BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

WESLEY JOBE,	:	
Claimant,	:	File No. 1651662.03
vs.	:	
AMSTED RAIL COMPANY, INC.,	:	ARBITRATION DECISION
Employer,	:	
Self-Insured,	:	Head Notes: 1108.50, 1402.40, 1804,
Defendant.	:	4000.2, 4100

STATEMENT OF THE CASE

Wesley Jobe, claimant, filed a petition in arbitration seeking workers' compensation benefits from Amsted Rail Company, Inc., self-insured employer as defendant. Hearing was held on September 20, 2021. This case was scheduled to be an in-person hearing occurring in Des Moines. However, due to the outbreak of a pandemic in Iowa, the Iowa Workers' Compensation Commissioner ordered all hearings to occur via video means, using CourtCall. Accordingly, this case proceeded to a live video hearing via CourtCall with all parties and the court reporter appearing remotely.

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.

Wesley Jobe was the only witness to testify live at trial. The evidentiary record also includes joint exhibits JE1-JE17. All exhibits were received without objection. The evidentiary record closed at the conclusion of the arbitration hearing.

The parties submitted post-hearing briefs on November 17, 2021, at which time the case was fully submitted to the undersigned.

ISSUES

The parties submitted the following issues for resolution:

1. The extent of industrial disability benefits that claimant is entitled to receive including a claim for permanent total disability benefits and the odd lot doctrine.

2. The appropriate date of maximum medical improvement.

3. Whether penalty benefits are appropriate.

4. Assessment of costs.

FINDINGS OF FACT

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

Wesley Jobe was 58 years old at the time of the hearing. On June 21, 2018, Mr. Jobe sustained a work-related injury at Amsted Rail ("Amsted") to his low back. (Testimony)

Mr. Jobe began working at Amsted on October 17, 1983. He worked at Amsted for 35 years. Amsted is a foundry that manufactures train wheels measuring up to 43 inches and weighing up to 1300 pounds. For the first six months Mr. Jobe worked as a gasket setter. This job required Mr. Jobe to lift and scrape gaskets. This job also required using a pry bar. He described this job as physical. He was able to perform this job without any physical difficulties. He was paid $9.75 per hour.

The next job Mr. Jobe performed at Amsted was taper helper; he performed this job for one or two years. This job involved putting a stamp of the date, time, and other details on a finished wheel. He described this as very physical work. He had to roll wheels that weighed 600 to 1300 pounds. He was able to perform this job without any physical difficulties. (Testimony)

Mr. Jobe then went to work in the melt shop as a third helper. This job required him to perform very heavy labor with lifting and bending. He worked in this position for approximately one year. He then moved to second helper. This was also a very physically demanding job. The position required shoveling, twisting, and bending. He had to shovel iron ore, cinder slag, silicon, and manganese. He remained in this position for several years. He did not have any difficulties performing the heavy physical labor required in that job. Mr. Jobe then moved to first helper. In the first helper position he had to use shovels and pry bars. He patched furnaces daily. He was required to move heavy rock that weighed 50 to 75 pounds. This work required heavy lifting and shoveling. Mr. Jobe worked as a first helper for approximately twenty years. He left that position to move to the day shift. He did not have any physical difficulties performing this job. (Testimony)

On the day shift Mr. Jobe worked in mold repair utility. This was also a very physical job that included heavy lifting. He performed this work for five years and did not have any physical problems performing this job. (Testimony)

Next, Mr. Jobe moved to the shipping department. In this position Mr. Jobe drove a forklift and performed extensive lifting, twisting, and bending. He had to move

some awkward items by hand, items such as 5 x 5s and 4 x 4s. He had no problems performing this job prior to the June 21, 2018 injury. This is the job Mr. Jobe was performing when he sustained the work injury at the center of this litigation. (Testimony)

On June 21, 2018, Mr. Jobe injured his low back while operating the fork truck at Amsted. He was working 12-hour days and driving on a dock that was full of potholes. As he was driving, he felt what he described as something blow in his back. Mr. Jobe reported his injury and the defendant directed his medical care. (Testimony)

Mr. Jobe went to Great River Health Systems on July 17, 2018. He reported that his problem began on June 21, 2018, at work. His primary pain was in his lower back. He described it as aching, sharp, deep, throbbing and excruciating. The impression was low back pain, intervertebral disc disorders with radiculopathy, lumbar region. Based on the MRI findings and his complaints on examination, the provider referred Mr. Jobe to an orthopedic spine specialist. In the meantime, modified duty was recommended. Mr. Jobe reported that he was off work for the next twelve weeks due to surgery for other issues. (JE1, pp. 1-2)

Ultimately, Mr. Jobe underwent five surgeries as the result of the work injury. The first surgery was performed by Robert Foster, M.D. on August 30, 2018. Dr. Foster performed an excision of a foraminal disc herniation on the left side at L3-4. Unfortunately, Mr. Jobe felt very limited relief from the surgery, and he continued to experience low back and leg pain. (JE1, pp. 3-11; testimony)

On November 26, 2018, Mr. Jobe saw Michelle L. Gray, ARNP at Quincy Medical Group. He reported lower back pain with radiation to the left lower extremity. In the last few weeks his pain increased. He had burning pain below his left knee and a throbbing pain in his left thigh. He tried Norco and Tramadol without improvement. His medications were changed and he was given restrictions. (JE2, pp. 1-4)

Mr. Jobe was referred to Matthew Howard, M.D. at the University of Iowa Hospitals and Clinics (UIHC). He reported bilateral low back pain with sciatica. Dr. Howard recommended a second surgery. On January 23, 2019, Dr. Howard performed an L3-L4 lumbar fusion. Mr. Jobe experienced very little relief from the surgery and subsequent physical therapy. He continued to have persistent symptoms of burning pain in his feet, left worse than right. Because there was radiographic evidence of adequate decompression and excellent position of the instrumentation, there were no more neurosurgical options for Mr. Jobe. He was referred for pain management for consideration of a spinal cord stimulator. Dr. Howard referred Mr. Jobe to his primary care physician for medication management. Mr. Jobe was to remain off work. (JE3, pp. 1-23; testimony)

Mr. Jobe began pain management at the UIHC in July 2019 where he saw Rahul Rastogi, M.D. The doctor noted Mr. Jobe had undergone a laminectomy and numerous bouts of physical therapy with modest benefits. Mr. Jobe had tried numerous pain medications. He noted Mr. Jobe underwent lumbar decompression fusion in January

2019. After the fusion, Mr. Jobe began developing bilateral lower extremity burning sensation which worsened over the last several months. An EMG demonstrated no definite abnormalities. Dr. Rastogi noted failed back syndrome. He discussed a spinal cord stimulator with Mr. Jobe and then made a referral for pain psychology and a psychiatrist to reduce his stress, anxiety, and clinical depression. (JE3, pp. 24-40)

On September 9, 2019, Mr. Jobe underwent a psychological assessment pre-spinal cord stimulator pain psychology evaluation at UIHC with Beth Dinoff, PhD, clinical pain psychologist. Mr. Jobe was not sure if he wanted to move forward with the spinal cord stimulator trial. She advised Mr. Jobe that Dr. Rastogi required 6 months of smoking cessation prior to spinal cord stimulator trial. Mr. Jobe smoked a half a pack per day and he was not considering smoking cessation. He was also not amenable to decreasing his current pain medications and anxiolytics prior to or after the trial. She identified several psychosocial risk factors including moderate clinical depression, severe clinical anxiety, and pain catastrophizing. She suggested he pursue pain psychology for coping with chronic pain. He declined to schedule with UIHC pain psychology. (JE4)

Dr. Rastogi saw Mr. Jobe again on September 18, 2019. The doctor advised Mr. Jobe that to proceed with the spinal cord stimulator trial he needed to stop smoking for 6 months. He advised Mr. Jobe to start physical therapy and gentle stretching exercises. It was also recommended that Mr. Jobe talk to his primary care physician regarding referral to a psychiatrist and psychologist to reduce his stress, anxiety, and clinical depression because this is important for success of the spinal cord stimulator. (JE3, pp. 41-48)

On October 25, 2019, Dr. Howard opined that Mr. Jobe sustained 27 percent whole person permanent impairment pursuant to the AMA Guides to the Evaluation of Permanent Impairment, 5th Edition, page 384, Table 15-3 and Example 15-6, p. 387. (JE10, p. 2)

Mr. Jobe saw Albert G. Singh, M.D. at Quincy Medical Group on November 25, 2019. He reported his pain as 6 out of 10 and primarily located in the left side of his low back. He also complained of burning pain bilaterally in his feet with weakness of his left knee. He was seen at UIHC and was initially offered a spinal cord stimulator trial. However, the psych evaluation noted that his level of somatization suggested that he was at risk for converting his emotional symptoms into physical sensations. He was told at the UIHC that he was not a candidate for a trial of a spinal cord stimulator. Dr. Singh offered to send him for a second psych evaluation to see if he was a candidate for a stimulator. (JE2, pp. 5-9)

On March 29, 2020, Dr. Howard opined that Mr. Jobe had 20 percent whole person disability due to his lumbar spine. (JE4, p. 49)

In July 2020, Mr. Jobe had his first appointment with Julie A. Van Hove, LCPC at Quincy for anxiety and depression. She provided individual psychotherapy with a cognitive behavioral therapy approach. (JE2)

Dr. Singh recommended a trial of a spinal cord stimulator. He referred him to Sanjay Sundar, M.D. On October 22, 2020, Mr. Jobe saw Dr. Sundar at ORA Orthopedics. His assessment was lumbar radiculitis, lumbar post laminectomy syndrome, previous lumbar fusion, and long-term use of opiate medication. Dr. Sundar recommended a spinal cord stimulator. (JE6, pp. 2-3)

Mr. Jobe underwent a trial of a spinal cord stimulator on November 16, 2020. He reported 90 to 100 percent improvement in his low back pain and radicular symptoms. Dr. Sundar strongly recommended proceeding to a permanent spinal cord stimulator implant. (JE2; JE5, pp. 1-2; JE6, pp. 4-8; testimony)

A permanent spinal cord stimulator was placed on January 11, 2021. On January 19, 2021, Mr. Jobe reported that overall he was pleased with the results. He continued to take hydrocodone. He was to remain off work. (JE6, pp. 6-7)

On February 1, 2021, Mr. Jobe returned to ORA Orthopedics. He was 3 weeks status post permanent placement of a spinal cord stimulator. Mr. Jobe did not feel the device was working properly. Dr. Sundar noted the leads had migrated caudally about 1 segment and may need to be revised in the future. (JE6, pp. 9-10)

On April 6, 2021, Dr. Sundar performed a spinal cord stimulator revision. Approximately one week later Mr. Jobe reported quite a bit of postprocedural soreness and pain. Dr. Sundar was not sure why Mr. Jobe had not turned the device on yet and encouraged him to do so to see how it helped with the pain. If the stimulator did not help then Dr. Sundar would not have anything else to offer him. (JE5, pp. 6-7; JE6, p. 11)

Dr. Sundar's office telephoned Mr. Jobe on April 28, 2021 for his second post-stimulator revision follow-up. The appointment was telephonic due to COVID protocols. Mr. Jobe was not quite certain if the stimulators were providing enough benefit for him or not. He rated his pain as 8/10. Mr. Jobe continued to work with the Medtronic representative for programming options. Dr. Sundar felt that if the stimulator failed to provide benefit, the only option would be to explant the stimulator. (JE6, p. 12)

On May 6, 2021, Mr. Jobe saw his primary care provider Quincy Medical Group where he saw Michelle Gray, ARNP. Mr. Jobe reported that he underwent his second neurostimulator surgery with no change in his pain. He was to see the Medtronic rep the next day to have his settings adjusted. (JE2, pp. 20-23)

Mr. Jobe saw ARNP Gray again on June 18, 2021. The notes indicate that Mr. Jobe was in constant pain and lies down most of the day. The assessment was chronic left-sided low back pain with left-sided sciatica and anxiety and depression. His

medications were adjusted. He was also provided permanent restrictions as follows: no climbing of stairs or ladders, no work around high-speed or moving machinery, no operating of mobile equipment, no work requiring repetitive bending of the waist, no repetitive shoveling, no lifting over 15 pounds, no push or pull over 15 pounds of force, no reaching above shoulder level, and no kneeling or squatting. Additionally, Mr. Jobe requires the ability to change positions: lying, sitting, standing as tolerated. (JE2, pp. 24-25; JE7) I find these are the permanent restrictions Mr. Jobe has as the result of the work injury.

In this case, Mr. Jobe asserts that he is permanently and totally disabled. In the alternative, Mr. Jobe asserts that he is an odd-lot employee. Each side has offered opinions from vocational experts regarding Mr. Jobe's employability.

On July 27, 2021, at the request of claimant's attorney, Barbara Laughlin, M.A. issued an employability assessment. (JE8) As part of her assessment Ms. Laughlin performed a vocational analysis. Ms. Laughlin opined that Mr. Jobe sustained 100 percent loss of all semiskilled and skilled occupations in the closest and good match occupations and 97 percent loss of unskilled occupations. She noted that not all of Mr. Jobe's restrictions could be input into a computerized transferable skills analysis. These include Mr. Jobe's restrictions of needing to alternate positions, no working around high speed or moving machinery, no operating mobile equipment, no work requiring repetitive bending of waist, and no repetitive shoveling. Ms. Laughlin felt that Mr. Jobe's need to change position, including lying down, precluded Mr. Jobe from employment. Ultimately, she concluded, "Mr. Jobe is precluded by employment due to his restrictions. There are no jobs in any quality, quantity, or dependability available to him. His need for accommodation is so severe it is unlikely to be met by any employer not only due to his need to change position but his need to lie down." (JE8, p. 14)

On August 26, 2021, at the request of defendant's attorney, Lana Sellner, MS, CRC, CEAS issued a preliminary employability analysis. Ms. Sellner opined that Mr. Jobe sustained no more than 80 percent occupational loss due to his restrictions. She felt the occupational loss was no more than 80 percent due to positions that can accommodate or self-modify in the labor market. She felt Mr. Jobe could work in positions such as ticket taker, cashier, greeter, courtesy driver (non CDL or passenger license), food order taker, food or small parcel delivery, bench worker, small parts assembly with rotations or work service dispatcher and/or scheduler. (JE14)

Mr. Jobe testified regarding his current condition. He still has his spinal cord stimulator permanently implanted in his back. His current medications are prescribed by the authorized treating physicians at Quincy Medical Group. His daily medications include hydrocodone 4 times per day, meloxicam, Viibryd for anxiety and depression, and the muscle relaxer, diazepam. When his stimulator is on, and he is taking his medications, he rates his pain as a 6 or 7 on a scale of 1 to 10. He does not get a lot of sleep due to the burning in his legs and back. He takes naps daily. Mr. Jobe also must lie down several times per day to try and reduce his pain and discomfort. Mr. Jobe testified that because of his chronic pain and lack of sleep he has problems with his

mental health, including anxiety. Since he received his permanent restrictions, he has tried to find a job, but he has not found an employer that would hire him given his medications and his permanent restrictions including the need to lie down. Mr. Jobe does not believe he would be capable of performing any of the jobs listed in Ms. Sellner's report. (Testimony)

At the time of the hearing Mr. Jobe was 58 years old. He graduated from high school, but barely passed. He has no college or vocational education. His work history included working at Pizza Hut during high school and one year after high school. After Pizza Hut, Mr. Jobe went to work for Griffin Rail which later became Amsted Rail. He has no other employment experience. For the last 35 years that Mr. Jobe was employed he was performing heavy, physically demanding work. As noted above, he was given numerous work restrictions as the result of this work injury. Unfortunately, those restrictions preclude him from returning to the work he performed for 35 years at Amsted. Additionally, Mr. Jobe has been out of the workforce for several years. (Testimony)

When considering and comparing the vocational opinions offered by Ms. Laughlin and Ms. Sellner, I find the opinions of Ms. Laughlin to be the more convincing in this case. Ms. Sellner does not address the daily medications Mr. Jobe takes. While Ms. Sellner does mention possible accommodations, she does not address Mr. Jobe's need to lie down throughout the day. Mr. Jobe testified he tried to find steady employment but could not find an employer who was willing to hire him considering the medications he takes and his permanent restrictions including the need to lie down. I find Mr. Jobe made reasonable but unsuccessful efforts to find steady employment.

With respect to the odd-lot claim, I find that claimant met his burden to establish a prima facie case as an odd-lot employee. Claimant produced a vocational report, which opines that he has been rendered unable to effectively compete for a full-time job in the competitive labor market. Defendant produced a competing vocational report which identified potential types of jobs that could be available to the claimant. However, I did not find defendant's report to be persuasive because the report failed to identify actual available jobs that Mr. Jobe would be capable of performing in his current condition. Defendant did not provide evidence that suitable employment exists for this claimant. Mr. Jobe's testimony regarding his daily medications, need to lie down, and other permanent restrictions cast doubt on the reliability of defendant's vocational report. Thus, I find Mr. Jobe established that he is not employable in any well-known branch of labor market.

Considering Mr. Jobe's age, educational background, employment history, limited ability to retrain, motivation to seek work, length of healing period, permanent impairment, and permanent restrictions, and the other industrial disability factors set forth by the Iowa Supreme Court, I find that Mr. Jobe has proven he is not capable of obtaining or performing competitive, gainful employment given the restrictions that are currently imposed upon him by the Quincy Medical Group. Therefore, using either the

odd-lot theory or the traditional industrial disability analysis, I find that he has proven he is not capable of gainful employment within the competitive labor market.

Claimant is seeking penalty benefits in this case because several benefit checks were delayed without reason or excuse. Defendant disputes the number of weekly checks that were delayed. Defendant does not offer any reason or excuse for the delays.

On December 2, 2020, Mr. Jobe received 3 benefit checks that were paid in a lump sum amount of $2,152.05. This check was issued on December 2, 2020, for the benefit period of November 12, 2020, through December 2, 2020. I find that 2 weeks of benefits were paid late and that defendant has failed to prove a reasonable or probable cause or excuse for the delay in payment of benefits in the amount of $1,434.70. (JE17, p. 1)

On June 23, 2021, Claimant received 4 weekly benefit checks in a lump sum. This check was issued on June 14, 2021, for a benefit period of May 27, 2021, through June 23, 2021. I find that 2 weeks of benefits were paid late and that defendant has failed to prove a reasonable or probable cause or excuse for the delay in payment of benefits in the amount of $1,434.70. (JE17, p. 2)

On July 14, 2021, Mr. Jobe received 3 weekly benefit checks that were late and paid in a lump sum amount. This check was issued on July 9, 2021, for a benefit period of June 24, 2021, through July 14, 2021. I find that 2 weeks of these benefits were paid late and that defendant has failed to prove a reasonable or probable cause or excuse for the delay in payment of benefits in the amount of $1,434.70. (JE17, p. 2)

On September 8, 2021, Mr. Jobe received two checks in a lump sum, rather than weekly. This check was issued on September 8, 2021, for a benefit period of August 26, 2021 through September 8, 2021. I find that 1 week of these benefits were paid late and that defendant has failed to prove a reasonable or probable cause or excuse for the delay in payment of benefits in the amount of $717.35. (JE17, p. 2)

The defendant has been paying weekly benefits since Mr. Jobe was taken off work in July 2018. Throughout the years of paying weekly benefits, it appears that defendant delayed payment on approximately six weeks of benefits. Although claimant is entitled to timely checks, I find that there were not numerous gaps or lengthy delays in the payments. Additionally, the defendant does not have a lengthy history of penalty awards before this agency. Thus, I find penalty in the amount of $1,500.00 is appropriate to punish the employer for its delay in payment of benefits under these facts and should serve as a deterrent against future conduct.

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).

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

Claimant has asserted that as the result of the work injury he is permanently and totally disabled. He also asserts, in the alternative, that he is an odd-lot employee.

First, we will address whether he is an odd-lot employee. In Guyton v. Irving Jensen Co., 373 N.W.2d 101 (Iowa 1985), the Iowa court formally adopted the "odd-lot doctrine." Under that doctrine a worker becomes an odd-lot employee when an injury makes the worker incapable of obtaining employment in any well-known branch of the labor market. An odd-lot worker is thus totally disabled if the only services the worker can perform are "so limited in quality, dependability, or quantity that a reasonably stable market for them does not exist." Id., at 105.

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

Based on the above findings of fact, I conclude that claimant produced a vocational report, which opines that he has been rendered unable to effectively compete for a full-time job in the competitive labor market. Claimant met his prima facie case, and the burden of production shifts to defendant to identify suitable work opportunities for this claimant. Defendant produced a competing vocational report which identified potential types of jobs that could be available to the claimant. However, I did not find defendant's report to be persuasive because the report failed to identify available jobs that Mr. Jobe would be capable of performing in his current condition. Defendant did not provide evidence that suitable employment exists for claimant. Mr. Jobe's testimony regarding his daily medications, need to lie down, and other permanent restrictions cast doubt on the reliability of defendant's vocational report. Thus, I find Mr. Jobe established that he is not employable in any well-known branch of labor market; I conclude he is odd-lot.

Mr. Jobe has also alleged he is permanently and totally disabled. Total disability does not mean a state of absolute helplessness. Permanent total disability occurs where the injury wholly disables the employee from performing work that the employee's experience, training, education, intelligence, and physical capacities would otherwise permit the employee to perform. See McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Diederich v. Tri-City Ry. Co. of Iowa, 219 Iowa 587, 258 N.W. 899 (1935)

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

Based on the above findings of fact, I conclude Mr. Jobe has proven he is not capable of obtaining or performing competitive, gainful employment given the

restrictions that are currently imposed upon him by the Quincy Medical Group. Therefore, using either the odd-lot theory or the traditional industrial disability analysis, I find that he has proven he is not capable of gainful employment within the competitive labor market. Thus, I conclude claimant has proven he is permanently and totally disabled and entitled to benefits pursuant to Iowa Code section 85.34(3).

We now turn to the penalty claim. Mr. Jobe asserts that defendant unreasonably delayed and/or denied his weekly benefits in this case and that defendant should be ordered to pay penalty benefits pursuant to Iowa Code section 86.13.

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 of 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 Custom 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).

Penalty is not imposed for delayed interest payments. Davidson v. Bruce, 594 N.W.2d 833, 840 (Iowa App. 1999). Schadendorf v. Snap-On Tools Corp., 757 N.W.2d 330, 338 (Iowa 2008).

Claimant bears the burden to prove a delay or denial of benefits. Iowa Code section 86.13(1). Claimant has clearly proven a delay in payment of benefits. Defendant offered no reason or excuse for the delay. Once claimant establishes a delay in payment of benefits, it is defendant's burden to establish that they possessed a reasonable basis, or excuse, for the delay in payment of benefits. Iowa Code section 86.13(4)(b)(2). I found that defendant did not offer a reasonable excuse for the delay in payment of benefits. Similarly, I find defendant did not contemporaneously convey their bases for delay of benefits to claimant. Iowa Code section 86.13(4)(c)(3). Defendant bore the burden to establish a reasonable basis, or excuse, and to prove the contemporaneous conveyance of those bases to the claimant. Defendant failed to carry their burden of proof on the penalty issues, and a penalty award is appropriate. Iowa Code section 86.13.

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). In this instance, the delay is only 16 days after expiration of the appeal deadline. However, the information available to the employer clearly established entitlement, and no excuse was offered for the delay, other than internal protocols of the insurance carrier.

Based on the above findings of fact, I conclude defendant unreasonably delayed approximately $5,021.00 worth of benefits. The defendant is encouraged to review its procedures to ensure compliance with the requirement to promptly issue payment to an entitled injured worker to avoid future penalty awards. A penalty sufficient to alert the insurance carrier to this problem and deter similar future conduct is warranted. Having considered the relevant factors and the purposes of the penalty statute, I conclude that a section 86.13 penalty in the amount of $1,500.00 is appropriate to punish the employer for its delay 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.

ORDER

THEREFORE, IT IS ORDERED:

All weekly benefits shall be paid at the stipulated rate of seven hundred seventeen and 35/100 dollars ($717.35).

Defendant shall pay claimant permanent total disability benefits on a weekly basis from June 21, 2018 through the date of the arbitration hearing and continuing into the future during the period of claimant's total disability.

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

Defendant shall pay accrued weekly benefits in a lump sum together with interest 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.

Defendant shall pay penalty benefits in the amount of one thousand five hundred and no/100 dollars ($1,500.00).

Defendant 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 2nd day of March, 2022.

ERIN Q. PALS
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Nicholas Pothitakis (via WCES)

Bill Lamson (via WCES)

Right to Appeal: This decision shall become final unless you or another interested party appeals within 20 days from the date above, pursuant to rule 876-4.27 (17A, 86) of the Iowa Administrative Code. The notice of appeal must be filed via Workers' Compensation Electronic System (WCES) unless the filing party has been granted permission by the Division of Workers' Compensation to file documents in paper form. If such permission has been granted, the notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 150 Des Moines Street, Des Moines, Iowa 50309-1836. The notice of appeal must be received by the Division of Workers' Compensation within 20 days from the date of the decision. The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or legal holiday.