BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

FREDERICK FRIDLEY, Claimant, vs. SECURITAS SECURITY SERVICES USA, INC., Employer, and INDEMNITY INS. CO. OF N.A., Insurance Carrier, Defendants.	:	File No. 21006485.02 A R B I T R A T I O N D E C I S I O N Head Note No. 1803

STATEMENT OF THE CASE

The claimant, Frederick Michael Fridley, filed a petition for arbitration and seeks workers' compensation benefits from Securitas Security Services, employer, and Indemnity Insurance Company of North America, insurance carrier. The claimant was represented by Gary Mattson. The defendants were represented by Caroline Westerhold.

The matter came on for hearing on May 30, 2023, before Deputy Workers' Compensation Commissioner Joe Walsh in Des Moines, Iowa via Zoom videoconferencing system. The voluminous record in the case consists of Joint Exhibits 1 through 20; Claimant's Exhibits 1 through 19; and Defense Exhibits A through I. The claimant testified at hearing, in addition to his spouse Elizabeth Fridley. Laurie A. Harford served as the court reporter. The matter was fully submitted on July 10, 2023.

ISSUES

The parties submitted the following issues for determination:

1. Nature and extent of permanent disability, including commencement date. The claimant alleges permanent and total disability and has asserted odd-lot.

2. The claimant's gross wages are disputed.

3. Whether the claimant is entitled to the medical expenses set forth in Claimant's Exhibit 13.

4. Whether the claimant is entitled to alternate medical care.

5. Whether the claimant is entitled to IME expenses under Iowa Code section 85.39.

6. Whether the defendants unreasonably denied or delayed payments.

STIPULATIONS

Through the hearing report, the parties stipulated to the following:

1. The parties had an employer-employee relationship.

2. Claimant sustained an injury which arose out of and in the course of employment on February 4, 2021. It is stipulated that this work injury resulted in both temporary and permanent industrial disability.

3. Temporary disability/healing period and medical benefits are no longer in dispute.

4. The claimant was married with five (5) exemptions.

5. Affirmative defenses have been waived.

FINDINGS OF FACT

Claimant Frederick Fridley was 49 years old as of the date of hearing. He sustained a catastrophic automobile accident which arose out of and in the course of his employment on or about February 4, 2021. While there are a number of issues in this case, the primary issue is whether this stipulated work injury has rendered Mr. Fridley permanently and totally disabled.

Mr. Fridley testified on his own behalf live and under oath. I find Mr. Fridley to be a credible witness. His testimony is consistent with other evidence in the record. While his memory was not outstanding, he was a decent historian. His answers were responsive and straightforward. There was nothing about his demeanor which caused me any concern for his truthfulness. In fact, the opposite is true. In addition, claimant's wife, Elizabeth Danielle Fridley (hereafter, "Dani"), also testified at hearing. Her testimony corroborated portions of Mr. Fridley's testimony and was credible and compelling.

Frederick Fridley graduated from high school in 1991 from North King City High, in Kansas City, Missouri. He served in the United States Army immediately after high school and specialized in tankers and tanks.

He and his wife, Dani, have resided in Milo, Iowa for approximately 25 years. They have three children. Mr. Fridley testified he has very limited computer skills; however, he earned a degree from ITT Tech in approximately 2011. It was an associate degree in Computer Electronic Engineering Technology. I believe him that he is not particularly talented or sophisticated at operating a PC, however, he is clearly a bright, mechanical person with basic computer skills.

The claimant submitted his work history in Claimant's Exhibit 2, and he testified about his prior work history in some detail at hearing. (Transcript, pages 15 to 25) Prior to earning his aforementioned degree, he worked in various manufacturing and construction settings performing fairly heavy manual labor work. He also worked for a sprinkler filter apprentice company as a journeyman from 2006 to 2009 for a company called Blackhawk Sprinklers. He apparently sustained a low back injury during this time. (Claimant's Exhibit 2, p. 1) He testified that he had a back surgery by Cassim Igram, M.D. (Tr., p. 19) While it does not appear he had any permanent restrictions following this surgery, he was apparently undergoing active medical care in 2020 for this condition. (Tr., p. 29) [Treatment 3]

The medical records reflect Mr. Fridley had back surgery with Dr. Igram in April 2009. (Jt. Ex. 1, pp. 4-5) Following surgery, he continued to struggle with some back pain. (Jt. Ex. 3, p. 3) In December 2010, a spinal cord stimulator was implanted, however, had to be removed the following month due to infection. (Jt. Ex. 1, pp. 6-10) Mr. Fridley went a full ten years before any follow up treatment. In March 2020, he reported worsening chronic back pain to Zachary Ries, M.D. (Jt. Ex. 6, p. 1) Dr. Ries performed a fusion surgery on June 18, 2020. The surgery was unsuccessful and Dr. Ries recommended weaning off narcotics. (Jt. Ex. 6, p. 6) After seeking a second opinion, he eventually returned to Dr. Ries, who recommended a repeat fusion surgery to help control the leg pain. The surgery was scheduled for February 2021, but moved to May 2021. (Jt. Ex. 6, p. 11) Then of course Mr. Fridley was in the work accident prior to having the surgery. It is evident that he was highly symptomatic in his low back prior to the work injury.

After he earned his computer degree in 2011, Mr. Fridley began working on machines as a technician in more maintenance and repair type jobs. Some of the work was still heavy, but the type of work he was doing was skilled. (Cl. Ex. 2, pp. 1-2) It is noted that the vast majority of his pre-injury employment was in the heavy to medium work classification. In 2018, he began working at Securitas as a remote security technician. Securitas is an electronic security company and Mr. Fridley testified he worked on cameras, alarms and card reader doors. He worked from his home and covered the entire state of Iowa. (Tr., p. 26) He essentially performed maintenance on electronic security systems. The work was technical and also physical at times. He traveled regularly in a company vehicle. (Cl. Ex. 3, p. 6)

There is some dispute regarding Mr. Fridley's average weekly wages between the parties. Mr. Fridley testified credibly that he earned just under $30 per hour and, prior to his work injury, he had some overtime. His wages are complicated by the fact that he had different hourly rates for different types of work. The parties have submitted

contested wage calculations. (*Compare* Def. Ex. I with Cl. Ex. 18A-B) Having reviewed all of this evidence, I find that claimant, on average, worked 44.68 hours per week at the rate of $29.64 per hour. I find that his average weekly wage prior to the work injury was $1,324.32.

On February 4, 2021, Mr. Fridley was in a catastrophic automobile accident while working for Securitas on Interstate 80 in Jasper County, Iowa. Mr. Fridley's vehicle collided with the rear of a semi. Seconds later, Mr. Fridley's vehicle was struck from behind by a truck, crushing his Ford Expedition into the semi. (Cl. Ex. 5, p. 16) The accident was partially captured by Iowa State Patrol dashcam video. (Cl. Ex. 6) Mr. Fridley was believed to be dead and was trapped in the vehicle for approximately an hour. Mr. Fridley testified credibly that he has no recollection of the accident. He was transported by Monroe Fire & Rescue EMS to Mercy Hospital.

The parties submitted hundreds of pages of medical records documenting the treatment Mr. Fridley received for his injuries. At Mercy, he was diagnosed with multiple lacerations, a subarachnoid hemorrhage, rib fractures and a right leg tibia fracture. He underwent surgery for the tibia fracture on February 8, 2021. While hospitalized, he developed pneumonia, left peroneal deep vein thrombosis, and a pulmonary embolism. He was noted to have confusion. He testified that he gradually came out of his fog while in the hospital. On February 22, 2021, he was transferred from Mercy to Mercy Acute Inpatient Rehabilitation. (Cl. Ex. 19, p. 6) He was discharged from the inpatient facility on March 6, 2021. (Cl. Ex. 19) He was provided with a wheelchair and a ramp for his home, as well as transportation services.

Following his release from the hospital, his primary ongoing treatment involved his head injury, his right leg fracture, in addition to damage to his vocal cords. He has also had further low back treatment. It is noted he also had some treatment for broken fingers on his right hand, as well as a surgery to remove some glass from his right arm.

For his right leg, Mr. Fridley treated with Kamaldeen Aderibigbe, M.D., who had performed the surgery. He underwent appropriate post-surgery follow up treatment including physical therapy. He developed knee pain. He was also eventually evaluated by Craig Mahoney, M.D., who opined he would eventually need a total knee replacement. (Jt. Ex. 12, p. 29) Dr. Mahoney provided a handicap sticker in April 2022. (Jt. Ex. 12, p. 37) He was placed at maximum medical improvement following a functional capacity evaluation (FCE) in May 2022. His valid FCE placed him in the light work category with the ability to lift 20 pounds. (Jt. Ex. 14, p. 14) The valid FCE placed Mr. Fridley in the light physical demand level with specific lifting (20 pound), bending and squatting restrictions. (Jt. Ex. 14, p. 17) Mr. Fridley did return to Dr. Mahoney in August 2022, and received a "Gel-One" injection for post-traumatic arthritis. (Jt. Ex. 12, p. 42) Dr. Mahoney assigned an impairment rating of 25 percent of the leg for this condition in June 2022. (Def. Ex. A) Dr. Aderibigbe confirmed this rating a few months later. (Def. Ex. A, pp. 2-3) While he did receive the additional injection in August 2022, I find that the appropriate date of maximum medical improvement is June 16, 2022.

Mr. Fridley had limited treatment for his head injury following his release from

rehabilitation. He was evaluated by Michael Jacoby, M.D., on August 12, 2021. Dr. Jacoby diagnosed Mr. Fridley generally with a traumatic brain injury. Dr. Jacoby documented Mr. Fridley's concerns regarding his difficulties with problem solving, word selection and feeling "slower." (Jt. Ex. 18, p. 1) Dr. Jacoby did not recommend any further neurological testing and noted that neurocognitive testing had been arranged already. He underwent neuropsychological testing with On With Life, David Demarest, Ph.D., on August 31, 2021. Dr. Demarest interviewed Mr. Fridley and his wife, reviewed records and performed testing on him. He confirmed the traumatic brain injury diagnosis and then stated the following in his summary:

> Taken in its entirety as has been detailed and discussed in this report, including in my extensive review of medical records, my clinical interview of Mr. Fridley and his wife, and via neuropsychological test findings, I do not find good evidence for consideration of neuropsychological, at least, residual to injury, not to say that he doesn't continue to deal with such things as orthopedic, pain, and other medical difficulties.
>
> My reading of Dr. Chen's records including initial evaluation report, as well as ongoing records from Mercy Rehabilitation staff over the next two weeks – he was discharged to home after just short, less than two-week, stay at Mercy Rehabilitation Hospital, is that there is not much report at all of cognitive impairment noted by staff who are quite familiar with the effects of brain injuries. In addition, as I have commented on above, despite Mr. Fridley's feeling that his differences, such as his emotional state and his cognitive inefficiencies are due to his February injury, he often overestimated the degree of difficulty, sometimes notably if not even dramatically so, that he had when doing cognitive testing. He actually did well to often quite well on cognitive testing in my evaluation of him, with no performances or subperformances falling below the Average range today, and with some very high performances, including in the area of memory skills or executive cognitive function, falling as high as the 91st %ile compared to his age (all %iles in this report are in comparison to age-peer norms). . . .

(Jt. Ex. 20, p. 9) Dr. Demarest did, however, recommend psychological counseling for what he characterized as "adjustment difficulties" following his work injury. (Jt. Ex. 20, p. 10)

Mr. Fridley had counseling through On With Life from October 2021 through March 2022. The documentation in the treatment notes is somewhat limited and repetitive; however, his counseling seemed to focus on his ability to deal with his pain and limitations, his use of opioid medications, his need to have more activity and follow medical advice and depression-related issues. In March, his therapist discontinued his treatment and recommended he "transfer to another therapist who is aware of his opioid issues." (Jt. Ex. 20, p. 24) There is no record he has continued with counseling of any kind since March 2022.

In regard to his vocal cord paresis, Mr. Fridley was diagnosed with severe oropharyngeal dysphagia while still in rehabilitation. (Cl. Ex. 19, p. 10) He followed up with Jeffrey Smit, M.D. on March 10, 2021. He diagnosed mild chondritis of the larynx as well as some pharyngeal dysphagia. (Jt. Ex. 13, p. 1) He followed up with testing and further evaluation. He worked with a speech therapist and performed exercises. The record reflects he may not have always been entirely compliant with his exercise schedule. In May 2022, it is documented that Dr. Smit recommended reducing caffeinated beverages. He has had no treatment for this condition since August 2022. Dr. Smit confirmed in a report to defendants that Mr. Fridley was released from care for this condition. (Def. Ex. C, p. 1) He did not respond to the question requesting a permanent impairment rating.

Mr. Fridley testified at hearing regarding his ongoing symptoms that he associates with his injury. (Tr., pp. 45-50) He testified that he would not be able to return back to any of his past employment, including his position at Securitas. Securitas agreed and has not offered him work. Based upon the record, it is clear that Mr. Fridley would not be able to work as a remote maintenance technician based upon the lifting. He now walks with the assistance of a cane and has balance issues as well. He cannot kneel, squat or climb ladders.

Securitas did offer vocational assistance to Mr. Fridley in August 2022. Amanda Ruhland, MA, CRC at Stricklett & Associates interviewed him on November 3, 2022 and provided a vocational assessment dated November 21, 2022. (Def. Ex. D, p. 10) Ms. Ruhland opined that there were opportunities for Mr. Fridley in the competitive job market if he wished to engage in services. A job placement services contract was agreed upon in March 2023. (Def. Ex. D, pp. 14-16) Mr. Fridley, however, did not comply with the agreement and his job search efforts were lacking. (Def. Ex. D, pp. 26-27) Mr. Fridley testified at hearing that Ms. Ruhland assisted in writing a good resume for him. He testified that he did not feel like any employer would want to hire him. (Tr., pp. 42-43)

Robin Sassman, M.D., evaluated Mr. Fridley on November 29, 2022, and prepared a report on his behalf dated December 15, 2022. (Cl. Ex. 1) She reviewed all of the relevant records in the case, interviewed Mr. Fridley and examined him. She is a certified disability examiner (CIME) and she is the only physician in the case to provide a comprehensive opinion regarding his overall condition.

Dr. Sassman also thoroughly documented his symptoms at the time of her evaluation. (Cl. Ex. 1, pp. 12-13) I find that this summary of his ongoing symptoms accurately portrays his functional capabilities. Dr. Sassman diagnosed the following conditions related to his stipulated work injury:

1. Traumatic brain injury;
2. Vocal cord paresis with swallowing difficulties
3. Forehead and scalp laceration with residual visible scarring on the forehead.
4. Right knee bicondylar tibial plateau fracture and lateral meniscus tear

status post open reduction, internal fixation of a complex bicondylar tibial plateau fracture and open repair of the lateral meniscus of the right knee on 2/08/2021 by Kamaldeen Aderibigbe, MD.
5. Retained glass in the upper extremities status post excision of retained glass x2 in his right forearm and the third webspace of the right hand on 4/22/2021 by Scott Shumway, MD
6. Low back pain with radicular symptoms in the setting of multiple previous low back symptoms.
7. Right 4th and 5th metacarpal fractures
8. Bilateral lower lobe pulmonary emboli and a left peroneal vein DVT during his hospitalization, resolved.
9. Ventilator-acquired pneumonia during his hospitalization – resolved.

(Cl. Ex. 1, p. 17) Using the AMA Guides, 5th edition, she assigned permanent impairment ratings related to several of these conditions. She assigned a 35 percent rating for the lower extremity. She assigned a 2 percent rating for voice impairment and another 3 percent for swallowing difficulties. She assigned 5 percent for the traumatic brain injury and another 5 percent for the visual facial scar. She further assigned 5 percent impairment for the increased symptoms to the low back. When all ratings are converted and appropriately combined, Dr. Sassman opined that Mr. Fridley sustained a 29 percent whole body impairment from his February 4, 2021, work injury.

Dr. Sassman also recommended permanent restrictions which are mostly consistent with the FCE.

> Mr. Fridley should limit lifting, pushing, pulling and carrying to 20 pounds from floor to waist, waist to shoulder height and over shoulder height to an occasional basis. He should not kneel or squat. He should not crawl. He should not use ladders. He should not work at heights. These restrictions are due to the 2/04/2021 injury date.

(Cl. Ex. 1, p. 20) I find her impairment ratings and restrictions are the clearest and most accurate comprehensive assessment of Mr. Fridley's functional restrictions as a result of his work injury. This report was quite expensive. (Cl. Ex. 10, p. 2) In light of the voluminous medical records and lack of other evidence regarding the reasonableness of her fees, I find that the IME expense is reasonable.

In February 2023, Mr. Fridley underwent an expert vocational evaluation with Barbara Laughlin, M.A. (Cl. Ex. 14) Ms. Laughlin opined Mr. Fridley has a 76.8 percent occupational loss of skilled and semi-skilled occupations from the restrictions imposed by Dr. Sassman and a 100 percent loss utilizing the restrictions of the FCE. (Cl. Ex. 14, p. 11) She recommended Mr. Fridley contact Iowa Vocational Rehabilitation Services for job placement, which he has not done.

Mr. Fridley has applied for Social Security Disability benefits. This application has been denied as of the date of hearing. Elizabeth Fridley testified that since his work injury, Mr. Fridley has challenges with his memory, anger issues and anxiety. (Tr., pp.

82-83) She testified that his voice has changed since the accident, and he has coughing fits while eating. He has difficulty bending and lifting. (Tr., pp. 85-86) He continues to have significant challenges with stairs.

CONCLUSIONS OF LAW

The primary question submitted is whether Mr. Fridley is permanently and totally disabled. He alleges he is and has asserted the burden shifting odd-lot theory. The defendants dispute this and contend he is skilled and capable of sedentary or light work.

The claimant has the burden of proving by a preponderance of the evidence that the alleged injury actually occurred and that it both arose out of and in the course of the employment. Quaker Oats Co. v. Ciha, 552 N.W.2d 143 (Iowa 1996); Miedema v. Dial Corp., 551 N.W.2d 309 (Iowa 1996). The words "arising out of" refer to the cause or source of the injury. The words "in the course of" refer to the time, place, and circumstances of the injury. 2800 Corp. v. Fernandez, 528 N.W.2d 124 (Iowa 1995). An injury arises out of the employment when a causal relationship exists between the injury and the employment. Miedema, 551 N.W.2d 309. The injury must be a rational consequence of a hazard connected with the employment and not merely incidental to the employment. Koehler Elec. v. Wills, 608 N.W.2d 1 (Iowa 2000); Miedema, 551 N.W.2d 309. An injury occurs "in the course of" employment when it happens within a period of employment at a place where the employee reasonably may be when performing employment duties and while the employee is fulfilling those duties or doing an activity incidental to them. Ciha, 552 N.W.2d 143.

The claimant has the burden of proving by a preponderance of the evidence that the injury is a proximate cause of the disability on which the claim is based. A cause is proximate if it is a substantial factor in bringing about the result; it need not be the only cause. A preponderance of the evidence exists when the causal connection is probable rather than merely possible. George A. Hormel & Co. v. Jordan, 569 N.W.2d 148 (Iowa 1997); Frye v. Smith-Doyle Contractors, 569 N.W.2d 154 (Iowa App. 1997); Sanchez v. Blue Bird Midwest, 554 N.W.2d 283 (Iowa App. 1996).

Since claimant has an impairment to the body as a whole, an industrial disability has been sustained. Industrial disability was defined in Diederich v. Tri-City Ry. Co. of Iowa, 219 Iowa 587, 258 N.W. 899 (1935) as follows: "It is therefore plain that the Legislature intended the term 'disability' to mean 'industrial disability' or loss of earning capacity and not a mere 'functional disability' to be computed in terms of percentages of the total physical and mental ability of a normal man."

Functional impairment is an element to be considered in determining industrial disability which is the reduction of earning capacity, but consideration must also be given to the injured employee's age, education, qualifications, experience, motivation, loss of earnings, severity and situs of the injury, work restrictions, inability to engage in employment for which the employee is fitted and the employer's offer of work or failure to so offer. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Olson v.

Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963); Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961).

Compensation for permanent partial disability shall begin at the termination of the healing period. Compensation shall be paid in relation to 500 weeks as the disability bears to the body as a whole. Section 85.34.

While a claimant is not entitled to compensation for the results of a preexisting injury or disease, its mere existence at the time of a subsequent injury is not a defense. Rose v. John Deere Ottumwa Works, 247 Iowa 900, 76 N.W.2d 756 (1956). If the claimant had a preexisting condition or disability that is materially aggravated, accelerated, worsened or lighted up so that it results in disability, claimant is entitled to recover. Nicks v. Davenport Produce Co., 254 Iowa 130, 115 N.W.2d 812 (1962); Yeager v. Firestone Tire & Rubber Co., 253 Iowa 369, 112 N.W.2d 299 (1961).

Apportionment of disability between a preexisting condition and an injury is proper only when some ascertainable portion of the ultimate industrial disability existed independently before an employment-related aggravation of disability occurred. Bearce v. FMC Corp., 465 N.W.2d 531 (Iowa 1991); Varied Enterprises, Inc. v. Sumner, 353 N.W.2d 407 (Iowa 1984). Hence, where employment is maintained and earnings are not reduced on account of a preexisting condition, that condition may not have produced any apportionable loss of earning capacity. Bearce, 465 N.W.2d at 531. Likewise, to be apportionable, the preexisting disability must not be the result of another injury with the same employer for which compensation was not paid. Tussing v. George A. Hormel & Co., 461 N.W.2d 450 (Iowa 1990).

The burden of showing that disability is attributable to a preexisting condition is placed upon the defendant. Where evidence to establish a proper apportionment is absent, the defendant is responsible for the entire disability that exists. Bearce, 465 N.W.2d at 536-537; Sumner, 353 N.W.2d at 410-411.

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 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 Ry. Co. of Iowa, 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).

In Guyton v. Irving Jensen Co., 373 N.W.2d 101 (Iowa 1985), the Iowa court formally adopted the “odd-lot doctrine.” Under that doctrine a worker becomes an odd-lot employee when an injury makes the worker incapable of obtaining employment in any well-known branch of the labor market. An odd-lot worker is thus totally disabled

if the only services the worker can perform are "so limited in quality, dependability, or quantity that a reasonably stable market for them does not exist." Id., at 105.

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

The refusal of defendant-employer to return claimant to work in any capacity is, by itself, significant evidence of a lack of employability. Pierson v. O'Bryan Brothers, File No. 951206 (App. January 20, 1995). Meeks v. Firestone Tire & Rubber Co., File No. 876894, (App. January 22, 1993); See also, 10-84 Larson's Workers' Compensation Law, section 84.01; Sunbeam Corp. v. Bates, 271 Ark. 609 S.W.2d 102 (1980); Army & Air Force Exchange Service v. Neuman, 278 F. Supp. 865 (W.D. La. 1967); Leonardo v. Uncas Manufacturing Co., 77 R.I. 245, 75 A.2d 188 (1950). An employer who chooses to preclude an injured worker's re-entry into its workforce likely demonstrates by its own action that the worker has incurred a substantial loss of earning capacity. As has previously been explained in numerous decisions of this agency, if the employer in whose employ the disability occurred is unwilling to accommodate the disability, there is no reason to expect some other employer to have more incentive to do so. Estes v. Exide Technologies, File No. 5013809 (App. December 12, 2006).

Having reviewed all of the evidence in the record I find that the claimant has failed to meet his burden of proof that he is permanently and totally disabled. He did suffer a catastrophic and life changing injury which nearly killed him. He had a better recovery than it appears was expected given his near-death experience. His finger fractures, arm injury and broken ribs healed fully, as did his hospital-related complications, including pneumonia, DVT and emboli. His head lacerations (scars), traumatic brain injury and vocal cord paresis also healed quite well, although not fully. It is evident that the traumatic brain injury could have been catastrophic by itself, but he is primarily left with adjustment issues related to the accident itself rather than any significant permanent neurological brain damage. His right leg and knee condition is

permanent and significant by itself. When all of his conditions are combined and considered in totality, he has a significant loss of earning capacity, but not total.

I find that the ratings by Dr. Sassman are the best summary of Mr. Fridley's work-connected impairments. I also have found that the restrictions assigned by Dr. Sassman are the best indication of his functional restrictions.

> Mr. Fridley should limit lifting, pushing, pulling and carrying to 20 pounds from floor to waist, waist to shoulder height and over shoulder height to an occasional basis. He should not kneel or squat. He should not crawl. He should not use ladders. He should not work at heights. These restrictions are due to the 2/04/2021 injury date.

(Cl. Ex. 1, p. 20) These restrictions are highly preclusive and prevent him from virtually any of his past employment. I find though that the vocational evidence strongly suggests that Mr. Fridley is employable were he to make a more serious effort to secure employment. Mr. Fridley is 49 years old. He has limited computer skills; however, he does have a degree in computer technology. He is bright and has transferrable skills which would enable him to work in a light or sedentary job. I acknowledge herein that this injury has been life-changing for Mr. Fridley and his family, and it will likely require further adjustment time for him to become employed, particularly since there is a mental component to his disability. I strongly suspect, however, in this record that he is capable of securing and maintaining employment. Considering all of the relevant factors of industrial disability, I find that Mr. Fridley has suffered an 85 percent loss of earning capacity. I conclude this entitles him to four hundred twenty-five (425) weeks of compensation.

The next contested issue is gross wages.

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. This Code section is intended to be applied flexibly, not mechanically or technically with the purpose of ascertaining a true sense of the injured worker's actual wages during a period of time. Jacobsen Transportation Co. v. Harris, 778 N.W.2d 192, 197 (Iowa 2010).

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. Iowa Code section 85.36(6).

Mr. Fridley worked on average 44.68 hours per week during the quarter leading up to his work injury. (Def. Ex. I) He earned $29.64 per hour. I find his average weekly

wage is $1,324.00 per week. Mr. Fridley was married with a total of five exemptions. His rate of compensation therefore is $869.10 per week. Defendants are entitled to a credit for overpaid benefits. *See* Thomas v. Archer Daniels Midland Company, No. 23-0323 (Iowa Court of Appeals, November 8, 2023).

The next contested issue is medical expenses. Claimant contends there are some unpaid medical expenses set forth in Claimant's Exhibit 13.

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. Iowa Code section 85.27. Holbert v. Townsend Engineering Co., Thirty-second Biennial Report of the Industrial Commissioner 78 (Review-Reopening October 1975).

I find that the claimant has failed to meet his burden of proof that any of the expenses outlined in Claimant's Exhibit 13 were authorized providers specifically treating his work-related disabilities.

The next issue is IME expenses.

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). I find that Dr. Sassman's fees in this voluminous record are reasonable.

The next issue is penalty.

"Because penalty benefits are a creature of statute, our discussion begins with an examination of the statutory parameters for such benefits." Keystone Nursing Care Ctr. v. Craddock, 705 N.W.2d 299, 307 (Iowa 2005). Under Iowa Code section 86.13(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.

This provision "codifies, in the workers' compensation insurance context, the common law rule that insurers with good faith disputes over the legal or factual validity of claims can challenge them, if their arguments for doing so present fairly debatable issues." Covia v. Robinson, 507 N.W.2d 411, 412 (Iowa 1993) (citing Dirks v. Farm Bureau Mut. Ins. Co., 465 N.W.2d 857, 861 (Iowa 1991) and Dolan v. Aid Ins. Co., 431 N.W.2d 790, 794 (Iowa 1988)). "The purpose or goal of the statute is both punishment and deterrence." Robbennolt v. Snap-On Tools Corp., 555 N.W.2d 229, 237 (Iowa 1996).

The legislature established in Iowa Code section 86.13(4)(b) a burden-shifting framework for determining whether penalty benefits must be awarded in a workers' compensation case. See 2009 Iowa Acts ch. 179, § 110 (codified at Iowa Code § 86.13(4)(b)); see also Pettengill v. Am. Blue Ribbon Holdings, LLC, 875 N.W.2d 740, 746–47 (Iowa App. 2015) as amended (Feb. 16, 2016) (discussing the burden-shifting required by the two-factor statutory test). The employee bears the burden to establish a prima facie case for penalty benefits. See Iowa Code § 86.13(4)(b). To do so, the employee must demonstrate a denial, delay in payment, or termination of workers' compensation benefits. Iowa Code § 86.13(4)(b)(1). If the employee fails to prove a denial, delay, or termination, there can be no award of penalty benefits and the analysis stops. See id. at § 86.13(4)(b); see also Pettengill, 875 N.W.2d at 747. However, if the employee makes the requisite showing, the burden of proof shifts to the employer. See id. at § 86.13(4)(b); see also Pettengill, 875 N.W.2d at 747.

To avoid an award of penalty benefits, the employer must "prove a reasonable or probable cause or excuse for the denial, delay in payment, or termination of benefits." Iowa Code§ 86.13(4)(b)(2). An excuse must meet all of the following criteria to be "a reasonable or probable cause or excuse" under the statute.

The weekly compensation payment records in this case are quite confusing. The claimant alleges that between November 2021 through April 2022, there were delays in just over 21 weeks' worth of payments. (Cl. Ex. 9; pp.1-2; Def. Ex. F, p. 11) Claimant is apparently asserting that his payments got behind in November 2021 and never really got caught up until April 2022. (Cl. Ex. 8, pp. 1-45) Defendants argue that payments were late because of the U.S. Postal Service and that checks were by and large issued timely.

Having reviewed all of the evidence in this record, I find that there were some weeks which were paid late. In this record, however, it does not appear this was an ongoing pattern of late payments as suggested by claimant. The defendants, in fact, acknowledge some late payments in their argument. I find a penalty of $500.00 is appropriate to deter defendants from making late payments in the future.

ORDER

THEREFORE IT IS ORDERED

Defendants shall pay all benefits at the rate of eight hundred sixty-nine and 10/100 dollars ($869.10) per week.

Defendants shall pay claimant four hundred twenty-five (425) weeks of permanent partial disability commencing June 16, 2022.

Defendants shall pay accrued weekly benefits in a lump sum.

Defendants shall pay interest on unpaid weekly benefits awarded herein as set forth in Iowa Code section 85.30.

Defendants shall be given credit for the weeks previously paid as stipulated by the parties. Defendants shall further be given a credit for the rate overpayment on previous benefits.

Defendants shall pay the IME report of Dr. Sassman as set forth in Claimant's Exhibit 10.

Defendants shall pay the costs set forth in Claimant's Exhibits 11 through 15.

Defendants shall pay a penalty in the amount of five hundred and 00/100 dollars ($500.00).

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

Signed and filed this __15th____ day of November 2023.

JOSEPH L. WALSH
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Gary Mattson (via WCES)

Tyler Ernst (via WCES)

Caroline Westerhold (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.