BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JASON SPENCE,	:	File No. 5046863
Claimant,	:	ARBITRATION
vs.	:	DECISION
TYSON FRESH MEATS, INC.,	:	
Employer,	:	Head Note Nos.: 1802; 1803; 2502; 2701; 2907; 3001; 4000.2
Self-Insured,	:	
Defendant.	:	

STATEMENT OF THE CASE

Jason Spence, claimant, filed a petition in arbitration seeking workers' compensation benefits from Tyson Fresh Meats, Inc., as his self-insured employer. This case proceeded to an arbitration hearing on April 8, 2015, in Des Moines, Iowa.

Claimant testified on his own behalf. Defendant called Alberto Olguin to testify. Claimant offered exhibits 1 through 7. Defendant offered exhibits A through O. All exhibits were received into the evidentiary record without objection.

The parties also submitted a hearing report, which contains stipulations. The parties' stipulations are accepted and relied upon in entering this decision. No findings or conclusions will be entered with respect to the parties' stipulations, and the parties are bound by those agreements.

Counsel for the parties requested the opportunity to file post-hearing briefs. This case was considered fully submitted upon the simultaneous filing of post-hearing briefs on April 24, 2015.

ISSUES

The parties submitted the following disputed issues for resolution:

1. Whether the July 18, 2012 injury caused temporary disability and, if so, the extent of claimant's entitlement to temporary disability, or healing period, benefits.

2. Whether the July 18, 2012 accident caused a scheduled member injury to the left hand or an unscheduled injury that should be compensated with industrial disability benefits.

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

4. The proper commencement date for permanent partial disability benefits.

5. Claimant's gross earnings immediately prior to the July 18, 2012 work injury and corresponding workers' compensation weekly rate.

6. Whether claimant is entitled to reimbursement of his independent medical evaluation expense.

7. Whether claimant is entitled to an order granting alternate medical care.

8. Whether penalty benefits should be awarded for an alleged unreasonable delay or denial in payment of weekly benefits.

9. Whether costs should be assessed as part of this case.

FINDINGS OF FACT

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

Jason Spence is a 38-year-old man, who sustained a left hand injury on July 18, 2012, while working in a general maintenance position for Tyson Fresh Meats, Inc. (hereinafter referred to as "the employer" or "Tyson"). Mr. Spence was attempting to work on a motor and was removing bolts when a co-worker began to manipulate the motor. Claimant slipped on some oil, his left hand fell beneath the motor and the motor fell down onto his hand. Claimant testified that the motor bounced twice onto his left hand before he could remove his hand.

Following the accident, Tyson referred claimant to an occupational medicine physician, Michael D. Jackson, M.D. (Exhibit B) Dr. Jackson obtained x-rays of claimant's left hand, which were negative. (Ex. B, pages 2-3) Dr. Jackson diagnosed claimant with a left hand contusion and offered a conservative course of treatment. By August 24, 2012, claimant was reporting significant improvement of his symptoms and demonstrated increased range of motion and increase in strength. Dr. Jackson declared maximum medical improvement and released claimant from care to regular work duties on September 21, 2012. (Ex. B, p. 11)

However, claimant experienced an increase in symptoms on October 31, 2012 at Tyson. Again, he was working as a general mechanic when he felt immediate pain and swelling in his left hand while performing his work activities. Tyson scheduled claimant to be evaluated by an orthopaedic surgeon, Benjamin S. Paulson, M.D. (Ex. D, p. 1)

Dr. Paulson ordered an EMG of claimant's left hand and arm, which was negative. (Ex. D, p. 13; Ex. F) Dr. Paulson offered conservative treatment. However, claimant did not return for additional medical care with Dr. Paulson between

January 30, 2013 and December 10, 2014. (Ex. D, pp. 25-26, 28-29) Instead, claimant was convicted of felony theft charges and was incarcerated during this time period. (Claimant's testimony; Ex. D)

Upon his release from prison, claimant returned for evaluation by Dr. Paulson on December 10, 2014. Dr. Paulson declared maximum medical improvement at that time, noted that there were no objective findings to document claimant's pain, numbness or tingling. However, Dr. Paulson did assign a 12 percent permanent impairment rating to claimant's left hand. (Ex. D, pp. 31, 34)

Mr. Spence sought an independent medical evaluation with Sunil Bansal, M.D. on January 13, 2015. (Ex. 2) Dr. Bansal diagnosed claimant with chronic regional pain syndrome (CRPS) and assigned a 12 percent permanent impairment to the whole person. (Ex. 2, p. 12) Dr. Bansal recommended significant permanent work restrictions that would preclude claimant from returning to work as a general maintenance person at Tyson. (Ex. 2, p. 13; Ex. 3)

Defendant continued their investigation of this claim after receipt of Dr. Bansal's opinion, asking Dr. Paulson to comment on the potential CRPS diagnosis. Dr. Paulson responded via report dated March 23, 2015. Dr. Paulson opined that claimant did not report any specific signs of CRPS during his treatment. Dr. Paulson noted that he observed no signs or abnormal sweating, temperature differences in claimant's hands, abnormal skin texture, skin changes, or abnormal hair or nail growth. Although Dr. Paulson did note a reduced range of motion, he strongly disagreed with Dr. Bansal's diagnosis of CRPS.

Claimant presented as a quiet and polite individual at hearing. However, he was very hesitant and attempted to minimize the significance of his criminal record. In addition to his felony theft charges and conviction after the date of injury, claimant was also convicted of burglary charges prior to the date of injury.

Mr. Spence's testimony about his past criminal activities and his efforts to downplay or minimize his participation in those criminal activities was not terribly credible. Similarly, claimant's denial of receipt of three separate certified letters for which the employer had signed return receipt cards documenting claimant's receipt was not terribly credible. Given my observations of claimant during hearing, as well as his past criminal convictions, I did not find Mr. Spence to be a credible witness. I view much of his testimony about his symptoms and condition with skepticism.

Nevertheless, claimant's claims may be legitimate even if his testimony is not credible. Review of all medical evidence in the record demonstrates one recorded finding of symptoms that would support Dr. Bansal's opinions. Specifically, claimant submitted to a functional capacity evaluation (FCE) on March 12, 2013. The physical therapist performing the FCE documented a slight temperature difference in claimant's hands. (Ex. G, p. 3) Dr. Bansal offered a similar opinion in support of his diagnosis of CRPS.

On the other hand, there is clearly evidence within this record that Dr. Paulson was cognizant of the possible CRPS diagnosis and was attempting to observe and document any relevant findings that could lead to a diagnosis of CRPS. For instance, in his November 29, 2012 office note, Dr. Paulson documented that claimant's swelling had nearly completely resolved in his left hand, that he had normal hand warmth, and normal hair appearance. (Ex. D, p. 14) In a subsequent office note, Dr. Paulson noted decreased range of motion, mild swelling, but normal fingernails on claimant's left hand. (Ex. D, p. 18)

In his December 10, 2014 note, Dr. Paulson specifically documented, "No observed differences in the right hand compared to the left. No swelling, no abnormal hair growth, no noticeable color changes, sweating, or temperature differences." (Ex. D, p. 28) Dr. Paulson was clearly cognizant of the potential for development of CRPS. He was clearly aware of and attempting to document any potential signs of the development of CRPS during his treatment. Dr. Paulson evaluated claimant on numerous occasions and opines that claimant did not demonstrate or report signs and symptoms of CRPS during his treatment. (Ex. D, pp. 33-34) Dr. Paulson indicated that he would "strongly disagree with Dr. Bansal's finding that Mr. Spence has RSD/CRPS." (Ex. D, p. 33)

Dr. Paulson last evaluated claimant in December 2014, while Dr. Bansal evaluated claimant approximately one month later. I find it strange that the two physicians record vastly different physical findings over that one-month period. Considering his opportunity to evaluate claimant over an extended period of time, multiple times, and his expertise as an orthopaedic hand specialist, I find Dr. Paulson's findings to be more credible and convincing than those of the one-time evaluator, Dr. Bansal, on the issue of CRPS. Therefore, I find that claimant has not proven he has CRPS, and I find that claimant's injury is limited to his left hand.

I also find Dr. Paulson's permanent impairment rating to be an accurate representation of claimant's functional limitations of the left hand. Therefore, I find that claimant has experienced a 12 percent permanent impairment of the left hand. (Ex. D, pp. 31, 34)

Mr. Spence seeks an award of temporary total disability benefits and healing period benefits from July 18, 2012 through December 10, 2014. I find that Mr. Spence returned to work for periods of time between July 18, 2012 and December 27, 2012. I find that claimant did not produce any wage records to document his actual loss of earnings, if any, which would substantiate a claim for temporary partial disability during this period of time.

As of December 27, 2012, Mr. Spence required a leave of absence for a non-occupational medical need. Specifically, he had pneumonia and needed time off work. The employer, per its corporate policy, required a return-to-work medical note after claimant's non-occupational leave of absence expired. Defendant's witness, Alberto Olguin, provided credible testimony that he spoke with claimant telephonically

and explained the need for this documentation. Contemporaneous documentation supports Mr. Olguin's testimony, and I accept his testimony as accurate. Therefore, I find that claimant knowingly failed to obtain a return-to-work release for his non-occupational medical condition. In so doing, I find that Mr. Spence refused suitable work that was being offered to him by Tyson consistent with his medical restrictions for his work injury.

On January 18, 2013, Tyson elected to terminate Mr. Spence because his leave of absence had expired, and he failed to comply and produce the necessary medical release for his non-occupational medical condition. At no time after January 18, 2013 did Tyson offer claimant suitable work consistent with his medical restrictions for the July 18, 2012 work injury.

The parties submit competing calculations and assertions pertaining to the applicable gross weekly earnings for claimant immediately preceding this injury date. The parties concur that 11 weeks of wages should be included within the weekly calculations. However, the parties differ about whether two additional weeks should be included or are not representative of claimant's typical earnings prior to the injury date.

Specifically, the dispute arises about whether the claimant's wages for the weeks ending May 5, 2012 and May 26, 2012 should be included in the calculation of claimant's gross weekly earnings. For the week ending May 5, 2012, claimant worked 44.2 hours and earned $530.40. For the week ending May 26, 2012, claimant worked 36 hours and earned $432.00. Claimant contends both weeks are not representative of his typical earnings.

Review of claimant's wages records and the parties' calculations of the applicable workers' compensation weekly rate at Exhibits 6 and M demonstrate that claimant's hourly rate, hours worked, and gross weekly pay varied significantly during the period immediately preceding his work injury. During the weeks immediately preceding his injury, claimant worked as few as 36 hours and as many as 79.5 hours in a week. His hourly rate ranged from $12.00 per hour to $21.60 per hour. His gross earnings ranged from $432.00 to $1,339.58 per week.

No explanation was offered in the evidentiary record why claimant's hours fluctuated, why his hourly rate fluctuated, or why the weeks ending May 5, 2012 and/or May 26, 2012 were not representative of claimant's typical earnings before the date of injury. Review of the wage records without other evidence demonstrates that claimant's wages varied significantly week by week. Claimant does not seek to exclude higher weeks but only seeks to exclude the lowest two weeks of earnings.

Given the significant fluctuation in claimant's hours, hourly rate, and gross earnings during the weeks immediately preceding claimant's date of injury, I find that it was typical for claimant's wages and hours to fluctuate significantly. Given that there is no evidence to explain the reason for claimant to have worked less in either challenged week, I find that all weeks and wages included in defendant's calculations at Exhibit M,

page 1, are accurate and representative of claimant's typical earnings immediately preceding the work injury.

Mr. Spence seeks an order for alternate medical care. Specifically, he seeks an order compelling defendant to provide care recommended by Dr. Bansal. Dr. Bansal recommends a "pain center referral for management." (Ex. 2, p. 13) This referral is based upon Dr. Bansal's diagnosis of CRPS, which I did not find convincing. Nevertheless, claimant continues to experience and report symptoms as a result of this work injury.

Defendant offers no further medical treatment and relies upon the designation of maximum medical improvement and release from care by Dr. Paulson. In this respect, I find that defendant is offering no further care while Dr. Bansal has identified specific care that may be beneficial to claimant. In this respect, I find that the medical care recommended by Dr. Bansal is superior to the lack of care currently offered by Tyson.

CONCLUSIONS OF LAW AND REASONING

The initial dispute between the parties is whether the stipulated July 18, 2012 work injury caused temporary disability and, if so, the extent of claimant's entitlement to either temporary disability benefits or healing period benefits.

An employee is entitled to appropriate temporary partial disability benefits during those periods in which the employee is temporarily, partially disabled. An employee is temporarily, partially disabled when the employee is not capable medically of returning to employment substantially similar to the employment in which the employee was engaged at the time of the injury, but is able to perform other work consistent with the employee's disability. Temporary partial benefits are not payable upon termination of temporary disability, healing period, or permanent partial disability simply because the employee is not able to secure work paying weekly earnings equal to the employee's weekly earnings at the time of the injury. Section 85.33(2).

At the commencement of hearing, claimant clarified that he returned to work after this alleged injury and seeks only temporary partial disability benefits from July 18, 2012 through December 27, 2012. Claimant's post-hearing brief concedes that he was "working at least partial days on light duty and under restrictions for his injury to his left hand" from July 18, 2012 through December 27, 2012. (Claimant's Post-Hearing Brief, p. 8)

Claimant produced no evidence of the actual hours he worked between July 18, 2012 and December 27, 2012. In his brief, claimant "requests that the employer be asked to produce the payroll records for this time period so that a payment of temporary partial disability can be calculated." (Claimant's Post-Hearing Brief) Claimant was entitled to conduct both written and oral discovery prior to hearing. Claimant apparently failed to seek necessary documentation to establish his claim for temporary partial disability. Agency rule 876 IAC 4.31 provides that "No evidence shall be taken after the

hearing." Claimant did not request a waiver of this rule or request that the evidentiary record be suspended or left open at the time of hearing. Claimant's request for additional discovery and evidence after the evidentiary record closed is denied.

The party who would suffer loss if an issue were not established has the burden of proving that issue by a preponderance of the evidence. Iowa R. App. P. 6.14(6). Therefore, claimant had the burden to establish entitlement to the temporary partial disability benefits he now seeks. Claimant's failure to conduct discovery or generate the necessary evidence to prove his claim results in the conclusion that he has failed to establish entitlement to any temporary disability benefits between July 18, 2012 and December 27, 2012.

Mr. Spence seeks an award of healing period benefits from December 27, 2012 through December 10, 2014.

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.

Claimant contends that he was on medical restrictions during this period of time and that the employer did not offer him suitable work. The employer contends that claimant was off work for a non-occupational medical reason (pneumonia) and that he failed to provide a necessary medical release to return to work. The employer contends that it stood ready and willing to offer claimant work consistent with his work injury restrictions, but claimant's failure to obtain and provide medical clearance for his non-occupational illness precluded his return to work. Therefore, defendant contends it terminated claimant and does not owe healing period benefits during this period of time.

Iowa Code section 85.33(3) provides in pertinent part:

> If an employee is temporarily, partially disabled and the employer for whom the employee was working at the time of injury offers to the employee suitable work consistent with the employee's disability the employee shall accept the suitable work, and be compensated with temporary partial benefits. If the employee refuses to accept the suitable work with the same employer, the employee shall not be compensated

> with temporary partial, temporary total, or healing period benefits during the period of the refusal.

Iowa Code section 85.33(3).

The Iowa Supreme Court held there is a two-part test to determine eligibility under section 85.33(3): "(1) whether the employee was offered suitable work, (2) which the employee refused. If so, benefits cannot be awarded, as provided in section 85.33(3)." Schutjer v. Algona Manor Care Center, 780 N.W.2d 549, 559 (Iowa 2010). "If the employer fails to offer suitable work, the employee will not be disqualified from receiving benefits regardless of the employee's motive for refusing the unsuitable work." Neal v. Annett Holdings, Inc., 814 N.W.2d 512 (Iowa 2012).

However, an injured worker will not be considered to have refused suitable work where the employee was unable to work based upon disciplinary action such as a suspension or termination based upon misconduct or a violation of a work rule. Alonzo v. IBP, Inc., File No. 5009878 (App. October 31, 2006); Franco v. IBP, Inc., File No. 5004766 (App. February 28, 2005); Woods v. Siemens-Furnace Controls, File No. 1303082, 1273249, App. July 2, 2002). The burden of proof to show a refusal of suitable work is on the employer. Koehler v. American Color Graphics, File No. 1248489, (App. February 25, 2005).

Tyson produces compelling evidence that it repeatedly requested medical documentation permitting claimant to return to work from his non-occupationally related pneumonia condition for which he left work on a leave of absence on December 27, 2012. Claimant did not comply with the employer's requests. Therefore, I found that the employer offered suitable work consistent with claimant's medical restrictions for his left hand injury. However, claimant refused that offer of light duty for a non-related medical condition and failed to produce documentation sufficient to permit him to return to work. Claimant refused suitable work during the period from December 27, 2012 through his termination on January 28, 2013. (Ex. I, p. 1)

However, once Tyson terminated claimant's employment, it was no longer offering Mr. Spence suitable employment. Therefore, Tyson has not carried its burden of proof to establish that it offered suitable work and that claimant refused that suitable work after claimant's termination. Claimant reiterated numerous times through his attorney that he did not wish to terminate his employment and that he desired to return to work. (Ex. 7, pp. 6-8, 10-14, 18) Although there was a misunderstanding that ultimately resulted in claimant's termination, Tyson did not establish that claimant willfully refused suitable work such that he would be disqualified from receiving healing period benefits after his termination. Iowa Code section 85.33(3); Schutjer v. Algona Manor Care Center, 780 N.W.2d 549, 559 (Iowa 2010).

Claimant did not actually return to work and was not capable of returning to substantially similar employment between January 28, 2013 and December 10, 2014.

Iowa Code section 85.34(1). Therefore, Mr. Spence is entitled to healing period benefits from January 28, 2013 through December 10, 2014.

Mr. Spence contends that his permanent disability should be compensated as an unscheduled injury. Specifically, claimant contends that his left hand injury resulted in the development of complex regional pain syndrome (CRPS). Claimant appropriately notes that a diagnosis of CRPS converts a scheduled injury into an unscheduled, industrial disability situation. Barton v. Nevada Poultry Co., 110 N.W.2d 660 (Iowa 1961); Collins v. Dept. of Human Services, 529 N.W.2d 627 (Iowa App. 1995).

An injury to a scheduled member may, because of after effects or compensatory change, result in permanent impairment of the body as a whole. Such impairment may in turn be the basis for a rating of industrial disability. It is the anatomical situs of the permanent injury or impairment which determines whether the schedules in section 85.34(2)(a) - (t) are applied. Lauhoff Grain v. McIntosh, 395 N.W.2d 834 (Iowa 1986); Blacksmith v. All-American, Inc., 290 N.W.2d 348 (Iowa 1980); Dailey v. Pooley Lumber Co., 233 Iowa 758, 10 N.W.2d 569 (1943). Soukup v. Shores Co., 222 Iowa 272, 268 N.W. 598 (1936).

In this case; however, I found that claimant failed to prove he sustained CRPS as a result of the left hand injury. Instead, I found the opinion of Dr. Paulson to be most credible on this issue. I conclude that claimant's injury is limited to a scheduled member injury to the left hand and should be compensated pursuant to Iowa Code section 85.34(2)(l).

Under the Iowa Workers' Compensation Act, permanent partial disability is compensated either for a loss or loss of use of a scheduled member under Iowa Code section 85.34(2)(a)-(t) or for loss of earning capacity under section 85.34(2)(u). The extent of scheduled member disability benefits to which an injured worker is entitled is determined by using the functional method. Functional disability is "limited to the loss of the physiological capacity of the body or body part." Mortimer v. Fruehauf Corp., 502 N.W.2d 12, 15 (Iowa 1993); Sherman v. Pella Corp., 576 N.W.2d 312 (Iowa 1998). The fact finder must consider both medical and lay evidence relating to the extent of the functional loss in determining permanent disability resulting from an injury to a scheduled member. Terwilliger v. Snap-On Tools Corp., 529 N.W.2d 267, 272-273 (Iowa 1995); Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417, 420 (Iowa 1994).

Having found Dr. Paulson's opinions to be most persuasive in this case, I also found that claimant sustained a 12 percent permanent impairment of his left hand. The hand is compensated based upon a 190 week schedule. Iowa Code section 85.34(2)(l). In this instance, claimant sustained less than total loss of the hand. Accordingly, he is entitled to a proportional award determined by multiplying his 12 percent permanent impairment rating by the 190-week schedule. Iowa Code section 85.34(2)(v). Therefore, claimant has established entitlement to 22.8 weeks of permanent partial disability.

Permanent partial disability benefits commence at the termination of the healing period. Iowa Code section 85.34(2).

The parties also dispute the appropriate weekly rate for payment of claimant's workers' compensation benefits. The fighting issue is the claimant's gross earnings immediately preceding the July 18, 2012 work injury.

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 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 utilize 11 of the same weeks for purposes of calculating claimant's gross weekly wages. The parties vary with respect to whether the weeks ending May 5, 2012 and May 26, 2012 should be included in the gross weekly wage calculations. Having found that the claimant's earnings during these two weeks are representative of claimant's typical earnings prior to the date of injury, I conclude that those weeks should be included in the gross earnings calculations.

Therefore, I conclude that defendant's calculation of the gross weekly earnings at $920.68 is correct. The parties stipulate that claimant was single and entitled to four exemptions on the date of injury. Therefore, using the Iowa Workers' Compensation Manual (rate book) for the time period from July 1, 2012 through June 30, 2013, the applicable weekly workers' compensation rate is $599.89.

Claimant seeks reimbursement for his independent medical evaluation with Dr. Bansal pursuant to 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).

In this situation, defendant obtained an impairment rating from its chosen physician, Dr. Paulson on December 10, 2014. Dr. Bansal performed his independent medical evaluation at claimant's request on January 13, 2015. Claimant has established entitlement to reimbursement for an evaluation pursuant to Iowa Code section 85.39.

Defendant challenges the reasonableness of Dr. Bansal's evaluation fee. Dr. Bansal's fee is within the range of independent medical evaluation fees seen by this agency, and I find that Dr. Bansal's independent medical evaluation fee is reasonable under the circumstances of this case. Therefore, claimant is entitled to reimbursement of Dr. Bansal's entire fee totaling two thousand nine hundred seventy-five and 00/100 dollars ($2,975.00).

Claimant also seeks an order compelling defendant to provide alternate medical care. Specifically, claimant seeks an order compelling defendant to provide treatment at a pain center pursuant to the recommendations made by Dr. Bansal.

An application for alternate medical care is not automatically sustained because claimant is dissatisfied with the care he has been receiving. Mere dissatisfaction with the medical care is not ample grounds for granting an application for alternate medical care. Rather, the claimant must show that the care was not offered promptly, was not reasonably suited to treat the injury, or that the care was unduly inconvenient for the claimant. Long v. Roberts Dairy Co., 528 N.W.2d 122 (Iowa 1995).

"Determining what care is reasonable under the statute is a question of fact." Long v. Roberts Dairy Co., 528 N.W.2d 122, 123 (Iowa 1995).

In Pirelli-Armstrong Tire Co. v. Reynolds, 562 N.W.2d 433, 437 (Iowa 1997), the supreme court held that "when evidence is presented to the commissioner that the employer-authorized medical care has not been effective and that such care is 'inferior or less extensive' than other available care requested by the employee, . . . the commissioner is justified by section 85.27 to order the alternate care."

In this case, claimant presents evidence from Dr. Bansal indicating that he requires ongoing medical care, including evaluation and treatment. Defendant takes the position that claimant has achieved maximum medical improvement pursuant to the opinions of Dr. Paulson. Defendant offers no alternate medical care.

Having found that treatment through a pain specialist is superior to no care, which is essentially what is being offered by defendant, I conclude that claimant has proven that the defendant's lack of any treatment offer is inferior and less extensive than the alternate care recommended by Dr. Bansal. Therefore, I conclude that claimant has established entitlement to an order for alternate medical care. Specifically,

defendant will be ordered to provide evaluation and any necessary treatment through a pain specialist or pain center.

Claimant also seeks an award of penalty benefits pursuant to Iowa Code section 86.13 for defendant's alleged underpayment of the rate, delay or denial of healing period and TPD benefits.

Iowa Code section 86.13(4) provides:

> 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 in 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.

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

> Based on the plain language of section 86.13, we hold an employee is entitled to penalty benefits if there has been a delay in payment unless the employer proves a reasonable cause or excuse. A reasonable cause or excuse exists if either (1) the delay was necessary for the insurer to investigate the claim or (2) the employer had a reasonable basis to contest the employee's entitlement to benefits. A "reasonable basis" for denial of the claim exists if the claim is "fairly debatable."
>
> Christensen, 554 N.W.2d at 260.

The Supreme Court has stated:

> (1) If the employer has a reason for the delay and conveys that reason to the employee contemporaneously with the beginning of the delay, no

penalty will be imposed if the reason is of such character that a reasonable fact-finder could conclude that it is a "reasonable or probable cause or excuse" under Iowa Code section 86.13. In that case, we will defer to the decision of the commissioner. See Christensen, 554 N.W.2d at 260 (substantial evidence found to support commissioner's finding of legitimate reason for delay pending receipt of medical report); Robbennolt, 555 N.W.2d at 236.

(2) If no reason is given for the delay or if the "reason" is not one that a reasonable fact-finder could accept, we will hold that no such cause or excuse exists and remand to the commissioner for the sole purpose of assessing penalties under section 86.13. See Christensen, 554 N.W.2d at 261.

(3) Reasonable causes or excuses include (a) a delay for the employer to investigate the claim, Christensen, 554 N.W.2d at 260; Kiesecker v. Webster City Meats, Inc., 528 N.W.2d at 109, 111 (Iowa 1995); or (b) the employer had a reasonable basis to contest the claim—the "fairly debatable" basis for delay. See Christensen, 554 N.W.2d at 260 (holding two-month delay to obtain employer's own medical report reasonable under the circumstances).

(4) For the purpose of applying section 86.13, the benefits that are underpaid as well as late-paid benefits are subject to penalties, unless the employer establishes reasonable and probable cause or excuse. Robbennolt, 555 N.W.2d at 237 (underpayment resulting from application of wrong wage base; in absence of excuse, commissioner required to apply penalty).

> If we were to construe [section 86.13] to permit the avoidance of penalty if any amount of compensation benefits are paid, the purpose of the penalty statute would be frustrated. For these reasons, we conclude section 86.13 is applicable when payment of compensation is not timely . . . or when the full amount of compensation is not paid.

Id.

(5) For purposes of determining whether there has been a delay, payments are "made" when (a) the check addressed to a claimant is mailed (Robbennolt, 555 N.W.2d at 236; Kiesecker, 528 N.W.2d at 112), or (b) the check is delivered personally to the claimant by the employer or its workers' compensation insurer. Robbennolt, 555 N.W.2d at 235.

(6) In determining the amount of penalty, the commissioner is to consider factors such as the length of the delay, the number of delays, the

information available to the employer regarding the employee's injury and wages, and the employer's past record of penalties. Robbennolt, 555 N.W.2d at 238.

(7) An employer's bare assertion that a claim is "fairly debatable" does not make it so. A fair reading of Christensen and Robbennolt, makes it clear that the employer must assert facts upon which the commissioner could reasonably find that the claim was "fairly debatable." See Christensen, 554 N.W.2d at 260.

Meyers v. Holiday Express Corp., 557 N.W.2d 502 (Iowa 1996).

Weekly compensation payments are due at the end of the compensation week. Robbennolt, 555 N.W.2d 229, 235.

Penalty is not imposed for delayed interest payments. Davidson v. Bruce, 593 N.W.2d 833, 840 (Iowa App. 1999). Schadendorf v. Snap-On Tools Corp., 757 N.W.2d 330, 338 (Iowa 2008).

When an employee's claim for benefits is fairly debatable based on a good faith dispute over the employee's factual or legal entitlement to benefits, an award of penalty benefits is not appropriate under the statute. Whether the issue was fairly debatable turns on whether there was a disputed factual dispute that, if resolved in favor of the employer, would have supported the employer's denial of compensability. Gilbert v. USF Holland, Inc., 637 N.W.2d 194 (Iowa 2001).

Having determined that defendant properly calculated the weekly rate, I identify no basis for a penalty. Having determined that claimant failed to prove entitlement to TPD benefits between July 18, 2012 and December 26, 2012, I identify no basis for penalty.

With respect to claimant's assertion of a penalty claim for the healing period claim between December 27, 2012 and December 10, 2014, I conclude that there was a misunderstanding between the parties and that defendant provided notice of its challenge for payment of healing period benefits. I further conclude that there was at least a reasonable basis to challenge claimant's entitlement to benefits given his refusal to provide necessary medical documentation to clear him to return to work for a non-occupational medical issue. Although I awarded healing period benefits, I conclude that penalty benefits would be inappropriate in this instance. Iowa Code section 86.13.

Finally, claimant seeks assessment of costs. Claimant submitted his requested costs at Exhibit 31. Assessment of costs is a discretionary function of the agency. Iowa Code section 86.40. Claimant prevailed on the healing period issue and lost on other disputed issues. The hearing report indicates claimant is requesting costs and refers to claimant's cost exhibit. However, claimant did not introduce a separate cost exhibit.

Exercising the agency's discretion, I conclude that it is appropriate to assess claimant's filing fee as a cost. Rule 876 IAC 4.33(7). No other costs, if requested, are assessed.

ORDER

THEREFORE, IT IS ORDERED:

Tyson shall pay claimant healing period benefits from January 28, 2013 through December 10, 2014.

Tyson shall pay claimant twenty-two point eight (22.8) weeks of permanent partial disability benefits commencing on December 11, 2014.

All weekly benefits shall be paid at the rate of five hundred ninety-nine and 89/100 dollars ($599.89).

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

Tyson shall reimburse claimant for Dr. Bansal's independent medical evaluation fee in the amount of two thousand nine hundred seventy-five and 00/100 dollars ($2,975.00).

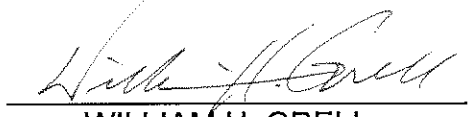
Tyson shall identify and authorize treatment with a pain specialist or at a pain center pursuant to the additional treatment recommendations made by Dr. Bansal.

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

Tyson shall reimburse claimant's filing fee in the amount of one hundred and 00/100 dollars ($100.00).

Tyson shall file subsequent reports of injury (SROI) as required by this agency pursuant to rules 876 IAC 3.1(2) and 876 IAC 11.7.

Signed and filed this 6th day of July, 2015.



WILLIAM H. GRELL
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WHG/sam

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.