BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

CHARLES WATROUS, Claimant, vs. EFCO CORPORATION, Employer, and SENTRY INSURANCE, Insurance Carrier, Defendants.	FILED FEB 02 2018 WORKERS COMPENSATION	File No. 5057264 ARBITRATION DECISION Head Note Nos.: 1108.50, 1402.20, 1402.40, 1802, 1803, 2206, 2501, 2907, 4000

STATEMENT OF THE CASE

Charles Watrous, claimant, filed a petition in arbitration seeking workers' compensation benefits from EFCO Corporation, employer, and Sentry Insurance, insurance carrier, as defendants. Hearing was held on October 3, 2017 in Des Moines, Iowa.

Claimant, Charles Watrous, and Josh Gorman both testified live at trial. The evidentiary record also includes joint medical exhibits 1-8 and joint non-medical exhibits A-R.

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 submitted post-hearing briefs on November 10, 2017.

ISSUES

The parties submitted the following issues for resolution:

1. Whether claimant sustained an injury on February 8, 2016, which arose out of and in the course of employment?

2. Whether the alleged injury is the cause of permanent disability? If so, the extent of industrial disability claimant sustained as a result of the work injury.

3. Whether the alleged injury is the cause of temporary disability?

4. The appropriate commencement date for the permanent partial disability benefits.

5. Whether claimant is entitled to past medical benefits?

6. Whether penalty should be assessed against the defendant?

7. Assessment of costs.

FINDINGS OF FACT

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

Charles Watrous alleges he sustained a compensable injury to his left shoulder on February 8, 2016. Claimant further alleges that the injury necessitated a total shoulder replacement surgery.

Mr. Watrous has worked for EFCO Corporation (hereinafter "EFCO") since 1999. The last position he held at EFCO was senior manufacturing supervisor. Approximately 15 years ago Mr. Watrous was diagnosed with Ehler-Danlos Syndrome (EDS). (JE 7, page 156) EDS is a disease that affects the body's joints making the joints more susceptible to injury and poor wound healing. (JE 1, p. 1)

In 2011, Mr. Watrous had a right shoulder replacement. (JE 7, p. 154) He had his left knee replaced in December of 2014; a revision surgery was performed in December of 2015. (JE 3, pp. 38, 39, & 45) Mr. Watrous has also had chronic pain management for the multiple joint issues. (JE 7, pp. 151-154) After each of these operations, Mr. Watrous returned to full-time work without any restrictions placed on his activities. (Testimony)

In February of 2016, Mr. Watrous returned to work for the first time after the December 2015 knee revision surgery. Mr. Watrous testified that he was scheduled to be off work through March 23, 2016, but he returned to work earlier because of tension he experienced with a supervisor due to previous surgeries. Mr. Watrous asked his surgeon to release him to return to work, as tolerated, on February 1, 2016. (JE 3, p. 48) Between February 2, 2016 and February 9, 2016, Mr. Watrous worked approximately 48 hours, over a period of 6 days. (JE E, p. 7)

On the date of the alleged injury, February 8, 2016, Mr. Watrous pulled on a door at work with his left arm. The door did not open, so he pulled on the door harder. He immediately felt burning pain in his left shoulder. (JE 4, p. 77; JE 7, p. 145; JE L, p. 32) Mr. Watrous sent an email to the defendant employer which stated in pertinent part: "the north door(s) in Plant 2 are really a beast to open. I about left my arm with the door after lunch trying to open it." (JE C, p. 3; JE L, p. 32)

The next day, Mr. Watrous sent an email to the defendant employer advising them that he decided to go back to his original release date of March 23. He stated, "[c]ombined with my pain and meds it is clear that I came back too soon and need to get myself put back together." (JE C, p. 4) The knee surgeon reinstated the prior restrictions. (JE 3, p. 49) Mr. Watrous testified that he needed this time off of work due to his knee symptoms and his newly developed left shoulder symptoms. Consistent with the procedure already in place, his salary continued. The salary payments continued through the end of March of 2016. (JE D, p. 5)

Mr. Watrous first sought treatment for his shoulder on February 12, 2016. (JE 1, p. 13) He went to see his family physician, Jason D. Brehmer, D.O., at Unity Point Clinic. He reported that he had left shoulder pain for the past week. He hurt his shoulder by tugging on a big door that was stuck. The doctor's impression included left shoulder pain. The doctor noted that Mr. Watrous likely had some arthritis due to his long-standing EDS. He gave Mr. Watrous an injection. The doctor wanted to see how Mr. Watrous did over the next 2 weeks and then he would consider physical therapy versus a repeat MRI. (JE 1, pp. 13-15)

Mr. Watrous began physical therapy for his left shoulder on February 23, 2016. The notes reflect that he had experienced instant burning and pain in his left shoulder when he pulled really hard on a door at work. (JE 4, p. 77) Physical therapy was not beneficial. An MRI was ordered.

The MRI was performed on March 16, 2016, and revealed degeneration as well as a significant labral tear and a paralabral cyst. After reviewing the MRI, Jason D. Brehmer, D.O., felt a surgical referral was appropriate. In the meantime, Mr. Watrous was to remain off work. (JE 1, pp. 16-18)

On March 17, 2016, Mr. Watrous had a meeting with Josh Gorman, the safety and human resources manager for EFCO. Mr. Watrous reported that he had sought treatment for his left shoulder. (JE 1, p. 16) He did not complete an incident report. He also did not make a request for medical treatment from the defendant employer or defendant insurance carrier. (Testimony)

Mr. Watrous saw Wesley Smidt, M.D., at DMOS on April 4, 2016. A total shoulder replacement was recommended. Dr. Smidt performed the surgery on May 6, 2016. (JE 3, pp. 50-53)

At the April 4, 2016 visit, Mr. Watrous gave Dr. Smidt short-term disability paperwork. At that time, Dr. Smidt checked a box which indicated that the left shoulder condition was not related to a work injury. (JE K, p. 26b)

Mr. Watrous testified that his performance reviews with the defendant employer had not been as good in recent years because he was being asked to take on different projects that he did not have the education or training to perform. He had been unhappy at work, in part, because he sensed tension with a supervisor when returning from work after prior surgeries. Mr. Gorman testified that this unhappiness led to him having a discussion with Mr. Watrous about a possible separation from employment. After that discussion, a draft of a confidential separation and general release agreement was given to Mr. Watrous for his review. As recommended by the agreement draft, Mr. Watrous had the document reviewed by an attorney. Mr. Watrous did not sign the agreement. (Testimony; Ex. F)

Claimant's counsel sent a letter to the defendant employer on May 4, 2016; defendants assert this was the first time they were told Mr. Watrous was making a claim for a work injury. (JE G, p. 11; Testimony)

The defendant-employer attempted to continue discussions with Mr. Watrous about resigning and settling his claims. Mr. Gorman testified that beginning in May of 2016, he continued to have discussions with Mr. Watrous about what accommodations would need to be made for him to return to work. However, those discussions and Mr. Watrous' employment ended on July 28, 2016, when he was laid off. During 2016, EFCO experienced a slowdown of their business which resulted in a number of layoffs. More than 100 individuals were affected by the downsizing, including Mr. Watrous. Mr. Watrous was the only employee at his level in management that was affected by the layoff decisions. As of the time of the hearing, Mr. Watrous's position still had not been filled. (JE M, p. 39; Testimony)

There is no dispute that Mr. Watrous has an underlying condition, EDS, which makes him more susceptible to injury. However, this does not preclude his workers' compensation claim. Under Iowa law, if a claimant's pre-existing condition is aggravated, accelerated, worsened or lighted-up by the work injury the claimant is entitled to recover. There are several experts who have offered their medical opinions in this matter.

Mr. Watrous's long-time family physician, Lori Miller, D.O., authored a missive to claimant's counsel. Dr. Miller left the practice in March of 2016, but she had received and reviewed updated records for Mr. Watrous. She stated that Mr. Watrous had many issues with his joints over the years which were secondary to his underlying EDS. However, during her treatment of Mr. Watrous, there was no indication that he would need a total shoulder replacement. She opined that his work injury exacerbated his condition and accelerated the need for the joint replacement. (JE 5)

Dr. Smidt, the surgeon who performed the replacement procedure, also offered his opinion. On July 28, 2016, Dr. Smidt indicated that while there was the potential that Mr. Watrous might have eventually needed a left shoulder replacement without the work incident the "incident caused a definite exacerbation of his level of symptoms and accelerated his need for that surgery." (JE 3, p. 60)

On August 30, 2016, Dr. Brehmer provided his opinions. Dr. Brehmer works in the same clinic where Dr. Miller worked; Dr. Brehmer became Mr. Watrous's primary care provider after her departure. Dr. Brehmer indicated that "it was more likely than not that this incident served to aggravate Mr. Watrous's underlying shoulder pathology and accelerate his need for treatment, including the shoulder replacement." (JE 1, p. 30)

At the request of his attorney, Mr. Watrous was evaluated by Robin Sassman, M.D., for the sole purpose of addressing causation. Dr. Sassman stated:

> It is my opinion that the incident that occurred on February 8, 2016, accelerated the need for the left shoulder replacement surgery. While it is true that he may have needed the shoulder replacement surgery at some time in the future absent this incent; but for this incident occurring on February 8, 2016, he would not have needed to have the left shoulder replacement surgery at the time it was done. Therefore, the incident on February 8, 2016, was a substantial contributing factor in the need for the left shoulder replacement surgery that took place on May 6, 2016.

(JE 7, p. 158)

Dr. Sassman confirmed her opinions in a February 23, 2017 report. (JE 7, p. 169)

At the request of the defendants, Mr. Watrous was evaluated by Mark Kirkland, D.O. The doctor stated that "the injury on or about February 8, 2016 did not cause any material change in Chuck's left shoulder." (JE 6, p. 141) Dr. Kirkland noted that Mr. Watrous had significant problems with his musculoskeletal system secondary to his EDS in prior years. Dr. Kirkland then opined that "the injury lit up or exacerbated his preexisting condition." (JE 6, p. 141) He also stated that Mr. Watrous "had an exacerbation and aggravation of a preexisting injury that occurred on or about February 8, 2016." Id. Additionally, he opined that "there was a lighting up and acceleration of a severe underlying chronic degenerative condition." Id.

Claimant's counsel correctly points out that there are no contrary opinions regarding causation. While Dr. Smidt did indicate in April of 2016 that the condition that was the source of Mr. Watrous's disability was not due to injury arising out of employment, the doctor was referring to the osteoarthritis in the left shoulder. (JE K, p. 26b) It is also important to note that the form that was provided to Dr. Smidt did not

ask him to address whether the condition was aggravated or accelerated by a work injury. Furthermore, Dr. Smidt made his opinions clear in July of 2016. (JE 3, pp. 59-60)

I find that claimant has demonstrated by a preponderance of the evidence that he sustained an injury to his left shoulder which arose out of and in the course of his employment with EFCO. The medical experts in this case all agree that the work injury exacerbated, aggravated, or lit up the underlying condition. Thus, I conclude that Mr. Watrous sustained a compensable injury to his body as a whole.

We now turn to the issue of permanent disability. Specifically, the extent of industrial disability, if any, that Mr. Watrous sustained as a result of the injury.

Dr. Smidt recommended that Mr. Watrous have the same restrictions for his left shoulder as he did for his previous right shoulder; no repetitive overhead activities and no lifting more than 25 pounds. This would indicate that Mr. Watrous is physically capable of returning to the position he was performing at the time of the injury. Dr. Smidt last saw Mr. Watrous on September 16, 2016, and advised him to follow-up if necessary. There was no further follow-up. Mr. Watrous was not taking any pain medication from Dr. Smidt. (JE 3, pp. 66-70) Unfortunately, Mr. Watrous's employment ended just weeks after his surgery, so he was never given the opportunity to return to his prior job.

Dr. Sassman assigned 20 percent whole person impairment as a result of the work injury. She permanently restricted Mr. Watrous to limit his lifting, pushing, pulling, and carrying to 20 pounds occasionally from floor to waist and waist to shoulder. The doctor also stated Mr. Watrous should not lift, push, pull, or carry above shoulder height. He also should not use vibratory or power tools, should not climb ladders, and should not grip or grasp above shoulder height. (JE 7, p. 170)

Mr. Watrous also underwent a functional capacity evaluation (FCE) on October 24, 2016; this was performed at the request his attorney. The test found that he gave consistent effort throughout the exam. The FCE placed him in the sedentary and light categories; up to 15 pounds on an occasional basis with front carry. (JE 8)

In August of 2016, Mr. Watrous went to work in a sales position for ADT Security Services, ("ADT"). However, this job only lasted for a couple of weeks. Mr. Watrous felt he was forced to quit due to difficulties communicating with his supervisor, and because he felt he was physically unable to handle the long work days. Mr. Watrous has not worked anywhere since ADT. He has not looked for any other work. He has filed for Social Security Disability ("SSD"). His application has been denied twice. (JE P, p. 50; Testimony)

At the time of the hearing, Mr. Watrous was 50 years of age. He graduated from high school, but has no additional formal education. His work history includes several

managerial positions. From 1987 to 1996 he worked as a production manager at All-State Belting Company. However, he was unable to continue his employment there because he did not have a college degree. At the time his employment ended he was earning $15.00 per hour. He also worked as a second shift supervisor from 1996 to 1997 for Qualis. He was paid $42,500.00 per year. He left this job because he felt the employer did not hire sufficient full-time help. He also worked as second shift supervisor for a printing business. He was paid $17.00 per hour. He left that job for a better opportunity with EFCO. (JE P, p. 49)

Mr. Watrous testified that he continues to have problems with his left shoulder. He feels like his left shoulder is just hanging there. His shoulder symptoms interfere with his ability to sleep; he cannot sleep on his left side at all. He has difficulty lifting heavy objects, he drops items, and experiences sharp pains. Mr. Watrous does not believe he could perform any full-time work due to his pain. However, there is no medical provider restricting him from working full-time. I find that the preponderance of the evidence demonstrates that his restrictions are as assigned by orthopaedic surgeon, Dr. Smidt. He restricted Mr. Watrous to no repetitive overhead activities and a weight limitation of lifting no more than 25 pounds. (JE 3, p. 66)

At the time of the injury Mr. Watrous was paid an annual salary of $69,700.00. This is the highest salary that he could recall being paid. His current restrictions are consistent with the restrictions he previously had for his other shoulder. Although he was laid off before he could attempt to return to work with his permanent restrictions, the evidence suggests that his restrictions would not preclude him from the job he was performing at the time of the injury. No medical provider has opined that he cannot work. I find his restrictions preclude him from a significant number of jobs. However, I find that the preponderance of the evidence does not show that he is permanently and totally disabled. I find Mr. Watrous has demonstrated that he has a work history with a varied employment and skills, including supervisory skills, what would enable him to pursue alternate employment if he were so motivated. He has demonstrated very little motivation to find alternate work or retraining.

I also find that Mr. Watrous has sustained a significant loss of future earning capacity as a result of the work injury. Unfortunately, he has now been out of the labor market for over a year and he has significant restrictions. He has lost access to a portion of his pre-injury employment opportunities. However, he should be able to expand his employment opportunities with a willingness to work. Considering claimant's age, educational background, employment history, ability to retrain, lack of motivation, length of healing period, permanent impairment and permanent restrictions and the other industrial disability factors identified by the Iowa Supreme Court, I find that Mr. Watrous has proven that he sustained a 50 percent loss of future earning capacity as a result of his work injury with the defendant employer. As such, Mr. Watrous is entitled to payment of 250 weeks of permanent partial disability benefits.

Claimant is seeking healing period benefits from April 1, 2016 through March 6, 2017. Defendants argue that Mr. Watrous's healing period should end in August of 2016, when he began working for ADT. Defendants point to the earning statements from ADT. These statements demonstrate that Mr. Watrous did return to work and worked the weeks ending August 26, 2016 and September 2, 2016. (Ex. R, pp. 62-63) I find that claimant's healing period ended on August 22, 2016 when he returned to work. However, the healing period recommenced on September 3, 2016 when he was back off of work. That healing period continued until Dr. Smidt placed Mr. Watrous at maximum medical improvement (MMI) as of September 19, 2016. I find that claimant's healing period ended on September 19, 2016. Thus, I find claimant is entitled to healing period benefits from April 1, 2016 through August 21, 2016 and from September 3, 2016 until September 19, 2016. Claimant's permanency benefits shall commence at the end of each of his healing periods.

Next, Mr. Watrous is seeking payment of past medical expenses. Claimant is seeking payment of the bills listed in the attachment to the hearing report. It appears that these charges are related to the work injury. Defendants present no arguments as to why the bills should not be their responsibility if the claim is found to be compensable. Therefore, I find that defendants are responsible for the bills set forth in the attachment to the hearing report.

Claimant is also seeking penalty benefits for the defendants' failure to properly investigate the injury and for their failure to pay any healing period or permanent partial disability benefits. Claimant contends that the employer knew he had sustained an injury, was aware he was receiving treatment for the injury, and by mid-March knew the injury was serious. Claimant further contends that rather than accepting responsibility for the injury the defendant employer attempted to negotiate a deal with Mr. Watrous to resign and give up all potential claims he had against the defendant employer.

Claimant further argues that the employer did not involve the workers' compensation carrier until the middle of May of 2016. (JE H) Even after the carrier was involved, it did not discuss the claim with Mr. Watrous until July 27, 2017. (JE L) At that point, the carrier was not aware that Mr. Watrous had undergone a total shoulder replacement. (JE L, p. 36)

On August 9, 2016, the defendant carrier was provided copies of the causation opinions of Dr. Miller and Dr. Smidt. (JE I, p. 22) On August 29, 2016, the carrier was provided a copy of the IME report from Dr. Sassman. (JE I, p. 23) On September 7, 2016, the carrier was faxed a copy of the IME report of Dr. Kirkland. Despite these numerous opinions, defendants did not accept the claim.

It was not until September 14, 2016, that the carrier officially denied the alleged work injury. The denial cited Dr. Kirkland's opinion and stated that a denial was in order because "it was the Ehlers-Danlos Syndrome that caused the need for the surgery." (JE I, p. 24) Unfortunately, the letter fails to even consider the aggravation aspect of

this claim. Claimant's counsel specifically requested an explanation of the denial. Specifically, one that would take into account the aggravation aspect, but no such explanation was provided. In that letter claimant's counsel pointed out to the defendants that even if Dr. Kirkland's causation opinion was the only one that existed, it would be enough to support Mr. Watrous's claim. (JE J, pp. 25-26)

Additionally, claimant requests an assessment of full penalty because the defendant insurance carrier has a "lengthy" track record of penalty assessments from this agency. (Claimant's Brief p. 12) In support of their argument claimant lists 12 different agency cases ranging from 2003 to 2017 where penalty was assessed against this insurance carrier.

Defendants argue that penalty is not appropriate because they question the weight that should be given to any of the opinions obtained by the claimant's attorney. The argument is not terribly persuasive because it still does not take into consideration the opinion of Dr. Kirkland which stated that the work injury exacerbated or lit up his underlying condition. Iowa law is clear; an employer takes an employee as they find them with all of their underlying weaknesses. It is well-established law that if a work incident aggravates a preexisting condition rendering that condition disabling, then the employer is liable for the disability. Even if defendants questioned the weight that should be given to the opinions of the experts engaged by the claimant, there still is not a reasonable basis for a denial of the claim in light of Dr. Kirkland's opinions.

Furthermore, defendants' current argument against penalty benefits is not the stated basis for the denial in the denial letter. When defendants did finally issue a formal denial letter, the stated basis for their denial was a portion of Dr. Kirkland's opinions. Defendants ignored the aggravation aspect of Dr. Kirkland's opinions and of this claim.

I find that the defendants denied payment of weekly benefits in this matter. I further find that the defendants have failed to provide reasonable cause or excuse for the denial of weekly benefits. I find that as of the time of this decision, approximately $81,000.00 in weekly benefits are accrued and unpaid. I further find that a penalty totaling $25,000.00 would be sufficient to achieve the goals of punishment and deterrence under the facts of this case.

Finally, claimant is seeking an assessment of costs. Costs are to be awarded at the discretion of the deputy commissioner hearing the case. I find that because claimant was generally successful in his claim, an award of costs is appropriate.

Claimant is seeking the $100.00 filing fee as a cost; I find that this is an appropriate cost under 876 IAC 4.33 (7).

Claimant is also seeking reimbursement for two practitioner's reports under 876 IAC 4.33 (6). Specifically, claimant is seeking reimbursement for expenses associated

with Dr. Sassman's office in the amount of $3,400.00. I find that only the report time charged by Dr. Sassman in the amount of $953.50 is an appropriate cost. Claimant is also seeking reimbursement for the FCE in the amount of $900.00. I find that only the report expense in the amount of $350.00 is an appropriate cost. See Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839 (Iowa 2015).

Thus, defendants shall reimburse claimant costs totaling $1,403.50.

CONCLUSIONS OF LAW

The party who would suffer loss if an issue were not established ordinarily has the burden of proving that issue by a preponderance of the evidence. Iowa Rule of Appellate Procedure 6.14(6)(e).

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).

While a claimant is not entitled to compensation for the results of a preexisting injury or disease, its mere existence at the time of a subsequent injury is not a defense. Rose v. John Deere Ottumwa Works, 247 Iowa 900, 76 N.W.2d 756 (1956). Employers take their employees as they find them with all of their underlying weaknesses and pre-dispositions. Bearce v. FMC Corp., 465 N.W.2d 531, 536 (Iowa 1991). If the claimant had a preexisting condition or disability that is materially aggravated, accelerated, worsened or lighted up so that it results in disability, claimant is entitled to recover. Nicks v. Davenport Produce Co., 254 Iowa 130, 115 N.W.2d 812 (1962); Yeager v. Firestone Tire & Rubber Co., 253 Iowa 369, 112 N.W.2d 299 (1961).

Apportionment of disability between a preexisting condition and an injury is proper only when some ascertainable portion of the ultimate industrial disability existed independently before an employment-related aggravation of disability occurred. Bearce v. FMC Corp., 465 N.W.2d 531 (Iowa 1991); Varied Enterprises, Inc. v. Sumner, 353 N.W.2d 407 (Iowa 1984). Hence, where employment is maintained and earnings are not reduced on account of a preexisting condition, that condition may not have produced any apportionable loss of earning capacity. Bearce, 465 N.W.2d at 531. Likewise, to be apportionable, the preexisting disability must not be the result of another injury with the same employer for which compensation was not paid. Tussing v. George A. Hormel & Co., 461 N.W.2d 450 (Iowa 1990).

The burden of showing that disability is attributable to a preexisting condition is placed upon the defendant. Where evidence to establish a proper apportionment is absent, the defendant is responsible for the entire disability that exists. Bearce, 465 N.W.2d at 536-537; Sumner, 353 N.W.2d at 410-411.

Based on the above findings of fact, I conclude that Mr. Watrous sustained an injury to his body as a whole which arose out of and in the course of his employment with the defendant employer.

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.

Based on the above findings of fact, I conclude that Mr. Watrous sustained an injury to his body as a whole which arose out of and in the course of his employment on February 8, 2016. As discussed above, I conclude that Mr. Watrous sustained 50 percent industrial disability as a result of the work injury. As such, Mr. Watrous has shown entitlement to 250 weeks of permanent partial disability benefits.

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

Based on the above findings of fact, I conclude Mr. Watrous is entitled to intermittent healing period benefits from April 1, 2016 through August 21, 2016 and from September 3, 2016 until September 19, 2016. Permanent partial disability benefits shall commence at the end of each healing period.

We now turn to the issue of past medical expenses under Iowa Code section 85.27. 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).

Based on the above findings of fact, I conclude that pursuant to Iowa Code section 85.27, the defendants are responsible for the medical expenses set forth in the attachment to the hearing report.

Claimant also seeks an award of penalty benefits pursuant to Iowa Code section 86.13 for an alleged unreasonable denial of weekly healing period and permanent disability benefits. Iowa Code section 86.13(4) provides:

> a. If a denial, a delay in payment, or a termination of benefits occurs without reasonable or probable cause or excuse known to the employer or insurance carrier at the time of the denial, delay in payment, or termination of benefits, the workers' compensation commissioner shall award benefits in addition to those benefits payable under this chapter, or chapter 85, 85A, or 85B, up to fifty percent of the amount of benefits that were denied, delayed, or terminated without reasonable or probable cause or excuse.
>
> b. The workers' compensation commissioner shall award benefits under this subsection if the commissioner finds both of the following facts:
>
> (1) The employee has demonstrated a denial, delay in payment, or termination in benefits.
>
> (2) The employer has failed to prove a reasonable or probable cause or excuse for the denial, delay in payment, or termination of benefits.
>
> c. In order to be considered a reasonable or probable cause or excuse under paragraph "b", an excuse shall satisfy all of the following criteria:
>
> (1) The excuse was preceded by a reasonable investigation and evaluation by the employer or insurance carrier into whether the benefits were owed to the employee.
>
> (2) The result of the reasonable investigation and evaluation were the actual basis upon which the employer or insurance carrier contemporaneously relied to deny, delay payment of, or terminate benefits.
>
> (3) The employer or insurance carrier contemporaneously conveyed the basis for the denial, delay in payment, or termination of benefits to the employee at the time of the denial, delay, or termination of benefits.

Iowa Code 86.13.

I found that defendants failed to provide reasonable cause or excuse for the denial of weekly benefits as discussed above. As such, I conclude that a penalty in the amount of $25,000.00 should be sufficient to achieve the goals of punishment and deterrence under the facts of this case.

ORDER

THEREFORE, IT IS ORDERED:

All weekly benefits shall be paid at the rate of eight hundred fifty-three and 50/100 dollars ($853.50).

Defendants shall pay two hundred fifty (250) weeks of permanent partial disability benefits commencing as set forth above.

Defendants shall pay healing period benefits from April 1, 2016 through August 21, 2016 and from September 3, 2016 until September 19, 2016.

All past due weekly benefits shall be paid in lump sum with applicable interest pursuant to Iowa Code section 85.30.

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

Defendants shall pay penalty benefits in the amount of twenty-five thousand and 00/100 dollars ($25,000.00).

Defendants shall reimburse claimant's costs in the amount of one thousand four hundred three and 50/100 dollars ($1,403.50).

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

Signed and filed this 2nd day of February, 2018.

ERIN Q. PALS
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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EQP/srs

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.