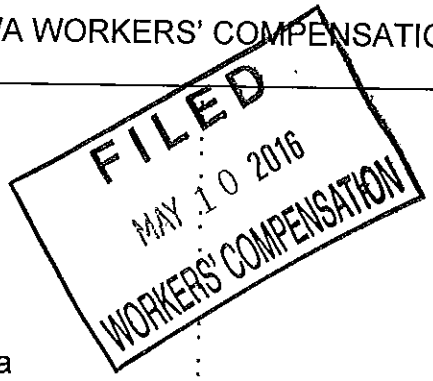
BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER



JEFF WILSON,

Claimant,

vs.

IDEX CORPORATION, d/b/a VIKING PUMP,

Employer,

and

LIBERTY MUTUAL INSURANCE COMPANY,

Insurance Carrier,
Defendants.

File No. 5053030

ARBITRATION

DECISION

Head Note Nos.: 1803, 4000.2

STATEMENT OF THE CASE

Jeff Wilson, the claimant, seeks workers' compensation benefits from defendants, IDEX Corporation, d/b/a Viking Pump, the alleged employer, and its insurer, Liberty Mutual Insurance Company, as a result of an alleged injury on April 26, 2013. Presiding in this matter is Larry P. Walshire, a deputy Iowa Workers' Compensation Commissioner. An oral evidentiary hearing commenced on April 11, 2016, but the matter was not fully submitted until the receipt of the parties' briefs and argument on April 18, 2016. Oral testimony and written exhibits received into evidence at hearing are set forth in the hearing transcript.

Claimant's exhibits were marked numerically. Defendants' exhibits were marked alphabetically. References in this decision to page numbers of an exhibit shall be made by citing the exhibit number or letter followed by a dash and then the page number(s). For example, a citation to claimant's exhibit 1, pages 2 through 4 will be cited as, "Ex 1-2:4." Citations to a transcript of testimony such as "Tr-4:5," either in a deposition or at hearing, shall be to the actual page number(s) of the original transcript, not to page number of a copy the transcript containing multiple pages.

The parties agreed to the following matters in a written hearing report submitted at hearing:

1. On April 26, 2013, claimant received an injury arising out of and in the course of employment with IDEX Corporation, d/b/a Viking Pump.

2. Claimant is not seeking additional healing period benefits in this proceeding.

3. The stipulated injury is a cause of some degree of permanent, industrial disability to the body as a whole.

4. Permanent partial disability benefits shall commence on August 20, 2013.

5. At the time of the stipulated injury, claimant's gross rate of weekly compensation was $1,161.28. Also, at that time, he was married and entitled to two exemptions for income tax purposes. Therefore, claimant's weekly rate of compensation is $740.74 according to the workers' compensation commissioner's published rate booklet for this injury.

6. Medical treatment benefits are not in dispute.

7. Prior to hearing, defendants voluntarily paid 35 weeks of permanent disability benefits for this work injury.

ISSUES

At hearing, the parties submitted the following issues for determination:

I. The extent of claimant's entitlement to weekly permanent disability benefits;

II. The extent of claimant's entitlement to a reimbursement for an independent disability evaluation pursuant to Iowa Code section 85.39; and,

III. The extent of claimant's entitlement to penalty benefits for an unreasonable delay or denial of weekly benefits pursuant to Iowa Code section 86.13.

FINDINGS OF FACT

In these findings, I will refer to the claimant by his first name, Jeff, and to the defendant employer as Viking Pump.

From my observation of his demeanor at hearing including body movements, vocal characteristics, eye contact and facial mannerisms while testifying in addition to consideration of the other evidence, I found Jeff credible.

Jeff is 58 years of age with a 9th grade formal education, but he obtained his GED in 2000. He had difficulty with the writing and essay portion of the GED testing and is not a good speller. He obtained a certificate in non-destructive testing and inspection of parts through Viking Pump after completing a week-long course. He also possesses a current commercial driver's license. He has a home computer that he

uses to pay bills and search the internet, but has limited typing skills and no experience with Microsoft business programs such as Excel. (See Tr-6:9)

The stipulated work injury on April 26, 2013 was to the left shoulder at Viking Pump. Jeff is right handed. He had a prior right shoulder problem which claimant states was a ligament tear in 2005, but he testified that he had no continuing problems with the right shoulder after recovering from that injury. (Tr-68:70) Jeff also has a prior surgery on the left shoulder from a non-work related incident sometime prior to the injury in this case, but Jeff states he had no left shoulder difficulties at the time of his April 26, 2013 work injury. (See Tr-68:69) There is no evidence in the record of any permanent impairment or disability before the work injury of April 26, 2013.

Jeff states that since this work injury in this case, he has developed low back problems from a herniated disc which compelled him to be off work for ten weeks in 2014. (Tr-67, 77; Ex. A-4:5) He also is now being treated for rheumatoid arthritis with medications. Jeff states that his arthritis primarily affects his hands, but it also affects his back and feet. (Tr-78:80) His arthritis reduces his ability to sit for long periods of time. (Tr-81)

Jeff has worked for Viking Pump, a manufacturer of rotary pumps, for 38 years and continued to do so at the time of hearing. At the time of his work injury in this case, he was performing the job of furnace tender. He had held that job since August 23, 2010. (Ex. 6-1) Before then, he held various jobs such as chipper/grinder, gate cutter, muller operator, pattern maintenance, molder, test bar machinist, and core maker helper. (Id). At the time of his injury, Jeff testified that he had no concerns about his physical ability to perform the furnace tender job. (Tr-24)

At hearing, Jeff described the various tasks he performed while working as a furnace tender. Initially, material would be loaded into a furnace using a mechanical car and crane. As the metal melts the furnace tender adds Perlite to the molten metal using a hand held scoop. As the melting process develops, dirt and other debris would float on top of the molten metal and the furnace tender would use the slag rod to lift the floating pile of slag out of the furnace and put it into a tub. (See Tr-25:26, 83).

After slagging off the furnace the furnace tender would take a preliminary sample of the molten metal to determine if they needed to add carbon, silicon or other materials to it. This material had to be hand carried using a bucket and can weigh up to 50 pounds. (Tr-29:30) After taking preliminary samples, the furnace tender would take a sample to send to the lab in order to determine what additional materials may need to be added to bring the metal up to specs. (Id).

Furnace tenders at Viking Pump also are required to work a considerable amount of overtime by working 12-hour shifts and on weekends on a rotating basis. There was no dispute that furnace tenders were given significantly more overtime than other workers at the plant, given the need to have these furnaces operating before other production workers arrive. One furnace tender was required to begin early on Mondays

to "melt in" the furnaces. (Tr-24) On Sundays, furnace tenders would patch the furnaces by chipping slag off the top caps using a hand-held jack hammer. (Tr-30:31) After chipping off the top caps they would clean them and then patch them by applying patch material using their hands and a small air hammer. (Tr-32:36)

About every two and a half to three months, the furnace tenders would have to replace the linings in the furnaces. The furnace tenders would take the lid off the furnace with an overhead hoist, cool down the furnace with a big box fan and then use a jackhammer to chip out the old liner. (Tr-37:40) After the furnace was cleaned out the furnace tenders would grout it, put some paper in it and start the lining process. (Tr-39) The furnace tenders would use a snorkel, like a funnel to put lining material, which is like a gravely powder dry mix, into the bottom of the furnace and then vibrate it down. The next step was to put a steel liner into the furnace and then fill in around it with lining material. (Tr-39:42) The relining was usually done on Saturdays. (Tr-40)

According to a job analysis report submitted into evidence by defendants, the jobs of furnace tender and assistant furnace tender required reaching above shoulder, at waist level and below waist and lifting up to 75 pounds, on an intermittent basis, except for an assistant who is required to carry up to 40 pounds continuously. It was noted that bags of graphite vary in weight between 50 and 50 plus pounds and slag weighs 26-50 pounds. (See Ex. B & C)

The work injury on April 26, 2013 was described by Jeff as the onset of immediate, severe pain in his left shoulder while slagging waste off a foundry furnace. (Tr-10) Specifically, the slagging task required Jeff to skim waste from the surface of molten metal using a pole with a paddle attached to the end. Jeff's right hand would grip the end of the pole closer to his body, while the left upper extremity was extended away from his body, supporting the weight of the waste on the end of the pole. Jeff would then lift the pole from floor level to a tub at about waist height and rotate the pole to dump the waste into a tub. (Tr-26:27)

After Jeff reported his injury to Viking Pump management, defendants referred Jeff for medical treatment to David Kirkle, D.O. an occupational medicine physician. Dr. Kirkle's treatment consisted of physical therapy and medication. When Jeff failed to improve, Dr. Kirkle ordered MRI of his left shoulder which revealed a "near full thickness tear" of the rotator cuff. Dr. Kirkle then referred Jeff to Christopher Eagan, D.O., an orthopedic surgeon. (See Tr-12; Ex. 4-1)

Dr. Eagan performed a surgical decompression and rotator cuff repair on June 11, 2013. (Ex. 1-2) Following this surgery, Dr. Eagan ordered physical therapy, and Jeff ultimately completed 69 sessions of therapy for his left shoulder. (Ex. 2-4; Ex. 3) Prior to surgery, Jeff was performing light duty running the melt deck crane, which only required him to push buttons. (Tr-15) Following surgery, Jeff was off work until July 17, 2013, at which time Dr. Eagan released him back to work but to only half days of clerical work. (Ex. 2-4) Despite the clerical work limitation, Jeff was sent back

to the melt deck to run the crane and give out iron (pouring molten metal into ladles), which was still a light duty task. (Tr-16)

While Jeff was still on light duty restrictions by Dr. Eagan, a truck driving job opened up in a different area. Jeff bid on this job and was transferred to it on August 28, 2013. (Ex. 6-1) This change of jobs was noted by Dr. Eagan in his note of October 22, 2013. (Ex. 2-10) Claimant testified that he previously discussed his job duties as a furnace tender with Dr. Eagan who then recommended that Jeff obtain different work because such work would risk re-injury of his shoulder. (Tr-17) On December 3, 2013, Dr. Eagan released claimant back to full duty work and directed him to return for an impairment rating. (Ex. 2-12) Jeff testified that Dr. Eagan would not have done so if he were still on the furnace job. Dr. Eagan approved of the truck driving job. (Tr-18) Dr. Eagan verified the conversations with Jeff about the inappropriateness of continuing in the furnace tender job. (Ex. 2-18) The truck driving job involves the operation of a straight truck which transfers product and raw materials to and from various Viking Pump locations. Jeff is required to load and unload his truck, but the loads are on pallets, and he uses a powered forklift to move the pallets in and out of his truck. (Tr-59:60)

Jeff returned to Dr. Eagan on March 6, 2014, reporting increased shoulder symptoms. (Ex. 2-13) Dr. Eagan injected Jeff's left shoulder and recommended a repeat MRI if his symptoms did not improve. Jeff returned on May 6, 2014 with continued pain and the doctor ordered an arthrogram. (Ex. 2-14) On May 28, 2014, the doctor states that the arthrogram revealed a very small rotator cuff tear, but he did not recommend further surgery. The doctor continued unrestricted duty and stated that Jeff has achieved MMI again. (Ex. 2-15) On June 30, 2014, Dr. Eagan authored a report assigning a 7 percent BAW impairment rating on the basis of weakness of the left shoulder. (Ex. 2-17)

In January 2016, defense counsel asked Dr. Eagan to opine as to Jeff's ability to work as a furnace tender and provided a copy of the Job Analysis Report previously discussed above along with some pictures of persons performing the job. The doctor opined that Jeff would not be able to perform the job as described. Also, when asked if Jeff could perform the job with accommodations, the doctor stated that the accommodations would have to include less repetitive tasks at lower weight amounts. (Ex. 2-19:20)

At the request of his attorney, Jeff was evaluated by Arnold Delbridge, M.D., a board certified orthopedist, in April 2015. In his report dated July 27, 2015, Dr. Delbridge agrees with Dr. Eagan that claimant has achieved MMI and requires no further treatment. He also agrees that Jeff cannot return to the furnace tender job, but is capable of performing the truck driving job. Dr. Delbridge opines that Jeff suffered an 8 percent permanent partial impairment to the body as a whole using the AMA Guides, Fifth Edition due to weakness and lost range of motion. The doctor also recommends permanent restrictions against repetitive above shoulder reaching, lifting more than five

pounds above shoulder level, repetitive reaching or picking up objects at arm's length, and lifting greater than 40 pounds bilaterally. (See Tr-3, 5; Ex. 4)

Jeff testified that he continues to suffer from aching, burning pain in his left shoulder as severe as 4–5/10. Jeff's pain increases in severity depending on the activity he is performing. However, he admits that symptoms subside when he is inactive and he had no symptoms while testifying at hearing. He also has decreased range of motion and weakness. Specifically, Jeff experiences increased pain with pushing, pulling, reaching and lifting overhead, reaching and lifting away from his body, repetitive lifting, and sleeping. (see Tr-21:24, 71:72; Ex. 2-16; Ex. 3) However, Jeff admits that he is able to physically perform his truck driving job and has not missed work in this job due to his left shoulder injury. (Tr-75:76)

As a furnace tender, Jeff was earning $21.55 per hour before he transferred to the truck driving job. The truck driving job pays $21.05 per hour. (Ex. 6-1) Consequently he suffered a $.50 per hour cut in wages from the transfer. However, the most significant cut in earnings from the transfer was the loss of the large amount of overtime compensation. During the year before the work injury, 2012, Jeff's gross income was $67,665.22, which included overtime compensation of $22,129.04. In the year following the transfer to truck driving, 2015, Jeff earned $44,125.94 which included only $1,861.99 of overtime pay. (Tr-61; Ex. 7) This is about a 35 percent loss of actual earnings.

Jeff testified that he could have bid to jobs other than truck driving, but they all required physical labor in excess of his limitations. (Tr-100) He attempted to get overtime in his job doing the furnace chipping and grinding on weekends, but could not do it due to his shoulder problems. (Tr-62) He also has attempted to bid on lead and supervisor positions in the foundry, but was either rejected or told he was not eligible because he worked in a different location than the location of the opening. (Tr-64:65)

I find that the work injury of April 26, 2013 is a cause of significant permanent impairment to the body as a whole. I, also, find as a result of this work injury, he is permanently unable to perform repetitive above shoulder reaching, lifting more than five pounds above shoulder level, repetitive reaching or picking up objects at arm's length, and lifting greater than 40 pounds bilaterally. I, also find that this work injury is a cause of Jeff's inability to continue in his job as a furnace tender at Viking Pump and was compelled to take a lower paying job as a truck driver at Viking Pump.

At hearing, defendants attempted to downplay the impact of the transfer to truck driving with the testimony of Daniel Proctor, the alloy foundry superintendent, who formerly was the production superintendent for the whole facility at Viking Pump.

First, Proctor asserts that there are reduced earnings for all employees due to a downturn in business activity. (Tr-110) However, Proctor admits that furnace tenders continue to have more overtime currently than other employees given the nature of their work. (Tr-127:128)

Secondly, Proctor states that Jeff talked to him about the truck driving job before his work injury, but he could not remember when he did so. He states that the truck driving job is a favorite among older workers, as it is lighter duty. (Tr-114:116) Defendants argue that Jeff would have taken the truck driving job regardless of the injury, especially now that he has significant back and arthritis problems.

Third, Proctor states that a new machine has been installed that now does almost all of the slagging task, and now hand slagging is only needed occasionally for small amounts of slag. (Tr-117:119) He states that furnace tenders only rarely need to lift five pounds overhead, but there would have to be accommodations, as the job still requires lifting up to 50 pounds when adding materials to the furnace and some tasks may still exceed Jeff's abilities. (Tr-120:121) However, despite Proctor's testimony that accommodations could be made, he did not testify that Jeff was offered accommodations either before or after his left his furnace tender job. Jeff testified he has not had any conversations with management about accommodations. (Tr-97)

I find the work injury prohibited a return to the type of work for which Jeff is best suited given his age, limited formal education, and work experience. Jeff remains employable, but only in lighter duty jobs which pay significantly less than the work he was doing at Viking Pump when he was injured. Whether or not Jeff would have taken the truck driving job regardless of the injury is speculation. The fact remains that he left the furnace tender job as a direct result of the work injury and suffered economic loss as a result. Whether or not accommodations are possible for the current furnace tender job is irrelevant, because such accommodations were never offered.

From examination of all of the factors of industrial disability, it is found that the work injury of April 26, 2013 was a cause of a 35 percent loss of earning capacity.

In the issue of rate, the following excerpt from claimant's post hearing brief is found to be correct:

> At hearing, the parties stipulated to an average weekly wage (hereinafter "AWW") of $1,161.28, which produces a weekly rate of $740.74 per week. (Hearing Rep.). Defendants initially paid benefits at $694.86 per week. (Ex. 9, p. 2). In early August 2015, Defendants answered Claimant's Interrogatory No. 18 by stating that the correct AWW was $1,161.28 per week. (Ex. 10, p. 1). However, Defendants made no effort to remedy the rate underpayment.
>
> On or about September 1, 2015, Claimant served a Request for Admissions asking that Defendants admit that the correct weekly rate was $740.74. (Ex. 5, p. 3). On October 1, 2014, Defendants served answers admitting the rate, but still failed to pay the resulting underpayment. Id. The undersigned wrote to Defendants on 4 occasions from August 2015 to January 2016 requesting that the rate underpayment be remedied and still

> Defendants did not pay. (Ex. 10, pp. 1–3). Defendants finally paid the rate underpayment on March 8, 2016. (Ex. 10, p. 4).
> (Claimant's Post Hearing Brief, page 7)

The only explanation offered by defendants for the delay in correcting the rate was a reference to Exhibit 9 which is merely the initial letter indicating the wrong rate based on what was reported to the insurer by Viking Pump. That in no way explains the delay in correcting the defendants admitted error in calculating the rate. As calculated by defendants, the underpayment totaled $2,231.87 at the time it was finally paid. (Ex. 10-4)

On the issue of an underpayment of voluntary permanent partial disability benefits, the parties stipulated in the hearing report that defendants paid 35 weeks permanent disability benefits. According to Exhibit 9, this was solely based on Dr. Eagan's permanency rating of 7 percent to the body as a whole.

CONCLUSIONS OF LAW

I. The extent of claimant's entitlement to permanent disability benefits is determined by one of two methods. If it is found that the permanent physical impairment or loss of use is limited to a body member specifically listed in schedules set forth in one of the subsections of Iowa Code section 85.34(2)(a-t), the disability is considered a scheduled member disability and measured functionally. If it is found that the permanent physical impairment or loss of use is to the body as a whole, the disability is unscheduled and measured industrially under Code subsection 85.34(2)(u). Graves v. Eagle Iron Works, 331 N.W.2d 116 (Iowa 1983); 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).

Industrial disability was defined in Diederich v. Tri-City R. Co., 219 Iowa 587, 258 N.W.2d 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. However, consideration must also be given to the injured workers' medical condition before the injury, immediately after the injury and presently; the situs of the injury, its severity, and the length of healing period; the work experience of the injured worker prior to the injury, after the injury, and potential for rehabilitation; the injured worker's qualifications intellectually, emotionally and physically; the worker's earnings before and after the injury; the willingness of the employer to re-employ the injured worker after the injury; the worker's age, education, and motivation; and, finally the inability because of the injury to engage in employment for which the worker is best fitted; Thilges v. Snap-On Tools Corp., 528 N.W.2d 614, 616, (Iowa 1995); McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Olson v. Goodyear Serv. Stores, 255 Iowa 1112, 125

N.W.2d 251 (1963); Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961).

The parties agreed in the hearing report that the work injury is a cause of some degree of permanent, industrial disability. Consequently, this agency must measure claimant's loss of earning capacity as a result of this impairment.

Pursuant to Iowa Code section 85.34(2)(u), Iowa has adopted the so-called "fresh start rule." Industrial loss now is no longer a measure of claimant's disability from all causes after which we then apportion out non-work causes and leave in work related causes under the full responsibility rule. The percentage of industrial loss now is the loss of earnings capacity from what existed immediately prior to the work injury. This means that an already severely disabled person before a work injury can have a high industrial loss because the loss is calculated in all cases from whatever his earning capacity was just before the injury and what it was after the injury, not the loss as compared to a healthy non-disabled person. In other words, all persons, start with a 100 percent earning capacity regardless of any prior health or disability conditions. The rationale for this approach is that an employer's liability for workers' compensation benefits is dependent upon that person's wages or salary. Consequently, the impact, if any, of any prior mental or physical disability upon earning capacity is automatically factored into a person's wages or salary by operation of the competitive labor market and there is no need to further apportion out that impact from any workers' compensation award. Roberts Dairy v. Billick, 861 N.W.2d 814 (Iowa 2015); Steffan v. Hawkeye Truck & Trailer, File No. 5022821 (App. September 9, 2009).

Although claimant is closer to a normal retirement age than younger workers, proximity to retirement cannot be considered in assessing the extent of industrial disability. Second Injury Fund of Iowa v. Nelson, 544 N.W.2d 258 (Iowa 1995). However, this agency does consider voluntary retirement or withdrawal from the work force unrelated to the injury. Copeland v. Boones Book and Bible Store, File No. 1059319 (App. November 6, 1997). Loss of earning capacity due to voluntary choice or lack of motivation is not compensable. Id.

A release to return to full duty work by a physician is not always evidence that an injured worker has no permanent industrial disability, especially if that physician has also opined that the worker has permanent impairment under the AMA Guides. Such a rating means that the worker is limited in the activities of daily living. See AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, Chapter 1.2, p. 2. Work activity is commonly an activity of daily living. This agency has seen countless examples where physicians have returned a worker to full duty, even when the evidence is clear that the worker continues to have physical or mental symptoms that limit work activity, *e.g.* the worker in a particular job will not be engaging in a type of activity that would cause additional problems, or risk further injury; the physician may be reluctant to endanger the workers' future livelihood, especially if the worker strongly desires a return to work and where the risk of re-injury is low; or, a physician, who has been retained by the employer, has succumbed to pressure by the employer to return an injured worker

to work. Consequently, the impact of a release to full duty must be determined by the facts of each case.

Assessments of industrial disability involve a viewing of loss of earning capacity in terms of the injured workers' present ability to earn in the competitive labor market without regard to any accommodation furnished by one's present employer. Quaker Oats Co. v. Ciha, 552 N.W.2d 143, 158 (Iowa 1996); Thilges v. Snap-On Tools Corp., 528 N.W.2d 614, 617 (Iowa 1995). However, an employer's special accommodation for an injured worker can be factored into an award determination to the limited extent the work in the newly created job discloses that the worker has a discerned earning capacity. To qualify as discernible, employers must show that the new job is not just "make work" but is also available to the injured worker in the competitive market. Murillo v. Blackhawk Foundry, 571 N.W.2d 16 (Iowa 1997).

A change or expected change in employee's actual earnings is strong evidence of the extent of the change in earning capacity. The factor should be considered and discussed in cases where the extent of industrial disability is adjudicated. Webber v. West Side Transport, Inc., File No. 1278549 (App. December 20, 2002).

In the case sub judice, I found that claimant suffered a 35 percent loss of his earning capacity as a result of the work injury. Such a finding entitles claimant to 175 weeks of permanent partial disability benefits as a matter of law under Iowa Code section 85.34(2)(u), which is 35 percent of 500 weeks, the maximum allowable number of weeks for an injury to the body as a whole in that subsection.

II. Section 85.39 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 that the initial evaluation is too low. In this case, claimant is seeking payment of Dr. Delbridge's disability evaluation in April 2015. This clearly occurred subsequent to Dr. Eagan's permanency rating and releases to return to work in 2014.

Claimant seeks reimbursement in the amount of $900.00 for an initial report and $300.00 for a supplemental report. Claimant improperly included this in their costs itemization in Exhibit 12. A reimbursement under Iowa Code section 85.39 is not a cost assessment. Also, only one report is allowed. However, in this case, Dr. Delbridge did not address specific work restrictions in the initial report and did so in the supplemental report. Both reports were needed to fully address the views of Dr. Eagan in the impairment rating and work restrictions. Therefore, the full fees of $1,200.00 shall be awarded pursuant to Iowa Code section 85.39.

III. Claimant seeks additional weekly benefits under Iowa Code section 86.13(4). That provision states that if a delay in commencement or termination of benefits occurs without reasonable or probable cause or excuse, the industrial commissioner shall award extra weekly benefits in an amount not to exceed 50 percent of the amount of benefits that were unreasonably delayed or denied if the employee demonstrates a

denial or delay in payment or termination of benefits and the employer has failed to prove a reasonable or probable cause or excuse for the denial, delay or termination of benefits. (Iowa Code section 85.13(4)(b). A reasonable or probable cause or excuse must satisfy the following requirements pursuant to Iowa Code section 86.13(4)(c):

> (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 of the denial, delay in payment, or termination of benefits to the employee at the time of the denial, delay or termination of benefits.

The employer has the burden to show a reasonable and probable cause or excuse. A "reasonable basis" for denial of the claim exists if the claim is "fairly debatable." City of Madrid v. Blasnitz, 742 N.W.2d 77, 83 (Iowa 2007); Christensen v. Snap-on Tools Corp., 554 N.W.2d 254 (Iowa 1996); Robbennolt v. Snap-on Tools Corp., 555 N.W.2d 229 (Iowa 1996).

In this case, claimant sought penalty benefits on two grounds. First, claimant asserts an unreasonable delay in correcting the admitted error in calculating the weekly rate of compensation. Defendants offered no reasonable excuse for the almost eight month delay in paying $2,231.87 in weekly benefits.

Second, claimant asserts that defendants unreasonably underpaid permanency benefits prior to hearing. According to their own notice to claimant, the permanency benefit payment was solely based on the 7 percent rating by the treating doctor. While this may be appropriate, when claimant has returned to work with either no or minimal loss of earnings, it is not appropriate for defendants to ignore claimant's significant actual loss of earnings due to the work injury. Their assertion that he could return to his job is not supported by any medical opinion. The assertion that accommodations could have been made is irrelevant. The assertion that subsequent medical conditions would have compelled claimant to take the driving job eventually is also irrelevant. This is a clear and obvious industrial disability claim, and compensation is paid on the basis of lost earning capacity not functional loss. At the very minimum, claimant should have been paid at least weekly benefits for a 15 percent loss of earning capacity. Consequently, defendants unreasonably withheld weekly benefits for an 8 percent loss of earning capacity. This amounts to 40 weeks for a total of $29,629.60.

Finally, the agency must determine the extent of the penalty. The penalty is limited to a maximum of 50 percent of the benefits denied or delayed. Claimant is

correct in that a party's past record of penalty assessments is relevant to the issue of the amount that should be assessed. Attached to claimant's brief is a list of 51 prior assessments of a penalty against Liberty Mutual Insurance Company between April 1993 and April 2015. Defendants have not challenged the accuracy of this listing. Given the extensive past history of abuses by the insurer in this case, the maximum penalty under law shall be assessed. For the delay in paying the correct amount of weekly rate, the penalty shall be $1,115.94. For the unreasonable underpayment of permanency benefits, the penalty shall be $14,814.80. The total penalties are $15,930.74.

ORDER

1. Defendants shall pay to claimant one hundred seventy-five (175) weeks of permanent partial disability benefits at the stipulated rate of seven hundred forty and 74/100 dollars ($740.74) per week from the stipulated date of August 20, 2013. Defendants shall pay accrued weekly benefits in a lump sum and shall receive credit against this award for the thirty-five (35) weeks previously paid.

2. Defendants shall pay to claimant the sum of one thousand two hundred and 00/100 dollars ($1,200.00) for the costs of Dr. Delbridge's reports.

3. Defendants shall pay to clamant the sum of fifteen thousand nine hundred thirty and 74/100 dollars ($15,930.74) as penalties for their unreasonable denial and delay in paying weekly benefits prior to hearing.

4. Defendants shall pay interest on unpaid weekly benefits awarded herein pursuant to Iowa Code section 85.30.

5. Defendants shall pay the costs of this action pursuant to administrative rule 876 IAC 4.33, including reimbursement to claimant for any filing fee paid in this matter.

6. Defendants shall file subsequent reports of injury (SROI) as required by our administrative rule 876 IAC 3.1(2).

Signed and filed this 10th day of May, 2016.

LARRY WALSHIRE
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.