BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

ROBERT CARNEY, Claimant, vs. T & C RODEO COMPANY, INC., Employer, Uninsured, Defendant.	:	File No. 5054767 ARBITRATION DECISION Head Note Nos.: 1402.10; 1402.40; 1403.30; 1504; 1802; 1803; 2501; 2907; 4000.2

STATEMENT OF THE CASE

Robert Carney, claimant, filed a petition in arbitration and seeks workers' compensation benefits from defendant, T & C Rodeo Company, Inc. (hereinafter referred to as "T & C Rodeo"). Hearing was held on November 9, 2016 in Des Moines, Iowa.

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.

Claimant testified on his own behalf and defendant called Talton Toney to testify. The evidentiary record also includes claimant's exhibits 1 through 3 and defendant's exhibits A through E. All exhibits were received without objection. Additionally, at hearing, defendants requested an opportunity to submit claimant's tax returns after the conclusion of the trial. Claimant did not object to the request and defendants were granted additional time to file claimant's relevant tax returns.

On December 14, 2016, defendants filed a motion and offered Exhibits F and G, which are claimant's tax returns for 2014 and 2015 respectively. Defendants' offer of Exhibits F and G is actually made beyond the 14-day period permitted by the undersigned at the time of hearing. However, claimant has not resisted the motion to enter Exhibits F and G into the evidentiary record and this appears to be the intention of the parties at the time of trial. Exhibits F and G are received into the evidentiary record. The evidentiary record is now closed.

Counsel requested the opportunity to file post-hearing briefs. Their request was granted. Both parties filed their post-hearing briefs on December 14, 2016, at which time the case was considered fully submitted to the undersigned.

ISSUES

The parties submitted the following disputed issues for resolution:

1. Whether an employer-employee relationship existed at the time of the alleged injury, or whether claimant was an independent contractor at the time of his injury.

2. Whether the alleged injury caused temporary disability such that claimant should be compensated with temporary total disability, or healing period, from July 7, 2015 through March 17, 2016.

3. Whether the alleged injury caused permanent disability and, if so, the extent of claimant's entitlement to permanent disability benefits, including a claim for permanent total disability.

4. The claimant's average gross weekly earnings prior to the date of injury and the corresponding weekly workers' compensation rate.

5. Whether claimant is entitled to payment of past medical expenses.

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

7. Whether claimant is entitled to an award of penalty benefits, pursuant to Iowa Code section 86.13, for an alleged unreasonable denial or delay in payment of weekly benefits by defendant.

FINDINGS OF FACT

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

Robert Carney is a 38 year old man, who lives in Osceola, Iowa. (Claimant's testimony) He is a high school graduate but has no additional certifications, training or education. (Claimant's testimony; Exhibit E, page 33) Mr. Carney worked as a truck driver from 1997-2012, until his employer went out of business. He earned $16.25 per hour working as a truck driver.

From 2007 through 2013, claimant was also self-employed, performing general maintenance work. He estimates he earned approximately $400.00 per week in this self-employment. Claimant has also worked as a "saw man" from August 2013 through

May 2015. Claimant estimated he earned approximately $900.00 per week in this employment. (Ex. 3)

Claimant's tax returns for 2014 and 2015 do not bear out his claimed earnings. In 2014, claimant reported $19,009 in wages. (Ex. F) In 2015, claimant reported $3,500 in wages for the six months before this injury. (Ex. G)

Although his legal status as an employee or an independent contractor is in dispute, it is undisputed that Mr. Carney suffered horrific and very significant injuries as a result of an accident that occurred while performing labor on behalf of T & C Rodeo. (Hearing Report; Ex. 1-2; Ex. A-C) Mr. Carney denies any significant prior injuries or limitations before the July 7, 2015 accident that resulted in this case.

Mr. Carney commenced his employment relationship with T & C Rodeo in July 2015. In early July, the owner of T & C Rodeo, Talton Toney, spoke with claimant and asked him to drive a truck for T & C Rodeo. T & C Rodeo needed a driver with a commercial driver's license (CDL). (Claimant's testimony) Mr. Carney had been a truck driver for five years previously and possessed the necessary CDL. (Ex. 3) Claimant agreed to provide services for T & C Rodeo. (Claimant's testimony)

The details of the employment relationship are a bit sketchy and the versions of events provided by Mr. Carney and Mr. Toney are not consistent about the terms of the agreement. Claimant testified that he was promised pay at the rate of $12.00 per hour. Defendant's witness, Talton Toney, testified that claimant was not offered an hourly rate for his work. Instead, Mr. Toney specified that he paid workers per project with specified amounts for work performed and dependent upon experience.

Claimant testified that Mr. Toney offered him full-time employment. Mr. Toney denied he had made a full-time offer of employment to claimant and, instead, testified that he offered claimant a one-time offer and work at any future rodeos were dependent upon claimant being available.

When considering the employment relationship between claimant and T & C Rodeo, I find that Mr. Carney established a prima facie case that he was a person that entered into the employment of, or worked under a contract of service for T & C Rodeo. Clearly, Mr. Carney and Mr. Toney discussed the fact that Mr. Carney would drive a truck and assist in setting up and tearing down a rodeo. There is little dispute in the record that claimant was retained in some manner to perform services for T & C Rodeo.

However, there was not a formal contract developed between the parties. Although claimant testified that he was promised full-time work, I did not find claimant's testimony to be convincing in this respect. Claimant had minimal earnings in 2014 and 2015. He was apparently not working full-time prior to being offered work through T & C Rodeo.

Similarly, I did not find claimant's testimony about the specific terms of his employment to be convincing. He testified that he was to be paid $12.00 per hour. Mr. Toney testified that he paid others for similar work on a flat-fee basis. While I believe the parties likely reached consensus about the terms of compensation, I honestly did not find either witness terribly credible on this issue. Considering the work to be performed and the relative credibility of the witnesses' testimony, I find that the parties likely negotiated a set price for the entire project, but did not likely negotiate the terms on an hourly rate.

I find that the rodeo business is not something that was an independent type business claimant typically engaged in. Claimant did have a history of truck driving and, if his only duties for T & C Rodeo were driving a truck, arguably this would look more like an independent contractor. However, claimant was hired to perform services that were unlike any of his prior jobs or employment.

I find that T & C Rodeo retained the right to discharge claimant or terminate his services at any time. There is no evidence that claimant was hired for a specified period of time or guaranteed work for a certain number of rodeos. Claimant was certainly not paid for any services and was not expected to find a replacement after he was injured.

I find that claimant did not provide or furnish any necessary materials. Claimant acknowledged that not many tools were required because the majority of the work was done with large gates and chains. However, claimant was not expected to provide any of those materials.

I find that claimant was not free to control the progress of his own work. He was instructed to follow the lead of other workers that had set up and run prior rodeos. Mr. Toney also indicated that claimant would be expected to perform some unspecified services during the rodeo event. Obviously, this would be an assigned task from T & C Rodeo and was not discretionary to claimant. Similarly, claimant was not free to hire an assistant or replacement.

Certainly, the work performed by Mr. Carney was within the regular business pursuits of T & C Rodeo. In fact, Mr. Carney's efforts were precisely requested and performed to permit the rodeo to be conducted by T & C Rodeo to take place. I find that claimant's work was specific to the regular business pursuits of T & C Rodeo.

Claimant's first trip for T & C rodeo took him to Missouri to a local rodeo site. Mr. Carney and other workers caravanned from the employer's residence to the rodeo site in Missouri on July 6, 2015. Upon arrival, it was too wet to set up and claimant camped overnight at the local rodeo site. The crew sent by T & C Rodeo for the rodeo started setting up on the morning of July 7, 2015. The first thing they attempted to perform was to set up a very large bucking shoot. As the workers unchained the bucking shoot and attempted to move it into place, the bucking shoot fell onto claimant. Mr. Carney was pinned under the bucking shoot and others present had to physically remove him.

Mr. Carney suffered very significant injuries as a result of this accident. He was initially taken to a local hospital in Missouri by ambulance. However, his injuries were significant enough that he was transferred to Des Moines, Iowa for trauma care, including surgical intervention. (Ex. C, pp. 13-15)

Specifically, Mr. Carney sustained a T12-L1 fracture dislocation of his spine. (Ex. A, p. 1) This left his spine unstable and required emergent operative intervention. (Ex. A, pp. 1-2) Following his spinal surgery, claimant developed a post-surgical infection and required intravenous antibiotics.

In addition to his spinal injuries, Mr. Carney sustained fractures to several ribs and a fracture of his right femur. Claimant required surgical intervention, including placement of an intramedullary nail into the right femur to stabilize the right femur fracture. (Ex. C, p. 18; Claimant's testimony)

Mr. Carney describes ongoing stiffness in his low back, as well as pain that he rates as a 6-7 out of 10 on a 0-10 scale with 0 being no pain and 10 being the worst imaginable pain. Mr. Carney testified that he experiences even worse pain on some days and must remain bedridden those days. (Claimant's testimony)

Claimant also testified that he has a reduced ability to move and does not feel as strong as he used to be before the injuries. He describes difficulties reaching out to pick something up, but admits that he no longer has pain in his right leg or in his ribs. (Claimant's testimony)

Mr. Carney testified that he has difficulties working on cars now, but he used to do so before the injury. He testified that he now has to find different ways to perform tasks, though he acknowledges that he still carries feed for animals at his house. Mr. Carney is not currently employed and has not worked or looked for work since the date of injury. He testified that he does not feel like he could work eight hours per day at the present time. (Claimant's testimony)

Claimant obtained two independent medical evaluations to address his injuries, permanent impairment and permanent work restrictions. Sunil Bansal, M.D., is a board certified occupational medicine physician, who evaluated claimant on May 13, 2016. Dr. Bansal found claimant to have achieved maximum medical improvement on March 17, 2016. He opined that claimant's injuries and treatment were causally related to the July 7, 2015 accident in Missouri. Dr. Bansal assigned a 25 percent permanent impairment for claimant's back injuries, as well as an additional 2 percent permanent impairment of the whole person as a result of claimant's femur fracture. (Ex. 1)

Dr. Bansal opined that claimant requires permanent restrictions. Specifically, Dr. Bansal imposed a lifting restriction that prevents claimant from lifting over 20 pounds occasionally or more than 10 pounds frequently. Dr. Bansal also indicated that claimant should be allowed to sit, stand, and walk as tolerated, but should not sit, stand, or walk for more than 30 minutes at a time. (Ex. 1, p. 14)

Mr. Carney also sought an independent medical evaluation performed by Daniel J. McGuire, M.D., on August 11, 2016. Dr. McGuire is an orthopaedic surgeon. He diagnosed claimant with an upper lumbar spine fracture with a resulting spinal fusion, as well as a right shaft femur fracture with surgical rodding. (Ex. 2, p. 4) Dr. McGuire opined that claimant sustained a 25 percent impairment of the whole person as a result of his back injuries. (Ex. 2, p. 2) Dr. McGuire did not outline specific work restrictions for claimant, but opined, "No matter the restrictions, I would find it difficult for him to work 8 hours per day, day after day, weeks after weeks." (Ex. 2, p. 2)

No other medical opinions are contained in this evidentiary record pertaining to causation, impairment, or permanent restrictions. Considering the opinions of Dr. Bansal and Dr. McGuire, I find that claimant has proven he sustained rib fractures as a result of the July 7, 2015 accident. However, claimant has no residual symptoms from the rib fractures and has not proven any disability related to the rib fractures.

Mr. Carney has also proven he sustained a spinal fracture that required a spinal fusion as a result of the July 7, 2015 accident. He has established that he has residual symptoms from the back injury and that he sustained a 25 percent permanent impairment of the whole person as a result of the back injury. Mr. Carney has clearly sustained a permanent disability as a result of the back injury.

Mr. Carney has also established by a preponderance of the evidence that he sustained a left femur fracture as a result of the July 7, 2015 accident. Although Mr. Carney has no specific and persistent symptoms as a result of the femur fracture, he has proven that it caused permanent impairment. I find that Mr. Carney has proven he sustained permanent disability as a result of the left femur fracture.

Neither Dr. Bansal nor Dr. McGuire specified what restrictions may be applicable to the back or specific to the femur fracture. Realistically, some restrictions are likely necessary for each injury. Regardless, the combined effects of this injury require that claimant permanently restrict his lifting to no more than 20 pounds occasionally and no more than 10 pounds frequently. Similarly, it is apparent that Mr. Carney requires periodic positional changes as a result of the effects of his injuries.

Claimant has proven by a preponderance of the evidence that he sustained permanent disability as a result of the injuries sustained on July 7, 2015. However, Mr. Carney has not attempted any return to work since his injuries. The restrictions outlined by Dr. Bansal, and adopted as accurate above, do not preclude all possible lines of work for Mr. Carney. I find that Mr. Carney has not proven he is permanently and totally disabled.

Nevertheless, claimant's injuries have resulted in significant and permanent work restrictions. Claimant is precluded from returning to work for T & C Rodeo. He is not likely to perform any truck driving with his positional change restrictions. It is unclear if claimant could return to his other prior lines of work. Realistically, however, claimant

has sustained a fairly significant loss of his future earning capacity as a result of the July 7, 2015 work injury.

Considering claimant's age, educational background, employment history, inability to return to similar work, his permanent impairment rating, his permanent work restrictions, the length of his healing period, his lack of motivation to return to work at this time, as well as all other factors of industrial disability outlined by the Iowa Supreme Court, I find that Mr. Carney has proven he sustained a 55 percent loss of his future earning capacity as a result of the July 7, 2015 work injury.

Mr. Carney also seeks an award of medical expenses related to the treatment of his July 7, 2015 work injury. However, no medical expenses are in evidence, though defendant stipulates that the medical providers would testify their medical treatment and expenses were reasonable and that defendants offer no contrary evidence. Defendants also stipulate that all claimed medical expenses are causally related to the medical conditions upon which this claim is based. (Hearing Report)

In spite of the stipulations offered by defendants, I cannot award any medical expenses in this case. Claimant has not submitted any medical expenses for review or consideration. Therefore, I find that claimant has not carried his burden of proof to establish entitlement to any past medical expenses.

Mr. Carney seeks an award of an independent medical evaluation expense. In this respect, I find that defendant did not obtain a permanent impairment rating in this case.

Finally, claimant seeks an award of penalty benefits. With respect to the claim for penalty benefits, I find that defendant offered a reasonable basis for challenge of claimant's claim for benefits. The evidence pertaining to claimant's employment status was debatable. There was certainly some evidence, which could suggest claimant was an independent contractor. Although I found against defendants on this issue, the testimony offered by Mr. Toney was sufficient to avoid penalty benefits in this case. Ultimately, many of the factors involved in this case turned on credibility determinations of witnesses. If Mr. Toney's testimony were accepted completely, defendant had a reasonable argument that claimant was not an employee on the date of injury. Therefore, I find that defendant had a reasonable basis to challenge this claim for benefits.

CONCLUSIONS OF LAW

The primary disputed issue in this case is whether the claimant was an employee of T & C Rodeo on July 7, 2015, when the claimant was injured. Claimant contends that he was an employee while T & C Rodeo contends that claimant was an independent contractor.

Section 85.61(11) provides in relevant part:

> "Worker" or "employee" means a person who has entered into the employment of, or works under contract of service, express or implied, or apprenticeship, for an employer. . . .

It is claimant's duty to prove, by a preponderance of the evidence, that he was an employee within the meaning of the law. Where claimant establishes a prima facie case, defendants then have the burden of going forward with the evidence which rebuts claimant's case. The defendants must establish, by a preponderance of the evidence, any pleaded affirmative defense or bar to compensation. Nelson v. Cities Service Oil Co., 259 Iowa 1209, 146 N.W.2d 261 (1967).

Factors to be considered in determining whether an employer-employee relationship exists are: (1) the right of selection, or to employ at will, (2) responsibility for payment of wages by the employer, (3) the right to discharge or terminate the relationship, (4) the right to control the work, and (5) identity of the employer as the authority in charge of the work or for whose benefit it is performed. The overriding issue is the intention of the parties. Caterpillar Tractor Co. v. Shook, 313 N.W.2d 503 (Iowa 1981); McClure v. Union et al., Counties, 188 N.W.2d 283 (Iowa 1971); Nelson, 259 Iowa 1209, 146 N.W.2d 261; Lembke v. Fritz, 223 Iowa 261, 272 N.W. 300 (1937); Funk v. Bekins Van Lines Co., I Iowa Industrial Commissioner Report 82 (App. December 1980). In Mallinger v. Webster City Oil Co., 234 N.W. 254, 211 Iowa 847 (1929), the Iowa Supreme Court outlined similar factors to determine whether a worker is an independent contractor or an employee. Specifically, the Mallinger Court identified the following factors:

> (1) The existence of a contract for the performance by a person of a certain piece or kind of work at a fixed price; (2) independent nature of his business or his distinct calling; (3) his employment of assistants with the right to supervise their activities; (4) his obligation to furnish necessary tools, supplies, and materials; (5) his right to control the progress of the work, except as to the final results; (6) the time for which the workman is employed; (7) the method of payment, whether by time or by job; (8) whether the work is part of the regular business of the employer. If the workman is using the tools or equipment of the employer, it is understood and generally held that the one using them, especially if of substantial value, is a servant.

Mallinger, 234 N.W. at 257.

Even if both parties by agreement state they intend to form an independent contractor relationship, their stated intent is ignored if the agreement exists to avoid the workers' compensation laws. Likewise, the test of control is not the actual exercise of the power of control over the details and methods to be followed in the performance of

the work, but the right to exercise such control. Also, the general belief or custom of the community that a particular kind of work is performed by employees can be considered in determining whether an employer-employee relationship exists. Caterpillar Tractor Co. v. Shook, 313 N.W.2d 503 (Iowa 1981); McClure v. Union et al., Counties, 188 N.W.2d 283 (Iowa 1971); Nelson, 259 Iowa 1209, 146 N.W.2d 261; Lembke v. Fritz, 223 Iowa 261, 272 N.W. 300 (1937); Funk v. Bekins Van Lines Co., I Iowa Industrial Commissioner Report 82 (App. December 1980).

In this case, I found that Mr. Carney clearly proved he was a "worker" or "employee" within the definition of Iowa Code section 85.61(11). Having established his status as a presumptive employee, the burden of proof shifted to T & C Rodeo to establish that claimant was actually an independent contractor, rather than an employee.

I found that the specific terms of claimant's employment relationship with T & C Rodeo were not clear and that neither witness provided entirely credible testimony or explanation of the terms. Neither party could produce a written contract. Typically, one would expect an arms-length negotiation and contract to be in writing in an independent contractor situation. No such contract existed in this case. I conclude that factor 1 outlined in the Mallinger case leans heavily toward a finding that claimant was an employee and not an independent contractor.

However, I found that the parties likely negotiated terms for the entire project, not just an hourly rate of pay. Typically, payment based upon the job, rather than an hourly rate would be considered to be more of an independent contractor type arrangement. Having made this finding, I conclude that factors 6 and 7 lean toward a finding that claimant was an independent contractor and not an employee.

With respect to factor number 2, claimant clearly was not involved in the rodeo business prior to commencing working for the benefit of T & C Rodeo. This factor weighs heavily in favor of an employer-employee relationship. Factor number 3 inquires about whether claimant had the right to hire assistants and his right to supervise those assistants. In this scenario, claimant did not have the right to hire assistants. He was not expected to find his own replacement after his injury for the rodeo or for subsequent rodeos. Factor number 3 weighs heavily in favor of a finding that claimant was an employee and not and independent contractor.

Claimant provided no tools. All gates, chains, and other necessary items such as a forklift were provided by the employer. At best Factor number 4 is neutral, but likely suggests claimant was an employee when injured.

Factor number 5 in the Mallinger test inquires about the worker's right to control the progress of work. Claimant clearly had no right to control the timing or progress of work. He was told when to leave. He traveled in a caravan from the employer's residence to the rodeo site. He worked when others worked. Claimant was to be told

what job to perform during the rodeo. Claimant had no right to control the timing or manner of his own work. Factor 5 suggests claimant was an employee.

Factor number 8 requires a determination of whether the work performed was part of the regular business of the employer. Clearly, the work being performed by claimant when injured was within the regular business of the employer. Factor 8 weighs heavily in favor of a finding that Mr. Carney was an employee at the time of his injury.

Under the majority of the common law indicia of an employment relationship, the claimant was an employee of T & C Rodeo when he was injured on July 7, 2015. At the very least, claimant produced sufficient evidence to establish a prima facie case that he was an employee. T & C Rodeo did not carry its burden of proof to establish otherwise, including specifically its assertion that claimant was an independent contractor at the time of his injury. Therefore, I conclude that Robert Carney was an employee of T & C Rodeo on July 7, 2015.

It is apparent and undisputed that Mr. Carney was severely injured on July 7, 2015 while attempting to set up a rodeo on behalf of T & C Rodeo. (Hearing Report) Defendants essentially concede that claimant is entitled to the requested healing period benefits from July 7, 2015 through March 17, 2016 if he is determined to have been an employee of T & C Rodeo on the date of his injury. (Hearing Report) Having concluded that claimant was an employee of T & C Rodeo on the date of injury and having accepted the parties' stipulations in the hearing report, I conclude that claimant is entitled to an award of healing period benefits from July 7, 2015 through March 17, 2016.

Claimant also seeks an award of permanent disability benefits, including a claim for permanent total disability. Defendants disputed whether the injury caused permanent disability. (Hearing Report) Having found that the July 7, 2015 injury did cause permanent disability, I must consider the extent of claimant's entitlement to permanent disability benefits.

Mr. Carney's injuries include a back injury that caused permanent disability. His injuries clearly extend beyond the scheduled members itemized in Iowa Code section 85.35(2).

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

Functional impairment is an element to be considered in determining industrial disability which is the reduction of earning capacity, but consideration must also be given to the injured employee's age, education, qualifications, experience, motivation,

loss of earnings, severity and situs of the injury, work restrictions, inability to engage in employment for which the employee is fitted and the employer's offer of work or failure to so offer. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963); Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961).

Compensation for permanent partial disability shall begin at the termination of the healing period. Compensation shall be paid in relation to 500 weeks as the disability bears to the body as a whole. Section 85.34.

As noted, Mr. Carney asserts a claim for permanent total disability as a result of his injuries and resulting limitations. Total disability does not mean a state of absolute helplessness. Permanent total disability occurs where the injury wholly disables the employee from performing work that the employee's experience, training, education, intelligence, and physical capacities would otherwise permit the employee to perform. See McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Diederich v. Tri-City R. Co., 219 Iowa 587, 258 N.W. 899 (1935).

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

Having found that claimant remains capable of lifting 20 pounds on an occasional basis and having considered claimant's age, lack of motivation, and ability to work other available positions in the competitive workforce, I found that Mr. Carney did not prove that he is wholly, or permanently and totally, disabled. Therefore, I conclude that claimant has not proven he is permanently and totally disabled.

Nevertheless, claimant has proven he sustained permanent disability and a fairly significant loss of future earning capacity. Having considered the applicable industrial disability factors outlined by the Iowa Supreme Court, I found that Mr. Carney proved he sustained a 55 percent loss of future earning capacity. Having found that claimant proved he sustained a 55 percent loss of future earning capacity as a result of the July 7, 2015 work injury, I conclude that claimant is entitled to a 55 percent industrial disability award, or 275 weeks of permanent partial disability benefits. Iowa Code section 85.34(2)(u). The parties stipulate permanent partial disability benefits should commence on March 18, 2016. (Hearing Report)

The parties also disputed the proper gross weekly earnings and the applicable weekly rate at which benefits should be awarded. (Hearing Report) Section 85.36 states the basis of compensation is the weekly earnings of the employee at the time of the injury. The section defines weekly earnings as the gross salary, wages, or earnings to which an employee would have been entitled had the employee worked the customary hours for the full pay period in which injured as the employer regularly

required for the work or employment. The various subsections of section 85.36 set forth methods of computing weekly earnings depending upon the type of earnings and employment.

Claimant provides no proposed findings and does not specify a rate at which he believes benefits should be awarded either on the hearing report or in his post-hearing brief. Defendant contends that, if awarded, benefits should be calculated using Iowa Code section 85.36(9).

Iowa Code section 85.36(9) provides:

> If an employee earns either no wages or less than the usual weekly earnings of a regular full-time adult laborer in the line of industry in which the employee is injured in that locality, the weekly earnings shall be one-fiftieth of the total earnings which the employee has earned from all employment during the twelve calendar months immediately preceding the injury.

The provisions of subsection 9 are not easily applied in this case because we do not have specific wage information limited to the 12 months immediately preceding the injury. However, none of the other subjections of Iowa Code section 85.36 appear directly applicable or applied in a manner that would be more reasonable or easier than Iowa Code section 85.36(9). I conclude section 85.36(9) should be applied under the facts and circumstances of this case.

I did not accept claimant's testimony about his estimated earnings prior to this date of injury. Rather, I found that the tax returns he filed did not bear out those earnings. I rely upon the earnings documented in the federal tax returns claimant filed as the accurate and best evidence of his earnings.

Unfortunately, the tax returns do not provide specifics as to earnings from July 2014 through July 2015 to comply directly with Iowa Code section 85.36(9). Defendant proposed to essentially prorate claimant's earnings in 2014 and use his earnings from 2015 as documented on the tax returns. Defendant essentially multiply claimant's 2014 earnings by 52 percent to represent the period of time from July 2014 through July 6, 2015. Given the lack of any specific evidence in this record, I conclude defendants' method of calculation is reasonable and most likely to reflect the claimant's gross weekly earnings prior to the date of injury.

Therefore, I accepted defendant's calculations on page 7 of their post-hearing brief and found that claimant's gross average weekly wage prior to the July 7, 2015 work injury was $267.69. The parties stipulated that claimant was married and entitled to two exemptions on the date of injury. (Hearing Report) Utilizing the Iowa Workers' Compensation Manual (rate book) with effective dates from July 1, 2015 through June 30, 2016, I conclude that the applicable benefit rate is $206.75 per week. All healing

period and permanent partial disability benefits will be awarded at the rate of $206.75 per week.

Having found that claimant introduced no medical expenses into this evidentiary record, I also found that claimant has not proven any related medical expenses related to the July 7, 2015 work injury. Having reached those factual findings, I conclude that claimant failed to carry his burden of proof for the award of any medical expenses in this case. Iowa Code section 85.27.

Claimant also sought reimbursement for the cost of Dr. Bansal's IME. Iowa Code section 85.39 is the applicable statutory provision and states, in pertinent part:

> 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.

Such a reimbursement is governed by Iowa Code section 85.39, which only permits an employee to be reimbursed for subsequent examination by a physician of the employee's choice where an employer-retained physician has previously evaluated "permanent disability" and the employee believes the initial evaluation to be too low. Des Moines Area Reg'l Transit Auth. v. Young, 867 N.W.2d 839, (Iowa 2015). In this case, defendant did not obtain a physician's opinion pertaining to permanent impairment. Therefore, claimant failed to demonstrate the pre-requisite for Iowa Code section 85.39 to become applicable. I conclude that claimant failed to establish entitlement to reimbursement of Dr. Bansal's independent medical evaluation fee.

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

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

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

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

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

In this case, I found that the employer had reasonable bases to challenge the claim. Given the existence of reasonable bases to challenge the claim for benefits, I conclude that claimant has not established entitlement to penalty benefits pursuant to Iowa Code section 86.13.

ORDER

THEREFORE, IT IS ORDERED:

Defendant shall pay claimant healing period benefits from July 7, 2015 through March 17, 2016.

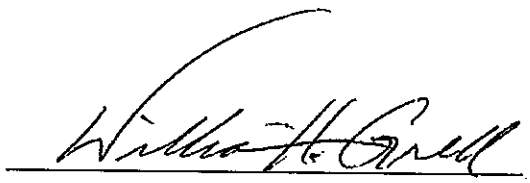
Defendant shall pay claimant two hundred seventy-five (275) weeks of permanent partial disability benefits commencing on March 18, 2016.

All weekly benefits shall be paid at the rate of two hundred six and 75/100 dollars ($206.75).

Defendant shall pay all accrued weekly benefits in lump sum with interest pursuant to Iowa Code section 85.30.

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 15th day of February, 2017.



WILLIAM H. GRELL
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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WHG/kjw

Right to Appeal: This decision shall become final unless you or another interested party appeals within 20 days from the date above, pursuant to rule 876-4.27 (17A, 86) of the Iowa Administrative Code. The notice of appeal must be in writing and received by the commissioner's office within 20 days from the date of the decision. The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday. The notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 1000 E. Grand Avenue, Des Moines, Iowa 50319-0209.