BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

DONALD L. RATLIFF,

Claimant,

vs.

QUAKER OATS COMPANY,

Employer,

and

INDEMNITY INSURANCE COMPANY OF NORTH AMERICA,

Insurance Carrier,
Defendants.

File No. 5046704

ARBITRATION

DECISION

Head Note No.: 1803

STATEMENT OF THE CASE

Donald Ratliff, claimant, has filed a petition in arbitration and seeks workers' compensation from Quaker Oats Company, employer and Indemnity Insurance Company of North America, insurance carrier, defendants.

This matter came on for hearing before deputy workers' compensation commissioner, Jon E. Heitland, on April 13, 2015 in Cedar Rapids, Iowa. The record in the case consists of claimant's exhibits 1 through 10; defense exhibits A through J; as well as the testimony of the claimant.

ISSUES

The parties presented the following issues for determination:

1. Whether the claimant is entitled to temporary total disability or healing period benefits during a period of recovery.

2. The extent of the claimant's entitlement to permanent partial disability benefits.

3. The commencement date for any permanent partial disability benefits awarded.

4. The correct rate of compensation for the claimant.

5. Whether the claimant is entitled to penalty benefits.

FINDINGS OF FACT

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

Donald Ratliff testified he is 60 years old. He grew up in Watkins, Iowa, and later lived in Troy Mills, Iowa. He graduated from high school in 1972. He has no further education.

His work experience includes working on farms during high school, then working at a mobile home park mowing lawns, setting up mobile homes, etc. He then worked at Cedar Rapids Merchandising, filling vending machines and driving a truck. He worked there about four months. He then worked at Iowa Manufacturing Company, where he operated a lathe. He was laid off in 1975. In 1976 he began working at Quaker Oats, but was laid off a year later. He returned to Quaker Oats and has worked there until this year, 2015.

When he was hired at Quaker Oats, he underwent a physical. He was in good health. He had no shoulder problems. He was athletic, playing basketball, baseball and softball.

At Quaker Oats, he worked primarily in the package department. Over the years, he worked at several positions. He was a tube blending machine tender, and later worked at a pancake job where he had to lift up to 50 pounds. He did that for nine years. His next job also lasted nine years. He then worked at the Tech Service department for six years, where he mowed the grass, cleaned the parking lot, changed light bulbs, etc. Parts of that job were physically demanding. He then worked as an Instant Oats line operator, where he put the product into packages and sent them down the production line. He then worked as a tender, putting oatmeal into the round tubes. He worked at that job about a year. He later did a job operating a fork truck.

After about six months at the fork truck job, he first noticed a problem with his left shoulder. He is left hand dominant. He reported pain to his employer, and was offered deep tissue massage with someone who may have been a chiropractor. After three weeks, she indicated there was nothing further she could do for him. The employer then offered physical therapy, which was done in the plant's health center. After a week and a half, it was making the pain worse.

Claimant was then sent to the company doctor, Jeffrey Westpheling, M.D., who diagnosed a frozen shoulder. He recommended further physical therapy, but then discontinued that and ordered an x-ray and eventually an MRI. The MRI showed a rotator cuff tear and a biceps tendon tear.

Claimant was then referred to Matthew White, M.D., an orthopedic surgeon. He recommended surgery, which occurred on January 31, 2013. Both the rotator cuff tear and the biceps tear were repaired. The employer wanted claimant to come back to

work the day of the surgery. Claimant took vacation time instead to avoid a lost time injury. Claimant iced his shoulder a couple of hours per day at work and was paid for eight hours per day, for several days.

Claimant went to physical therapy about three times per week, eventually undergoing 70 therapy sessions. Those sessions helped at first, but eventually there was no improvement. Claimant had pain in his shoulder post-surgery, and was prescribed Percocet for pain. Claimant took pain medication for the pain from his injury and would take extra for physical therapy sessions, as they would increase his pain. He also wore an arm sling which kept his arm out from his side. He had to wear it 24 hours per day. He underwent therapy from February through August. In June 2013, claimant indicated to his physical therapist he was disappointed he was not regaining range of motion in his shoulder. The therapist contemplated forcing the range of motion to "break" the scar tissue.

Dr. White recommended a cortisone injection instead. Claimant was sent back to work where he would drive a fork truck for an hour or two a day, filling in for other drivers. He had work restrictions which included not lifting over 10 pounds.

On August 20, 2013, Dr. White sent claimant back to work and indicated claimant did not need to return for further treatment.

When claimant returned to work, the employer had new fork trucks. The new truck seat was three inches shorter than before, which caused claimant pain in his knees. He reported this, and the employer took him off that job. He was assigned to drive his old truck part of the day, the new one other parts of the day, and eventually claimant was able to operate the new fork truck without pain.

In January 2014, claimant slipped on some ice and twisted his back. Claimant went to a chiropractor, and then his family doctor, Shane Kasner, M.D. Claimant was released to return to work.

Claimant's shoulder was not painful, but he had loss of range of motion. However, in 2014, his shoulder began to have pain in certain positions again. He had been performing his regular work duties. Claimant was referred to Stanley Mathew, M.D., who recommended work restrictions.

The employer did not respond to those restrictions. Instead claimant was sent back to see Dr. White on January 23, 2015. Dr. White told claimant they could do an MRI to see if further surgery was viable, or claimant could go on restrictions. He felt claimant's pain would go away under the restrictions. Claimant was fearful surgery would make things worse. He can live with the limitations, he just does not want to get worse.

Today, claimant has trouble using his left hand to reach things that are high. He is happy he can now get a belt on, but to put on a shirt or jacket, he has to put his left

arm in first or he cannot put it on. He cannot lift things he used to be able to lift. Showering is a problem, and using a towel is difficult. Even brushing his teeth can cause his bicep to cramp up. His sleep is disrupted. He slept on a chair for two years after the injury, but he can now sleep in a bed on his shoulder but he cannot assume the position he would like to. He does not take any medication for his shoulder now, other than over-the-counter pain medications. He lives in a mobile home. He has to mow the lawn and shovel snow, clear out eaves, etc. He is not able to do those tasks due to his limited range of motion, especially the overhead work with the eaves. He has to follow the permanent restrictions from Dr. White and Dr. Mathew.

Anytime he holds something, even something as light as a young kitten, his arm cramps up. If he gets groceries, he has to carry the bag low or his bicep will cramp up. He can no longer participate in sports and has not since the injury. He used to play sports with his grandchildren, bowl, play baseball and basketball. Now he cannot do those things. He played organized baseball since age 5, but cannot now. His daughter has five children but he cannot play with them physically as he could before.

Claimant has some non-work injuries, including breaking his left wrist playing basketball on a work team. In 1975 he had a hairline fracture of his ankle, with no permanent problems. He also had a broken bone while playing baseball.

On February 13, 2015, claimant had a meeting with the human resources personnel who told him he would be placed on a 30 day leave due to his restrictions. He understood the employer had 30 days to find a job to accommodate his restrictions, but there were none. In February 2015, claimant applied for short-term disability benefits, but he was denied. He understood this was because the employer's doctor did not feel he was at maximum medical improvement (MMI) yet. He was also denied long-term disability benefits because he first had to be on short-term disability for six months. Claimant had no income, so he used up his four weeks of vacation he had accumulated. He eventually took early retirement. He had planned to work at least to age 62 and possibly 65.

On cross examination, claimant agreed exhibit G showed he had worked 60 hours some weeks. He took voluntary overtime on weekends. For a 15 month period of time, he was back to his regular work duties until he saw Dr. Mathew. Dr. Mathew gave him work restrictions, and claimant's attorney asked Dr. White if he agreed with those restrictions. Exhibit C, pages 37-38, contains Dr. White's statement he had not seen claimant for two years, and he could not state claimant was at maximum medical improvement. Exhibit H, page 1, is a letter dated March 13, 2015, from claimant's attorney to defendants' attorney, requesting approval of physical therapy.

Claimant agreed that in February 2014, he saw his personal doctor for his slip on the ice and did not mention problems with his left shoulder. He agreed he was not having problems with his shoulder at that time. He had no restrictions since Dr. White released him. His problems started sometime in the summer of 2014. He went back to

Dr. White for treatment, and was given two options: surgery or restrictions. He is still having problems with his left shoulder today.

His bicep pain has been present since he first started doing physical therapy. He agreed his shoulder pain was better in February 2014, but came back during the summer of 2014, and he returned for further treatment in the fall of 2014, in November. That pain continues today.

On re-direct examination, claimant agreed Dr. White stated he was not sure surgery was in claimant's best interests. Claimant agreed, due to the risks of surgery and the possibility his condition could worsen. Claimant stated he worked overtime on a regular basis even before his injury. Exhibit 7 shows claimant usually worked more than 40 hours per week. In the 13 weeks before his injury, he only worked one 40-hour week. He sometimes worked 16 hours overtime per week, and for one week, he worked 40 hours regular time and 40 hours overtime. He has many weeks with more than 50 hours of work.

On re-cross examination, claimant agreed exhibit G shows his hours for late 2014. He saw Dr. Mathew in November 2014, but in December he continued to work weeks with a great deal of overtime.

Claimant underwent surgery in the form of a left shoulder arthroscopic rotator cuff repair, debridement and decompression on January 31, 2013. (Exhibit 3, page 4) Over the next several months, claimant attempted physical therapy and underwent injections. Dr. White continuously revised claimant's work restrictions. He released claimant to work with restrictions of working two hours per day only, doing light duty one arm work. (Ex. 3, p. 7) On February 18, 2013, Dr. White again returned claimant to work with a restriction of light duty or sedentary work with use of one arm. (Ex. 3, p. 10) Claimant underwent physical therapy for a time. On March 20, 2013, Dr. White released claimant to return to work with restrictions of no lifting, pushing, or pulling, and continuation of light duty work. (Ex. 3, p. 13) On May 1, 2013, Dr. White returned claimant to work with a restriction of not lifting more than 10 pounds. (Ex. 3, p. 16) On July 5, 2013, Dr. White released claimant to return to work with a restriction of no above-shoulder reaching, two hours of fork truck driving per day, and not lifting more than 10 pounds the remainder of the day. (Ex. 3, p. 23) On July 19, 2013, Dr. White released claimant to return to work with restrictions of no above shoulder reaching, doing 4 hours of fork truck driving per day, and not lifting more than 10 pounds the rest of the day. (Ex. 3, p. 24) On August 12, 2013, claimant was released with restrictions of working 8 hours per day, 40 hours per week as tolerated, and may perform fork lift duties. (Ex. 3, p. 25)

When claimant completed physical therapy, he was found to lack a full range of motion of the left shoulder. (Ex. 2, p. 3) Dr. White concluded claimant had reached maximum medical improvement and released him to return to work on August 26, 2013 without any restrictions. (Ex. 3, pp. 26-28) At medical visits over the next few months, claimant reported no pain in his left shoulder. (Ex. 3, p. 29; Ex. E, p. 2., p. 3) On December 18, 2013, Dr. White assigned claimant a permanent partial impairment rating

of two percent of the left upper extremity, or one percent of the body as a whole. (Ex. 3, p. 29)

However, in the summer of 2014, claimant's pain symptoms returned. On October 28, 2014, claimant underwent an independent medical examination (IME) by Dr. Mathew. He concluded on November 25, 2014, claimant had a 25 percent permanent partial impairment of the left upper extremity, and recommended permanent work restrictions of avoiding overhead activities without any pushing, pulling, or repetitive rotation of the left shoulder, as well as not lifting more than 20 pounds. (Ex. 4, p. 4) However, as these restrictions were not imposed by a treating doctor, the employer did not honor them.

On January 14, 2015, Dr. White did express agreement with a statement that claimant's permanent impairment would be higher than Dr. White originally opined a year earlier in light of later physical findings by Dr. Mathew. He also agreed with Dr. Mathew's recommended restrictions. (Ex. 3, p. 30)

Claimant also saw Dr. White again, on January 23, 2015. Claimant reported pain with overhead activities or reaching out in front. Dr. White found evidence of a possible new rotator cuff problem. (Ex. 3, p. 32) Dr. White offered claimant two options. First would be another MRI and possible second surgery, which might involve risk due to claimant's diabetes, would not guarantee improvement, and might make claimant's condition worse. The other option was for claimant to learn to live with Dr. Mathew's work restrictions permanently, along with physical therapy and cortisone injections. (Ex. 3, p. 34)

CONCLUSIONS OF LAW

The first issue in this case is whether the claimant is entitled to temporary total disability or healing period benefits during a period of recovery.

Section 85.34(1) provides that healing period benefits are payable to an injured worker who has suffered permanent partial disability until (1) the worker has returned to work; (2) the worker is medically capable of returning to substantially similar employment; or (3) the worker has achieved maximum medical recovery. The healing period can be considered the period during which there is a reasonable expectation of improvement of the disabling condition. See Armstrong Tire & Rubber Co. v. Kubli, 312N.W.2d 60 (Iowa App. 1981). Healing period benefits can be interrupted or intermittent. Teel v. McCord, 394 N.W.2d 405 (Iowa 1986).

In this case, we have the unusual situation where defendants are asserting claimant is still in a healing period, and claimant argues he has reached maximum medical improvement. Defendants rely on Dr. White's expression of agreement with a March 12, 2015, letter composed by defense counsel. (Ex. C, p. 37) Claimant points to Dr. White's note from the last time he saw claimant, January 23, 2015, where Dr. White

set out claimant's two options of further surgery, or living with his restrictions from Dr. Mathew. (Ex. 3, p. 34)

Claimant does not want to undergo a further surgery. Claimant requests a finding that he has reached maximum medical improvement on August 21, 2013, which is the date Dr. White found claimant to be at MMI after his January 2013 rotator cuff surgery. Claimant feels future cortisone injections or physical therapy are maintenance in nature, designed to address anticipated pain and not designed to improve claimant's condition.

Defendants on the other hand point out claimant had a good result from his January 2013 surgery, and was found to be at maximum medical improvement after recovering from that surgery. He returned to his job operating a fork lift.

Claimant then underwent his IME with Dr. Mathew, and at that time work restrictions were recommended. Dr. White expressed agreement with Dr. Mathew's conclusions at the request of claimant's attorney, and agreed a higher rating of impairment was probably appropriate.

This was stated at a time when Dr. White had not seen claimant for over a year. Dr. White then did see claimant again, and found him to have new pain and impairment in his left shoulder. Dr. White felt further surgery might be necessary, and recommended an MRI. He also offered the alternative of foregoing surgery and living with the condition. He also ordered a Functional Capacity Evaluation (FCE) but the report of those results were not available at the hearing. Dr. White also stated further treatment might change the ratings of functional impairment and work restrictions already recommended. (Ex. C, p. 36-38)

Thus, claimant was originally found to be at MMI after his surgery, but his condition later worsened, causing him to seek further treatment. Dr. White found claimant to have indeed worsened, and he offered two alternatives for treatment: surgery or living with the restrictions and treating any further pain with physical therapy and injections.

Although both parties put their own spin on Dr. White's report, a reasonable reading of it indicates he mentions further surgery as an option, although he really does not recommend it. Instead, he states:

> I have reviewed Dr. Mathew's recommendations. I do think that at this point his options would be to obtain a new MRI. This would only ostensibly be to discuss whether or not a surgical parameter would be of value. At this point I'm not convinced that that is in his best interest. He does have diabetes as well as other health conditions that may impact healing, and certainly any sort of surgery would not be a guarantee to make him better, and in some regards may make his function less.

> Alternatively, I do think that following along with restrictions long term would be a reasonable recommendation. (emphasis added)

(Ex. C, p. 36)

Thus, since Dr. White sees surgery as potentially risky, and continuing to live with restrictions as reasonable, it is concluded claimant has reached maximum medical improvement. This is even more true since claimant, who is the ultimate decider of the question of whether he will undergo surgery or not, does not wish to do so.

The next issue is the extent of the claimant's entitlement to permanent partial disability benefits.

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 R. Co., 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 the 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.

The parties agree claimant has suffered an unscheduled injury. He was diagnosed by Dr. Westpheling with left adhesive capsulitis and a left rotator cuff tear. Dr. White found a left shoulder full-thickness rotator cuff tear and left shoulder degenerative SLAP tear/biceps tendinopathy. (Ex. 3, p. 4)

Claimant is 60 years old. He has a high school diploma. He has worked most of his life for Quaker Oats in various physical labor capacities, from 1977 to 2015. (Ex. 6, p. 2) His work duties required him to lift 50 pounds on an occasional basis, push and pull up to 60 pounds on an occasional basis at waist height, and to reach above the shoulder on an occasional basis. (Ex. 5, p. 3) He often worked overtime hours.

As a result of his injury, he is no longer able to perform these duties. Eventually, he took early retirement when the employer could not find a position within his restrictions. This has resulted in a loss of earnings for him.

He was given a rating of permanent partial impairment by Dr. White of two percent of the left upper extremity, or one percent of the body as a whole. (Ex. 3, p. 30) Dr. Mathew assigned a rating of permanent partial impairment of 25 percent of the left upper extremity, or 15 percent of the body as a whole. (Ex. 4, p. 4)

Claimant was given permanent work restrictions by Dr. Mathew of avoiding overheard activities without any pushing, pulling, or repetitive rotation of the left shoulder, and no lifting more than 20 pounds. (Ex. 4, p. 4) Dr. White expressed agreement with these restrictions. (Ex. 3, p. 30)

Based on these and all other appropriate factors of industrial disability, it is concluded claimant has, as a result of his work injury, an industrial disability of 50 percent.

The next issue is the commencement date for any permanent partial disability benefits awarded.

Defendants assert claimant has not reached MMI, and therefore is still in a healing period. However, that argument has been rejected and claimant has been found to be at maximum medical improvement. Permanent partial disability benefits shall commence August 21, 2013.

The next issue is the correct rate of compensation for the claimant.

Claimant asserts his average weekly wage, or gross earnings, were $1,616.81 per week. Defendants submit they were $1,494.42. This results in claimant arguing for a rate of $913.23, and defendants $851.62. Claimant was single and had one exemption. Under Iowa Code section 86.36(6), an employee paid on an hourly basis has his rate determined by dividing by 13 the earnings over the last completed 13 consecutive calendar weeks before the injury. Claimant's rate calculation is contained in exhibit 7, page 1. Defendants' calculation is set forth in exhibit I, page 1.

Claimant has omitted from this calculation weeks in which claimant did not work overtime hours, as claimant testified he did normally work overtime. (Ex. 7, p. 1, pp. 3-10; Ex. G, p. 1) Claimant criticizes defendants' calculation of rate for failing to include in the gross earnings shift differential pay, vacation pay, holiday pay, wellness pay, and both an annual bonus and a quarterly bonus. (Ex. I, p. 1) Claimant's rate calculation is set forth in exhibit 7, page 1.

Claimant normally received shift differential pay between $9.00 and $20.00 per week. (Ex. 7, p. 1) Iowa Code section 85.36(6) specifically provides shift differential pay should be included in the rate calculation.

Claimant states defendants improperly excluded claimant's vacation and holiday pay. Claimant received two weeks in which he was paid $217.28 in holiday pay, and one week where he was paid $265.20 vacation pay. As claimant worked 56, 44.25, and 53 hours those weeks, he asserts they are representative of his normal earnings. (Id)

Claimant also disputes defendants' exclusion of two bonuses. Claimant received $240.21 "performance pay" bonus for the quarter April 2012 to June 2012, paid on July 6, 2012. (Ex. 7, pp. 2, 8) On January 27, 2012, claimant received a $500.00 longevity "vacation" bonus. (Ex. 7, pp. 2-3) This was an annual bonus, and claimant has divided it by 52 weeks and added that amount, $9.62, to the weekly earnings. He also received $4.49 in "wellness pay" for the week May 20 to May 26, 2012. (Ex. 7, p. 1, p. 7)

Defendants submit that all 13 weeks prior to the injury, from May 26, 2012 to August 25, 2012, should be used, with the exception of the week ending June 30, 2012. During that week, claimant only worked 33 hours and defendants agree that week is unrepresentative.

In the hearing report, claimant asserts his average weekly wage, or gross earnings, were $1,616.81 per week. Defendants submit they were $1,494.42. This results in claimant arguing for a rate of $913.23, and defendants $851.62. However, in defendants' post hearing brief, they set forth in a table not 13, but 14, weeks of earnings, yet divide the total by 13. This yields an average weekly wage of $1,608.24 and a rate of $908.72. This would appear to be in error. The calculation set forth in defendants' post-hearing brief does include shift differential pay.

Claimant's holiday pay and bonuses are found to be includable in his rate calculation, as well as his shift differential pay. Claimant asserts the bonuses are regular bonuses, which are normally included, and there is no contrary evidence in the record.

Claimant's rate calculation in exhibit 7, page 1, properly excludes three weeks from the 13 weeks before the injury as unrepresentative. Two weeks are paid vacation weeks where claimant did not work at all. The third week he only worked 33 hours and defendants agree this week was unrepresentative. Claimant thus uses 13 representative weeks in his calculation.

Claimant does exclude the week ending August 25, 2012, as unrepresentative because he only worked 40 hours that week. He testified he normally worked overtime. Merely asserting he normally worked overtime does not establish that fact, and that assertion can be overcome by wage records. If his wage records in exhibit 7, page 1, showed a handful of weeks where he only worked 40 hours per week and claimant then excluded those weeks in favor of others where he worked overtime, his calculation would be rejected, as doing so would skew the calculation in his favor. But here, the week ending August 25, 2012, is the only week in the 13 prior to the work injury where claimant did not work over 40 hours per week. The other figures show he did in fact normally work over 40 hours per week, and thus the week ending August 25, 2012, being an isolated aberration from his normal work hours, should be omitted as unrepresentative.

Thus claimant's rate calculation set forth in exhibit 7, page 1, is found to be correct. Claimant's rate is found to be $913.23 per week.

Claimant also seeks temporary partial disability (TPD) benefits from February 1, 2013 to August 26, 2013. However, the hearing report indicates claimant was paid TPD benefits but claimant does not know if they were paid at a correct rate. Neither party addressed this in their post hearing briefs. The undersigned has insufficient evidence in the record to ascertain the party's positions on this issue, or to adjudicate the issue.

The final issue is whether the claimant is entitled to penalty benefits.

If weekly compensation benefits are not fully paid when due, section 86.13 requires that additional benefits be awarded unless the employer shows reasonable cause or excuse for the delay or denial. Robbennolt v. Snap-on Tools Corp., 555 N.W.2d 229 (Iowa 1996).

Delay attributable to the time required to perform a reasonable investigation is not unreasonable. Kiesecker v. Webster City Meats, Inc., 528 N.W.2d 109 (Iowa 1995).

It also is not unreasonable to deny a claim when a good faith issue of law or fact makes the employer's liability fairly debatable. An issue of law is fairly debatable if viable arguments exist in favor of each party. Covia v. Robinson, 507 N.W.2d 411 (Iowa 1993). An issue of fact is fairly debatable if substantial evidence exists which would support a finding favorable to the employer. Gilbert v. USF Holland, Inc., 637 N.W.2d 194 (Iowa 2001).

An employer's bare assertion that a claim is fairly debatable is insufficient to avoid imposition of a penalty. The employer must assert facts upon which the commissioner could reasonably find that the claim was "fairly debatable." Meyers v. Holiday Express Corp., 557 N.W.2d 502 (Iowa 1996).

If the employer fails to show reasonable cause or excuse for the delay or denial, the commissioner shall impose a penalty in an amount up to 50 percent of the amount unreasonably delayed or denied. Christensen v. Snap-on Tools Corp., 554 N.W.2d 254 (Iowa 1996). The factors to be considered in determining the amount of the penalty include the length of the delay, the number of delays, the information available to the employer and the employer's past record of penalties. Robbennolt, 555 N.W.2d at 238.

Defendants paid to claimant 27 weeks of temporary partial disability benefits. Claimant worked under temporary restrictions from Dr. White after his left rotator cuff surgery. Claimant was paid temporary partial disability benefits from February 1, 2013 to August 26, 2013. Claimant requested wage records from defendants and did not receive them. Thus, claimant cannot state he was underpaid temporary partial disability benefits but feels it is likely because defendants paid other benefits at an incorrect rate.

Claimant bears the burden of proof for entitlement to any benefits requested. The undersigned cannot award temporary partial disability benefits due to insufficient evidence.

Claimant also seeks penalty benefits for underpayment of benefits due to the incorrect rate. (Ex. 8, p. 1) As of the hearing, defendants had paid permanent partial disability benefits of $580.00 per week for 20 weeks. This was less than the rate proposed by defendants at hearing, which was $851.62. It was less than the rate of $913.23 determined in this decision, by $333.23. (Ex. 7, p. 1)

Defendants, as claimant's employer, had full access to his wage records. No reasonable excuse has been offered for the gross miscalculation of claimant's rate. Penalty benefits are appropriate. Defendants will be ordered to pay 50 percent of the underpaid wages of $333.23 per week for 20 weeks.

Defendants paid permanent partial disability benefits based on Dr. White finding claimant at MMI on August 20, 2013. Claimant's entitlement to permanent partial disability benefits commenced at that time. However, defendants did not begin paying the 20 weeks of benefits until December 9, 2013. Claimant asserts 14 of 20 weekly payments were made late, and seeks penalty benefits as a result. (Ex. 3, p. 27; Ex. 8, p. 2)

Again, defendants have not offered a valid reason or excuse for the delay of three and one half months. Penalty benefits are appropriate. Defendants will be ordered to pay 25 percent of the 14 late weekly permanent partial disability benefits as a penalty. Claimant also requests penalty benefits for defendants' failure to pay interest on these late payments. However, the statute does not contemplate penalty on late interest.

Claimant also seeks penalty benefits based on defendants failing to timely pay additional temporary benefits when claimant was placed on unpaid leave for 30 days due to his injury and restrictions. Benefits were not paid until March 5, 2015. (Ex. 8, p. 3)

Claimant was placed on unpaid leave of absence for 30 days. (Ex. 5, p. 10) Claimant began receiving benefits on March 5, 2015. Claimant has been found to have been at maximum medical improvement. These benefits are properly classified as permanent partial disability benefits.

These benefits were paid at an incorrect rate. Although defendants calculated claimant's rate to be $851.62, they continued to pay at the rate of $580.00 per week, or $333.23 per week too low.

As above, defendants have not offered a valid or reasonable reason or excuse for the unreasonable conduct. They offer the fact claimant had returned to work without restrictions as indicative of claimant having no disability from his work injury. This is

unreasonable as claimant underwent surgery, had two ratings of permanent partial impairment, and permanent work restrictions. He clearly had industrial disability from his work injury.

A penalty is appropriate. Defendants will be ordered to pay as a penalty 50 percent of the permanent partial disability benefits paid at the incorrect rate of $580.00 per week.

ORDER

THEREFORE IT IS ORDERED:

Defendants shall pay unto the claimant two hundred fifty (250) weeks of permanent partial disability benefits at the rate of nine hundred thirteen and 23/100 dollars ($913.23) per week from August 21, 2013.

Defendants shall pay additional benefits as a penalty pursuant to Iowa Code section 86.13 as set forth in the decision above.

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 benefits previously paid.

Defendants shall pay the claimant's prior medical expenses submitted by claimant at the hearing.

Defendants shall pay the future medical expenses of the claimant necessitated by the work injury.

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

Costs are taxed to defendants.

Signed and filed this 16th day of July, 2015.

JON E. HEITLAND
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

Copies To:

Robert R. Rush
Attorney at Law
PO Box 637
Cedar Rapids, IA 52406-0637
bob@rushnicholson.com

Timothy W. Wegman
Attorney at Law
6800 Lake Drive, Suite 125
West Des Moines, IA 50266
tim.wegman@peddicord-law.com

JEH/kjw

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.