BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

ITHICA JONES, Claimant, vs. AEROTEK, INC., Employer, and INDEMNITY INSURANCE COMPANY OF N.A., Insurance Carrier, Defendants.	File No. 5068857.02 ARBITRATION DECISION Head Note Nos.: 1803, 2500, 2700 2907, 3000, 3001, 3002, 4000 4000.2

STATEMENT OF THE CASE

The claimant, Ithica Jones, filed a petition for arbitration seeking workers' compensation benefits from Aerotek, Inc. ("Aerotek") and Indemnity Insurance Company of N.A. Nicholas Platt appeared on behalf of the claimant. Peter Thill appeared on behalf of the defendant.

The matter came on for hearing on December 16, 2020, before deputy workers' compensation commissioner Andrew M. Phillips. An order issued on March 13, 2020, and updated June 1, 2020, August 14, 2020, and October 12, 2020, by the Iowa Workers' Compensation Commissioner, In the Matter of Coronavirus/COVID-19 Impact on Hearings (Available online at: https://www.iowaworkcomp.gov/order-coronavirus-covid-19 (last viewed December 29, 2020)) amended the hearing assignment order in each case before the Commissioner scheduled for an in-person regular proceeding hearing between March 18, 2020, and March 19, 2021. The amendment makes it so that such hearings will be held by Internet-based video, using CourtCall. The parties appeared electronically, and the hearing proceeded without significant difficulties. The matter was fully submitted on January 15, 2021, after briefing by the parties.

The record in this case consists of Joint Exhibits 1-7, Claimant's Exhibits 1-11, and Defendants' Exhibits A-G. The claimant objected to the receipt of Defendants' Exhibits F and G into evidence. The objection was filed timely prior to the hearing. The objection was argued at the outset of the hearing. Considering all of the arguments, the undersigned overruled the claimant's objection. All of the proposed exhibits were received into evidence. Testimony under oath was also taken from the claimant, Ithica

Jones. Chris Quinlin was appointed the official reporter and custodian of the notes of the proceeding.

STIPULATIONS

Through the hearing report, as reviewed at the commencement of the hearing, the parties stipulated and/or established the following:

1. There was an employer-employee relationship at the time of the alleged injury.

2. The claimant sustained an injury arising out of, and in the course of, employment, on June 19, 2018.

3. That the alleged injury is a cause of temporary disability during a period of recovery.

4. That the alleged injury is a cause of permanent disability.

5. That the disability is a scheduled member disability to the left upper extremity.

6. That the claimant was single, and entitled to one exemption.

7. That the costs listed in Claimant's Exhibit 9 have been paid.

Any entitlement to temporary disability and/or healing period benefits is no longer in dispute. The defendants waived their affirmative defenses.

The parties are now bound by their stipulations.

ISSUES

The parties submitted the following issues for determination:

1. The extent of permanent disability, if any is awarded.

2. Whether the commencement date for permanent partial disability, if any are awarded, is March 22, 2019, as contended by the defendants, or August 13, 2020, as contended by the claimant.

3. Whether the claimant's gross earnings are $913.09, as contended by the defendants, or $955.69, as contended by the claimant, and thus whether the rate of compensation is $548.42 or $569.55.

4. Whether the claimant is entitled to reimbursement for an independent medical examination ("IME") pursuant to Iowa Code section 85.39.

5. Whether the defendants are entitled to a credit for 69.429 weeks of compensation for permanent partial disability benefits paid at a rate of $548.42 per week, through December 16, 2020, and ongoing.

6. Whether the claimant is entitled to penalty benefits pursuant to Iowa Code 86.13.

7. Whether the claimant is entitled to a reimbursement for certain costs, and if so, the amount.

FINDINGS OF FACT

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

Ithica Jones, the claimant, was 23 years old at the time of the hearing. (Testimony). He resides in Ames, Iowa. (Testimony). He is single and has no children. (Testimony). Mr. Jones graduated from Collins-Maxwell High School, and has no subsequent formal education. (Testimony).

After high school, Mr. Jones worked at Menards in the receiving department, welded stainless steel, worked for a company called Viola, and detasseled corn. (Testimony). He also pursued a career in professional hockey. (Testimony). He played for a time in the United States Premier Hockey League. (Testimony).

Mr. Jones began working as a laborer for Aerotek in March of 2018. (Testimony). Aerotek is a temp agency. (Testimony). He was a subcontractor to an environmental company known as Apex. (Testimony). At Apex, Mr. Jones worked on a crew that excavated areas of commercial parking lots in order to adjust water drainage. (Testimony). As a laborer, Mr. Jones stood next to the excavation, and picked up or shoveled soil or concrete that the excavator could not handle. (Testimony). He also laid rebar, and inspected the structure of the excavation. (Testimony). Eventually, Mr. Jones was hired as an employee of Apex. (Testimony).

On June 19, 2018, Mr. Jones was cleaning up a job site in Belton, Missouri, at the end of a day. (Testimony). He walked over to pick up a piece of steel. (Testimony). When he tried to stand up, dirt gave way and he began to fall. (Testimony). He stuck his arms out to brace himself, and was cut by a piece of corrugated steel on the left wrist. (Testimony). After he was cut, blood squirted onto his neck and face from his wrist. (Testimony). A coworker put a tourniquet around his left biceps, and drove him to Belton Regional Medical Center. (Testimony).

Mr. Jones was examined at Belton Regional Medical Center's emergency department on June 19, 2018. (Joint Exhibit 1:1-44). The medical records have the incorrect name for Mr. Jones. (JE 1:1). Mr. Jones testified that this appeared to be due to confusion upon his admittance to the emergency room. (Testimony). Mr. Jones presented with a laceration to his left wrist. (JE 1:3). A previous nerve injury was noted to Mr. Jones' left hand, but Mr. Jones testified that this is false, and that he never had nerve injury to his left hand. (JE 1:3; Testimony). The provider found no tendon exposure. (JE 1:3). The provider diagnosed Mr. Jones with a laceration and avulsion to his left wrist. (JE 1:4). The provider notes an approximate 8 cm laceration on his left wrist. (JE 1:4). Mr. Jones had x-rays of his left wrist, which showed subcutaneous air within the volar soft tissues of the distal forearm and wrist. (JE 1:2). The x-rays showed no fracture or foreign bodies. (JE 1:2). The emergency department discharged him to not return to work until seen by an orthopedic doctor for clearance. (JE 1:12).

On June 29, 2018, Mr. Jones reported to Iowa Ortho, where Benjamin Paulson, M.D., examined him for his left wrist complaints. (JE 2:1-3). Mr. Jones reported pain of 8 out of 10. (JE 2:1). He had numbness and tingling in his arms. (JE 2:1). Pain radiated to his left wrist and was aggravated by movement. (JE 2:1). Over the counter medicine relieved his pain. (JE 2:1). Upon physical examination, Dr. Paulson found decreased range of motion and decreased strength in Mr. Jones' left wrist. (JE 2:2). Mr. Jones continued to have a laceration on his left wrist. (JE 2:2). The ulnar nerve had abnormal sensation. (JE 2:2). Dr. Paulson opined, "[p]atient has LEFT wrist laceration with possible ulnar nerve and tendon involvement." (JE 2:2). Dr. Paulson and the claimant agreed to proceed with a left wrist wound exploration with possible nerve and tendon repairs. (JE 2:2). Dr. Paulson placed Mr. Jones in a short arm fiberglass splint. (JE 2:2). Dr. Paulson prescribed Keflex and Hydrocodone. (JE 2:2). Dr. Paulson gave Mr. Jones restrictions of no use of his left arm. (JE 2:4).

On July 3, 2018, Mr. Jones reported to Mercy River Hills Surgery Center. (JE 3:1-2). Dr. Paulson performed surgery on Mr. Jones' left wrist. (JE 3:1-2). The surgery was a left forearm wound exploration with repair of 60 percent laceration of the flexor digitorum profundus, a 100 percent repair of the ulnar artery, a 100 percent repair of the ulnar nerve, and a 100 percent repair of the flexor carpus ulnaris in the forearm with a Guyon's canal release. (JE 3:1). Dr. Paulson's diagnoses were: "[l]eft forearm laceration with 100% laceration of flexor carpi ulnaris in the forearm, 100% laceration of the ulnar artery in the forearm, 100% laceration of the ulnar nerve in the forearm and 60% laceration of flexor digitorum profundus of the small finger and forearm." (JE 3:1). Dr. Paulson continued the restriction of no use of the left arm through August 16. (JE 2:5). The procedure occurred with no complications. (JE 3:2).

Mr. Jones returned to Dr. Paulson's office on July 16, 2018, for a postoperative examination. (JE 2:6-9). He reported mild symptoms after his surgery. (JE 2:6). Dr. Paulson prescribed Ibuprofen and Keflex. (JE 2:6-9). Mr. Jones was doing okay after his left arm surgery. (JE 2:7). Dr. Paulson discussed scar massage and precautions. (JE 2:7). Dr. Paulson ordered occupational therapy for a splint. (JE 2:7). He continued to restrict Mr. Jones in the use of his left arm. (JE 2:8).

Mr. Jones reported to Select Physical Therapy on July 16, 2018, for occupational therapy. (JE 4:1-2). Molly J. Manning, O.T., examined him. (JE 4:1). He rated his pain 5 out of 10. (JE 4:1). He continued to have a lack of sensation in his left hand along the ulnar nerve pathway. (JE 4:1). Ms. Manning instructed Mr. Jones on the proper usage of a splint. (JE 4:1).

On August 3, 2018, Dr. Paulson examined Mr. Jones for continued postoperative care. (JE 2:10-12). Mr. Jones reported pain of 0 out 10. (JE 2:10). Mr. Jones noted attendance at therapy. (JE 2:10). Mr. Jones took ibuprofen as directed. (JE 2:10). Dr. Paulson found well healing incisions, mild swelling, and mild tenderness over the incision site. (JE 2:11). Mr. Jones displayed a decreased range of motion and decreased sensation. (JE 2:11). Dr. Paulson felt that Mr. Jones was doing well post-surgery. (JE 2:11). Dr. Paulson encouraged heat, massage, and continued occupational therapy. (JE 2:11). Dr. Paulson also recommended that Mr. Jones continue to wear his split for two more weeks, and provided continued restrictions of no use of the left arm until the next appointment. (JE 2:11-12).

Mr. Jones returned to Dr. Paulson's office on August 29, 2018 for another postoperative examination. (JE 2:13-16). Mr. Jones continued to report mild, daily symptoms. (JE 2:13). Therapy relieved his symptoms. (JE 2:13). Mr. Jones reported improved range of motion, but continued numbness in his fingers. (JE 2:13). Upon physical examination, Dr. Paulson found mild swelling and tenderness over the incision site. (JE 2:14). Dr. Paulson also found a slightly decreased range of motion and decreased sensation in the ulnar distribution. (JE 2:14). Dr. Paulson ordered continued occupational therapy. (JE 2:14; 16). He also changed Mr. Jones's work restrictions to include lifting up to 25 pounds with his left arm. (JE 2:14). Dr. Paulson anticipated a return to regular duty in one to two months. (JE 2:14-15).

Mr. Jones reported for his 18th occupational therapy visit with Ms. Manning on September 13, 2018. (JE 4:3-6). Ms. Manning noted that Mr. Jones gained 13 pounds of grip strength and 2 pounds of lateral pinch strength since measurements taken during a prior session. (JE 4:5). Ms. Manning recommended lateral pinch strengthening with theraputty. (JE 4:5). Mr. Jones also tolerated lifting 10 more pounds at all levels, as compared to a prior session. (JE 4:5). He experienced some scar hypersensitivity. (JE 4:5). Ms. Manning indicated that Mr. Jones was highly motivated to return to work and "prepared to mind his lifting restrictions." (JE 4:5). Ms. Manning opined that Mr. Jones' prognosis was "good." (JE 4:5-6). Ms. Manning discharged Mr. Jones because he had to leave town abruptly due to work. (JE 4:6).

On September 21, 2018, Mr. Jones again met with Dr. Paulson. (JE 2:17-19). Mr. Jones continued to have mild symptoms, but noted that they occur randomly. (JE 2:17). Mr. Jones told Dr. Paulson that his symptoms continued to improve, and that his work did not approve additional physical therapy. (JE 2:17). He further reported that cold weather bothered his hands and fingers. (JE 2:17). Dr. Paulson found decreased sensation over the left wrist on examination. (JE 2:18). Dr. Paulson recommended that

Mr. Jones continue occupational therapy, and returned him to work "as tolerated." (JE 2:18-19). Dr. Paulson recommended that Mr. Jones follow up in one month. (JE 2:18).

Mr. Jones returned on November 2, 2018, for a repeat examination by Dr. Paulson. (JE 2:20-22). Mr. Jones continued reporting occasional, mild left wrist pain. (JE 2:20). He reported improvement with his pain and stiffness. (JE 2:20). Upon physical examination, Dr. Paulson found no tenderness, but did note slightly decreased range of motion. (JE 2:21). Mr. Jones showed continued numbness with his ulnar nerve. (JE 2:21). Dr. Paulson wanted to continue to observe Mr. Jones and requested that he return in two months. (JE 2:21). Dr. Paulson continued to recommend no work restrictions. (JE 2:21-22).

On January 4, 2019, Dr. Paulson re-examined Mr. Jones. (JE 2:23-25). Mr. Jones complained of intermittent moderate shooting pain that radiated to his left hand. (JE 2:23). Cold temperatures aggravated his pain. (JE 2:23). He also complained of issues with flexion of his left ring finger. (JE 2:23). Dr. Paulson examined Mr. Jones and found mild swelling to the left wrist. (JE 2:24). Dr. Paulson also found decreased sensation with the ulnar nerve, decreased grip strength, and mild muscle atrophy of the left hand. (JE 2:24). Dr. Paulson wanted to continue to observe Mr. Jones. (JE 2:24). Dr. Paulson declined to add any work restrictions. (JE 2:24-25). Dr. Paulson recommended wearing a glove or hand warmers while working outside. (JE 2:24).

Mr. Jones followed up with Dr. Paulson on March 22, 2019 for continued monitoring. (JE 2:26-28). Mr. Jones indicated that he had constant pain of 7 out of 10. (JE 2:26). Cold temperatures aggravated his pain. (JE 2:26). Warm water relieved his pain. (JE 2:26). Dr. Paulson found that Mr. Jones had a decreased range of motion and muscle atrophy of the left hand. (JE 2:27). Dr. Paulson also documented a complete loss of sensation with the ulnar nerve from mid palm distally. (JE 2:27). Dr. Paulson opined that Mr. Jones plateaued with active treatment. (JE 2:27). He provided no work restrictions. (JE 2:27-28). Dr. Paulson declared Mr. Jones to have reached maximum medical improvement ("MMI") as of the date of the appointment. (JE 2:27).

Dr. Paulson followed up the March 22, 2019, examination with a letter to Jamie Anderton of ESIS wherein he performed an impairment rating analysis. (JE 2:29-30). Dr. Paulson outlined the treatment that he provided, and informed Jamie Anderton that Mr. Jones had an uneventful recovery. (JE 2:29). Dr. Paulson noted, "[u]nfortunately, he regained little function from his ulnar nerve." (JE 2:29). Dr. Paulson opined again that Mr. Jones reached MMI, as his improvement plateaued. (JE 2:29). Dr. Paulson identified identical range of motion for both the left and right thumb, thus assigning no impairment based upon range of motion to the thumb. (JE 2:29). Dr. Paulson identified a loss of range of motion amounting to impairment of 3 percent to the left index finger, to 9 percent impairment to the left middle finger, to 14 percent impairment of the left ring finger, and to 21 percent for the left little finger. (JE 2:29). Dr. Paulson combined these ratings to provide a 6 percent impairment to the hand due to loss of range of motion of the digits. (JE 2:29). Dr. Paulson utilized Table 16-2 in the Fifth Edition of the AMA Guides to Evaluation of Permanent Impairment to translate a 6 percent impairment of

the hand to a 5 percent impairment of the left upper extremity. (JE 2:29-30). Dr. Paulson provided Mr. Jones with an impairment rating of 3 percent for loss of range of motion in his left wrist. (JE 2:30). Dr. Paulson combined these ratings to arrive at 8 percent impairment of the upper extremity due to loss of range of motion between the fingers and left wrist. (JE 2:30). Based upon some sensory issues, Dr. Paulson assigned a 40 percent impairment to the left upper extremity. (JE 2:30). When Dr. Paulson combined the sensory impairment with the range of motion impairment, he arrived at a 45 percent impairment to the left upper extremity. (JE 2:30) Dr. Paulson provided no permanent restrictions. (JE 2:30).

On July 6, 2019, Mr. Jones returned to Dr. Paulson's office complaining of occasional worsening pain to his left wrist. (JE 2:31-32). He told Dr. Paulson that he had numbness and weakness that worsened. (JE 2:31). Dr. Paulson examined Mr. Jones' left hand and found atrophy, decreased range of motion, and decreased sensation. (JE 2:32). Dr. Paulson indicated that he had nothing to offer for nerve damage, and that he encouraged Mr. Jones to continue strengthening exercises. (JE 2:32). Dr. Paulson declined to provide work restrictions. (JE 2:32).

Mr. Jones had a second opinion with Shane Cook, M.D., at Des Moines Orthopaedic Surgeons, P.C., on September 30, 2019. (JE 5:1-3). Dr. Cook reviewed Mr. Jones' history and treatment with Dr. Paulson. (JE 5:1). Mr. Jones expressed concerns about weakness in his left hand. (JE 5:1). He felt as though his hand was not improving, and experienced pain with hyperextension of the wrist. (JE 5:1). Upon physical examination, Dr. Cook noted "significant wasting and atrophy of the intrinsic musculature of the hand." (JE 5:1). Dr. Cook found clawing associated with the small and ring fingers. (JE 5:1). Dr. Cook also found a "very weak grip." (JE 5:1). Dr. Cook opined, "I do not think the patient has recovered any function of the ulnar nerve." (JE 5:1). Dr. Cook also found numbness that carried over to the median nerve distribution. (JE 5:1). Mr. Jones expressed a desire to improve his grip strength. (JE 5:1). Dr. Cook indicated a desire for a nerve conduction test. (JE 5:1).

Mr. Jones had an EMG at Central Iowa Neurology on November 4, 2019. (JE 7:1-4). Irving Wolfe, D.O., performed and interpreted the EMG. (JE 7:2). Dr. Wolfe's impression was that the findings supported severe dysfunction of the left median nerve consistent with carpal tunnel syndrome, severe dysfunction of the left ulnar nerve at the wrist and elbow consistent with cubital tunnel syndrome, and entrapment of the left ulnar nerve at Guyon's canal. (JE 7:2).

On December 9, 2019, Mr. Jones returned to Dr. Cook's office to review his nerve conduction study from November 4, 2019. (JE 5:4-5). The nerve conduction study showed severe dysfunction of the left median nerve consistent with severe carpal tunnel syndrome, and severe dysfunction of the left ulnar nerve at the wrist and elbow consistent with left cubital tunnel syndrome and left ulnar nerve compression at Guyon's canal. (JE 5:4). Dr. Cook reviewed the operative report of Dr. Paulson, and indicated that there were no signs of carpal tunnel release. (JE 5:4). Dr. Cook recommended a

revision to the Guyon canal and carpal tunnel release with extension proximally and median and ulnar nerve neurolysis and a cubital tunnel release. (JE 5:4).

Mr. Jones reported to Orthopaedic Outpatient Surgery Center, L.C., on March 13, 2020, for a surgical procedure by Dr. Cook. (JE 6:1-3). Dr. Cook performed a left cubital tunnel release, a left ulnar nerve submuscular anterior transposition with flexor pronator mass Z-lengthening at the elbow, a left Guyon canal release, a left ulnar nerve extensive neurolysis and exploration, and a left carpal tunnel release with median nerve exploration. (JE 6:1). Dr. Cook's postoperative diagnoses were: left cubital tunnel syndrome, left carpal tunnel syndrome, left Guyon canal syndrome, and previous history of a left ulnar nerve repair. (JE 6:1).

Mr. Jones visited Dr. Cook on March 26, 2020, for a post-operative visit. (JE 5:6-7). Dr. Cook previously performed a left carpal tunnel release, Guyon canal release, ulnar nerve neurolysis, and cubital tunnel release. (JE 5:6). Overall, Mr. Jones indicated that his hand felt somewhat better. (JE 5:6). He complained of dense numbness to the small and ring finger. (JE 5:6). Mr. Jones still had a claw deformity with the small and ring finger. (JE 5:6). Dr. Cook sent Mr. Jones to formal therapy to work on strengthening his hand. (JE 5:6). Dr. Cook allowed Mr. Jones to return to work with a five pound lifting restriction. (JE 5:6). Dr. Cook also told Mr. Jones to avoid repetitive vigorous grasping, pinching, pushing, pulling and twisting. (JE 5:9).

Mr. Jones had additional visits with Select Physical Therapy starting in April of 2020. (JE 4:8-12). Janet Lebsack, O.T., C.H.T., met with Mr. Jones on April 3, 2020. (JE 4:8-12). Mr. Jones reported following a left carpal tunnel release, cubital tunnel release with anterior transposition of the ulnar nerve and flexor pronator, and Guyon's canal release in March of 2020. (JE 4:8). He reported that his last day of work prior to the aforementioned surgery was March 12, 2020. (JE 4:8). Ms. Lebsack recommended moving into dexterity exercises and noted some issues with limiting activities of daily living. (JE 4:11-12).

On April 27, 2020, Mr. Jones followed up with Dr. Cook for his continued postoperative care. (JE 5:10-11). Mr. Jones complained of continued numbness in the small and ring finger, and felt like he still had weakness in his hand. (JE 5:10). Dr. Cook found continued clawing of the ring and small finger on the left hand. (JE 5:10). Mr. Jones showed improvements, but Dr. Cook opined that the ulnar nerve would not recover. (JE 5:10). Dr. Cook provided updated restrictions. (JE 5:10-11).

On May 20, 2020, Mr. Jones returned to Select Physical Therapy for his 20th visit with Ms. Lebsack for continued occupational therapy. (JE 4:13-16). Ms. Lebsack recommended limitations of non-material handling tasks to meet Mr. Jones' job demands for reaching and grasping. (JE 4:15).

Mr. Jones visited Dr. Cook again on June 22, 2020, for continued postoperative follow up. (JE 5:12-13). Mr. Jones felt significantly improved. (JE 5:12). He continued to work and made great strides in therapy. (JE 5:12). He had numbness and tingling in

his small and ring finger. (JE 5:12). Dr. Cook indicated that there was an additional surgery possible if Mr. Jones continued to have issues with his little finger. (JE 5:12). Mr. Jones expressed no desire to have an additional surgery. (JE 5:12). Dr. Cook allowed Mr. Jones to lift up to 30 pounds frequently with his left arm until his next visit on August 3, 2020. (JE 5:14).

On August 12, 2020, Mr. Jones returned to Dr. Cook's office for continued postoperative follow up care. (JE 5:15-16). Overall, Mr. Jones felt better, and felt like he was able to bring his fingers closer together. (JE 5:15). He still complained of numbness in his small and ring fingers. (JE 5:15). Dr. Cook placed Mr. Jones at MMI during this visit. (JE 5:15).

On September 18, 2020, Mr. Jones reported to Sunil Bansal, M.D., M.P.H., for an IME. (Claimant's Exhibit 1:1-14). Dr. Bansal reviewed Mr. Jones' clinical history. (CE 1:1-8). Mr. Jones told Dr. Bansal that he previously injured some tendons in his left elbow due to a dislocation when he was 20 years old. (CE 1:8). He attended physical therapy and recovered without problems. (CE 1:8). Mr. Jones told Dr. Bansal that he wore a glove on his left hand because his fingers locked up. (CE 1:8). He could hold a coffee cup for a short time, but reported numbness and tingling in his fourth and fifth digits. (CE 1:8). After his second surgery, he developed a "shock-like" sensation in his hand near his second finger. (CE 1:8). Dr. Bansal found mild tenderness to palpation in the left elbow, but also noted full range of motion. (CE 1:9). Dr. Bansal also noted severe weakness with the fifth digit adduction and abduction. (CE 1:9). Mr. Jones' left wrist had a loss of two-point sensory discrimination over the thumb, index, and long fingers. (CE 1:9). Mr. Jones' ring and small fingers have no sensation. (CE 1:9). Dr. Bansal performed range of motion and reflex testing. (CE 1:9-10).

Based upon Dr. Bansal's examination, he essentially restated the diagnoses of Dr. Paulson and Dr. Cook. (CE 1:11). Dr. Bansal noted, that based upon the previous ulnar nerve transposition surgery, Mr. Jones may need an ulnar nerve graft. (CE 1:12). Dr. Bansal recommended permanent restrictions of no lifting greater than 25 pounds with the left hand, and no frequent kneeling or squatting. (CE 1:12). Regarding Mr. Jones' left elbow, Dr. Bansal indicated that the claimant suffered a 100 percent sensory deficit, a 100 percent motor deficit, and a 7 percent impairment due to a sensory deficit of the median nerve below the mid forearm involving the ulnar nerve. (CE 1:12). Dr. Bansal assigned the claimant a 35 percent impairment to the upper extremity due to the ulnar nerve below the mid forearm. (CE 1:12). Based upon the foregoing, Dr. Bansal assigned a 40 percent upper extremity impairment for the left elbow. (CE 1:12). For digital sensory deficits related to the left median nerve, or carpal tunnel syndrome, Dr. Bansal arrived at a 5 percent upper extremity impairment rating. (CE 1:13). For issues with left wrist range of motion, Dr. Bansal assigned a 5 percent upper extremity impairment rating. (CE 1:13). Dr. Bansal also assigned impairment ratings to each digit on Mr. Jones' left hand based upon range of motion issues. (CE 1:13-14). Dr. Bansal assigned an impairment of 1 percent to the upper extremity for the left index finger, 2 percent to the upper extremity for the left middle finger, 2 percent to the upper extremity for the left ring finger, and 2 percent to the upper extremity for the left small finger. (CE

1:14). Dr. Bansal totaled the upper extremity impairment ratings and combined them to a 50 percent upper extremity impairment rating, or a 30 percent whole person impairment. (CE 1:14). Dr. Bansal also provided a right knee impairment rating, but the right knee is not at issue in this matter, as the parties previously stipulated that Mr. Jones sustained permanent impairment to the left upper extremity. (CE 1:14). Dr. Bansal agreed with Dr. Cook that Mr. Jones reached MMI on August 12, 2020. (CE 1:14).

On December 2, 2020, Dr. Paulson wrote another letter to Jamie Anderton of ESIS. (Defendants' Exhibit F:13-15). This followed an appointment and examination of Mr. Jones on the same date. (DE G:16-17). Mr. Jones reported constant pain of 4-6 out of 10 in his left wrist. (DE G:16). The pain radiated to his hand, and was aggravated by movement and cold temperatures. (DE G:16). Dr. Paulson found decreased sensation of the left long, ring, and small fingers. (DE G:17). He also found good range of motion in the left elbow and wrist. (DE G:17). Dr. Paulson stated, "[a]gain, unfortunately, I have nothing to offer for the nerve damage." (DE G:17). He encouraged Mr. Jones to continue his strengthening exercises. (DE G:17). Dr. Paulson still considered Mr. Jones at MMI, and needing no restrictions for work. (DE G:17). Dr. Paulson indicated that he could not attribute Mr. Jones' cubital tunnel to the injury to the wrist, and further opined that he did not attribute the injury to Mr. Jones' wrist injury. (DE F:13). Dr. Paulson also noted that Mr. Jones' median nerve was not injured at the wrist, and therefore Mr. Jones' carpal tunnel syndrome is not attributable to his left wrist injury. (DE F:13). Mr. Jones' continued symptoms from his cubital tunnel and carpal tunnel syndromes are ratable, but Dr. Paulson does not think these are connected to the work injury, and excludes them from any rating. (DE F:13). Dr. Paulson proceeded with a rating analysis for Mr. Jones' current conditions. (DE F:13-14). He noted some improvements in range of motion. (DE F:14). He concluded that Mr. Jones suffered a 33 percent impairment of the left upper extremity due to the work injury on June 19, 2018. (DE F:14). Despite some limitations, Mr. Jones told Dr. Paulson that he could continue to perform his job with some accommodations. (DE F:14-15). Dr. Paulson concluded that because of this, no restrictions were necessary. (DE F:15). Dr. Paulson also concluded that Mr. Jones required no further medical treatment or care based upon the June 19, 2018, work incident. (DE F:15).

Dr. Cook wrote a letter to claimant's counsel dated December 14, 2020, outlining the claimant's treatment. (CE 10:1-2). Dr. Cook opined that his treatment of Mr. Cook was due to the June 19, 2018, work injury. (CE 10:1). Further, he opined that Mr. Jones had severe carpal tunnel syndrome that was materially aggravated by the trauma, surgery, and postoperative rehab from the June 19, 2018, work injury. (CE 10:1). Dr. Cook concluded his letter by opining that he agreed with the original 45 percent impairment rating provided by Dr. Paulson on March 22, 2019. (CE 10:2). Dr. Cook goes on to state that a slightly higher rating could be appropriate considering the continued issues that Mr. Jones had with range of motion in the fingers and wrist. (CE 10:2). Dr. Cook does not provide a rating that he thinks is more appropriate. (CE 10:2).

Mr. Jones was displeased by Dr. Paulson's overall treatment. (Testimony). He felt like Dr. Paulson simply sent him down a conveyor system and did not listen to his concerns. (Testimony).

He reported issues with holding cans of soda. (Testimony). He can no longer hold a hockey stick, which put a pause on his professional hockey aspirations. (Testimony). Due to his left wrist injury, he could not fulfill his contract with a Canadian hockey team. (Testimony). He testified that he had no issues with his left hand or arm prior to this incident. (Testimony).

Since his incident, Mr. Jones can continue to do his job, as he adapted around certain limitations. (Testimony). He also requests help when needed. (Testimony). He has not provided his employer with any of Dr. Bansal's restrictions because he does not "want that as a strike" on his name. (Testimony). He wears a wrist guard and glove on his left hand, and has to modify his lifting. (Testimony). Cold weather increases his pain when he is working outside. (Testimony). He has a nagging, burning pain of 4 out of 10. (Testimony). He indicated that if he sleeps on his hand wrong, it takes until midday for his hand to feel "normal." (Testimony). He also received a promotion from Apex to a supervisory position. (Testimony).

Regarding his pay, Mr. Jones testified that he is paid a $55.00 per day per diem. (Testimony). He was paid a per diem for every day that they worked out of town. (Testimony). Mr. Jones testified that he worked out of the office 38 to 40 weeks per year. (Testimony).

CONCLUSIONS OF LAW

The party who would suffer loss if an issue were not established has the burden of proving that issue by a preponderance of the evidence. Iowa R. App. P. 6.904(3).

Permanent Disability

Under the Iowa Workers' Compensation Act, permanent partial disability is compensated either for a loss of use of a scheduled member under Iowa Code 85.34(2)(a)-(u) or for loss of earning capacity under Iowa Code 85.34(2)(v). The extent of scheduled member disability benefits to which an injured worker is entitled is determined by using the functional method. Functional disability is "limited to the loss of the physiological capacity of the body or body part." Mortimer v. Fruehauf Corp., 502 N.W.2d 12, 15 (Iowa 1993); Sherman v. Pella Corp., 576 N.W.2d 312 (Iowa 1998).

An injury to a scheduled member may, because of after effects or compensatory change, result in permanent impairment of the body as a whole. Such impairment may in turn be the basis for a rating of industrial disability. It is the anatomical situs of the permanent injury or impairment which determines whether the schedules in Iowa Code 85.34(a) – (u) are applied. Lauhoff Grain v. MacIntosh, 395 N.W.2d 834 (Iowa 1986); Blacksmith v. All-American, Inc., 290 N.W.1d 348 (Iowa 1980); Dailey v. Pooley Lumber

Co., 233 Iowa 758, 10 N.W.2d 569 (1943); Soukup v. Shores Co., 222 Iowa 272, 268 N.W. 598 (1936).

Where an injury is limited to a scheduled member, the loss is measured functionally, not industrially. Graves v. Eagle Iron Works, 331 N.W.2d 116 (Iowa 1983).

Iowa Courts have repeatedly stated that for those injuries limited to the schedules in Iowa Code 85.34(2)(a)-(u), this agency must only consider the functional loss of the particular scheduled member involved, and not the other factors which constitute an "industrial disability." Iowa Supreme Court decisions over the years have repeatedly cited favorably language in a 66-year old case, Soukup v. Shores Co., 222 Iowa 272, 277, 268 N.W. 598, 601 (1936), which states:

> The legislature has definitely fixed the amount of compensation that shall be paid for specific injuries … and that, regardless of the education or qualifications or nature of the particular individual, or of his inability … to engage in employment … the compensation payable … is limited to the amount therein fixed.

Our court has even specifically upheld the constitutionality of the scheduled member compensation scheme. Gilleland v. Armstrong Rubber Co., 524 N.W.2d 404 (Iowa 1994). Permanent partial disabilities are classified as either scheduled or unscheduled. A specific scheduled disability is evaluated by the functional method; the industrial method is used to evaluate an unscheduled disability. Graves, 331 N.W.2d 116; Simbro v. DeLong's Sportswear, 332 N.W.2d 886, 887 (Iowa 1983); Martin v. Skelly Oil Co., 252 Iowa 128, 133, 106 N.W.2d 95, 98 (1960).

When the result of an injury is loss to a scheduled member, the compensation payable is limited to that set forth in the appropriate subdivision of Iowa Code 85.34(2). Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961). "Loss of use of a member is equivalent to "loss" of the member. Moses v. national Union C.M. Co., 194 Iowa 819, 184 N.W. 746 (1921). Pursuant to Iowa Code 85.34(2)(w), the workers' compensation commissioner may equitably prorate compensation payable in those cases wherein the loss is something less than that provided for in the schedule. Blizek v. Eagle Signal Co., 164 N.W.2d 84 (Iowa 1969).

Consideration is not given to what effect the scheduled loss has on claimant's earning capacity. The scheduled loss system created by the legislature is presumed to include compensation for reduced capacity to labor and to earn. Schell v. Central Engineering Co., 232 Iowa 421, 4 N.W.2d 339 (1942).

The right of a worker to receive compensation for injuries sustained which arose out of and in the course of employment is statutory. The statute conferring this right can also fix the amount of compensation to be paid for different specific injuries, and the employee is not entitled to compensation except as provided by statute. Soukup, 222 Iowa 272, 268 N.W. 598.

Because the injury is to a scheduled member, claimant is not entitled to an evaluation of disability based upon loss of earning capacity. Only the functional loss can be awarded.

In this case, the disability is stipulated as a scheduled disability to the left upper extremity. A wrist injury is an injury to the arm, not the hand. Holstein Elec. v. Breyfogle, 756 N.W.2d 812 (Iowa 2008). Compensation for a loss of the upper extremity is based on 250 weeks. Iowa Code section 85.34(2)(m).

The question of medical causation is "essentially within the domain of expert testimony." Cedar Rapids Cmty. Sch. Dist. v. Pease, 807 N.W.2d 839, 844-45 (Iowa 2011). The commissioner, as the trier of fact, must "weigh the evidence and measure the credibility of witnesses." Id. The trier of fact may accept or reject expert testimony, even if uncontroverted, in whole or in part. Frye v. Smith-Doyle Contractors, 569 N.W.2d at 156. When considering the weight of an expert opinion, the fact-finder may consider whether the examination occurred shortly after the claimant was injured, the compensation arrangement, the nature and extent of the examination, the expert's education, experience, training, and practice, and "all other factors which bear upon the weight and value" of the opinion. Rockwell Graphic Sys., Inc. v. Prince, 366 N.W.2d 187, 192 (Iowa 1985). Unrebutted expert medical testimony cannot be summarily rejected. Poula v. Siouxland Wall & Ceiling, Inc., 516 N.W.2d 910 (Iowa App. 1994). Supportive lay testimony may be used to buttress expert testimony, and therefore is also relevant and material to the causation question.

There are two conflicting impairment ratings. Those of treating physician Dr. Paulson, and the IME doctor, Dr. Bansal. Dr. Bansal's opinions are buttressed by the opinions of treating physician Dr. Cook.

Dr. Paulson provided an initial impairment rating in March of 2019. His rating was 45 percent to the left upper extremity. Dr. Paulson provided no permanent restrictions. Dr. Paulson also placed Mr. Jones at MMI on March 22, 2019. Dr. Paulson saw Mr. Jones in July of 2019, and indicated that he had nothing further to offer. Mr. Jones felt that his care with Dr. Paulson was inadequate, and that additional care was necessary. He felt that Dr. Paulson simply sent him down a conveyor belt, rather than listening to his concerns.

In September of 2019, Mr. Jones began treatment with Dr. Cook, initially as a second opinion. Dr. Cook ordered another EMG, which showed dysfunction to the left median nerve consistent with carpal tunnel syndrome, and issues with the left ulnar nerve consistent with cubital tunnel syndrome. Based upon these results, Dr. Cook recommended a surgical revision to the Guyon canal, a carpal tunnel release, median and ulnar nerve neurolysis, and a cubital tunnel release. Dr. Cook performed his recommended surgery on March 13, 2020. Mr. Jones continued to follow up with Dr. Cook through 2020 for postoperative care. On August 20, 2020, Dr. Cook placed Mr. Jones at MMI.

Throughout his care with Dr. Paulson and Dr. Cook, Mr. Jones reported numbness along the ulnar nerve pathway. By July of 2019, Mr. Jones told Dr. Paulson that his numbness and weakness worsened. Dr. Paulson found decreased sensation in the left hand, but offered no additional care. Dr. Cook eventually opined that the ulnar nerve would not likely recover. After his second surgery, Mr. Jones reported some improvement.

Dr. Bansal performed an IME on September 18, 2020. He initially interviewed Mr. Jones on the telephone, and examined him for only 15 to 20 minutes. But Dr. Cook and Dr. Bansal indicated that an additional surgery may be required in order to get an ulnar nerve graft. Dr. Bansal provided a detailed impairment analysis. Mr. Jones indicated that Dr. Bansal performed a series of tests, including tests of the sensation in Mr. Jones' hands. After performing his testing, and interviewing Mr. Jones, Dr. Bansal concluded that Mr. Jones suffered a 50 percent impairment to his left upper extremity. Dr. Bansal also provided permanent restrictions; however, the claimant has not provided these restrictions to his employer. Thus, he works without restrictions.

Dr. Paulson provided a much lower impairment rating of 33 percent of the left upper extremity. He indicated that this was due to the positive results from Dr. Cook's subsequent surgical procedure. Additionally, he opined that the work incident was not a cause of the carpal tunnel and cubital tunnel procedures performed during Mr. Jones' second surgery.

Dr. Cook issued a subsequent report on December 14, 2020, in which he opined that Mr. Jones' trauma, surgery, and postoperative rehabilitation materially aggravated Mr. Jones' left upper extremity to the extent that it caused his carpal tunnel syndrome. He emphasized that he agreed with the original 45 percent impairment provided by Dr. Paulson, and concluded that the rating could be even higher.

The defendants argue that Dr. Paulson's rating is the most persuasive due to his active treatment of Mr. Jones for over one year, including performing the initial surgery on Mr. Jones' wrist. They argue that Dr. Bansal only examined the claimant for a limited period of time, and that Dr. Paulson refuted the opinions of Dr. Cook. The claimant argues that Dr. Paulson was influenced by the insurer in making a decision to discharge the claimant from care, and that the opinions of Dr. Bansal and Dr. Cook are more credible.

Dr. Cook is a treating physician. His time treating Mr. Jones is closer in time to the arbitration hearing than Dr. Paulson. Dr. Paulson did see Mr. Jones one more time to provide an updated impairment rating, but this did not appear to be any type of substantial treatment, such as that provided by Dr. Cook. Dr. Bansal provided an impairment rating. Dr. Cook indicated that he felt Dr. Paulson's original 45 percent rating was accurate, and further indicated that he felt the impairment rating could be higher. While I am concerned that Mr. Jones does not operate under the restrictions provided by Dr. Bansal, I find Dr. Bansal's opinions to be more persuasive when buttressed by Dr. Cook's opinions. Therefore, I find that Mr. Jones suffered a 50

percent impairment to the left upper extremity and is entitled to 125 weeks of benefits (50 percent x 250 weeks = 125 weeks).

Date of Maximum Medical Improvement/Commencement of Benefits

Next, we must turn to the commencement date of benefits. The defendants argue that there are two dates of maximum medical improvement, and thus the commencement date may vary. The claimant argues that the appropriate commencement date is August 13, 2020.

In July of 2017, significant changes were implemented to workers' compensation laws in Iowa. Among these, was the inclusion of the following language in Iowa Code section 85.34(2):

> Compensation for permanent partial disability shall begin when it is medically indicated that maximum medical improvement from the injury has been reached that that extent of loss or percentage of permanent impairment can be determined by use of the guides to the evaluation of permanent impairment, published by the American medical association, as adopted by the workers' compensation commissioner by rule pursuant to chapter 17A.

Iowa Code section 85.42(2)(2017). In this case, I adopted the findings of Dr. Bansal and Dr. Cook. Therefore, I find that MMI was achieved on August 13, 2020. The commencement date for permanent partial disability benefits is thus August 13, 2020.

Gross Earnings/Compensation Rate

The parties have a dispute regarding the claimant's weekly workers' compensation rate. Iowa Code 85.36 states "[t]he basis of compensation shall be the weekly earnings of the injured employee at the time of the injury." Weekly earnings are defined as the gross salary, wages, or earnings of an employee had the employee worked the customary hours for the full pay period in which the employee was injured as the employer regularly required for work of employment. Id. Gross earnings are defined as:

> recurring payments by the employer to the employee for employment, before any authorized or lawfully required deduction or withholding of funds by the employer, excluding irregular bonuses, retroactive pay, overtime, penalty pay, reimbursement of expenses, expense allowances, and the employer's contribution for welfare benefits.

Iowa Code section 85.61(3).

The subsections of Iowa Code 85.36 set forth methods for computing weekly earnings depending upon the type of earnings and employment. Based upon the evidence in the record, the claimant was paid on a weekly basis. (CE 5:1-6). If the

employee is paid on a weekly pay period basis, the weekly gross earnings are the basis of compensation. Iowa Code 85.36(1).

In this case, the claimant was employed for less than thirteen calendar weeks at the time of the incident. If an employee has been employed by the employer for less than thirteen (13) calendar weeks immediately preceding the injury, the employee's weekly earnings shall be computed pursuant to Iowa Code 85.36(6) taking the earnings to be what the employee would have earned had the employee been so employed for the full thirteen (13) weeks immediately preceding the injury, and had worked when work was available to other similarly employed employees. Iowa Code 85.36(7). If the earnings of other employees cannot be determined, the employee's weekly wage shall be the average computed for the number of weeks that the employee has been employed with the employer. Id.

The claimant testified that he was paid fifty-five and 00/100 dollars ($55.00) per day as a per diem when he was away from the office working. He worked away from the office 38 to 40 weeks per year. The per diem was always the same and was paid on the claimant's weekly checks. The per diem was unrelated to any expense incurred by Mr. Jones.

The claimant cites to Huff v. CRST Expedited, File No. 5063162 (App., June 5, 2020), to support the prospect that a per diem paid for work performed regardless of actual expenses should be included in a rate calculation. In Huff, the claimant was paid a per diem based upon the number of miles driven. In this case, the claimant was paid regardless of work done, provided he was out of town. This is much more akin to Bowers v. Premium Transportation Staffing, Inc., File No. 5040646 (Arb., November 5, 2013). Additionally, the claimant did not produce any evidence that the per diem was compensation rather than a reimbursement of expenses or an expense allowance.

For the reasons set forth above, I conclude that the claimant's gross weekly wages are nine hundred thirteen and 09/100 dollars ($913.09). The claimant is single and entitled to one exemption. Thus, the claimant's weekly workers' compensation rate is five hundred forty-eight and 42/100 ($548.42).

IME Pursuant to Iowa Code section 85.39

Iowa Code 85.39(2) states:

> If an evaluation of permanent disability has been made by a physician retained by the employer and the employee believes this evaluation to be too low, the employee shall, upon application to the commissioner and upon delivery of a copy of the application to the employer and its insurance carrier, be reimbursed by the employer the reasonable fee for a subsequent examination by a physician of the employee's own choice, and reasonably necessary transportation expenses incurred for the examination.

Iowa Code 85.39(2).

Defendants are responsible only for reasonable fees associated with claimant's independent medical examination. Claimant has the burden of proving the reasonableness of the expenses incurred for the examination. See Schintgen v. Economy Fire & Casualty Co., File No. 855298 (App. April 26, 1991). Claimant need not prove the injury arose out of and in the course of employment to qualify for reimbursement under section 85.39. See Dodd v. Fleetguard, Inc., 759 N.W.2d 133, 140 (Iowa App. 2008).

Iowa Code 85.39 was amended in 2017 to include:

> An employer is only liable to reimburse an employee for the cost of an examination conducted pursuant to this subsection if the injury for which the employee is being examined is determined to be compensable under this chapter or chapter 85A or 85B. An employer is not liable for the cost of such an examination if the injury for which the employee is being examined is determined not to be a compensable injury. A determination of the reasonableness of a fee for an examination made pursuant to this subsection shall be based on the typical fee charged by a medical provider to perform an impairment rating in the local area where the examination is conducted.

Iowa Code 85.39(2) (2017).

On March 22, 2019, Dr. Paulson provided an impairment rating. The defendants' paid for the claimant's medical treatment with Dr. Paulson, and the impairment rating was provided to the defendants' insurer in a letter. The claimant subsequently had an IME with Dr. Bansal. Therefore, it is appropriate for the claimant to be reimbursed for Dr. Bansal's IME. The reimbursement amount is two thousand nine hundred eighty-four and 00/100 dollars ($2,984.00).

Medical Mileage / Examination Wage

The claimant requests an assessment of costs. In his posthearing briefing, the claimant requests an assessment of costs for medical mileage and for 6 hours of missed work due to Dr. Paulson's December examination. The claimant was required to take a day off work and drive from Missouri to Des Moines for his examination with Dr. Paulson. The proper avenue for this compensation is not via an assessment of costs as allowed by Iowa Code section 86.40, and 876 Iowa Administrative Code 4.33. Rather, these benefits should be considered under Iowa Code section 85.27, as they pertain to medical treatment.

The employer shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance, and hospital services and supplies for all conditions compensable under the workers' compensation law. The

employer shall also allow reasonable and necessary transportation expenses incurred for those services. The employer has the right to choose the provider of care, except where the employer has denied liability for the injury. Iowa Code 85.27. Holbert v. Townsend Engineering Co., Thirty-second Biennial Report of the Industrial Commissioner 78 (Review-Reopening, October 1975).

An employee is entitled to payment for wages lost if they are required to leave work for one full day or less to receive services pursuant to Iowa Code section 85.27. Iowa Code section 85.27(7). In order to be entitled to payment, the employee must not be receiving weekly benefits pursuant to Iowa Code section 85.33, or Iowa Code section 85.34(1). Id. The employee is paid an amount equivalent to the wages lost as the employee's regular rate of pay for the time that the employee is required to leave work. Id.

The claimant submitted a mileage log as Claimant's Exhibit 3:2. In reviewing the dates of alleged mileage owed, I find that the claimant appeared for authorized medical care on those dates. The claimant provided evidence of the mileage and noted proper rates. Based upon the evidence in the record, I award the claimant one thousand three hundred one and 65/100 dollars ($1,301.65) for mileage incurred.

The claimant also appeared for an examination at the request of the defendants on December 2, 2020. The claimant missed six hours of work for this appointment. The claimant alleges earnings of twenty-one and 00/100 dollars ($21.00) per hour during this time for one hundred twenty-six and 00/100 dollars ($126.00) in missed earnings. Based upon the evidence in the record, the claimant is owed one hundred twenty-six and 00/100 dollars ($126.00) for this missing time.

Credit for PPD

The defendants assert a credit for 69.429 weeks of payments for permanent partial disability paid at five hundred forty-eight and 42/100 dollars ($548.42). The claimant alleges that the defendants only paid 67 weeks, but notes that only if the amounts paid were for PPD, then the claimant would agree to a credit. In reviewing Defendants' Exhibit C, it is difficult to discern which payments were made for PPD, TPD or TTD. However, I do note at least 69.429 weeks of payments. A credit for these payments is appropriately applied to PPD.

Penalty for Delayed Payments

Iowa Code 86.13(4) provides the basis for awarding penalties against an employer. Iowa Code 86.13(4) states:

> (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 present 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 provide a reasonable or probable cause or excuse for the denial, delay in payment, or termination of benefits.
>
> (c) In order to be considered a reasonable or probable cause or excuse under paragraph "b", an excuse shall satisfy all of the following criteria:
>
> (1) The excuse was preceded by a reasonable investigation and evaluation by the employer or insurance carrier into whether benefits were owed to the employee.
>
> (2) The results of the reasonable investigation and evaluation were the actual basis upon which the employer or insurance carrier contemporaneously relied to deny, delay payment of, or terminate benefits.
>
> (3) The employer or insurance carrier contemporaneously conveyed the basis for the denial, delay in payment, or termination of benefits to the employee at the time of the denial, delay, or termination of benefits.

If weekly compensation benefits are not fully paid when due, Iowa Code 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 is also 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 an 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.

For purposes of determining whether an employer has delayed in making payments, payments are considered "made" either (a) when the check addressed to a claimant is mailed, or (b) when the check is delivered personally to the claimant by the employer or its workers' compensation insurer. Robbennolt, 555 N.W.2d at 235-236; Kiesecker, 528 N.W.2d at 112).

Penalty is not imposed for delayed interest payments. Schadendorf v. Snap-On Tools Corp., 757 N.W.2d 330, 338 (Iowa 2008); Davidson v. Bruce, 593 N.W.2d 833, 840 (Iowa 1999).

Dr. Paulson issued an impairment rating on March 22, 2019. The defendants commenced benefits payments on April 4, 2019. It appears that the first benefit payment was for two weeks, a tacit acknowledgment that benefits should have started earlier. In reviewing payment records provided in Defendants' Exhibit C, there are gaps in payment from April 24, 2019 to July 5, 2019. There is also a gap from August 12, 2020, to November 2, 2020. The defendants argue in their posthearing brief that the delays in benefits were remedied once the delays were brought to the attention of the defendants' attorney. The defendants provide no explanation for a reasonable cause or excuse for the delay. They provide no good faith issue of law or fact that make liability fairly debatable.

In this case there were three gaps in payments. The delays lasted two weeks, just over ten weeks, and just under twelve weeks. This amounts to thirteen thousand seven hundred ten and 50/100 dollars ($13,710.50). The employer was aware of the impairment rating of Dr. Paulson, and provided no information regarding a justification for a delay of benefit payments. Finally, the claimant provided a listing of penalties incurred by the employer's insurer. One of these cases involved the defendant employer, Aerotek. The remainder of the cases total 19, and are of varying amounts. Based upon a lack of reasonable cause or excuse for delay, it is reasonable to assess a penalty against defendants. I find a 40 percent penalty to be reasonable considering the lack of justification for the delay, the record of the insurer in delaying payments, and the multiple periods of delay. This amounts to five thousand four hundred eighty-four and 20/100 dollars ($5,484.20).

Costs

Claimant seeks the award of costs for the filing fee, mileage, and missed work for the December 2, 2020, appointment with Dr. Paulson. The mileage and missed time from work were previously addressed in this decision.

Costs are to be assessed at the discretion of the deputy commissioner hearing the case. See 876 Iowa Administrative Code 4.33; Iowa Code 86.40. 876 Iowa Administrative Code 4.33(6) provides:

> [c]osts taxed by the workers' compensation commissioner or a deputy commissioner shall be (1) attendance of a certified shorthand reporter or presence of mechanical means at hearings and evidential depositions, (2) transcription costs when appropriate, (3) costs of service of the original notice and subpoenas, (4) witness fees and expenses as provided by Iowa Code sections 622.69 and 622.72, (5) the costs of doctors' and practitioners' deposition testimony, provided that said costs do not exceed the amounts provided by Iowa Code sections 622.69 and 622.72, (6) the reasonable costs of obtaining no more than two doctors' or practitioners' reports, (7) filing fees when appropriate, including convenience fees incurred by using the WCES payment gateway, and (8) costs of persons reviewing health service disputes.

The claimant requests an assessment of one hundred and 00/100 dollars ($100.00). for the filing fee. Based upon my discretion, I award the claimant one hundred and 00/100 dollars ($100.00) in costs.

ORDER

THEREFORE, IT IS ORDERED:

The defendants are to pay unto claimant one hundred twenty-five (125) weeks of permanent partial disability benefits at the rate of five hundred forty-eight and 42/100 dollars ($548.42) per week from the commencement date of August 13, 2020.

The defendants shall reimburse the claimant two thousand nine hundred eighty-four and 00/100 dollars ($2,984.00) for Dr. Bansal's two IMEs pursuant to Iowa Code section 85.39.

That defendants shall reimburse the claimant one thousand three hundred one and 65/100 dollars ($1,301.65) for mileage costs.

That defendants shall reimburse the claimant one hundred twenty-six and 00/100 dollars ($126.00) for time off work in attendance of a medical visit.

That defendants shall be given credit for six nine point four two nine (69.429) weeks of permanent partial disability benefits previously paid, as stipulated.

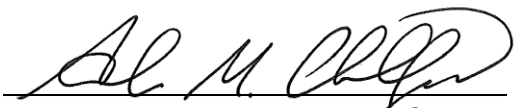
That defendants shall pay the claimant a penalty of five thousand four hundred eighty-four and 20/100 dollars ($5,484.20).

That defendants shall reimburse the claimant one hundred and 00/100 dollars ($100.00) for the filing fee.

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).

That defendants shall file subsequent reports of injury (SROI) as required by this agency pursuant to 876 IAC 3.1(2) and 876 IAC 11.7.

Signed and filed this 28th day of April, 2021.



ANDREW M. PHILLIPS
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Nick Platt (via WCES)

Peter Thill (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.