BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

FILED
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WORKERS' COMPENSATION

MAX L. BYERS, Claimant, vs. GUARDSMARK, LLC, Employer, and NEW HAMPSHIRE INSURANCE COMPANY, Insurance Carrier, Defendants.	File No. 5055931 APPEAL DECISION Head Note Nos: 1108; 1804; 2907; 3000; 4000

Defendants Guardsmark, LLC, employer, and New Hampshire Insurance Company, insurance carrier, appeal from an arbitration decision filed on June 19, 2017. The case was heard on April 19, 2017, and it was considered fully submitted in front of the deputy workers' compensation commissioner on June 6, 2017.

In the arbitration decision, the deputy commissioner found claimant was permanently and totally disabled as a result of the stipulated injury which arose out of and in the course of claimant's employment with defendant-employer on September 1, 2014. The deputy commissioner found claimant's weekly benefit rate for the work injury was $231.80. The deputy commissioner awarded claimant penalty benefits in the amount of $1,000.00 for defendants' underpayment of the weekly rate. Finally, the deputy commissioner taxed defendants with claimant's costs of the arbitration proceeding.

On appeal, defendants assert the deputy commissioner erred by finding claimant to be permanently and totally disabled, in failing to address claimant's credibility, in failing to address causation of claimant's ongoing complaints, in finding defendants failed to provide timely and appropriate care, in finding the weekly benefit rate to be $231.80, in awarding penalty benefits, in failing to address the applicability of Iowa Code section 85.34(7), and in failing to address defendants' claim for costs.

Those portions of the proposed agency decision pertaining to issues not raised on appeal are adopted as a part of this appeal decision.

I performed a de novo review of the evidentiary record and the detailed arguments of the parties. Pursuant to Iowa Code sections 17A.15 and 86.24, those

portions of the proposed arbitration decision filed on June 19, 2017, relating to issues properly raised on intra-agency appeal are affirmed in part and modified in part.

FINDINGS OF FACT

A summary of claimant's background and medical treatment is warranted given the deputy commissioner's sparse findings.

Claimant, who was 72 years old at the time of the hearing, was working for defendant-employer as a security guard at a Farmland plant at the time of his injury. (Hearing Transcript, pages 8, 14) His job was to walk around the plant to ensure Farmland employees were not stealing product. (Tr., pp. 15-16) It is undisputed that on the date of his injury, September 1, 2014, claimant was walking up some muddy stairs when he fell. (Tr., p. 17)

Claimant's description of the severity of his unwitnessed fall has varied. In the emergency room on September 1, 2014, claimant initially described losing his balance, grabbing the hand railing, twisting, and slamming his back into the railing. (Exhibit 7, p. 1) In the "Supervisor's Incident Investigation Report," dated September 2, 2014, the incident is described as claimant "slip[ing] on wet steps" and "hit[ting] his back on the handrail as he fell." (Ex. D, p. 21) On September 5, 2014, claimant told a representative from defendant-insurer that he slipped, hit the back of the hand railing, and fell "maybe eight or ten steps." (Ex. E, p. 25) On September 11, 2014, claimant told his surgeon, W.O. Samuelson, M.D., that he "fell down the stairs." (Ex. 1, p. 13) Days later, claimant told Dr. Samuelson's partner, Leonel Herrera, M.D., that he "fell on steps at work." (Ex. 1, p. 23) On September 29, 2015, claimant told Timonthy A. Burd, M.D., at the Nebraska Spine and Pain Center that he "lost his balance, twisted and slammed his back into the hand railing." (Ex. 2, p. 18)

During claimant's deposition on October 27, 2015, his account of the incident changed significantly. He testified he went "over" the hand railing and fell 30 feet, landing on his "back and side." (Ex. 14, pp. 41-42) At hearing, claimant testified he "hung" from the hand railing before he fell "approximately 33 feet" and landed "in a standing position." (Tr., p. 17)

I do not find claimant's testimony that he fell more than 30 feet after going over the handrail to be credible. It simply does not match the initial descriptions he gave to medical providers, his supervisor, and the representative of defendant-insurer.

Even though I find claimant's later descriptions of the incident to be exaggerated, the fact remains that claimant's injury on September 1, 2014, for which defendants admitted liability (see Hearing Report, p. 1), was significant. Claimant was diagnosed with "[c]auda equinus syndrome with severe lumbar spinal stenosis with an extruded fragment at L2-3 and severe stenosis at L3-4 with a very large herniated nucleus pulposus at L3-4." (Ex. 1, p. 14) As a result, Dr. Samuelson performed a bilateral discectomy at L3-L4 on September 11, 2014. (Ex. 1, pp. 15-16)

After surgery, claimant was largely noncompliant with the physical therapy recommended by both Dr. Samuelson and Dr. Herrera. (See Ex. 1, pp. 28, 31, 34, 36, 37, 44, 45). On December 22, 2014, despite his physicians' recommendations to the contrary, claimant indicated he was not interested in therapy and instead wanted a functional capacity evaluation (FCE). (Ex. 1, p. 45) However, because claimant sustained a fall while walking with a therapist or nurse to one of the few physical therapy appointments he actually attended, Dr. Herrera recommended a repeat MRI. (Ex. 1, p. 45)

The MRI revealed a "large disc herniation at L3-4" that was "displacing the adjacent nerve roots." (Ex. 1, p. 52) Dr. Herrera believed the herniation was "more than likely causing his pain in his back." (Ex. 1, p. 52) Dr. Herrera referred claimant back to Dr. Samuelson for consideration of another surgery, but claimant indicated he was not interested and instead wanted to pursue an injection. (Ex. 1, pp. 52, 56) When claimant returned to Dr. Samuelson after his injection, he informed the doctor he had moved to Omaha, so claimant's care was transferred to the Nebraska Spine and Pain Center. (Ex. 1, p. 68)

When conservative pain management at the Nebraska Spine and Pain Center failed to alleviate claimant's complaints of pain and numbness, claimant was referred to Timothy A. Burd, M.D., for a surgical consultation. (Ex. 2, p. 17) Dr. Burd evaluated claimant on January 12, 2016, after claimant completed updated imaging studies, including an EMG of the lower extremities. (Ex. 2, p. 35) Dr. Burd initially recommended a fusion surgery, but he rescinded that recommendation a month later after multiple phone calls from claimant and inconsistencies in claimant's statements. (Ex. 2, p. 45) Due to claimant's "somewhat erratic behavior," Dr. Burd recommended a psychiatric evaluation to help determine whether claimant would be a reasonable candidate for surgery. (Ex. 2, p. 45)

Roughly a week later, on February 26, 2016, Dr. Burd authored a letter in response to a letter from claimant's counsel. In that letter, Dr. Burd opined that claimant's "current symptomatology is likely the residual of his cauda equina surgery by Dr. Samuelson" and that "the work injury was the cause of [claimant's] cauda equina syndrome and necessitated surgery by Dr. Samuelson." (Ex. 2, p. 47) Dr. Burd assigned a whole person impairment rating of 13% and placed claimant in the sedentary to light physical demand category with a 20-pound lifting restriction, with restrictions of no repetitive lifting, bending, twisting, or stooping. (Ex. 2, p. 48) Dr. Burd also stated claimant was not a good candidate for surgery and instead referred claimant to Jeffery Jacobs, M.D., for pain management. (Ex. 2, pp. 46-47)

It appears from Dr. Jacobs' note that there was some confusion as to whether claimant wanted to pursue surgery or pain management. (Ex. 6) Claimant moved back to Iowa, however, before Dr. Jacobs could offer additional care. (Tr., p. 55)

In response to claimant's move, defendants authorized care with Muhammad Iqbal, M.D. Dr. Iqbal evaluated claimant on August 12, 2016. Dr. Iqbal raised the

possibility of a spinal cord stimulator trial but first requested a referral to the Mayo Clinic (hereinafter "Mayo") to address claimant's left leg numbness and burning pain in the mid back and right leg. (Ex. 8, p. 4) It appears from defendants' attorney's correspondence to claimant's attorney on September 13, 2016, that defendants did, in fact, authorize the referral to Mayo, but Mayo declined to accept Dr. Iqbal's referral. (Ex. Q, p. 95)

In the arbitration decision, the deputy commissioner stated Dr. Iqbal's request for a referral to Mayo "was not positively acted upon" and "was a breach of the defendants' statutory requirement to provide timely and appropriate care." (Arbitration Decision, p. 3) First, medical benefits were not in dispute in this case (Hearing Report, p. 2), so it is not clear why the deputy commissioner felt it necessary to make this statement. Second, I disagree with the deputy commissioner's findings that Dr. Iqbal's referral was "not positively acted upon" and that defendants breached their statutory duty. Defendants made the referral to Mayo, but Mayo declined to accept claimant as a patient. This was entirely out of defendants' control. For those reasons, contrary to the deputy commissioner's findings, I find defendants acted timely and reasonably in their attempt to satisfy Dr. Iqbal's request for a referral to Mayo. Ultimately, however, my reversal of the deputy commissioner's findings has no substantive effect on the outcome of this case because, as mentioned above, medical benefits were not a disputed issue.

After the failed referral to Mayo, defendants authorized treatment with Todd Harbach, M.D., a spine surgeon, and Wesley Rayburn, M.D., a pain specialist. In the meantime, however, claimant established care for his personal conditions, including diabetes, at Laurens Family Medicine. (Ex. 9, p. 1) Kylie Mauer, PA-C, the physician assistant who treated claimant, made it very clear to claimant that she would not treat his back condition. (See Ex. 9, pp. 5, 7, 12)

Claimant was eventually evaluated by both Dr. Harbach and Dr. Rayburn. Dr. Harbach recommended a spinal cord stimulator and no additional surgery, but Dr. Rayburn cautioned against a spinal cord stimulator due to claimant's "significant pain behavior." (Ex. 10, p. 4, 11) Instead, Dr. Rayburn recommended referral to a pain psychologist. (Ex. 10, p. 11)

Defendants in turn authorized an evaluation with Amy Mooney, Ph.D. Defendants initially scheduled an appointment for February 15, 2017, but claimant did not attend. Defendants were charged $400.00 for a "No Show fee." (Ex. F, p. 33)

In an e-mail, claimant's counsel indicated he was at fault for claimant's absence because he failed to timely convey the appointment to his client. (Ex. Q, p. 111) At hearing, claimant testified he did not attend the appointment because the roads were icy. (Tr., p. 65) In either scenario, defendants were not at fault for claimant's failure to attend.

When claimant was eventually evaluated by Dr. Mooney on March 13, 2017, claimant refused to participate in psychological testing. (Ex. P, p. 68) Dr. Mooney opined claimant was not a good candidate for mental health counseling, in part because

Dr. Mooney was concerned with claimant's willingness and compliance. (Ex. P, p. 68) This appears to be the most recent medical treatment in the record before hearing.

Claimant obtained an independent medical examination (IME) with Jacqueline Stoken, D.O., on March 16, 2017. In her report, Dr. Stoken assigned a 39 percent whole body impairment rating for both chronic pain and gait disorder and opined claimant "is unable to work due to his pain and limited mobility." (Ex. 11, p. 43)

At hearing, both claimant and his son testified claimant is no longer able to live by himself or care for himself. (Tr., pp. 26-27, 76) Claimant testified that prior to his September 1, 2014, injury he had no problems getting around and was able to walk the several miles required of him during his shifts with defendant-employer without issue. (Tr., p. 28)

With this history and these opinions in mind, I will first address whether claimant's ongoing complaints of back pain are causally related to his September 1, 2014, work injury. On appeal, defendants suggest claimant's back pain at the time of the hearing was related to an injury sustained by claimant in the late 1990s when claimant was working for a different employer. Defendants are correct that claimant had a back injury in the late 1990s with a different employer that resulted in a lumbar microdiskectomy. (Ex. H, p. 35) However, claimant received only sporadic treatment for his back after the late 1990s. (See Ex. I, pp. 44-45; Ex. L, pp. 56-57; Ex. M, p. 58) In fact, in defendants' own words, claimant's low back symptoms and treatment prior to his September 1, 2014, work injury was only "occasional." (Def. Brief, p. 5) While claimant's back injury in the 1990s limited his employability, I find claimant's residual day-to-day symptoms were fairly negligible prior to his September 1, 2014, work injury.

Defendants also suggest claimant's ongoing back pain is related to his diabetes. Defendants point to PA Maurer's statement that it was unclear whether claimant's back pain was related to his injury or his uncontrolled diabetes (Ex. 9, p. 20), but I give this statement little credence given the fact that PA Maurer explicitly declined to treat claimant's back condition and had not yet reviewed any of claimant's past medical records when she made this statement. (See Ex. 9, p. 26 ("I still do not have any old records for my review."))

However, Dr. Burd, a physician authorized by defendants, opined that claimant's "current symptomatology is likely the residual of his cauda equina surgery by Dr. Samuelson" and that "the work injury was the cause of [claimant's] cauda equina syndrome and necessitated surgery by Dr. Samuelson." (Ex. 2, p. 47) I find Dr. Burd's opinion more persuasive than defendants' arguments that claimant's ongoing back symptoms are due to his prior back injury or his diabetes. For these reasons, I find claimant's ongoing back symptoms are related to his September 1, 2014, work injury.

Having found claimant's ongoing back symptoms are causally related to his work injury, the next issue to address on appeal is the extent of claimant's permanent disability. Defendants argue the deputy commissioner erred in his determination that

claimant is permanently and totally disabled because the deputy commissioner relied solely on the opinion of Dr. Stoken, which they assert is flawed, without taking other relevant factors into consideration, such as claimant's credibility and lack of motivation or the opinions of claimant's treating physicians.

While I appreciate defendants' frustration with the deputy commissioner's limited findings, I ultimately agree with the deputy commissioner that claimant is permanently and totally disabled due to his September 1, 2014, work injury. Defendants argue Dr. Stoken's report did not consider claimant's pre-existing limp. While claimant testified he had a limp when he started working for defendant-employer, he was also able to walk several miles each shift he worked for defendant-employer without assistance. (Tr. pp. 16, 40). The effects of claimant's September 1, 2014, work injury, however, left him unable to walk without assistance. (Ex. 11, p. 42; Tr., pp. 28, 76) Thus, even if claimant had a pre-existing limp, claimant's gait was significantly altered by the work-related injury. For these reasons, I find Dr. Stoken's report persuasive.

Even assuming Dr. Stoken's report is flawed, however, Dr. Burd, a defendant-retained physician, restricted claimant to the sedentary to light physical demand level. (See Ex. 2, p. 48) Further, as mentioned, claimant testified his job with defendant-employer required walking several miles each shift, and I find claimant's ongoing back complaints would preclude him from performing this amount of walking.

At hearing, claimant admitted he has not attempted to return to work, but he also testified he did not think there are any jobs he would be physically capable of performing. (Tr. p. 27) When defendant-employer hired claimant in 2014, he had been essentially unemployed since 1998. (Tr., pp. 35-36) Claimant's prior back injury in the late 1990s left him unable to pass a DOT physical, and the only job he attempted between 1998 and 2014 was a truck driving job that he was physically incapable of performing. (Ex. 14, pp. 21, 26) During this period of unemployment, he received Social Security disability benefits before switching over to Social Security retirement benefits. (Ex. 14, p. 24) Claimant testified he had considered himself retired for a number of years when he was hired by defendant-employer. (Ex. 14, p. 29)

As evidenced by claimant's receipt of Social Security disability benefits, I find claimant's prior back injury in the 1990s limited claimant's earning capacity prior to his employment with defendant-employer. That said, by hiring claimant, defendant-employer obviously believed claimant had some residual earning capacity. Whatever earning capacity remained, however, was severely damaged by claimant's September 1, 2014, work injury.

I acknowledge claimant made no attempt to return to work at the time of the hearing, and I also acknowledge there are problems with claimant's overall credibility, especially in light of his exaggerated description of his fall and his changing stories with various medical providers. I also recognize claimant was often times non-cooperative, if not noncompliant, with his treating physicians. However, the fact remains that claimant's ongoing back symptoms would make it impossible for him to return to his job with

defendant-employer, and it is difficult to imagine a job claimant could perform given his ongoing back complaints and the assistance he requires. Considering all the appropriate factors of industrial disability, including claimant's experience, training, education, physical capabilities, and motivation, I find claimant's work injury wholly disabled him from performing the work that he would otherwise be capable of performing. I therefore affirm the deputy commissioner and I find claimant is permanently and totally disabled.

Having found claimant to be permanently and totally disabled, the next issue to be addressed is the rate at which claimant's benefits should be paid. The deputy commissioner calculated a rate of $231.80, which was not proposed by either party. The deputy commissioner excluded the two-week periods ending July 19, 2014, and August 2, 2014, because claimant worked significantly less hours in those periods than in the remaining relevant weeks. It is not clear, however, which weeks, if any, the deputy commissioner used to replace those two excluded weeks.

Defendants on appeal assert a rate of $198.80, which includes the two-week periods that were excluded by the deputy commissioner. Defendants argue it was customary for claimant's hours to fluctuate and for claimant to work less than 40 hours per week. Unfortunately, defendants offered no evidence of the breakdown of the two-week pay periods, so I have insufficient evidence to make any findings with respect to claimant's weekly hours. The only evidence regarding claimant's rate is presented in two-week periods.

In the two-week period ending July 19, 2014, claimant only worked 30 hours, and in the two-week period ending August 2, 2014, claimant only worked 48 hours. In the two-week periods immediately preceding claimant's injury, claimant worked 82 hours, and in the four two-week periods before the period ending on July 19, 2014, claimant worked no less than 65.75 hours. (Ex. C, p. 20; Ex. 15, pp. 3-4) Because the 30- and 48-hour periods are outliers, I agree with the deputy commissioner and find that the two-week periods ending on July 19, 2014, and August 2, 2014, do not fairly reflect claimant's customary earnings.

I also find the two-week periods ending on May 10, 2014, (92.25 hours) and April 26, 2014 (72 hours) are the closest previous periods that fairly represent claimant's customary earnings. I therefore find the following two-week periods should be included in claimant's rate calculation: (1) 8/16/14 (82.00 hours); (2) 7/05/14 (65.75 hours); (3) 6/21/14 (94.50 hours); (4) 6/07/14 (84.00 hours); (5) 5/24/14 (76.00 hours); (6) 5/10/14 (92.25 hours); (7) 4/26/14 (72.00 hours). (See Ex. C, p. 20; Ex. 15, pp. 3-4) This amounts to 566.50 hours. At a rate of $8.65 per hour (Ex. 15, pp. 3-4), claimant's average gross weekly earnings were $350.02 (566.50 hours x $8.65 = $4,900.23 / 14). The deputy commissioner's finding regarding claimant's average weekly wage is therefore modified.

The parties agree that claimant was single and entitled to one exemption. (Hearing Report, p. 1)

Defendants also appeal the deputy commissioner's penalty award. In his decision, the deputy commissioner awarded $1,000.00 in penalties for defendants' underpayment of the rate. More specifically, the deputy commissioner found it was unreasonable to include the two-week periods in which claimant only worked 30 and 48 hours.

On appeal, defendants argue the weekly rate was obviously fairly debatable given the fact that the deputy commissioner rejected both parties' rate calculations. This overlooks the basis of the deputy commissioner's penalty award, however. The question is whether it was fairly debatable for defendants to include the two-week periods in which claimant only worked 30 and 48 hours. As mentioned, with the exception of the week during which claimant was hired, the next lowest hours worked by claimant in any two-week period was 65.75 hours. All other two-week periods were above 70 hours. (Ex. 15, pp. 3-4) Because the two-week periods in which claimant worked only 30 and 48 hours were so significantly different from all other two-week periods in evidence, I find the issue of whether these two-week periods fairly reflected claimant's customary earnings was not fairly debatable. I therefore agree with the deputy commissioner and find defendants had no reasonable basis for including these two two-week pay periods.

CONCLUSIONS OF LAW

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).

The question of causal connection is essentially within the domain of expert testimony. The expert medical evidence must be considered with all other evidence introduced bearing on the causal connection between the injury and the disability. Supportive lay testimony may be used to buttress the expert testimony and, therefore, is also relevant and material to the causation question. The weight to be given to an expert opinion is determined by the finder of fact and may be affected by the accuracy of the facts the expert relied upon as well as other surrounding circumstances. The expert opinion may be accepted or rejected, in whole or in part. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); IBP, Inc. v. Harpole, 621 N.W.2d 410 (Iowa 2001); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995). Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417 (Iowa 1994). Unrebutted expert medical testimony cannot be summarily rejected. Poula v. Siouxland Wall & Ceiling, Inc., 516 N.W.2d 910 (Iowa App. 1994).

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 R. Co., 219 Iowa 587, 258 N.W. 899 (1935).

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

As discussed above, I found claimant's ongoing back pain is related to his September 1, 2014, work injury. I also found claimant's injury and ongoing back symptoms wholly disabled him from performing the work that he would otherwise be capable of performing. As such, I affirm the deputy commissioner and conclude claimant is permanently and totally disabled.

Permanent total disability compensation is payable during the period of the employee's disability. Iowa Code section 85.34(3)(a). As such, permanent total disability benefits generally commence on the date of injury. In this case, the parties stipulated at hearing that permanent disability commenced on January 13, 2016. Presumably, claimant was paid healing period benefits through this date. Pursuant to Iowa Code section 85.34(3)(b), any weekly benefits paid to claimant pursuant to Iowa Code section 85.34(1) would be credited against this award. Therefore, it is sufficient to accept the parties' stipulation and commence permanent total disability benefits effective January 13, 2016.

Defendants on appeal argue they are entitled to a credit or apportionment under Iowa Code section 85.34(7) for claimant's prior back injury in the 1990s, which they acknowledge occurred with a different employer.

In 2004, Iowa Code section 85.34(2)(u) was amended to read as follows:

> In all cases of permanent partial disability other than those hereinabove described or referred to in paragraphs "a" through "t" hereof, the compensation shall be paid during the number of weeks in relation to five hundred weeks as the reduction in the employee's earning capacity caused by the disability bears *in relation to the earning capacity that the employee possessed when the injury occurred.*

Iowa Code section 85.34(2)(u) (emphasis added).

In the same year, the legislature also added subsection (7) of Iowa Code section 85.34. Only paragraph (a) of subsection (7) is relevant to this decision given the fact that claimant's prior back injury involved a different employer:

> a. An employer is fully liable for compensating all of an employee's disability that arises out of and in the course of the employee's employment with the employer. An employer is not liable for compensating an employee's preexisting disability that arose out of and in the course of employment with a different employer or from causes unrelated to employment.

Iowa Code section 85.34(7)(a).

These changes were intended to modify—not abrogate—the so-called "fresh-start rule." Roberts Dairy v. Billick, 861 N.W.2d 814, 820 (Iowa 2015) (citing 2004 Iowa Acts 1st Extraordinary Sess. Ch. 1001, § 20 ("The market reevaluates a person as a working unit each time the person competes in the competitive labor market, causing a fresh start with each change of employment.")). The fresh-start rule is based upon the premise that a claimant's earnings in the competitive labor market at the time of a work injury are reflective of that workers' earning capacity. See id. at 818. In other words, if a claimant has any physical or mental impairment limiting his employment prior to a work injury, the impact of that impairment upon a claimant's earning capacity has already occurred and is reflected in his earnings at the time of injury. See id.

In Roberts Dairy v. Billick, the Iowa Supreme Court addressed the effects and extent of the 2004 amendments and concluded as follows:

> [T]he general assembly unmistakably reaffirmed the vitality of the fresh-start rule in cases involving successive injuries in the course and scope of employment with different employers. With each fresh start, the employee's earning capacity is reset. If a percentage of that refreshed earning capacity is subsequently lost as a consequence of a permanent partial unscheduled injury, compensation for that percentage is owed. The measure of such compensation is based on "the number of weeks in relation to five hundred weeks as the reduction in the employee's earning capacity caused by the disability bears in relation to the earning capacity that the employee possessed when the injury occurred." Iowa Code § 85.34(2)(u). When a successive injury is sustained in the course and scope of employment with a different employer, the earning capacity possessed by the employee when the injury occurred is an earning capacity refreshed by market forces when the new employment began.

Roberts Dairy, 861 N.W.2d at 822–23.

The court further explained:

> The new employer's liability under section 85.34(2)(u) for permanent partial disability caused by a successive injury is measured by comparing the claimant's earning capacity "when the injury occurred" with "the reduction in earning capacity caused by the disability." Id. § 85.34(2)(u). The earning capacity when the injury occurred is a refreshed capacity provided by the fresh-start rule. When, as a consequence of a successive work-related injury, part of that refreshed earning capacity is lost, compensation is owed under section 85.34(2)(u). See id. In this context, the fresh-start rule holds the employer liable for a work-related permanent partial loss of the new earning capacity refreshed by market forces and existing at the time of the successive injury—not for a preexisting disability arising from employment with a different employer.

Id. at 823.

Thus, a claimant's percentage of industrial loss is the loss of earning capacity from what existed immediately prior to the work injury. See id.; see also Iowa Code section 85.34(u). This means a claimant who is severely impaired before he is hired by a new employer can still sustain a significant industrial disability if a work injury eliminates what is left of the earning capacity that existed just before injury. See Steffan v. Hawkeye Truck & Trailer, File No. 5022821 (App. September 9, 2009).

Applying the Iowa Supreme Court's holding in Roberts Dairy to this case, I reject defendants' argument that they are entitled a credit for, or that its liability for, claimant's industrial disability should be apportioned to reflect claimant's prior back injury with a different employer. Under the fresh-start rule, defendants are liable for the work-related loss of claimant's earning capacity that was refreshed by market forces and existing at the time of his injury on September 1, 2014. Roberts Dairy, 861 N.W.2d at 823. Ultimately, while an earlier back injury with a different employer limited the work claimant was physically capable of performing, I conclude claimant's September 1, 2014, work injury took away all that was left of claimant's earning capacity which existed just before his work injury, leaving him permanently and totally disabled. I therefore conclude defendants are not entitled to a credit or an apportionment under Iowa Code section 85.34(7)(a).

The next issue to be determined is the proper weekly rate at which claimant's permanent total disability benefits should be paid. Specifically, the parties dispute claimant's gross weekly earnings at the time of the 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 the employee was injured as the employer regularly required for the work or employment. The various subsections of section 85.36 set forth

methods of computing weekly earnings depending upon the type of earnings and employment.

If the employee is paid on a daily or hourly basis or by output, weekly earnings are computed by dividing by 13 the earnings over the 13-week period immediately preceding the injury. Any week that does not fairly reflect the employee's customary earnings is excluded, however. Iowa Code section 85.36(6).

Defendants on appeal assert the deputy commissioner erred by excluding two of the two-week pay periods because it was customary for claimant's hours to fluctuate. I do not find defendants' argument persuasive.

Iowa Code section 85.36(6) provides that "[a] week which does not fairy reflect the employee's customary earnings shall be replaced by the closest previous week with earnings that fairly represent the employee's customary earnings." Iowa Code section 85.36(6) (emphasis added). Whether it was customary for claimant's hours to fluctuate is irrelevant to whether the week fairly reflects claimant's customary earnings.

I found the two-week periods ending July 19, 2014, and August 2, 2014, did not fairly reflect claimant's customary earnings and therefore should be replaced with the two-week periods ending on May 10, 2014, and April, 26, 2014. I therefore found claimant's average gross weekly earnings to be $350.02.

The weekly benefit amount payable to an employee shall be based upon 80 percent of the employee's weekly spendable earnings, but shall not exceed an amount, rounded to the nearest dollar, equal to 66-2/3 percent of the statewide average weekly wage paid employees as determined by the Department of Workforce Development. Iowa Code section 85.37.

Having found that claimant's gross average weekly wage was $350.02 and relying upon the parties' stipulations that he is single with one exemption, I conclude the applicable weekly rate for permanent total disability benefits in this case is $229.49. The deputy commissioner's conclusion regarding claimant's rate is therefore modified.

The next issue to be decided is whether claimant is entitled to penalty benefits for defendants' underpayment of claimant's weekly rate.

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).

I found the issue of whether the two-week periods at issue fairly reflected claimant's customary earnings was not fairly debatable, and as such, I also found defendants had no reasonable basis for including these two two-week periods.

I found claimant's rate is $229.49, meaning defendants underpaid claimant by $30.59 per week ($229.49 - $198.90). This resulted in an underpayment of more than $4,000.00 at the time of the hearing. I ultimately agree with the deputy commissioner that a penalty of $1,000.00, which is in the range of 25 percent, is necessary and

appropriate to deter such actions in the future. The deputy commissioner's penalty award is therefore affirmed.

The final issue to be decided on appeal is costs. Defendants argue the deputy commissioner erred by not addressing whether claimant should be assessed the $400.00 no-show fee from Dr. Mooney's office.

Assessment of costs is a discretionary function of this agency. Iowa Code section 86.40. Costs are to be assessed at the discretion of the deputy commissioner or workers' compensation commissioner hearing the case. 876 IAC 4.33.

Defendants were assessed a $400.00 no-show fee for claimant's failure to appear at Dr. Mooney's office. While I empathize with defendants, who were monetarily penalized for claimant's failure to appear at an appointment through no fault of their own, none of the subsections of rule 876-4.33 allow me to assess fees to claimant under these circumstances. I therefore decline to tax claimant with any costs. The commissioner's costs assessment is therefore affirmed.

ORDER

IT IS THEREFORE ORDERED that the arbitration decision filed on June 19, 2017, is affirmed in part and modified in part.

Defendants shall pay claimant permanent total disability benefits commencing January 13, 2016, at the rate of two hundred twenty-nine and 49/100 dollars ($229.49), and continuing during periods of disability.

Defendants shall receive credit for all benefits previously paid.

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

Defendants shall pay claimant a penalty of one thousand and no/100 dollars ($1,000.00).

Pursuant to rule 876 IAC 4.33, defendants shall pay claimant's costs of the arbitration proceeding, and the parties shall split the costs of the appeal, including the cost of the hearing transcript.

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

Signed and filed on this 17th day of January, 2019.

JOSEPH S. CORTESE II
WORKERS' COMPENSATION
COMMISSIONER

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