him to additional benefits under review-reopening proceeding.

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

3. Whether claimant is entitled to reimbursement for an independent medical evaluation (IME) under Iowa Code section 85.39.

4. Whether defendant is liable for a penalty under Iowa Code section 86.13.

5. Whether claimant is due costs associated with the request for admissions.

6. Whether claimant is due costs assessed for attorney's fees.

FINDINGS OF FACT

Claimant was 47 years old at the time of hearing. (Hearing Transcript, page 22) Claimant graduated from high school. He went to a community college but did not graduate. (Arbitration Decision, page 2)

Claimant worked as a laborer for construction and plumbing companies. He has worked at biodiesel plants. Claimant worked as a painter in his own business. Claimant began with Deere in 2011. (Arb. Dec., p. 2)

Claimant was an inspector at Deere in department 818. The job required him to do visual and hands-on inspections of Deere crawlers. (Arb. Dec., p. 2)

On September 5, 2017, while stepping off a crawler, claimant had a misstep to the ground. Claimant said he felt a jolt in his lower back and had immediate lower back and left leg pain. (Arb. Dec., p. 2)

Claimant underwent conservative care. When conservative care failed to significantly alleviate his symptoms, claimant underwent lower back surgery on January 11, 2018, performed by Chad Abernathey, M.D. Surgery consisted of a partial hemilaminectomy and diskectomy. (Arb. Dec., p. 2)

Claimant was returned to work by Dr. Abernathey on March 5, 2018. (Arb. Dec., p. 2)

Dr. Abernathey found claimant at maximum medical improvement (MMI) for the September 5, 2017, lower back injury as of August 8, 2018. Dr. Abernathey found claimant had a 7 percent permanent impairment to the body as a whole from his lower back injury. (Arb. Dec., p. 3)

In an IME report, Mark Taylor, M.D., opined claimant had a 19 percent permanent impairment to the body as a whole regarding his September 5, 2017 back injury. (Arb. Dec., pp. 4-5)

In a July 21, 2021, arbitration decision, claimant was found to have a 10 percent permanent impairment regarding the September 5, 2017, date of injury. That decision was modified by a January 11, 2022, appeal decision, which found that claimant was due 95 weeks of permanent partial disability benefits for the September 5, 2017, date of injury.

Claimant testified that after the arbitration decision he began experiencing progression in his symptoms. He said that his pain down his legs was worse. He said that up until August 2021 he was in a lot of pain. (Tr., pp. 15-16)

On February 15, 2021, claimant underwent a lumbar MRI. It showed diffuse degenerative disk disease, prior posterior decompressive changes of L5 and a left hemilaminectomy at the L4 level. The MRI also showed moderate central stenosis at L3-4 with right foraminal narrowing and mild central stenosis at L4-5. (Joint Exhibit 4, pp. 20-21)

On March 3, 2021, claimant was evaluated by Dr. Abernathey for chronic lower back pain. Surgery was discussed as a treatment option. Claimant was sent to the University of Iowa Hospitals and Clinics (UIHC) for evaluation of a possible fusion. (JE 5, p. 31)

On March 8, 2021, claimant underwent a lumbar spine injection performed by Timothy Miller, M.D. (JE 3, p. 17)

On March 30, 2021, claimant was evaluated at the UIHC by Matthew Howard, M.D. Claimant had back pain with radiculopathy to the left leg below the knee. Claimant also had radicular pain in the right leg. Surgery was discussed. Dr. Howard recommended further imaging of the lumbar spine. (JE 8, pp. 109-114)

On April 13, 2021, claimant was evaluated by Satoshi Yamaguchi, M.D., at the UIHC. Since his evaluation and injection with Dr. Howard, claimant had relief of left leg symptoms, but began to have right leg pain. Imaging studies showed severe left neuroforaminal stenosis at the L4-5 levels but did not explain his right leg pain. Surgery was not recommended at this time. (JE 8, p. 123)

On June 8, 2021, claimant was evaluated at the UIHC by Dr. Yamaguchi. Claimant had an epidural steroid injection (ESI) in the lumbar spine and had some improvement in the right leg, but still had symptoms. Claimant had weakness in his right calf, foot, and ankle. Claimant also had bilateral leg cramps. Claimant had signs of atrophy in the left leg. Surgery was recommended for treatment. (JE 8, pp. 125-128)

In a June 21, 2021 letter, defendant Deere authorized surgery for claimant at the UIHC. (JE 8, p. 129)

In a June 25, 2021 report, Robert Broghammer, M.D., gave his opinions of claimant's condition following a record review. Dr. Broghammer assessed claimant as having degenerative spondyloarthropathy of the lumbar spine. (Defendant's Exhibit E, p. 64) Dr. Broghammer opined:

> Simply put, just because he had an accepted injury to the lumbar spine in 2017 resulting in surgery, does not mean that the ongoing degenerative process of the lumbar spine would then therefore be related to this remote injury. As stated in a previous Reviewer's Note, there is no reason not to think that the need for surgery could be just as easily due to the original surgery which occurred back in 2015 with Dr. Parvin. In my medical opinion, the accepted injury of 2017 was really a nonevent and in my medical opinion the act of stepping down off of something and jarring one's back would not rise to the level of causing anything more than a lumbar strain or sprain and certainly would not cause a disc extrusion nor would it rise to the level of requiring surgery. In my medical opinion, the 2017 "injury" was really more of a lumbar sprain with subsequent workup demonstrating a disc extrusion, which was a consequence of the degradation of the worker's lumbar spine due to the natural degenerative process and not the alleged 2017 injury.

(Ex. E, pp. 64-65)

Dr. Broghammer opined that any ongoing care required by claimant was due entirely to a pre-existing degenerative process of claimant's spine and not due to an alleged "industrial" injury. (Ex. E, p. 65)

Claimant testified that Deere authorized him to see doctors at the UIHC regarding his back. He said Deere initially authorized surgery. He said Deere revoked that authorization. Claimant testified it was his understanding that the authorization was revoked due to Dr. Broghammer's report. (Tr., pp. 10-12)

In a June 28, 2021 letter, defendant's counsel indicated defendant was denying claimant's lower back injury based on Dr. Broghammer's report. As a result, defendant revoked prior authorization of claimant's back surgery. (Ex. G, p. 71)

In a July 14, 2021 letter, written by claimant's counsel, Dr. Abernathey indicated the surgery performed on claimant on January 11, 2018, arose out of and in the course of the September 5, 2017, work incident. He opined that claimant's September 5, 2017, work injury was a substantial contributing factor to the progression of claimant's lower back condition, which led to a referral to Dr. Howard. Dr. Abernathey noted that the need for ongoing surgery for claimant was more likely than not related to the September 5, 2017, work injury. (Claimant's Exhibit 1, pp. 17-19)

Claimant said that after authorization for surgery was revoked by Deere, he rushed to have surgery authorized through his health insurance. (Tr., p. 13)

On August 19, 2021, claimant underwent lumbar surgery performed by Dr. Yamaguchi and Dr. Howard. Surgery consisted of an L4 through S1 laminectomy and diskectomy, a facetectomy from L4 through S1, and a fusion between the L4 and S1 levels. (JE 8, pp. 137-138)

Claimant testified that after surgery his right leg symptoms improved. He said he still got numbness in his leg and numbness to the small toes in both feet. (Tr., p. 16)

In a January 21, 2022 letter, Dr. Howard opined that it was more likely than not that the work-related injury and surgery performed by Dr. Abernathey were substantial contributing factors for the need for surgery done in August of 2021. (Ex. 1, p. 22)

In an April 7, 2022 report, David Segal, M.D., gave his opinions of claimant's condition following an IME. Dr. Segal indicated records showed that claimant's function remarkably deteriorated after his work injury of September of 2017. He found claimant had a flare-up of symptoms approximately in January of 2021, with symptoms progressing more rapidly. (Ex. 1, p. 44)

Dr. Segal reviewed Dr. Broghammer's report and disagreed with Dr. Broghammer's opinions regarding causation of the 2017 incident. Dr. Segal found the following diagnoses were related to the September of 2017 work injury:

1. Disc herniation at L4-L5 and L5-S1.
2. Bilateral L5 and right S1 radiculopathy.
3. Permanent aggravation of lumbar degenerative disc and spine disease.

4. Lumbar spinal and foraminal stenosis.
5. Post-laminectomy syndrome.
6. Gait dysfunction.

(Ex. 1, p. 48)

Dr. Segal opined that claimant's work injury of September 5, 2017, and subsequent 2018 surgery were substantial contributing factors regarding claimant's need for surgery in August of 2021. (Ex. 1, pp. 56-58)

Dr. Segal found claimant at MMI as of February 19, 2022. He opined that claimant had a 37 percent permanent impairment to the body as a whole using the AMA Guides to the Evaluation of Permanent Impairment (Fifth Edition). (Ex. 1, pp. 59-61) Dr. Segal limited claimant, among other things, to walking only up to 30 minutes at a time, no carrying over 40 pounds, no squatting, rarely using ladders and kneeling. (Ex. 1, p. 63)

In a May 6, 2022 report, Dr. Broghammer indicated he reviewed additional medical records since his June of 2021 review, including Dr. Segal's report. Dr. Broghammer again opined that the September 5, 2017, injury was not a substantial factor in causing the need for the 2018 surgery. He did not believe claimant had permanent impairment related to the September 5, 2017 injury. (Ex. l, pp. 76-88)

Claimant testified he was off work for his 2021 surgery from August 19, 2021 and returned to work on December 20, 2021. He testified he returned to work at the same job and the same hours. Claimant said he was not working under any new restrictions. (Tr., pp. 13-14) Claimant said he is able to do everything that is required of him in his inspector job. (Tr., p. 20) Claimant testified his earnings had increased at Deere since the arbitration hearing due to a collective bargaining agreement. (Tr., p. 21) Claimant testified he received short-term disability benefits from Deere while he was off work. (Tr., p. 18)

Claimant testified his back is worse now than it was at the time of the arbitration hearing. He said he is limited in his ability to bend. Claimant said he is limited in his ability to do other physical activities. (Tr., pp. 17-18)

CONCLUSION OF LAW

The first issue to be determined is whether claimant is entitled to additional benefits under review-reopening proceeding.

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).

Upon review-reopening, claimant has the burden to show a change in condition related to the original injury since the original award or settlement was made. The change may be either economic or physical. Blacksmith v. All-American, Inc., 290 N.W.2d 348 (Iowa 1980); Henderson v. Iles, 250 Iowa 787, 96 N.W.2d 321 (1959). A mere difference of opinion of experts as to the percentage of disability arising from an original injury is not sufficient to justify a different determination on a petition for review-

reopening. Rather, claimant's condition must have worsened or deteriorated in a manner not contemplated at the time of the initial award or settlement before an award on review-reopening is appropriate. Bousfield v. Sisters of Mercy, 249 Iowa 64, 86 N.W.2d 109 (1957). A failure of a condition to improve to the extent anticipated originally may also constitute a change of condition. Meyers v. Holiday Inn of Cedar Falls, Iowa, 272 N.W.2d 24 (Iowa App. 1978).

Dr. Broghammer opined that claimant's permanent impairment and his need for his August 2021 surgery was not due to the September 5, 2017 injury. (Ex. I, pp. 76-88)

The doctrine of res judicata provides that:

> A final judgment rendered by a court of competent jurisdiction on merits is conclusive as to the rights of the parties . . ., and as to them, constitutes an absolute bar to a subsequent action involving the same claim, demand, or cause of action.

(Blacks Law Dictionary, 1305 (6th Edition) 1990).

To establish the bar under the doctrine of res judicata, the party asserting the bar must establish that the former case involves:

1. The same parties or parties in privity;

2. The same cause of action;

3. The same issues.

Bloom v. Steeve, 165 N.W.2d 825, 827-828 (Iowa 1969).

The doctrine of res judicata includes both claim preclusion and issue preclusion. Winnebago Industries, Inc. v. Haverly, 727 N.W.2d 567, 571 (Iowa 2006). Principles of res judicata are also applicable to administrative decisions. Bd. Of Sup'rs, Carroll Cty. v. Chi. & N.W. Transp. Co., 260 N.W.2d 813 (Iowa 1977). Under issue preclusion, once a court has decided an issue of fact or law necessary to its judgment, the same issue cannot be re-litigated in later proceedings. The doctrine of issue preclusion applies if: 1. The issue determined in the prior action is identical to the present issue; 2. The issue was raised and litigated in the prior action; 3. The issue was material and relevant to the disposition in the prior action; and 4. The determination made of the issue in the prior action was necessary and essential to that resulting judgment. Winnebago Industries, 727 N.W.2d at 571-572.

The issue of permanent impairment of the September 5, 2017 injury, was already determined in the arbitration and appeal decisions. Those issues are identical to the issues that Dr. Broghammer based his opinion. These very same issues were raised and determined in the arbitration hearing. The issue of permanency and causation was material and relative to the arbitration hearing. The issue of permanent impairment was essential in the arbitration decision. Given this, issue preclusion applies regarding Dr.

Broghammer's opinion concerning claimant's permanent impairment in this review-reopening proceeding. As a result, the opinions of Dr. Broghammer regarding permanent impairment, causation, and claimant's need for surgery in August 2021, are found not credible.

At the time of the arbitration hearing, claimant had undergone two lower back surgeries. At the time of his review-reopening hearing, claimant had undergone an additional lower back surgery. The arbitration decision found that claimant had a 19 percent permanent impairment to the body as a whole. In the review-reopening decision, Dr. Segal opined that the claimant had a 37 percent permanent impairment to the body as a whole. (Ex. 1, pp. 59-61) Claimant credibly testified his back condition has worsened since the time of his arbitration decision. (Tr., pp. 17-18) As noted above, Dr. Broghammer's opinions regarding causation, permanent impairment and the need for the August 2021 surgery are found not credible. Given this record, claimant has carried his burden of proof he has a physical change in condition related to the original injury since the arbitration decision was issued.

Iowa Code section 85.34(2)(v) (2017) now provides:

> In all cases of permanent partial disability other than those hereinabove described or referred to in paragraphs 'a' through 't' hereof, the compensation shall be paid during the number of weeks in relation to five hundred weeks as the reduction in the employee's earning capacity caused by the disability bears in relation to the earning capacity that the employee possessed when the injury occurred. A determination of the reduction in the employee's earning capacity caused by the disability shall take into account the permanent partial disability of the employee and the number of years in the future it was reasonably anticipated that the employee would work at the time of the injury. If an employee who is eligible for compensation under this paragraph returns to work or is offered work for which the employee receives or would receive the same or greater salary, wages, or earnings than the employee received at the time of the injury, the employee shall be compensated based only upon the employee's functional impairment resulting from the injury, and not in relation to the employee's earning capacity.

Iowa Code section 85.34(v) limits claimant's entitlement to additional permanent partial disability benefits under review-reopening proceeding to the functional rating. Based on this, claimant is due a functional impairment of 37 percent, less the 19 percent awarded to claimant in the arbitration decision. Claimant is due 90 weeks of permanent partial disability benefits (18 percent x 500 weeks).

Defendant stipulated in the hearing report that if they were found liable for the injury, claimant is due healing period benefits from August 19, 2021, through December 12, 2021. (Hearing Report)

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).

Drs. Abernathey, Segal and Howard all opined that claimant's August 2021 surgery was causally connected to the September 5, 2017 injury. As detailed above, the opinion of Dr. Broghammer regarding causation and need for the August 2021 surgery are found not credible. Given this record, claimant has carried his burden of proof that defendant is liable for the claimed medical expenses as detailed in Exhibit 4.

The next issue to be determined is whether claimant is entitled to reimbursement for an IME under Iowa Code section 85.39.

Section 85.39 permits an employee to be reimbursed for subsequent examination by a physician of the employee's choice where an employer-retained physician has previously evaluated "permanent disability" and the employee believes that the initial evaluation is too low. The section also permits reimbursement for reasonably necessary transportation expenses incurred and for any wage loss occasioned by the employee attending the subsequent examination.

Defendants are responsible only for reasonable fees associated with claimant's independent medical examination. Claimant has the burden of proving the reasonableness of the expenses incurred for the examination. See Schintgen v. Economy Fire & Casualty Co., File No. 855298 (App. April 26, 1991). Claimant need not ultimately prove the injury arose out of and in the course of employment to qualify for reimbursement under section 85.39. See Dodd v. Fleetguard, Inc., 759 N.W.2d 133, 140 (Iowa App. 2008).

Regarding the IME, the Iowa Supreme Court provided a literal interpretation of the plain language of Iowa Code section 85.39, stating that section 85.39 only allows the employee to obtain an independent medical evaluation at the employer's expense if dissatisfied with the evaluation arranged by the employer. Des Moines Area Reg'l Transit Auth. v. Young, 867 N.W.2d 839, 847 (Iowa 2015).

Under the Young decision, an employee can only obtain an IME at the employer's expense if an evaluation of permanent disability has been made by an employer-retained physician.

Iowa Code section 85.39 limits an injured worker to one IME. Larson Mfg. Co., Inc. v. Thorson, 763 N.W.2d 842 (Iowa 2009).

The Supreme Court, in Young noted that in cases where Iowa Code section 85.39 is not triggered to allow for reimbursement of an independent medical examination (IME), a claimant can still be reimbursed at hearing the costs associated with the preparation of the written report as a cost under rule 876 IAC 4.33. Young at 846-847.

Dr. Broghammer, the employer-retained expert, gave his opinions of permanent impairment in a report dated June 25, 2021. Dr. Segal, the employee-retained expert, gave his opinions of claimant's permanent impairment in a report dated April 7, 2022. Given the chronology of these reports, claimant has carried his burden of proof he is entitled to reimbursement for Dr. Segal's IME.

The next issue to be determined is whether defendant is liable for a penalty under Iowa Code section 86.13.

In Christensen v. Snap-on Tools Corp., 554 N.W.2d 254 (Iowa 1996), and Robbennolt v. Snap-on Tools Corp., 555 N.W.2d 229 (Iowa 1996), the supreme court said:

> Based on the plain language of section 86.13, we hold an employee is entitled to penalty benefits if there has been a delay in payment unless the employer proves a reasonable cause or excuse. A reasonable cause or excuse exists if either (1) the delay was necessary for the insurer to investigate the claim or (2) the employer had a reasonable basis to contest the employee's entitlement to benefits. A "reasonable basis" for denial of the claim exists if the claim is "fairly debatable."

Christensen, 554 N.W.2d at 260.

The supreme court has stated:

> (1) If the employer has a reason for the delay and conveys that reason to the employee contemporaneously with the beginning of the delay, no penalty will be imposed if the reason is of such character that a reasonable fact-finder could conclude that it is a "reasonable or probable cause or excuse" under Iowa Code section 86.13. In that case, we will defer to the decision of the commissioner. See Christensen, 554 N.W.2d at 260 (substantial evidence found to support commissioner's finding of legitimate reason for delay pending receipt of medical report); Robbennolt, 555 N.W.2d at 236.
>
> (2) If no reason is given for the delay or if the "reason" is not one that a reasonable fact-finder could accept, we will hold that no such cause or excuse exists and remand to the commissioner for the sole purpose of

assessing penalties under section 86.13. See Christensen, 554 N.W.2d at 261.

(3) Reasonable causes or excuses include (a) a delay for the employer to investigate the claim, Christensen, 554 N.W.2d at 260; Kiesecker v. Webster City Custom 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, 594 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).

Claimant seeks penalties regarding healing period and permanent partial disability benefits owed. Claimant is due healing period benefits from August 19, 2021, through December 12, 2021. Defendant did not pay temporary benefits during this period of time based on Dr. Broghammer's reports of June of 2021 and May of 2022. Dr. Broghammer opined that claimant's September 5, 2017, date of injury did not result in a permanent disability, and it was only temporary in nature. As noted above, it was already determined in the arbitration and appeal decisions that claimant had permanent impairment from his September 5, 2017 injury and was due permanent partial disability benefits. As this issue was already determined at the arbitration and appeal levels, defendant's denial of temporary benefits from August 19, 2021 through December 12, 2021, was unreasonable. A penalty of 50 percent is appropriate. The period of time between August 19, 2021, and December 12, 2021, is approximately 16 weeks. Defendant is liable for a penalty of $5,700.00 (16 weeks x $712.46 x 50 percent).

Claimant also seeks a penalty for permanent partial disability benefits due under review-reopening proceeding. As detailed above in the Findings of Fact, claimant returned to work at Deere at his job as an inspector after the August 2021 surgery. Claimant's hourly earnings had increased due to a collective bargaining agreement. Claimant had no restrictions in place for his work at Deere. There is little caselaw regarding how Iowa Code section 85.34(v) affects a review-reopening proceeding. See E.N.T. Associates v. Collentine, 525 N.W.2d 827, 829 (Iowa 1994) (claimant needs to carry her burden of proof to show she sustained a loss of earning capacity proximately caused by the original injury in a review-reopening proceeding). Given this record, defendant had reasonable grounds to believe claimant was not due additional permanent partial disability benefits under review-reopening proceeding. A penalty is not appropriate for defendant's failure to pay claimant additional permanent partial disability benefits under review-reopening proceeding.

The next issue to be determined is whether claimant is awarded costs associated with attorney's fees based on defendant's denial of a request for admission.

Claimant contends he is due attorney's fees based on defendant's response to a request for admissions, where defendant denied claimant sustained a back injury that arose out of and in the course of employment on September 5, 2017. (Ex. 2, p. 106; Claimant's Post-Hearing Brief, pp 12-15) Claimant contends he should be awarded attorney's fees incurred for, allegedly, having to relitigate causation in this case.

Under the Iowa Workers' Compensation Laws, it is within the discretion of the agency regarding assigning costs. Iowa Code section 86.40. Generally, under Iowa's Workers' Compensation Laws, each party pays their own attorney's fees.

Iowa R. Civ. P. 1.517(3) provides a narrow exception to this requirement to pay one's own attorney fees in the limited circumstance of the fees involved in having to prove a matter that should have been admitted. Claimant's counsel contends Iowa R. Civ P. 1.512(3) applies, in this case, and that he should be awarded fees, allegedly, incurred in again proving causation. (Claimant's Post-Hearing Brief, pp. 12-15)

Rule 876 IAC 4.35 states, in part:

> The rules of civil procedure shall govern the contested case proceedings before the workers' compensation commissioner **unless the provisions are in conflict with these** rules and Iowa Code chapters 85, 85A, 85B, 86, 87 and 17A, or obviously inapplicable to the workers' compensation commissioner. **In those circumstances, these rules or the appropriate Iowa Code section shall govern**. (Emphasis added)

1.517(3) provides:

> 1.517(3) Expenses on failure to admit. If a party fails to admit the genuineness of any document or the truth of any matter as requested under rule 1.510, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, the requesting party may move for an order requiring the other party to pay the reasonable expenses incurred in making that proof, including reasonable attorney's fees. The court shall make the order unless it finds any of the following:
>
> a. The request was held objectionable pursuant to rule 1.510.
>
> b. The admission sought was of no substantial importance.
>
> c. The party failing to admit had reasonable grounds to believe that the party might prevail on the matter.
>
> d. There was other good reason for the failure to admit.

Costs that are allowable in a contested case before this agency are provided in rule 876 IAC 4.33. Costs regarding expenses for requests for admissions is not a cost specified in rule 4.33. Costs for attorney fees is also not a cost detailed in rule 4.33. Given this, Iowa Rule of Civil Procedure 1.517(3) is in conflict with rule 4.33 and rule 1.517(3) does not apply.

As rule 876 IAC 4.33 does not allow for costs associated with requests for admissions or the payment of attorney fees, claimant's counsel's request for attorney fees is denied.

ORDER

THEREFORE IT IS ORDERED:

That defendant shall pay claimant healing period benefits from August 19, 2021, through December 12, 2021, at the rate of seven hundred twelve and 46/100 dollars ($712.46) per week.

That defendant shall pay claimant ninety (90) weeks of permanent partial disability benefits commencing on February 19, 2022 at the rate of seven hundred twelve and 46/100 dollars ($712.46) per week.

That defendant 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 defendant shall pay claimant five thousand seven hundred dollars ($5,700.00) in penalty for failure to pay healing period benefits.

That defendant shall receive a credit under Iowa Code section 85.38(2) in the amount of seven thousand one hundred forty-six and 93/100 dollars ($7,146.93).

That defendant shall reimburse claimant for Dr. Segal's IME costs.

That defendant shall pay claimant's medical bills as detailed in claimant's Exhibit 4.

That defendant shall pay costs as detailed in Exhibit 7.

Signed and filed this ___13th___ day of October, 2022.

JAMES F. CHRISTENSON
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Thomas Wertz (via WCES)

Dirk Hamel (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.