BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JOSH SILVERS,

Claimant,

vs.

PRECISION PIPELINE, LLC,

Employer,

and

INDEMNITY INS. CO. OF AMERICA,

Insurance Carrier,
Defendants.

File No. 5057994

ARBITRATION

DECISION

Headnotes: 1801, 1108, 1803, 2500, 4000.2

STATEMENT OF THE CASE

Claimant, Joshua Silvers, filed a petition in arbitration seeking workers' compensation benefits against Precision Pipeline, LLC, employer, and Indemnity Insurance Company of North America, insurer, as defendant, for a disputed work injury.

This case was heard on December 12, 2017, in Cedar Rapids, Iowa. The case was considered fully submitted on January 3, 2018, upon the simultaneous filing of briefs.

The record consists of Joint Exhibits 1-4, Claimant's Exhibits 1-9, and Defendants' Exhibits A-J.

ISSUES

1. Whether the alleged injury is a cause of temporary disability and, if so, the extent;

2. Whether the alleged injury is a cause of permanent disability and, if so,;

3. The appropriate commencement date of permanent disability benefits;

4. The extent of claimant's scheduled member disability;

5. Whether there is a causal connection between claimant's injury and the medical expenses claimed by claimant;

6. The rate of compensation;

7. Whether claimant is entitled to penalty benefits under Iowa Code section 86.13 and, if so, how much.

STIPULATIONS

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.

The parties agree claimant sustained an injury to his foot arising out of and in the course of his employment on August 26, 2016. They further agree that claimant was off work from September 23, 2016 through May 7, 2017.

At the time of his injury, claimant's gross earnings were $1372.01 per week. He was married and entitled to four exemptions. Based on those foregoing numbers, the weekly benefit rate is $862.18.

Claimant seeks reimbursement of medical expenses. While defendants dispute responsibility for those medical expenses, they do stipulate that the medical providers would testify as to the reasonableness of the fees and/or treatment of the listed expenses and that the listed expenses are causally connected to the medical conditions upon which the claim of injury is based.

FINDINGS OF FACT

Claimant is a 39-year-old person at the time of the hearing. On August 26, 2016, claimant suffered an injury to his right foot while working on the Dakota Access Pipeline. His crew was responsible for digging a trench and putting a large diameter pipe into the ground. Specifically, he served as an oiler working in conjunction with an operator to ensure that the equipment is running smoothly. On the aforementioned date, claimant was directing dump trucks with a full load to a site where they would dump the rock. The area was marshy and the crews used wooden mats so that the heavy machinery would not sink into the ground. As claimant was walking backwards, two mats slid apart and his foot became caught in between the two mats. He twisted and fell to the ground. Because a truck was coming, he hopped to his feet and continued to work.

As the day went on, his ankle began hurting. He radioed his boss and reported the injury.

He began working for defendant employer in August 2016, approximately a week before he was injured. His past work history includes cook, laborer at Nordstrom, and an operator of machinery for Ryan Corporation.

He graduated from high school and has had no formal post-secondary education.

Approximately a half hour after reporting the injury, he was called in to provide an incident report. At that time, he was offered medical care or paperwork that indicated that if he declined it, he could have a few days off of work to improve. Claimant chose the latter option. (Exhibit D-18; Ex. 3:22-23) While claimant was off work, he was paid his regular wages.

Claimant returned from his brief leave and continued to work. Gary Cooper, a senior field safety person for defendant, testified that he was unaware claimant had lingering problems and that claimant had sought out medical attention on his own until claimant presented a work release form from his physician. (Ex. 3: 23)

Claimant's past medical history includes work-related bursitis in the right knee, depression and anxiety diagnosed in 2014, and low back pain reported in 2014. He also developed CTS symptoms in the right. On December 12, 2014, claimant reported a pain in the right knee and was given a prescription of hydrocodone and referred to orthopedics. He was given a cortisone injection and a knee brace. In 2016, claimant sustained a right wrist injury while at work and was diagnosed with De Quervain's syndrome that was treated conservatively with medication, injections, and physical therapy. (JE 1)

August 30, 2016, claimant presented at the Unity Point Walk-In Clinic and was seen by Keith Allen, PA-C. (JE 2:20) Claimant reported pain on the top of the right foot, pain in the knee, and tingling in the toes. (JE 2:22) He had been using ice and elevation along with over-the-counter drugs with minimal relief. Minimal swelling was noted and claimant was tender to palpation on the dorsal aspect of the right foot. X-rays were negative for a fracture. Id. Claimant was diagnosed with a right foot sprain, given an Ace wrap and recommendations to rest and alternate heat and ice. (JE 2:22) Mr. Allen instructed claimant to remain off work until September 2, 2016. (JE 2:22) Claimant presented the work release and was placed into a spotter position or pump monitor position. Because of ongoing pain, claimant was unable to stand for long periods of time and was terminated because he could not perform the duties of his position. (Ex 3:22)

After being let go by defendant employer, he found new employment in May 2017 with a contracting company, Mashuda Corporation, out of Eau Claire, Wisconsin. He drove a Caterpillar 740 until the job was completed. He was able to do his job without accommodations, working 50-60 hours per week. The claimant was laid off in August 2017. In October 2017, he was employed by Appalachian Pipeline and was learning to be an "oiler." (Ex. 1:4)

Claimant testified he requested medical care and was denied. He was told that he was not entitled to any because he signed the denial of care document. Mr. Cooper testified that claimant did not ask for care. (Ex 3:27) However, Mr. Cooper knew that when claimant returned to work, claimant was placed into a different position "so that he [sic] not have to spend a lot of time on his foot or on his legs." (Ex. 3:24) When asked if "the purpose of him being in that job was so that he could spend less time on his feet?", Mr. Cooper answered, rather unbelievably, "I don't know that I was ever asked, so I don't know what the purpose would have been." (Ex. 3:24) He further acknowledged that he,

> got a call and I can't even recall who it was from, that they have a spotter who could not do—who was complaining about his foot or would not stand out on the right-of-way. And when I got over there it was Josh and he said he couldn't stand—he couldn't stand up. He couldn't stand up and watch them on the right-of-way or under overhead power, he had to sit in his truck.

(Ex. 3:25)

When asked why claimant said he could not stand, Mr. Cooper answered, "He just said his ankle hurt." (JE 3:25) As a result, Mr. Cooper let claimant go. Defendants argue that it was the labor steward, Mr. Hersh, who terminated claimant's employment. Mr. Cooper testified that he visited the site, spoke with claimant and determined that because claimant could not stand in the right-of-way, he would need to be fired. Mr. Cooper cannot now claim that he did not know why claimant was moved to a different position or that claimant did not maintain an ongoing problem with his right ankle and foot. To the extent that claimant's testimony contradicts with Mr. Cooper's testimony, claimant's testimony is adopted. Mr. Cooper's testimony is given low weight as a result of his credibility issues.

On or about September 27, 2016, claimant began care with Peter Caldwell, D.P.M. (JE 4:34) New x-rays were taken which showed a moderate bunion deformity and an elongated second metatarsal with cortical hypertrophy. (JE 4:34) Dr. Caldwell diagnosed claimant with a stress fracture in the second metatarsal. He was placed in a boot and instructed to return. (JE 4:34)

In his follow-up visit on October 17, 2016, Dr. Caldwell recommended four more weeks of E-boot immobilization and excused claimant from work. (JE 4:37)

When Dr. Caldwell learned that this was a work injury, he said that he would no longer care for the claimant. (JE 4:38) An MRI was ordered and on November 22, 2016, claimant returned to Dr. Caldwell's office. Claimant was continuing to have tenderness in his toes and ankle along with clicking and crepitus upon range of motion in the ankle joint. (JE 4:40) During this visit, Dr. Caldwell wrote, "It has likely exacerbated an underlying problem, so he is unsure of whether he is covered by work comp or not. Since he does not seem to be improving with immobilization, we discussed

bunionectomy/cheilectomy of the first MPT and a possible arthrotomy with chondroplasty of his ankle." (JE 4:40) No further care was provided by Dr. Caldwell, presumably because of the workers' compensation component of claimant's injury.

Claimant returned to Unity Point and was seen by Pravin Gupta, MD, on January 4, 2017. (JE 2:26) The claimant described a constellation of issues including obesity, depression, bipolar disorder, nicotine dependence, recent fracture of the right foot, and ingrown toenail on the left. (JE 2:26) Dr. Gupta prescribed Prozac and trazodone and made a referral for psychiatric care. He also recommended that claimant be seen at the University of Iowa for the bariatric program. (JE 2:29)

Claimant then sought care with Rodney Dempewolf, D.P.M., on January 30, 2017. (JE 1:12) To Dr. Dempewolf, claimant reported pain in the right distal forefoot, top and bottom of the foot, and some anterolateral ankle pain. (JE 1:12) Dr. Dempewolf described claimant as "a good reliable historian. He does not appear to be overly histrionic or attention seeking behavior." (JE 1:14) Radiographs were reviewed.

> X-rays do show dorsal lateral osteophyte coming off of the dorsal lateral first MTPJ consistent with early hallux limitus. No significant toe deformities appreciated but these are all nonweightbearing films. MRI shows osteochondral defect to the dorsal lateral first MTPJ. Joint capsule to the second MTPJ shows fibrosis consistent with old chronic injury as the MRI was performed in November and the injury was in late August.

(JE 1:14)

Dr. Dempewolf concluded that claimant's signs and symptoms were consistent with how the injury occurred and diagnosed claimant with capsulitis sprain of the second MTPJ plantar ligamentous structure and hallux limitus with osteochondral injury to the dorsal lateral first MTPJ. *Id.* He recommended claimant begin with a corticosteroid injection. *Id.* Claimant agreed. (JE 1:15) Dr. Dempewolf wrote a letter to Dr. Gupta, indicating that Dr. Dempewolf was attempting to avoid surgery but that claimant's morbid obesity was "obviously complicating care." (JE 1:17) Claimant returned to Dr. Dempewolf's office on April 24, 2017. (JE 1:18) Claimant reported he was having little to no pain or discomfort from the work injury, rather an ingrown toenail on the right was problematic. (JE 1:18)

> Claimant does not feel like he needs medical care at this time.

In a letter to the defendants' counsel, Dr. Caldwell wrote the following:

> In reviewing my notes, Mr. Silvers reports on August 16th while at work he stepped between two mats, twisting his foot, which resulted in acute onset of pain on the top of his foot, which had been present for two weeks. His pain was isolated to the top of his foot, mid-diaphyseal region of his second metatarsal, suggesting a possible stress fracture. Incidentally, his

> initial x-rays at his first visit demonstrated a mild bunion deformity with some early degenerative changes at the first MTP joint, which at the time of our initial encounter were asymptomatic. After six weeks of immobilization in an E-boot, repeat x-rays and a subsequent MRI revealed that there was no evidence of a stress fracture in his forefoot, but there were early degenerative changes noted in his first MTP joint. Therefore, his likely diagnosis is a midfoot sprain attributed to his injury on August 16th. After six weeks of immobilization, any mild sprain would likely be resolved and the negative MRI confirms this. Any degenerative changes of his first MTP joint would be considered a pre-existing condition and possibly exacerbated by his foot injury, but certainly not the cause.
>
> Given his negative findings, it is reasonable to conclude that no permanent injury was sustained pertaining to his area of chief complaint. Any further treatment regarding his bunion deformity and early degenerative changes of his first MTP joint would be considered pre-existing and not directly attributable to his reported injury.

(JE 3:43)

A defense IME was conducted with Jonathan Fields, M.D. on October 23, 2017. Dr. Fields recorded that claimant still had minor pain in the right second toe which occasionally radiates to the dorsum of the foot that he treats with ibuprofen. (Ex. A, p. 5) Dr. Fields felt that claimant was not consistent during the examination. "Reported tenderness to palpation over MTPJ of right 2nd toe (both dorsal and plantar) and wincing from pain. However, when Mr. Silvers was distracted and this examiner applied full palpation force, there was no apparent pain response." (Ex. A:7) Dr. Fields diagnosed claimant with contusion to the right midfoot, chronic degenerative changes to the right 1st MTP joint and chronic osteochondral lesion of the right ankle joint. (Ex A:7) Dr. Fields attributed the midfoot injury to the work incident but that the injury was minimal and resolved quickly and that it was the degenerative issues along with the osteochondral lesion of the ankle that contribute to the ongoing symptomatology. (Ex. A:8) Dr. Fields further felt that claimant was inconsistent regarding his report of injury.

> Mr. Silvers' symptomatology regarding his right 2nd MTP joint has been inconsistent throughout the medical documentation. He initially presented with pain across all of the "metatarsals 2-3-4-5" to Keith Allen PA-C on 8/30/2016. On 9/26/2016 Keith Allen PA-C noted pain on the lateral side of the dorsum pedis "about the fifth metatarsal." Then on 11/22/16 Dr. Caldwell noted "tenderness over the first MTP joint and continued tenderness in the mid-diaphysis of the 2nd metatarsal." Interestingly, on 1/30/2017 Dr. Dempewolf notes "no pain to the dorsal second MTPJ." As noted previously, there are no findings on MRI with regard to the 2nd metatarsal phalangeal joint. In addition, Mr. Silvers' clinical exam shows no reported pain to the right dorsal or plantar 2nd MTP joint with distraction. He displayed wincing pain behavior to palpation of

> the 2nd MTP joint while watching the examiner. I have no medical explanation for this.
>
> Mr. Silvers was wearing Caterpillar Steel toe work boots (similar to model P89162) which meet ANSI and ASTM standards to protect the toe box against 2500 lbs of compressive force. It is unclear what pathomechanical mechanism would have allowed Mr. Silvers to sustain ligamentous damage to solely his second toe while wearing these protective work boots. In my medical opinion, it is unclear that there has been any injury to the right 2nd metatarsal phalangeal joint.

(Ex. A: 8) Dr. Fields set claimant's MMI date as September 26, 2016, and that he had no lingering issues or impairment. (Ex. A:8) In his self-assessment for the time with Dr. Fields, claimant acknowledged being able to run errands, shop, climb in and out of a car, vacuum and perform yard work. (EX A: 12) In summary, he has symptoms but they do not impede his ability to undertake his activities of daily living or execute the tasks required of him. (Ex. A:13)

Claimant retained Mark C. Taylor, M.D., to perform an IME which was conducted on October 24, 2017. (Ex. 1:1) The report was issued on November 13, 2017. (JE 1:1) Claimant described his current symptomatology as minor pain and discomfort in the foot which he treats with daily ibuprofen. *Id* at 4. He described difficult walking, standing, working on ladders and going up and down stairs. At times, he will tape his toe. *Id.* On examination, Dr. Taylor recorded pain centered at the second MTP joint with inward compression on the medial and lateral aspects of the foot and pronounced tenderness over the second MTP joint, between the first and second joints and to some extent over the second and third MTP joints. *Id.* at 5. Claimant also demonstrated pronounced tenderness over the plantar aspect of the second MTP joint. *Id. a*t 6. Dr. Taylor refused to describe claimant's injury as temporary, as there has been no time in which claimant returned to his asymptomatic baseline. *Id.* at 7. Instead, he found claimant to have suffered a persistent metatarsalgia not present prior to injury and therefore entitling claimant to a 3 percent right foot impairment. *Id.* at 8. Dr. Taylor believed that claimant should return to Dr. Dempewolf's care and set the MMI date at June 5, 2017. *Id.* at 8. As for restrictions, Dr. Taylor assigned none currently, but addressed what restrictions might have been imposed during the injury and some appropriate time frame following. *Id.* at 8.

Claimant testified that his symptoms—numbness, tingling, and occasional sharp pains, are primarily in the ankle, whereas the pain in his foot is reduced. He testified that pain and discomfort increase with activity and at times he might have to slow down or take a break. He still takes ibuprofen 1-2 times per day.

Claimant has sought penalty benefits for unreasonable denial of care. Defendants stated in their answers to interrogatories that no care was authorized because claimant signed a Refusal of Medical Treatment form. (Ex. 2:15)

ANSWER:

Defendants never authorized any health care providers to examine or treat Claimant. On August 26, 2016, Claimant signed a Refusal of Medical Treatment form acknowledging he was refusing medical treatment offered by Precision Pipeline and his employer would not be responsible for the payment of any medical expenses because he had declined the treatment. See attached Refusal of Medical Treatment Form.

Id. Defendants continued to deny causation and refused to provide care although they acknowledge that claimant was terminated from his employment for being unable to perform the job duties for which he was hired without a medical excuse. (Ex 2:18)

ANSWER:

Claimant returned to work without restrictions on September 2, 2016. On or about September 22, 2016, Claimant complained to be unable to perform the job he was hired to perform. He met with Labor Steward Greg Hersh, who terminated his employment for being unable to perform the job duties for which he was hired without a medical excuse.

(Ex. 2:18)

On November 22, 2016, claimant's counsel initiated contact with defendants informing defendants of representation for the injury to claimant's right foot. (Ex. 4:38) Claimant's counsel wrote to the employer requesting medical care. (Ex. 4:39) No response was provided until January 3, 2017, requesting a medical waiver. (Ex. H:26) On January 5, 2017, defense counsel asserted that they could not obtain all of claimant's medical records. (Ex. 4:41) On January 10, 2017, defendants acknowledged receipt of a patient's waiver. (Ex. 4:42) On February 14, 2017, defendants' counsel forwarded a copy of Dr. Caldwell's IME report and that due to the opinions of Dr. Caldwell, defendants denied any causal relationship between claimant's work injury and his current symptomatology. (Ex 4:44)

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. 6.14(6).

The claimant has the burden of proving by a preponderance of the evidence that the alleged injury actually occurred and that it both arose out of and in the course of the employment. Quaker Oats Co. v. Ciha, 552 N.W.2d 143 (Iowa 1996); Miedema v. Dial Corp., 551 N.W.2d 309 (Iowa 1996). The words "arising out of" referred to the cause or source of the injury. The words "in the course of" refer to the time, place, and circumstances of the injury. 2800 Corp. v. Fernandez, 528 N.W.2d 124 (Iowa 1995). An injury arises out of the employment when a causal relationship exists between the injury and the employment. Miedema, 551 N.W.2d 309. The injury must be a rational

consequence of a hazard connected with the employment and not merely incidental to the employment. Koehler Electric v. Wills, 608 N.W.2d 1 (Iowa 2000); Miedema, 551 N.W.2d 309. An injury occurs "in the course of" employment when it happens within a period of employment at a place where the employee reasonably may be when performing employment duties and while the employee is fulfilling those duties or doing an activity incidental to them. Ciha, 552 N.W.2d 143.

The claimant has the burden of proving by a preponderance of the evidence that the injury is a proximate cause of the disability on which the claim is based. A cause is proximate if it is a substantial factor in bringing about the result; it need not be the only cause. A preponderance of the evidence exists when the causal connection is probable rather than merely possible. George A. Hormel & Co. v. Jordan, 569 N.W.2d 148 (Iowa 1997); Frye v. Smith-Doyle Contractors, 569 N.W.2d 154 (Iowa App. 1997); Sanchez v. Blue Bird Midwest, 554 N.W.2d 283 (Iowa App. 1996).

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

The medical experts agree claimant sustained an injury arising out of a work incident on August 26, 2017. The dispute is whether claimant's injury was temporary and resolved shortly thereafter or lingered and resulted in a permanent injury. The greater weight of the evidence suggests claimant never returned to his asymptomatic pre-injury baseline. Dr. Caldwell treated claimant from beginning in September 2016 until Dr. Caldwell discovered claimant's injury was possibly a workers' compensation issue. Claimant was then forced to find a new orthopedic foot specialist. Dr. Caldwell and the defense independent medical examiner, Dr. Fields, both opine that claimant's injury was temporary in nature. However, when Dr. Caldwell issued his opinion, it was several weeks after he had last seen claimant. Dr. Fields' opinions were based, in part, on the lack of radiographic proof of injury. However, Dr. Dempewolf found fibrosis consistent with symptoms reported by claimant and the mechanism of injury described by claimant. Dr. Fields was critical of claimant's inconsistent symptomatology, however, claimant maintained right metatarsal pain since the onset of his injury. While it did drift from the dorsal to the plantar part of the second MTP joint, the reports of pain in the toes on the right foot were consistent. The minor variations of pain in the toes are not considered to be critical in this case.

Instead, the opinion of Dr. Taylor is adopted. Claimant sustained an injury to his right second and third MTP joints. That resulted in ongoing pain and discomfort.

Claimant's complaints of pain in the right ankle have varied. At some points, it was non-existent and at others, it was reported as mild. Dr. Taylor did not diagnose a permanent disability arising out of the right ankle. To the extent claimant maintains ankle pain, it is found that it is unrelated to the work injury of August 26, 2016.

Under the Iowa Workers' Compensation Act, permanent partial disability is compensated either for a loss or loss of use of a scheduled member under Iowa Code section 85.34(2)(a)-(t) or for loss of earning capacity under section 85.34(2)(u). 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). The fact finder must consider both medical and lay evidence relating to the extent of the functional loss in determining permanent disability resulting from an injury to a scheduled member. Terwilliger v. Snap-On Tools Corp., 529 N.W.2d 267, 272-273 (Iowa 1995); Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417, 420 (Iowa 1994).

Under the Iowa Workers' Compensation Act, permanent partial disability is compensated either for a loss or loss of use of a scheduled member under Iowa Code section 85.34(2)(a)-(t) or for loss of earning capacity under section 85.34(2)(u). 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). The fact finder must consider both medical and lay evidence relating to the extent of the functional loss in determining permanent disability resulting from an injury to a scheduled member. Terwilliger v. Snap-On Tools Corp., 529 N.W.2d 267, 272-273 (Iowa 1995); Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417, 420 (Iowa 1994).

Dr. Taylor opined claimant's permanent impairment was three percent of the right foot. Claimant admitted during the hearing that the pain in his right foot is mostly resolved. In his last visit with Dr. Dempewolf, claimant was reported as having little to no pain or discomfort. Dr. Taylor's three percent impairment rating is adopted.

Claimant seeks healing period benefits from September 23, 2016, through May 7, 2017.

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

Iowa App 312 N.W.2d 60 (1981). Healing period benefits can be interrupted or intermittent. Teel v. McCord, 394 N.W.2d 405 (Iowa 1986).

Dr. Caldwell took claimant off work on October 21, 2016. There is no official return to work by Dr. Caldwell, but he did opine in a letter dated February 9, 2017, that claimant's ongoing symptoms were unrelated to the work injury. Claimant began new employment on May 8, 2017. There was no explanation for the time period during which claimant was not working. When claimant was working for Mashuda Corporation, he worked 50-60 hours a week and performed all the necessary duties of his position.

Claimant still treated with Dr. Dempewolf until April 24, 2017, at which time claimant reported to have little or no pain or discomfort. Therefore, the MMI date is set at April 24, 2017. Given that April 24, 2017 is the earlier date, that is the appropriate date on which healing period benefits should end. Claimant is entitled to healing period benefits from his termination, September 23, 2017, until the MMI date of April 24, 2017.

The commencement date of PPD is thus April 25, 2017.

Claimant seeks reimbursement of medical expenses associated with the care and treatment of his right foot injury identified in Exhibit 6. Defendants have denied liability and therefore cannot exercise an authorization defense.

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. Section 85.27. Holbert v. Townsend Engineering Co., Thirty-second Biennial Report of the Industrial Commissioner 78 (Review-Reopening October 1975).

Any and all bills related to claimant's right foot are the responsibility of the defendants. The defendants stipulated that the medical providers would testify as to the reasonableness of the fees and/or treatment of the listed expenses and that the listed expenses are causally connected to the medical conditions upon which the claim of injury is based. To the extent that Exhibit 6 reflects bills of that nature, claimant is entitled to reimbursement. He is also entitled to return to Dr. Dempewolf and seek additional care, if necessary, for treatment to his right foot.

Finally, we turn to the issue of penalty.

In Christensen v. Snap-on Tools Corp., 554 N.W.2d 254 (Iowa 1996), and Robbennolt v. Snap-on Tools Corp., 555 N.W.2d 229 (Iowa 1996), the supreme court said:

> Based on the plain language of section 86.13, we hold an employee is entitled to penalty benefits if there has been a delay in payment unless the

employer proves a reasonable cause or excuse. A reasonable cause or excuse exists if either (1) the delay was necessary for the insurer to investigate the claim or (2) the employer had a reasonable basis to contest the employee's entitlement to benefits. A "reasonable basis" for denial of the claim exists if the claim is "fairly debatable."

Christensen, 554 N.W.2d at 260.

The supreme court has stated:

(1) If the employer has a reason for the delay and conveys that reason to the employee contemporaneously with the beginning of the delay, no penalty will be imposed if the reason is of such character that a reasonable fact-finder could conclude that it is a "reasonable or probable cause or excuse" under Iowa Code section 86.13. In that case, we will defer to the decision of the commissioner. See Christensen, 554 N.W.2d at 260 (substantial evidence found to support commissioner's finding of legitimate reason for delay pending receipt of medical report); Robbennolt, 555 N.W.2d at 236.

(2) If no reason is given for the delay or if the "reason" is not one that a reasonable fact-finder could accept, we will hold that no such cause or excuse exists and remand to the commissioner for the sole purpose of assessing penalties under section 86.13. See Christensen, 554 N.W.2d at 261.

(3) Reasonable causes or excuses include (a) a delay for the employer to investigate the claim, Christensen, 554 N.W.2d at 260; Kiesecker v. Webster City Meats, Inc., 528 N.W.2d at 109, 111 (Iowa 1995); or (b) the employer had a reasonable basis to contest the claim—the "fairly debatable" basis for delay. See Christensen, 554 N.W.2d at 260 (holding two-month delay to obtain employer's own medical report reasonable under the circumstances).

(4) For the purpose of applying section 86.13, the benefits that are underpaid as well as late-paid benefits are subject to penalties, unless the employer establishes reasonable and probable cause or excuse. Robbennolt, 555 N.W.2d at 237 (underpayment resulting from application of wrong wage base; in absence of excuse, commissioner required to apply penalty).

> If we were to construe [section 86.13] to permit the avoidance of penalty if any amount of compensation benefits are paid, the purpose of the penalty statute would be

> frustrated. For these reasons, we conclude section 86.13 is applicable when payment of compensation is not timely . . . or when the full amount of compensation is not paid.

Id.

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

(6) In determining the amount of penalty, the commissioner is to consider factors such as the length of the delay, the number of delays, the information available to the employer regarding the employee's injury and wages, and the employer's past record of penalties. Robbennolt, 555 N.W.2d at 238.

(7) An employer's bare assertion that a claim is "fairly debatable" does not make it so. A fair reading of Christensen and Robbennolt, makes it clear that the employer must assert facts upon which the commissioner could reasonably find that the claim was "fairly debatable." See Christensen, 554 N.W.2d at 260.

Meyers v. Holiday Express Corp., 557 N.W.2d 502 (Iowa 1996).

Weekly compensation payments are due at the end of the compensation week. Robbennolt, 555 N.W.2d 229, 235.

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

When an employee's claim for benefits is fairly debatable based on a good faith dispute over the employee's factual or legal entitlement to benefits, an award of penalty benefits is not appropriate under the statute. Whether the issue was fairly debatable turns on whether there was a disputed factual dispute that, if resolved in favor of the employer, would have supported the employer's denial of compensability. Gilbert v. USF Holland, Inc., 637 N.W.2d 194 (Iowa 2001).

While there is no penalty for wrongfully denied care, penalty benefits are appropriate for late or unpaid benefits. It is undisputed that the defendants denied the claim and resulted to pay any benefits. The burden shifts for the defendants to show the denial was reasonable.

Defendants denied care from the outset of this claim, based primarily on claimant's refusal of medical care. (Ex. 2:19) There is no basis in the law to deny workers' compensation benefits simply because an injured worker initially denied need for medical care. Claimant reported his injury to his supervisor. Mr. Cooper testified in the deposition that claimant was let go because he was unable to perform the essential duties of his job. Claimant testified that because of his work injury, he could not stand for a long period of time.

Since the initial injury, claimant has improved to 90-95 percent of his pre-injury status, yet defendants have still maintained no responsibility, primarily because of the initial refusal of medical care. That initial refusal does not constitute a reasonable investigation. As such, claimant is entitled to penalty benefits up until January 3, 2017, when defense counsel began obtaining medical records and obtained an IME from Dr. Caldwell. Once Dr. Caldwell provided an opinion that claimant's injury was temporary and had resolved, defendants then had a reasonable basis to deny the claim. Up until that point, however, defendants' lack of investigation and communication with the claimant was unreasonable and therefore in violation of their responsibilities under the Code.

Claimant is entitled to penalty benefits of any unpaid benefits from the date of his injury up to January 3, 2017.

Further, because defendants essentially did nothing and relied on this refusal of medical care, the appropriate amount of the penalty benefit is the maximum allowed at 50 percent.

ORDER

THEREFORE, it is ordered:

That defendants are to pay unto claimant four point five (4.5) weeks of permanent partial disability benefits at the rate of eight hundred sixty-two and 18/100 dollars ($862.18) per week from April 25, 2017.

That defendants are to pay unto claimant healing period benefits at the above rate from September 23, 2017, until April 24, 2017.

That defendants are to pay fifty (50) percent of all late paid or unpaid benefits from September 23, 2017, to January 3, 2017, in the form of penalty benefits.

That defendants shall pay accrued weekly benefits in a lump sum.

That defendants shall pay interest on unpaid weekly benefits awarded herein as set forth in Iowa Code section 85.30.

That defendants shall pay the costs of this matter pursuant to rule 876 IAC 4.33.

Signed and filed this 15th day of March, 2018.

JENNIFER S. GERRISH-LAMPE
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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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.