

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

DENNIS M. MARSHALL,

Claimant,

vs.

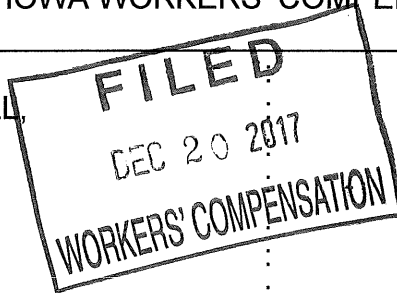
CITY OF MAXWELL,

Employer,

and

EMCASCO INSURANCE COMPANY,

Insurance Carrier,  
Defendant.



File No. 5255382

ARBITRATION

DECISION

:Head Notes: 1801, 2501, 2502, 2907, 4000.2

STATEMENT OF THE CASE

Dennis Marshall, claimant, filed a petition in arbitration and seeks workers' compensation benefits from defendants, City of Maxwell, as the employer and EMCASCO Insurance Company, as the insurance carrier. This case was originally scheduled to occur on June 13, 2017. Claimant moved to bifurcate the issue of permanent disability from the scheduled trial date. The undersigned denied that request for bifurcation based on administrative efficiency.

Claimant filed a motion to reconsider the request to bifurcate on June 9, 2017. In that motion to reconsider, claimant asserted that he was "likely to lose his home and all the equity acquired in it ... and may well be without any place to live" if the underlying healing period claim was not tried expeditiously. Based upon claimant's plea and representation of the urgency of the need for hearing, the undersigned reconsidered his ruling on the motion to bifurcate and ordered that this case could proceed to trial on the temporary disability, or healing period, claim only.

Counsel rescheduled the hearing, as directed. Hearing occurred on August 9, 2017.

During the course of claimant's testimony, Mr. Marshall testified that the foreclosure proceedings he had put forth in his request to bifurcate have never been filed by the bank and any such anticipated efforts had been halted. (Transcript, pages 38, 41-42, 51) At the time of hearing, claimant was not in imminent risk of losing his

house, the equity in that home, or of becoming homeless. The undersigned is troubled that these allegations were specifically put forth as the basis for bifurcation to change the undersigned's mind, but that correction of the record was not made prior to the hearing.

Counsel has a duty to be candid toward this tribunal. Iowa R. Prof. Conduct 32.3.3. Counsel's statement may have been accurate when made, rendering them ethical at the time made. However, it is assumed by the undersigned that counsel would bring a material change in those circumstances to the attention of this agency when it is relatively clear that the undersigned relied upon the facts, as stated, in making a decision or entering a ruling.

Claimant's counsel walked a very fine line in this case. While I do not believe that the conduct specifically crossed the ethical line of Iowa R. Prof. Conduct 32.3.3 because the statements were true when made, counsel's failure to correct the record before trial is not appreciated by the undersigned.

At the commencement of hearing, defendants consented to try the temporary disability, or healing period, claims. Defendants also consented to try the issues of interest, penalties, past medical expenses, a request for costs for failure to admit requests for admissions, and costs. The undersigned permitted those issues to be tried and submitted, despite the contrary ruling entered on June 29, 2017, and despite the claimant's testimony establishing that the facts asserted for the bifurcation were no longer accurate.

The parties filed a hearing report at the commencement of the arbitration hearing. On the hearing report, the parties entered into various stipulations. All of those stipulations were accepted and are hereby incorporated into this arbitration decision and no factual or legal issues relative to the parties' stipulations will be raised or discussed in this decision. The parties are now bound by their stipulations.

The evidentiary record includes Joint Exhibits I and II, Claimant's Exhibits I and II, and Defendants' Exhibits A through J. All exhibits were received without objection.

Claimant testified on his own behalf and called his uncle, Carl Marshall, to testify. Defendant elected not to call any witnesses to testify live.

At the conclusion of the arbitration hearing, counsel for the parties requested the opportunity to file post-hearing briefs. Their request was granted. The undersigned did not place any specific requirements upon the parties with respect to their briefs.

Both parties filed post-hearing briefs on September 15, 2017. Claimant filed a 63-page brief. Defendants filed a 10-page brief. Although no specific requirements were imposed upon counsel for their brief, it is noted that 876 IAC 4.45 provides "[e]xcept by permission of the presiding deputy workers' compensation commissioner ... principal briefs shall not exceed 50 Arabic-numbered pages."

On its face, claimant's post-hearing brief exceeds the permissible length of a brief allowed by Rule 4.45. Claimant's brief is not reasonable in its length, particularly when compared with the brief filed by defendants. In spite of this violation of Rule 4.45, claimant's post-hearing brief is being accepted and considered in its entirety.

However, claimant's counsel should be cognizant of Rule 4.45 in the future and ensure compliance with it when filing a brief with this agency. Claimant's counsel should also be aware that the undersigned will now begin implementing limitations and specific requirements on post-hearing briefs to ensure that unreasonable briefs are not submitted to the undersigned.

With the increasing workload of this agency, all counsel are reminded that brevity in advocacy is important and appreciated. Brevity can be an effective advocacy technique in representing a client. More is not always better when trying to capture the attention of and sway the decision of a deputy commissioner.

As noted above, the issue of permanent disability is bifurcated. Subject to the pertinent statute of limitations, once claimant achieves maximum medical improvement and believes he is entitled to permanent disability, he may pursue such a claim via a review-reopening petition. No findings or conclusions will be reached at this time regarding any claims for permanent disability.

### ISSUES

The parties submitted the following disputed issues for resolution:

1. Whether claimant is entitled to temporary total disability, or healing period, benefits between December 11, 2013 through the date of the arbitration hearing on August 9, 2017 and running into the future.
2. Whether claimant is entitled to payment, reimbursement, or satisfaction of past medical expenses and medical mileage contained at Joint Exhibit II and the Itemized List of Disputed Medical Expenses attached to the hearing report.

At the commencement of the hearing, the undersigned reviewed the hearing report with counsel. The issue of past medical expenses was noted as a disputed issue. However, upon discussion with counsel on the record, the parties reached an agreement as to past medical expenses. The undersigned entered a verbal order at the time of hearing that requires defendants to reimburse claimant for any out-of-pocket expenses to date, as well as pay or otherwise satisfy any past and outstanding medical expenses contained in Joint Exhibit II, such that defendants may dispute the reasonableness of any charges with the medical providers but must ultimately hold claimant harmless for any such expenses.

3. Whether claimant is entitled to reimbursement for an independent medical evaluation pursuant to Iowa Code section 85.39.

At the commencement of hearing, claimant's request for reimbursement of an independent medical evaluation was noted as disputed on the hearing report. However, after discussion of the issue on the record with counsel, defendants agreed to reimburse claimant's counsel or pay the independent medical evaluation fee directly to Robin L. Sassman, M.D. Therefore, the requested independent medical evaluation fee will be ordered to be paid or reimbursed but no additional findings of fact or conclusions of law will be entered in this decision.

4. Whether claimant is entitled to an order directing defendants to pay all health care providers within 30 days of their billings.
5. Whether penalty benefits should be assessed against defendants pursuant to Iowa Code section 86.13, for alleged unreasonable delay or denial of weekly benefits.
6. Whether defendants should be ordered to pay claimant's costs in proving the accuracy of denied requests for admissions.
7. Whether claimant's costs should be assessed against defendants.

#### FINDINGS OF FACT

The undersigned, having considered all of the evidence and testimony in the record, recognizing that there may be competing or contradictory facts within this evidentiary record, I find the following facts:

Dennis Marshall worked as a volunteer firefighter for the City of Maxwell. On December 11, 2013, he responded to an emergency call. Unfortunately, during the course of his work at the house fire he was responding to as a volunteer firefighter, he slipped on ice, fell, and injured his low back. (Transcript, page 21) He was transported to the hospital and kept overnight.

Unfortunately, Mr. Marshall's injury did not respond to conservative treatment and his lumbar MRI demonstrated a large disk herniation. An orthopaedic spine surgeon, Sarkis Kaspar, M.D., took claimant to surgery on January 27, 2014. (Joint Ex. I, p. 6) Unfortunately, although the initial surgery relieved claimant's symptoms fairly well, he experienced a re-herniation shortly after surgery and another surgery was recommended. On February 19, 2014, claimant submitted to a second surgery performed by Dr. Kaspar. (Joint Ex. I, p. 11)

Following the second surgery, claimant's symptoms persisted. Ultimately, claimant's care was transferred to another spine surgeon, Lynn Nelson, M.D., in Des Moines. Dr. Nelson diagnosed a recurrent disk herniation at L4-5 and recommended repeat surgery. Claimant submitted to a third surgical procedure, which resulted in a fusion in his lumbar spine on April 28, 2014. (Joint Ex. I, p. 57)

Dr. Nelson maintained care over claimant until January 20, 2015. At that juncture, in spite of a recommendation by a physical therapist for continued therapy, Dr. Nelson opined that claimant had achieved maximum medical improvement on January 17, 2015. Dr. Nelson recommended permanent work restrictions, offered a permanent impairment rating for claimant's injury, and released him from further care. (Joint Ex. I, pp. 68-69)

Unfortunately, Mr. Marshall continued to experience symptoms. Defendants declined to authorize additional treatment given the maximum medical improvement declaration. Claimant sought an independent medical evaluation, performed by Robin L. Sassman, M.D., on August 4, 2015. Dr. Sassman opined that claimant was not yet at maximum medical improvement and recommended additional surgical evaluation and pain management if surgical intervention was not recommended. (Claimant's Ex. I, p. 5)

Following Dr. Sassman's recommendations, defendants did schedule an evaluation with another spine surgeon, David Boarini, M.D. Dr. Boarini evaluated claimant on March 30, 2016. However, he did not have claimant's most recent MRI at the time of his evaluation. He requested the additional diagnostic films and then issued a written report. Dr. Boarini recommended against any additional surgical intervention and suggested that claimant could return to work with weight loss, an exercise plan, and use of appropriate medication. No weight loss program, exercise plan, or medications were offered as treatment options by defendants following Dr. Boarini's evaluation.

Claimant ultimately sought treatment with another spine surgeon, David H. Strothman, M.D., who first evaluated Mr. Marshall on January 6, 2017. Dr. Strothman concluded that the placement of instrumentation placed during a spine fusion surgery was causing symptoms. He recommended removal of the fusion instrumentation and exploration of surrounding structures.

Dr. Strothman took claimant to surgery on April 10, 2017. During surgery, Dr. Strothman removed the fusion hardware and performed a revision decompression at the L4-5 disk level. Dr. Strothman had not released Mr. Marshall to return to work, claimant had not actually returned to work, and had not achieved maximum medical improvement as of the date of the arbitration hearing.

The primary disputes in this case involve whether claimant achieved maximum medical improvement on January 17, 2015, as opined by Dr. Nelson, or whether he is yet to achieve maximum medical improvement. There is no factual dispute that claimant remained off work from December 12, 2013 through the date of the arbitration hearing. There is no factual dispute that claimant was not capable of returning to employment in his safety officer position or his volunteer firefighter position between December 12, 2013 and the date of the arbitration hearing.

When evaluating the issue of maximum medical improvement, I find that both parties have reasonable arguments and reasonable medical evidence upon which they

base their arguments. Claimant contends that he continued to have symptoms even after the surgery with Dr. Nelson. Claimant contends that he did not achieve maximum medical improvement, as opined by Dr. Sassman and as evidenced by the need for additional surgery through Dr. Strothman.

Defendants contend that claimant achieved maximum medical improvement January 17, 2015, as assigned by Dr. Nelson. Defendants appropriately note that another spine surgeon, Dr. Boarini, concurred that no additional surgical intervention was necessary in March 2016. Defendants acknowledge that another surgery was eventually performed by Dr. Strothman on April 17, 2017. They further acknowledge that claimant was in a healing period after the April 17, 2017 surgery through the date of the arbitration hearing.

However, defendants contend that claimant achieved his best functional state, performance of work at 55 pound lifting level, as of January 17, 2015. Defendants argue that claimant has never improved beyond that level and there is no evidence that he ever will. Therefore, defendants argue, claimant achieved maximum medical improvement on that date. Only after his April 17, 2017 surgery did he re-enter a new, or intermittent, healing period.

Again, I find that both parties had reasonable arguments in this issue and both parties had reasonable medical opinions upon which to base their opinions. In this instance, it was reasonable as of January 17, 2015 to believe claimant had achieved maximum medical improvement. Although an independent medical evaluator provided evidence of potential additional treatment after that date, another surgeon similarly concluded that no further surgery was indicated. Defendants possessed a reasonable belief that claimant had achieved maximum medical improvement as of January 17, 2015.

They sent notification to claimant explaining their expectation of conversion to permanent disability and payment of a voluntary industrial disability sum. They continued their investigation after that initial letter, later revised their estimate, and paid additional voluntary benefits that they believed were permanent disability benefits.

However, with the benefit of hindsight, I find that claimant did not actually achieve maximum medical improvement on January 17, 2015. Ultimately, claimant's continued symptoms were partially caused by the placement of fusion instrumentation. That hardware ultimately had to be surgically removed and yet another decompression performed at the L4-5 disk level. Unfortunately, claimant's symptoms continued after January 17, 2015. As his uncle testified, claimant was not capable of working and had significant symptoms. Therefore, I find that Mr. Marshall did not achieve maximum medical improvement on January 17, 2015 and had not yet achieved maximum medical improvement as of the date of the arbitration hearing.

With respect to claimant's assertion of a claim for penalty benefits, I find that the defendants asserted a reasonable position and made a reasonable argument about

claimant's alleged achievement of maximum medical improvement on January 17, 2015. Defendants reasonably relied upon the medical opinion of the treating spine surgeon, Dr. Nelson, when making their assessment and volunteering what they believed were permanent disability benefits.

Defendants gave timely notice of their commencement of, what they believed were permanent disability benefits and timely notice of the anticipated termination date for those benefits. Defendants' arguments could have reasonably been accepted as accurate in this case. If accepted, those arguments would have resulted in the denial of claimant's request for ongoing temporary disability, or healing period, benefits between January 17, 2015 and April 17, 2017.

On the other hand, defendants did not pay claimant benefits for December 12, 2013. Claimant was clearly within a period of temporary disability, or healing period, on December 12, 2013. Defendants make an argument about the commencement date for weekly benefits. However, defendants offer no excuse or justification for not subsequently paying claimant for the missed work day of December 12, 2013. I find that defendants had no reasonable basis for not paying benefits for this date after the 14-day period outlined in Iowa Code section 85.32 passed.

Failure to pay benefits on December 12, 2013 technically makes all subsequent benefit payments untimely and subject to interest and penalties. On the other hand, defendants did a fairly good job of paying timely benefits once they commenced. It is apparent that defendants were not attempting to intentionally deny benefits to claimant without reasonable cause of excuse, but did miss the payment for December 12, 2013.

Claimant contends that defendants were late on all weekly benefits because healing period benefits commenced immediately after the injury. Defendants contend that benefits commenced after the three-day waiting period, that they commenced benefits prior to the required deadlines in Iowa Code section 85.32 and actually paid most benefits ahead of schedule. Ultimately, I find that defendants had a reasonable basis for the manner in which they paid weekly benefits and that they were paying most benefits in a timely manner.

Defendants do concede that benefit payments for weeks ending January 19, 2014 and February 16, 2014, were each paid one day late. I concur with defendants' calculation of the dates when benefits were due and find that defendants paid two weeks of benefits late, in addition to missing the payment for December 12, 2013. I acknowledge that the legal ramification of missing the payment and paying one day late is to make subsequent payments subject to interest, underpayment, and a growing principle under the United States Rule. However, it is obvious that defendants were attempting to pay claimant promptly and appropriately.

Considering the two weeks of clearly late benefits and the missed payment for December 12, 2013, the initial principle denied or paid late would total slightly over \$2,000.00. I find that only a minimal penalty is necessary in this circumstance to

achieve the goals of punishment and deterrence. Specifically, even acknowledging the effects of the United States Rule, I find that a penalty totaling \$500.00 would be sufficient to achieve the goals of punishment and deterrence under the facts of this case.

### CONCLUSIONS OF LAW

The initial disputed issue is whether claimant is entitled to temporary disability, or healing period, benefits from December 11, 2013 through the August 9, 2017 hearing and continuing into the future until the first factor outlined in Iowa Code section 85.33 or Iowa Code 85.34(1) is achieved. In reality, defendants concede that claimant was entitled to a running healing period at the time of the hearing. The parties stipulated that any claim for permanent disability was not ripe at the time of the arbitration hearing. The issue of permanent disability has been bifurcated because of the running healing period.

There are two real disputes between the parties pertaining to the issue of temporary disability, or healing period benefits. The first is claimant's entitlement to payment of temporary disability, or healing period, benefits on December 11, 2013 and December 12, 2013. Defendants voluntarily commenced weekly benefits on December 13, 2013. However, there is no record that they ever paid claimant for December 11, 2013 or December 12, 2013.

Claimant contends that he is entitled to healing period benefits for both December 11, 2013 and December 12, 2013. Defendants do not specifically challenge December 12, 2013, but do not appear to have paid benefits for December 12, 2013 either.

On the other hand, defendants dispute entitlement to award of any benefits for December 11, 2013, which is the date of injury. As noted, claimant asserts this claim as a healing period claim, which would make Iowa Code section 85.34(1) the applicable statutory provision. Section 85.34(1) provides that "the employer shall pay to the employee compensation for a healing period ... beginning on the first day of disability after the injury."

On its face, the statutory provision relied upon by claimant indicates that healing period benefits commence on the first day of disability after the date of injury. Although claimant argues that his admission to the hospital on the date of injury demonstrates disability, the date of injury is not the first date of disability after the date of injury. The undersigned concludes that December 11, 2013 is not the first date of disability after December 11, 2013. Instead, the first date of disability after December 11, 2013 is December 12, 2013 in this case.

Realistically, defendants should have paid compensation for December 12, 2013. The undersigned is not able to find any payment records that demonstrate this date was paid under either Iowa Code section 85.33 or Iowa Code section 85.34(1). Defendants



clearly owe temporary disability, or healing period, benefits for December 12, 2013, because claimant was hospitalized on that date, not released to return to work, not capable of substantially similar work, and was not at maximum medical improvement. Iowa Code sections 85.33, 85.34(1). Claimant will be awarded temporary disability, or healing period, benefits for December 12, 2013. Claimant's request for award of benefits on December 11, 2013 is denied as contrary to the plain language of Iowa Code section 85.33 and Iowa Code section 85.34(1).

The second disputed period of time for temporary disability, or healing period, benefits is between Dr. Nelson's release and declaration of maximum medical improvement on January 17, 2015 and claimant's subsequent surgery with Dr. Strothman on April 10, 2017. Claimant contends that he remained within a healing period pursuant to Iowa Code section 85.34(1) during this claimed period of time because he did not return to work, was not medically capable of returning to substantially similar work, and had not yet achieved maximum medical improvement.

There is no real dispute about the fact that claimant did not work between January 17, 2015 and surgery on April 10, 2017. Similarly, there is really no dispute between the parties about whether claimant was capable of performing substantially similar employment during this period of time. He was not.

Rather, the dispute between the parties is whether claimant reached the point that it was medically indicated that significant improvement from the injury was no longer anticipated. Iowa Code section 85.34(1). This statutory phrase is often referred to as the point of maximum medical improvement.

Claimant contends that he had not achieved maximum medical improvement during this period of time. Defendants contend that claimant achieved maximum medical improvement on January 17, 2015, as opined by Dr. Nelson. Defendants contend that claimant qualified for additional healing period benefits after his subsequent surgery with Dr. Strothman on April 10, 2017 and that healing period benefits should be awarded on an intermittent basis pursuant to Waldinger Corp. v. Mettler, 817 N.W.2d 1 (Iowa 2012).

Both parties asserted facts, which if accepted, support their theory of the case. Having considered both parties' asserted facts, I found that claimant did not achieve maximum medical improvement on January 17, 2015. Instead, there were alternative treatments, including the subsequent surgery, a potential spinal stimulator, physical therapy, and potential pain management procedures that could have been explored to provide claimant additional pain relief and functional improvement.

Having found that claimant did not achieve maximum medical improvement on January 17, 2015, and having found that he had not yet returned to work, was not medically capable of returning to substantially similar employment, and had not achieved maximum medical improvement at the time of the arbitration hearing, I conclude that claimant has proven entitlement to temporary disability, or healing period,

benefits from December 12, 2013 through the date of the arbitration hearing and continuing into the future until the first of the factors outlined in Iowa Code section 85.33 or Iowa Code section 85.34(1) are met.

Claimant also asserts a claim for penalty benefits pursuant to Iowa Code section 86.13 for unreasonable delay or denial of weekly 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).

I found that the defendants had a reasonable basis to assert claimant had achieved maximum medical improvement by January 17, 2015 and to dispute temporary disability, or healing period, benefits between January 17, 2015 and April 17, 2017. I similarly found that defendants contemporaneously conveyed the basis for their conversion of benefits and their anticipated dates for termination of weekly benefits. If defendants' reasonably asserted evidence and argument were accepted, claimant's request for temporary disability, or healing period, benefits during the above period would have been denied. Therefore, although I found claimant proved a delay in payment of benefits for this period of time, I conclude that no penalty benefits should be awarded for defendants' denial of benefits during this period of time. Iowa Code section 86.13.

Claimant also asserts that defendants paid weekly benefits late. Claimant contends that he was owed benefits commencing on December 11, 2015 and payable through the date of the arbitration hearing. Using claimant's assumptions, theory, and calculations, defendants' weekly payments were essentially all late.

This determination turns on two legal issues. The first is whether claimant is entitled to benefits for December 11, 2013. As noted above, I conclude that claimant is not entitled to temporary disability, or healing period, benefits for December 11, 2013.

Therefore, claimant's calculations and the assumptions underlying his arguments are legally inaccurate.

Claimant similarly argues that defendants were obligated to commence healing period benefits pursuant to Iowa Code section 85.34(1) immediately after the injury because the injury involves permanent disability. Claimant may well be correct that this claim involves permanent disability given the numerous back surgeries claimant has submitted to since December 2013. However, the parties noted that permanent disability is a disputed issue on the hearing report and stipulated that the issue of permanent disability is not ripe for determination at this time.

If the issue of permanent disability is not ripe for determination at this time, it is premature to assert definitively that Iowa Code section 85.34(1) applies. Moreover, given the stipulation that permanent disability is not yet ripe for determination, it appears reasonable for defendants to have paid benefits using the temporary disability statutes, including Iowa Code section 85.32 as well as Iowa Code section 85.30.

According to Iowa Code section 85.32, benefits commence on the fourth day of disability after the injury. The first weekly benefit payment is due on the eleventh day according to Iowa Code section 85.32. Defendants appear to have voluntarily commenced benefits on the second day after the injury and paid weekly thereafter, rendering each of their benefit payments (barring those noted below and conceded by defendants) to be paid on time or early. Claimant's analysis of the commencement of benefits is legally inaccurate. Defendants' contention and practice in this case is accurate and certainly defendants had a reasonable basis for their commencement and payment of benefits (again with the exception of three items discussed below). Therefore, I perceive no basis for award of penalty benefits for defendants' commencement of benefits and payment earlier than the statutory requirement of the eleventh day. Iowa Code section 85.30; Iowa Code section 85.23; Iowa Code section 86.13.

Claimant did establish that defendants did not pay weekly benefits for December 12, 2013 and that they paid benefits one day late on two different occasions, as noted in the findings of fact. Defendants did not put forth a reasonable basis for these denials and delays. Therefore, claimant is entitled to an award of penalty benefits in some amount. Iowa Code section 86.13(4).

The purpose of Iowa Code section 86.13 is both punishment for unreasonable conduct but also deterrence for future cases. Id. at 237. In this regard, the Commission is given discretion to determine the amount of the penalty imposed with a maximum penalty of 50 percent of the amount of the delayed, or denied, benefits. Christensen v. Snap-On Tools Corp., 554 N.W.2d 254, 261 (Iowa 1996).

In exercising its discretion, the agency must consider factors such as the length of the delays, 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. Meyers

v. Holiday Express Corp., 557 N.W.2d 502, 505 (Iowa 1996). Having missed one day of benefits and delayed two weeks of benefits by one day, I find the number and effect of the denial and delays were minimal. There is no apparent maliciousness or intent to have denied or delayed benefits.

However, the cumulative effect of the delays and missed checks is more significant upon the claimant when the effect of the United States Rule and interest is applied. Neither party put evidence on, or offered argument, about the information available to the employer or the employer's past record of penalties.

Having considered the relevant factors and the purposes of the penalty statute, I conclude that a section 86.13 penalty in the amount of \$500.00 is appropriate in this case. Such an amount is appropriate to punish the employer for delays in payment of benefits under these facts and should serve as a deterrent against future conduct. However, the facts of this case are not of such an egregious nature that an additional penalty is warranted.

Mr. Marshall seeks an order of this agency directing defendants to "pay the health care providers within 30 days of their billings." Claimant does not identify specific statutory authority or case law precedent that permits the undersigned authority to issue a prospective order on the timeline within which a medical bill must be paid.

Claimant asserts that "[h]ealth care providers who are not paid reasonably their billings sometimes become reluctant to provide their services and supplies reasonably." (Claimant's Post-Hearing Brief, p. 61) Even if this unsupported statement is accepted as accurate, claimant cannot establish that there is a pending issue of a provider refusing further care due to untimely payment of medical expenses.

Claimant describes a past situation in this claim when payment was not prompt by defendants and describes the efforts and difficulties to ensure payment of medical providers. Yet, claimant has not experienced a refusal of care due to non-payment of medical expenses. Nor has claimant sought alternate medical care in this case due to the non-payment of medical expenses. If and when claimant faces the situation he predicts "sometimes" occurs, claimant has a remedy available in Iowa Code section 85.27(4) to pursue alternate medical care and an order of this agency.

Claimant's request also fails to consider the defendants' statutory rights to challenge the reasonableness of a medical provider's charges. There is a specific mechanism provided in Iowa Code sections 85.27(3) and 86.39, as well as in 876 IAC 10.1 through 10.3, for dispute and resolution of medical fee disputes. Entering an order for payment within a specific date that may terminate defendants' legitimate future rights without the opportunity to utilize any of the above statutory authority or administrative procedures would be a denial of due process toward defendants. Claimant's request for an order requiring payment to medical providers within 30 days of the issuance of a billing is rejected for the above reasons.

Nevertheless, defendants have a duty to provide reasonable and prompt medical care and are reminded of this duty. Failure to pay a medical provider could result in complete loss of any right to direct medical care if the failure to pay a medical provider results in a delay or denial of medical care. Therefore, a prospective order will not be entered at this time, but claimant certainly could attain a future right to pursue alternate medical care if the timeliness of payment of medical expenses later causes delays or denial of reasonable and necessary medical care.

Mr. Marshall also seeks an award of expenses, costs, or sanctions for defendants' denial of requests for admissions. Claimant seeks this award pursuant to Iowa Rule of Civil Procedure 1.510(2), as made effective by agency rule 876 IAC 4.35. Review of Iowa Rule of Civil Procedure 1.510(2) does not demonstrate any provision within that rule that specifically allows for imposition of expenses, costs or sanctions for a denial of a request for admission. However, the rule does refer to Iowa Rule of Civil Procedure 1.517(3).

Presumably, claimant is relying upon that alternate reference for his claim for expenses, costs or sanctions. Iowa Rule of Civil Procedure 1.517(3) provides:

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 responses to requests for admissions at issue are contained in Claimant's Exhibit II at pages 71 and 72. Review of those responses to requests for admissions demonstrates that defendants denied only request for admission number two. That request for admission requested that defendants admit that the December 11, 2013 work injury proximately caused Mr. Marshall to be in a healing period from at least December 11, 2013 through December 1, 2015. (Claimant's Ex. II, p. 72)

Ultimately, claimant did not prove he was entitled to benefits on December 11, 2013. Defendants appropriately denied the request because claimant's asserted inclusive dates were erroneous from a legal standpoint. Given that claimant failed to prove the entitlement denied by defendants and given that defendants had a valid legal basis for the denial, no sanctions or costs will be ordered against defendants.

Iowa Rule of Civil Procedure 1.517(3)(c) also provides that expenses should not be awarded for a denial of a request for admission if the court finds that the party failing to admit had reasonable grounds to believe that the party might prevail on the matter. Obviously, claimant did not prevail on the entirety of his claim, having used the date of injury as part of his inclusive claim. However, even beyond that, as discussed in the penalty section of these conclusions, defendants had evidence that could have been accepted and that would have precluded the award of the temporary disability, or

healing period, benefits during the inclusive dates requested by claimant in request for admission number two. Therefore, I conclude that defendants had reasonable grounds to believe that they might prevail on this issue and reasonably denied this request for admission. For this additional reason, claimant's request for expenses, costs, or sanctions for denial of a request for admission is denied.

Finally, claimant seeks assessment of his costs. Assessment of costs is a discretionary function of the agency. Iowa Code section 86.40.

Claimant has prevailed on the merits and obtained a running healing period award, including an award for the disputed period of time. I conclude it is reasonable to assess claimant's costs against defendants in this file. Claimant seeks assessment of his filing fee (\$100.00) and service fee (\$13.92). Both are reasonable and are assessed pursuant to 876 IAC 4.33(3) and (7).

#### ORDER

#### THEREFORE, IT IS ORDERED:

Any claim for permanent disability is bifurcated and must be raised by claimant within the applicable statute of limitations via an original notice and petition for review-reopening.

Defendants shall pay claimant healing period benefits from December 12, 2013 through the date of the arbitration hearing and into the future until such time as the first qualifying factor outlined in Iowa Code section 85.33 or Iowa Code section 85.34 shall be achieved.

All weekly benefits in this case shall be paid at the rate of one thousand seventy-nine and 79/100 dollars (\$1,079.79) per week.

Defendants shall pay all accrued weekly benefits in lump sum.

Defendants shall pay applicable interest pursuant to Iowa Code section 85.30 for all accrued weekly benefits.

If the parties cannot reach an amicable resolution and calculation of the applicable interest owed, the parties may file a motion for appointment of an appropriate expert to calculate the interest owed. In making such a motion, the parties shall each submit their calculation of the applicable interest and shall identify two experts that are willing and qualified to perform the necessary calculations. The undersigned will select one of the experts suggested to perform the necessary calculations and the expense of the selected expert will be assessed against the party (or parties) that submitted inaccurate calculations.

Defendants shall reimburse claimant for any out-of-pocket medical expenses, including medical mileage, incurred to date, as well as pay or otherwise satisfy any past



and outstanding medical expenses contained in Joint Exhibit II and the Itemized List of Disputed Medical Expenses attached to the hearing report, such that defendants may dispute the reasonableness of any charges with the medical providers but must ultimately hold claimant harmless for any such expenses.

If previously paid by claimant, defendants shall reimburse claimant's independent medical evaluation fee charges totaling two thousand two hundred thirty-two and 50/100 dollars (\$2,232.50) pursuant to Iowa Code section 85.39.

If the independent medical evaluation fee remains outstanding, defendants shall pay the above amount directly to Dr. Sassman to satisfy their stipulated obligation under Iowa Code section 85.39.

Defendants shall pay claimant penalty benefits pursuant to Iowa Code section 86.13 totaling five hundred and 00/100 dollars (\$500.00).

Defendants shall reimburse claimant's costs totaling one hundred thirteen and 92/100 dollars (\$113.92).

Defendants 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 20<sup>th</sup> day of December, 2017.



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WILLIAM H. GRELL  
DEPUTY WORKERS'  
COMPENSATION COMMISSIONER

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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.