BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JOHN HILL,

Claimant,

vs.

VERMEER CORPORATION,

Employer,

and

EMC RISK SERVICES,

Insurance Carrier,
Defendants.

File No. 5066032

ARBITRATION

DECISION

Headnotes: 1402.30, 1402.40, 1402.60, 1803, 2907

Claimant John Hill filed a petition in arbitration on July 10, 2017, alleging he sustained an injury to his left arm while working for the defendant, Vermeer Corporation (hereinafter "Vermeer") on October 10, 2016. Hill also named the Second Injury Fund of Iowa (hereinafter "Fund") as a defendant. Vermeer and its insurer, EMC Insurance Company ("EMC"), filed an answer on July 17, 2017, denying Hill sustained a work injury. The Fund filed an answer on August 1, 2017.

An arbitration hearing was held on July 31, 2018, at the Division of Workers' Compensation in Des Moines, Iowa. Prior to the arbitration hearing Hill entered into a settlement with the Fund. Attorney Joseph Powell represented Hill. Hill appeared and testified. Attorney William Scherle represented Vermeer and EMC. Ron Stanhope appeared on behalf of Vermeer, but did not testify. Joint Exhibits ("JE") 1 through 6, Exhibits 1 through 9, and Exhibits A through E were admitted into the record. The record was held open through August 31, 2018, for the receipt of post-hearing briefs. The briefs were received and the record was closed.

Before the hearing the parties prepared a hearing report, listing stipulations and issues to be decided. Vermeer and EMC waived all affirmative defenses.

STIPULATIONS

1. An employer-employee relationship existed between Vermeer and Hill at the time of the alleged injury.

2. Hill sustained an injury on October 10, 2016, which arose out of and in the course of his employment with Vermeer.

3. Temporary benefits are no longer in dispute.

4. If the injury is found to be the cause of permanent disability, the disability is a scheduled member disability to the left arm.

5. If the injury is found to be the cause of permanent disability, the commencement date for permanent partial disability benefits, if any are awarded, is February 14, 2017.

6. At the time of the alleged injury, Hill's gross earnings were $719.00 per week, he was married and entitled to two exemptions, and the parties believe his weekly rate is $473.92.

7. Costs have been paid.

ISSUES

1. Is the alleged injury a cause of temporary disability during a period of recovery?

2. Is the alleged injury a cause of permanent disability?

3. If the alleged injury is a cause of permanent disability, what is the extent of disability?

4. Is Hill entitled to payment of medical expenses?

5. Is Hill entitled to recover the cost of the independent medical examination?

6. Should penalty benefits be awarded to Hill?

7. Should costs be awarded to either party?

FINDINGS OF FACT

Hill is left-hand dominant. (JE 2, page 1; JE 4, p. 1; Transcript, p. 7) At the time of the hearing he was fifty-six. (Tr., p. 7)

Vermeer hired Hill in April 1996. (Ex. B, p. 9) Hill held a number of positions with Vermeer. (Ex. B, pp. 9-10) At the time of his work injury Hill was working as a safety technician. (Ex. B, p. 9) During his end-of-year review in 2016, Hill's overall evaluation rating was "meets expectations." (Ex. 2, p. 1) His manager noted Hill had a good attitude, got along well with everyone, and was always dependable and willing to fill in or move to another area to complete the job. (Ex. 2, p. 1)

Hill reported he sustained an injury at work on October 10, 2016. (Tr., p. 8) Hill relayed:

> I was putting away some bailer parts on the machine shop shelves, and as I was picking up the part – it was a long odd-shaped part that was at a 90-degree bend, had to twist it and put it in the shelf to stack them up correctly. As I was putting it up there – it was about shoulder height. As I was putting the part up there, I felt my elbow pop and my arm just immediately fell to my side.

(Tr., pp. 8-9) Hill reported the work injury to his group leader and Vermeer sent him to occupational health. (Tr., p. 9) Hill testified that prior to his injury on October 10, 2016, he did not have any physical problems with his left elbow. (Tr., p. 8)

Matthew Doty, M.D., with Vermeer Health Services Center, examined Hill the day of his work injury. (JE 1, p. 1; Tr., p. 9) Dr. Doty noted Hill was complaining of severe pain in the medial aspect of his left elbow. (JE 1, p. 1) Dr. Doty documented "[h]e states that he had put away approximately 100 parts and states that the only heavy lifting that he can recall is that he lifted four 13-lb parts at the same time, or a total of 52 lbs, onto an approximately chest high shelf," at approximately 9:00 a.m. (JE 1, p. 1) Dr. Doty assessed Hill with a left elbow strain, noted Hill admitted lifting fifty-two pounds, which is above the recommended fifty-pound restriction, imposed a restriction of no lifting over ten pounds, and provided Hill with an elbow strap to wear. (JE 1, p. 1)

Dr. Doty conducted a worksite evaluation of Hill's worksite. (JE 1, p. 2) Hill returned to Dr. Doty on October 24, 2016, reporting his left elbow pain was fifty percent better, and that the elbow strap had been very helpful. (JE 1, p. 2) Dr. Doty examined Hill and assessed him with left elbow strain/medical epicondylitis. (JE 1, p. 2) Dr. Doty stated that based on the worksite evaluation, his examination, and lack of prior symptoms he believed, to a reasonable degree of medical certainty Hill's symptoms were related to his employment with Vermeer, and again noted, "admittedly had not kept a close eye on the weights of the pieces he was lifting and did most likely lift outside of the 50-lb limit." (JE 1, p. 2) Dr. Doty recommended Hill continue to wear the elbow strap, take anti-inflammatory medications, and continued his lifting restriction. (JE 1, p. 2)

Dr. Doty prescribed prednisone for Hill. (Ex. B, p. 16) On December 12, 2016, Hill returned to Dr. Doty. (JE 1, p. 3) Dr. Doty documented Hill reported the prednisone had been very beneficial and he reported mild pain at the medial elbow, and denied having pain during the appointment. (JE 1, p. 3) Dr. Doty assessed Hill with left medial elbow pain/medial epicondylitis, noted Hill had an appointment scheduled with Steven Aviles, M.D., an orthopedic surgeon, the next day, and continued his lifting restriction. (JE 1, p. 3)

Hill attended an appointment with Dr. Aviles on December 13, 2016. (JE 2, p. 1) Dr. Aviles examined Hill, and noted Hill's left elbow pain is aggravated by lifting, pulling,

and picking up things, and relieved by rest and prednisone. (JE 2, p. 1) Dr. Aviles assessed Hill with left elbow pain, noted he was concerned about ulnar collateral ligament tearing and Hill's flexor mass, recommended magnetic resonance imaging, imposed a five-pound lifting restriction, and stated Hill should avoid grasping with the left arm. (JE 2, pp. 3, 5)

Hill underwent left elbow magnetic resonance imaging on December 20, 2016. (JE 3, pp. 1-2) The reviewing radiologist listed an impression of "[p]artial tear of the common flexor tendon at the medial epicondyle. No evidence of fracture. Edematous changes are seen within the soft tissues." (JE 3, p. 2)

On January 3, 2017, Hill returned to Dr. Aviles after receiving the imaging. (JE 2, pp. 6, 9) Dr. Aviles noted the imaging showed a partial tear of the medial flexor mass measuring approximately fifty percent of the medial flexor mass, noted the ulnar collateral ligament was intact, administered a corticosteroid injection, prescribed occupational therapy, and imposed restrictions of avoiding repetitive grasping, and no lifting above five pounds with the left arm. (JE 2, pp. 7-12)

Hill attended a follow-up appointment with Dr. Aviles on January 24, 2017, and reported he had received no relief from the injection and he was experiencing daily, moderate symptoms. (JE 2, p. 13) Dr. Aviles assessed Hill with left elbow medial epicondylitis and left elbow pain, continued his restrictions, and ordered Hill to attend three additional weeks of occupational therapy. (JE 2, pp. 14, 16)

Vermeer terminated Hill for misconduct at work on February 10, 2017. (Ex. 6, p. 4; Tr., p. 18) Hill testified Vermeer terminated his employment because he was working outside of his work restrictions. (Tr., pp. 18-20) Hill was busy working and lifted an item weighing sixty-four pounds. (Tr., pp. 21-22)

Hill attended occupational therapy on February 13, 2017. (JE 4, p. 1) The occupational therapist noted Hill had attended fifteen sessions, and Hill continued to have to move his elbow around while driving and sitting in a chair due to pain sensitivity in his left medial elbow. (JE 4, p. 1) The occupational therapist documented Hill had improved during treatment, but he continued to be concerned about his ability to complete work at his previous level of functioning, reported moderate pain during resistance and while pinching and gripping, pain with palpation to the medial epicondyle and FA flexors, difficulty sleeping, and inflammation. (JE 4, p. 2) The occupational therapist recommended eight additional occupational therapy sessions. (JE 4, p. 3)

On February 14, 2017, Hill attended an appointment with Dr. Aviles. (JE 2, pp. 17, 20) Hill relayed he had some good and bad days, and Dr. Aviles documented Hill failed corticosteroid injections and occupational therapy. (JE 2, pp. 17, 20) Dr. Aviles examined Hill and found he had no further treatment options, noted "I do feel optimistic that that should improve on its own," found Hill had reached maximum medical improvement, and released him to return to work with no restrictions and to perform activities as tolerated. (JE 2, pp. 19-20, 22)

Following his appointment with Dr. Aviles on February 14, 2017, Hill returned to Vermeer Health Services Center. (JE 1, p. 4) Lisa Balduchi, RN, documented Hill's employment with Vermeer ended on February 10, 2017 because he performed activities outside of his work restrictions. (JE 1, p. 4) Balduchi noted Dr. Aviles had released Hill to full duty, and she closed his case. (JE 1, p. 4)

Hill applied for and was awarded unemployment insurance benefits following his termination. (Ex. 4, p. 1) Iowa Workforce Development issued a decision on March 27, 2017, finding the record did not support Hill had engaged in willful or deliberate misconduct at Vermeer. (Ex. 4, p. 1)

Hill started a vehicle detailing business March 1, 2016, while he was working at Vermeer. (Tr., pp. 14, 28) Hill performs detail services on cars, trucks, sport utility vehicles, and motorcycles. (Tr., p. 34) Hill cleans the interior of vehicles, washes the vehicles, polishes the exterior of vehicles, cleans the windows, vacuums the carpet, operates a buffer, operates a carpet shampooer, and wipes down the vehicles with microfiber cloths. (Tr., pp. 14-15) The buffers weigh between four and eight pounds, and he uses a hose attached to a wheeled shop vacuum to vacuum. (Tr., p. 15) Hill estimated the plastic nozzle of the shop vacuum weighs between one to two pounds. (Tr., p. 15) Hill relayed his vehicle detailing duties fall within Dr. Aviles's restrictions. (Tr., pp. 15-16) Hill offers detailing services ranging in price from $75.00 to $1,500.00. (Tr., pp. 29-30) The most expensive service is ceramic coating Hill applies by hand to a vehicle with a two-inch by one-inch sponge on a microfiber towel after a vehicle has been buffed and polished. (Tr., p. 31)

Hill testified prior to his injury at Vermeer he performed a couple dozen detailing jobs. (Tr., p. 29) As of November 22, 2017, Hill had performed 150 to 160 detailing jobs in 2017. (Tr., p. 38) At hearing, Hill estimated he had performed fifty to sixty detailing jobs in 2018. (Tr., p. 39) Hill's detailing work requires him to lift more than five pounds on occasion. (Tr., p. 39)

Exhibit D produced by Vermeer contains two videos of Hill detailing two trucks. The January 24, 2017 video showed Hill removing items from the interior of a very dirty truck with a full truck bed using both arms to lift out the items. Hill removed trash by hand and vacuumed the interior with a shop vacuum, using both arms. He also cleaned the interior, including the seats, doors, and windows using towels. While Hill is left-hand dominant, he used his right arm more than his left in the video, but still used the left arm.

The video from January 26, 2017, showed Hill detailing the exterior of a truck. Hill used his right arm more than the left throughout the fifty-three minute video. When he used his left arm it was often closer to his body. In the video Hill used his right and left arms to use towels and what appeared to be a sponge to rub or polish the outside of the truck. Hill lifted a buffer with his left arm and used both arms to operate the buffer. Hill shook and opened a liquid substance for buffing with his left hand. The video showed Hill lifting a bucket a short distance with his left arm, and putting keys on a key

rack with his left hand. The video recorded Hill adjusting the garage door near the opener and pulling on the door with his left arm. Hill also carried an electrical cord with his left hand.

Hill testified that after his February 14, 2017 appointment with Dr. Aviles, he continued to have problems with his left elbow. (Tr., p. 12) Hill reported his left elbow problems have never gone away. (Tr., p. 12)

Hill's attorney sent a letter to Vermeer's attorney on July 18, 2017, stating he had received Vermeer's answer denying Hill sustained a work-related injury on October 10, 2016, but Vermeer had admitted Hill had injured his left arm and paid benefits. (Ex. 5, p. 1) Hill's attorney requested an explanation pursuant to 876 Iowa Administrative Code 3.1(2) and Iowa Code section 86.13 as to why Vermeer and EMC were denying the claim. (Ex. 5, p. 1) Vermeer and EMC did not disclose the reason in their answers to interrogatories on September 7, 2017. (Ex. 6)

On December 11, 2017, Hill attended an appointment with Wesley Smidt, M.D., an orthopedic surgeon. (JE 5, p. 1) Hill relayed he made an appointment with Dr. Smidt because he was still experiencing significant pain and discomfort in his elbow. (Tr., p. 12) Hill denied that he sustained any injuries to his left elbow after the October 2016 work injury before his appointment with Dr. Smidt. (Tr., pp. 12-13)

Dr. Smidt examined Hill, noted he had full range of motion in the elbow, tenderness over the medial epicondyle and just distal, a positive Tinel's at the cubital tunnel, no instability of the ulnar nerve, normal strength, and a positive carpal tunnel provocation test at the wrist. (JE 5, p. 2) Dr. Smidt recommended an EMG/NCV study and repeat magnetic resonance imaging. (JE 5, p. 2)

Amy Lynch, D.O. performed electromyography on Hill on January 4, 2018. (JE 6, p. 1) Dr. Lynch found no abnormalities on nerve conduction studies of carpal tunnel syndrome, ulnar neuropathy, or cervical radiculopathy on the left. (JE 6, p. 1)

Hill returned to Dr. Smidt on January 8, 2018. (JE 5, p. 5) Dr. Smidt documented the electromyography studies were normal, noted clinically Hill has carpal tunnel syndrome, and Hill had an option of living with his symptoms or undergoing debridement and drilling of the medial epicondylitis with a carpal tunnel release. (JE 5, p. 5) Hill testified while he would like to undergo the surgery, he is self-employed, and financially he cannot afford to undergo the surgery at this time. (Tr., p. 13) At the time of the hearing Vermeer was not providing Hill with medical treatment. (Tr., pp. 13-14)

Robin Sassman, M.D., an occupational medicine physician, conducted an independent medical examination for Hill on May 21, 2018, and issued her report on June 26, 2018. (Ex. 1, p. 1) Dr. Sassman reviewed Hill's medical records and examined him. (Ex. 1) Dr. Sassman evaluated Hill's left elbow and conditions related to his action against the Fund. (Ex. 1)

Dr. Sassman noted Hill was injured when he lifted "a long, baler part that he was putting on a shelf that weighed approximately 35 pounds," noting he felt a pop in his left elbow. (Ex. 1, p. 10) Dr. Sassman later noted Dr. Doty documented Hill admitted he had most likely lifted outside of the fifty-pound limit, but again when addressing causation, notes Hill was injured when he placed "an approximately 35-pound baler part" on a shelf and felt a pop in his left elbow and pain in his left elbow. (Ex. 1, p. 15) Dr. Sassman noted in her report Hill had operated his own vehicle detailing business since March 1, 2016. (Ex. 1, p. 12) Hill informed Dr. Sassman he has a difficult time climbing in and out of sport utility vehicles, but given he is the owner of the business he can pace himself. (Ex. 1, p. 12)

Dr. Sassman noted Dr. Smidt had recommended a surgical procedure consisting of debridement and drilling of the medial epicondyle, and opined Hill was not at maximum medical improvement. Alternatively, if the surgery is not performed, using the Guides to the Evaluation of Permanent Impairment (AMA Press, 5th Ed. 2001) ("AMA Guides"), Dr. Sassman opined:

> [b]ased on Figure 16-34 on page 472, and Figure 16-37 on page 474, he can be assigned 1% upper extremity impairment for loss of flexion and 1% upper extremity impairment for loss of supination for a total of 2% upper extremity impairment. Given that Mr. Hill has a tear in the common flexor attachment that has not been repaired at this point, I believe it is also appropriate to add impairment for loss of muscle strength. Turning to Table 16-35 on page 510, he can be assigned 6% impairment [*sic*] the upper extremity for loss of flexion strength. Using the Combined Values Chart on page 604, 6% upper extremity impairment is combined with 2% upper extremity impairment for a total of 8% upper extremity impairment.

(Ex. 1, p. 16)

Vermeer and EMC challenge Dr. Sassman's assessment of six percent for loss of flexion strength, alleging "[n]owhere in Dr. Sassman's clinical exam is there any indication of **ANY** loss of strength in the right arm. Therefore, the 6% impairment must be rejected." (Defendants' Brief, p. 8) This case concerns an injury to the left upper extremity, not the right. Moreover, during her examination, Dr. Sassman noted elbow range of motion for flexion was 150 degrees for the right and 135 degrees for the left, supporting her impairment rating of six percent for loss of flexion in the left upper extremity. (Ex. 1, p. 14) Defendants' claim lacks merit. Dr. Sassman documented her flexion findings from her examination in the report.

Dr. Sassman recommended permanent restrictions for the left upper extremity and left thumb of limiting forceful gripping and grasping with the left hand to an occasional basis, use of vibratory tools occasionally, and lifting ten pounds with the left hand occasionally. (Ex. 1, p. 17)

Hill reported the numbness in his hand had a gradual onset. (Tr., p. 46) Dr. Smidt has opined Hill also has left carpal tunnel syndrome. In this case Hill alleges he sustained an injury to his left upper extremity involving his elbow, not carpal tunnel syndrome. The complaints involving carpal tunnel syndrome are not related to the present action against Vermeer and EMC.

Hill reported he has pain on the inside of his left elbow that is constant and nagging, and occasionally becomes sharp, and sometimes radiates up and down his arm. (Tr., p. 27) Hill reported lifting makes his pain worse, and the pain interferes with his sleep and he cannot tolerate sleeping on his left arm. (Tr., p. 28) Hill takes ibuprofen for his left elbow daily. (Tr., p. 26) Hill is self-employed, and when his elbow hurts he takes a break, rests his elbow, and applies ice. (Tr., p. 26)

Hill relayed lifting a gallon of milk will sometimes cause shooting pain through his elbow and he will have to put the gallon of milk down. (Tr., p. 27) When he drinks a large glass of milk Hill puts his little finger underneath the glass because he does not know if he will drop it. (Tr., p. 27) Hill admitted the weight of the buffer and bucket of supplies is similar to the weight of a gallon of milk. (Tr., p. 46) Hill relayed raising or lowering a garage door also would require as much or more effort than picking up a gallon of milk. (Tr., p. 46)

Hill told Dr. Sassman vibration aggravates his elbow. (Tr., p. 47) Hill testified the buffers he uses mainly are dual action buffers, so there is less vibration, but there is some vibration. (Tr., p. 47) Hill reported he has modified his equipment and uses lighter buffers, more efficient buffers, and thicker pads. (Tr., p. 47)

Hill admitted his detailing work does aggravate his elbow on occasion. (Tr., p. 40) Hill relayed he experiences elbow pain and stiffness, and tingling in his pinky, middle, and index fingers. (Tr., p. 40) Hill testified he believes the tingling is related to his work injury because the nerves run through his elbow. (Tr., p. 42) Hill relayed that prior to his work injury using vibratory tools did not aggravate his left elbow. (Tr., p. 66)

CONCLUSIONS OF LAW

I. Arising Out of and in the Course of Employment

To receive workers' compensation benefits, an injured employee must prove, by a preponderance of the evidence, the employee's injuries arose out of and in the course of the employee's employment with the employer. 2800 Corp. v. Fernandez, 528 N.W.2d 124, 128 (Iowa 1995). An injury arises out of employment when a causal relationship exists between the employment and the injury. Quaker Oats v. Ciha, 552 N.W.2d 143, 151 (Iowa 1996). The injury must be a rational consequence of a hazard connected with the employment, and not merely incidental to the employment. Koehler Elec. v. Willis, 608 N.W.2d 1, 3 (Iowa 2000). The Iowa Supreme Court has held, an

injury occurs "in the course of employment" when:

> it is within the period of employment at a place where the employee reasonably may be in performing his duties, and while he is fulfilling those duties or engaged in doing something incidental thereto. An injury in the course of employment embraces all injuries received while employed in furthering the employer's business and injuries received on the employer's premises, provided that the employee's presence must ordinarily be required at the place of the injury, or, if not so required, employee's departure from the usual place of employment must not amount to an abandonment of employment or be an act wholly foreign to his usual work. *An employee does not cease to be in the course of his employment merely because he is not actually engaged in doing some specifically prescribed task, if, in the course of his employment, he does some act which he deems necessary for the benefit or interest of his employer.*

Farmers Elevator Co. v. Manning, 286 N.W.2d 174, 177 (Iowa 1979) (emphasis in original).

The claimant bears the burden of proving the claimant's work-related injury is a proximate cause of the claimant's disability and need for medical care. Ayers v. D & N Fence Co., Inc., 731 N.W.2d 11, 17 (Iowa 2007); George A. Hormel & Co. v. Jordan, 569 N.W.2d 148, 153 (Iowa 1997). "In order for a cause to be proximate, it must be a 'substantial factor.'" Ayers, 731 N.W.2d at 17. A probability of causation must exist, a mere possibility of causation is insufficient. Frye v. Smith-Doyle Contractors, 569 N.W.2d 154, 156 (Iowa Ct. App. 1997). The cause does not need to be the only cause, "[i]t only needs to be one cause." Armstrong Tire & Rubber Co. v. Kubli, 312 N.W.2d 60, 64 (Iowa 1981).

The question of medical causation is "essentially within the domain of expert testimony." Cedar Rapids Cmty. Sch. Dist. v. Pease, 807 N.W.2d 839, 844-45 (Iowa 2011). The deputy commissioner, as the trier of fact, must "weigh the evidence and measure the credibility of witnesses." Id. The trier of fact may accept or reject expert testimony, even if uncontroverted, in whole or in part. Frye, 569 N.W.2d at 156. When considering the weight of an expert opinion, the fact-finder may consider whether the examination occurred shortly after the claimant was injured, the compensation arrangement, the nature and extent of the examination, the expert's education, experience, training, and practice, and "all other factors which bear upon the weight and value" of the opinion. Rockwell Graphic Sys., Inc. v. Prince, 366 N.W.2d 187, 192 (Iowa 1985).

At hearing Vermeer and EMC admitted Hill sustained a work injury on October 10, 2016, but allege the chain of causation was broken following Hill's recovery on February 14, 2017, and contend Hill's current impairment is the direct result of his work

as a vehicle detailer. (Defendants' Brief at 4) Hill rejects the defendants' assertion. No medical opinion was produced by Vermeer and EMC supporting their assertion.

Dr. Aviles found Hill reached maximum medical improvement and he released Hill without restrictions on February 14, 2017. (JE 2, pp. 19-20, 22) During Hill's appointment that day Dr. Aviles documented Hill reported he had some good and bad days and noted, "I do feel optimistic that that should improve on its own." (JE 2, p. 19) The day before the appointment Hill's occupational therapist had also recommended eight additional occupational therapy sessions. Hill testified he continued to have symptoms, which lead him to seek a second opinion from Dr. Smidt. Dr. Smidt offered additional treatment to Hill. Dr. Sassman recommended additional treatment. Hill is not in a position to undergo the additional treatment at this time because he is self-employed and he cannot afford to stop working.

Dr. Sassman opined Hill sustained an injury to his left elbow caused by the October 2016 work injury. (Ex. 1) Dr. Sassman noted in her report Hill has operated his own vehicle detailing business since March 1, 2016. (Ex. 1, p. 12) Dr. Aviles has not examined Hill in more than a year. Drs. Smidt and Sassman both found Hill continues to experience left elbow problems. Imaging of the left elbow also documents Hill's left elbow injury. When Dr. Aviles released Hill without restrictions, he documented Hill continued to complain of problems and noted he was optimistic his problems would improve on their own. The record supports Hill did not have any problems with his left elbow prior to the work injury. I find Dr. Sassman's opinion most persuasive and consistent with the other evidence I believe.

At hearing I had the opportunity to observe Hill testify under oath. Hill maintained direct eye contact, and his rate of speech was normal and fluid. Hill did not engage in any furtive movements. I found his testimony he continued to have symptoms with his left elbow following his work injury up through the time of hearing credible and consistent with the other evidence I believe. During his last appointment with Dr. Aviles, Hill reported he was still experiencing problems with his left elbow. Dr. Aviles documented he was optimistic Hill's symptoms would improve on their own.

Hill acknowledged at hearing his vehicle detailing work aggravates his left elbow. There was no medical evidence presented at hearing supporting Hill's continued elbow symptoms are caused by his vehicle detailing business. Hill performed vehicle detailing before the October 2016 work injury. Hill denied having left elbow problems prior to the October 2016 work injury.

Vermeer and EMC assert Exhibit E shows Hill working effortlessly for extended periods without apparent limitations or pain. Exhibit E is a copy of the paper calendar admitted at hearing. It does not support the defendants' assertion. As I noted above, Exhibit D produced by Vermeer contains two videos, showing Hill detailing two trucks. Hill is left-hand dominant. In the videos I observed Hill used his right arm more than his left. When he used his left arm it was often closer to his body. I do not find the videos show Hill has no impairment. Hill has established he sustained an injury to his left

elbow arising out of and in the course of his employment with Vermeer. Defendants have not proven Hill's current impairment is the direct result of his work as a vehicle detailer.

II. Extent of Disability

Permanent partial disabilities are divided into scheduled and unscheduled losses. Iowa Code § 85.34(2). In March 2017, the legislature enacted changes (hereinafter "Act") relating to workers' compensation in Iowa, including Iowa Code section 85.34. 2017 Iowa Acts chapter 23 (amending Iowa Code sections 85.16, 85.18, 85.23, 85.26, 85.33, 85.34, 85.39, 85.45, 85.70, 85.71, 86.26, 86.39, 86.42, and 535.3). 2017 Iowa Acts chapter 23 contains an applicability section as follows:

> Section 24. APPLICABILITY
>
> 1. The sections of this Act amending sections 85.16, 85.18, 85.23, 85.26, 85.33, 85.34, 85.39, 85.71, 86.26, and 86.42 apply to injuries occurring on or after the effective date of this Act.
>
> 2. The sections of this Act amending section 85.45 apply to commutations for which applications are filed on or after the effective date of this act.

This case concerns an injury occurring before July 1, 2017. Therefore, under the Act, the law in effect prior to July 1, 2017, controls this case with respect to the commencement date for permanency.

If the claimant's injury is listed in the specific losses found in Iowa Code section 85.34(2)(a)-(t), the injury is a scheduled injury and is compensated by the number of weeks provided for the injury in the statute. Second Injury Fund v. Bergeson, 526 N.W.2d 543, 547 (Iowa 1995). "The compensation allowed for a scheduled injury 'is definitely fixed according to the loss of use of the particular member.'" Id. (quoting Graves v. Eagle Iron Works, 331 N.W.2d 116, 118 (Iowa 1983)). If the claimant's injury is not listed in the specific losses in the statute, compensation is paid in relation to 500 weeks as the disability bears to the body as a whole. Id.; Iowa Code § 85.34(2)(u). "Functional disability is used to determine a specific scheduled disability; industrial disability is used to determine an unscheduled injury." Bergeson, 526 N.W.2d at 547.

The schedule provides a maximum award of 250 weeks of permanent partial disability benefits. Iowa Code § 85.34(2)(*m*) (2015). As discussed above, I found Dr. Sassman's opinion more persuasive than Dr. Aviles's opinion. Dr. Sassman assigned a permanent impairment of eight percent to Hill's upper extremity. The evidence presented at hearing does not support a deviation from the schedule. Under the schedule, Hill is entitled to twenty weeks of permanent partial disability benefits, commencing on February 14, 2017, at the stipulated weekly rate of $473.92.

III. Medical Expenses

Hill seeks to recover medical bills for treatment he received for his left elbow after Vermeer and EMC discontinued his treatment. (Ex. 8) Hill's private insurance paid $110.00, Hill paid $100.00, and $160.00 remains outstanding to Des Moines Orthopedic Surgeons. (Ex. 8, pp. 1-2) Hill also seeks to recover $135.00 for magnetic resonance imaging performed at Iowa Radiology, and $500.11 for magnetic resonance imaging at Iowa Methodist, for a total of $1,005.11. (Ex. 8, pp. 1, 3-4)

An employer is required to furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance, hospital services and supplies, and transportation expenses for all conditions compensable under the workers' compensation law. Iowa Code § 85.27(1). The employer has the right to choose the provider of care, except when the employer has denied liability for the injury. Id. "The treatment must be offered promptly and be reasonably suited to treat the injury without undue inconvenience to the employee." Id. § 85.27(4). If the employee is dissatisfied with the care, the employee should communicate the basis for the dissatisfaction to the employer. Id. If the employer and employee cannot agree on alternate care, the commissioner "may, upon application and reasonable proofs of necessity therefore, allow and order other care." Id. The statute requires the employer to furnish reasonable medical care. Id. § 85.27(4); Long v. Roberts Dairy Co., 528 N.W.2d 122, 124 (Iowa 1995) (noting "[t]he employer's obligation under the statute turns on the question of reasonable necessity, not desirability"). The Iowa Supreme Court has held the employer has the right to choose the provider of care, except when the employer has denied liability for the injury, or has abandoned care. Iowa Code § 85.27(4); Bell Bros. Heating & Air Conditioning v. Gwinn, 779 N.W.2d 193, 204 (Iowa 2010).

Vermeer and EMC refused to provide additional care to Hill after Drs. Aviles and Doty released Hill from care. As analyzed above, Hill has established he sustained a permanent impairment to his left upper extremity caused by his work injury at Vermeer. The medical bills Hill seeks to recover are for treatment to his left elbow. Vermeer is responsible for all causally related medical bills.

IV. Penalty

Iowa Code section 86.13 governs compensation payments. Under the statute's plain language, if there is a delay in payment absent "a reasonable or probable cause or excuse," the employee is entitled to penalty benefits, of up to fifty percent of the amount of benefits that were denied, delayed, or terminated without reasonable or probable cause or excuse. Iowa Code § 86.13(4); see also Christensen v. Snap-On Tools Corp., 554 N.W.2d 254, 260 (Iowa 1996) (citing earlier version of the statute). "The application of the penalty provision does not turn on the length of the delay in making the correct compensation payment." Robbennolt v. Snap-On Tools Corp., 555 N.W.2d 229, 236

(Iowa 1996). If a delay occurs without a reasonable excuse, the commissioner is required to award penalty benefits in some amount to the employee. Id.

The statute requires the employer or insurance company to conduct a "reasonable investigation and evaluation" into whether benefits are owed to the employee, the results of the investigation and evaluation must be the "actual basis" relied on by the employer or insurance company to deny, delay, or terminate benefits, and the employer or insurance company must "contemporaneously convey the basis for the denial, delay, or termination of benefits to the employee at the time of the denial, delay, or termination of benefits." Iowa Code § 86.13(4)(a). An employer may establish a "reasonable cause or excuse" if "the delay was necessary for the insurer to investigate the claim," or if "the employer had a reasonable basis to contest the employee's entitlement to benefits." Christensen, 554 N.W.2d at 260. "A 'reasonable basis' for denial of the claim exists if the claim is 'fairly debatable.'" Burton v. Hilltop Care Ctr., 813 N.W.2d 250, 267 (Iowa 2012). "Whether a claim is 'fairly debatable' can generally be determined by the court as a matter of law." Id. The issue is whether the employer had a reasonable basis to believe no benefits were owed to the claimant. Id. "If there was no reasonable basis for the employer to have denied the employee's benefits, then the court must 'determine if the defendant knew, or should have known, that the basis for denying the employee's claim was unreasonable.'" Id.

Benefits must be paid beginning on the eleventh day after the injury, and "each week thereafter during the period for which compensation is payable, and if not paid when due," interest will be imposed. Iowa Code § 85.30. In Robbennolt, the Iowa Supreme Court noted, "[i]f the required weekly compensation is timely paid at the end of the compensation week, no interest will be imposed . . . . As an example, if Monday is the first day of the compensation week, full payment of the weekly compensation is due the following Monday." Robbennolt, 555 N.W.2d at 235. A payment is "made" when the check addressed to the claimant is mailed, or personally delivered to the claimant. Meyers v. Holiday Express Corp., 557 N.W.2d 502, 505 (Iowa 1996) (abrogated by Keystone Nursing Care Ctr. v. Craddock, 705 N.W.2d 299 (Iowa 2005) (concluding the employer's failure to explain to the claimant why it would not pay permanent benefits upon the termination of healing period benefits did not support the commissioner's award of penalty benefits)).

When considering an award of penalty benefits, the commissioner considers "the length of the delay, the number of delays, the information available to the employer regarding the employee's injuries and wages, and the prior penalties imposed against the employer under section 86.13." Schadendorf v. Snap-On Tools Corp., 757 N.W.2d 330, 336 (Iowa 2008). The purposes of the statute are to punish the employer and insurance company and to deter employers and insurance companies from delaying payments. Robbennolt, 555 N.W.2d at 237.

Hill avers he is entitled to penalty benefits from Vermeer and EMC because Vermeer and EMC never requested an impairment rating from Dr. Aviles. Dr. Aviles released Hill to return to his normal duties and assigned no restrictions on February 14,

2017. There is no indication in the record Dr. Aviles concluded Hill sustained a permanent impairment.

Hill requested an explanation why Vermeer and EMC were denying his claim on July 18, 2017. (Ex. 5, p. 1) Vermeer and EMC did not provide a response by letter or in their answers to interrogatories. The statute requires the employer or insurance company to "contemporaneously convey the basis for the denial, delay, or termination of benefits to the employee at the time of the denial, delay, or termination of benefits." Iowa Code § 86.13(4)(a). Vermeer and EMC have not complied with the requirements of the statute. Imposition of penalty benefits is warranted. Vermeer and EMC are assessed a $500.00 penalty.

V. Costs

Hill seeks to recover the $100.00 filing fee, $6.77 for service, and $5,684.77 for the cost of the independent medical examination and report. (Ex. 9, p. 1) Vermeer and EMC aver Hill is not entitled to recover the full cost of the independent medical examination and report because a significant portion of the report is related to Hill's claim against the Fund.

Iowa Code section 86.40, provides, "[a]ll costs incurred in the hearing before the commissioner shall be taxed in the discretion of the commissioner." Rule 876 IAC 4.33(6), provides:

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

A. Independent Medical Examination and Report

Dr. Sassman charged $322.00 for two x-rays of Hill's knees, $1,807.50 for the independent medical exam, and $3,447.50 for the report. (Ex. 9, p. 2) Vermeer and EMC aver the cost of the independent medical examination and report should be apportioned because the examination was conducted and the report was prepared to address the claims against Vermeer, EMC, and the Fund.

After receiving an injury, the employee, if requested by the employer, is required to submit to examination at a reasonable time and place, as often as reasonably

requested to a physician, without cost to the employee. Iowa Code § 85.39. If an evaluation of permanent disability has been made by a physician retained by the employer and the employee believes the evaluation is too low, the employee "shall, upon application to the commissioner and upon delivery of a copy of the application to the employer and its insurance carrier, be reimbursed by the employer the reasonable fee for a subsequent examination by a physician of the employee's own choice . . . ." Id.

In the case of Des Moines Area Regional Transit Authority v. Young, the Iowa Supreme Court held:

> [w]e conclude section 85.39 is the sole method for reimbursement of an examination by a physician of the employee's choosing and that the expense of the examination is not included in the cost of a report. Further, even if the examination and report were considered to be a single, indivisible fee, the commissioner erred in taxing it as a cost under administrative rule 876-4.33 because the section 86.40 discretion to tax costs is expressly limited by Iowa Code section 85.39.

867 N.W.2d 839, 846-47 (Iowa 2015).

Dr. Sassman's bill is itemized. (JE 13, p. 2) Dr. Sassman documented she spent five and three-quarter hours preparing the report, and three and one-half hours were spent on the Fund issues. (Ex. 1, p. 1) Given the report took five and three-quarter hours, two and one-quarter hours were spent on the claim against Vermeer and EMC or .39 of the time. Dr. Sassman relayed she spent one and one-half hours on the examination, and three quarters of an hour on the Fund issues, or one-half of the time. (Ex. 1, p. 1) Given the exam was one and one-half hours, three quarters of an hour was spent on the claim against Vermeer and EMC.

Vermeer and EMC are only responsible for the portion of Dr. Sassman's examination and report related to Hill's claims against Vermeer and EMC. Vermeer and EMC are responsible for $903.75 for the examination, and $1,344.53 for the report. The x-rays of Hill's knees are not related to the work injury with Vermeer. Hill is not entitled to recover $322.00 for the x-rays.

B. Additional Costs

Hill also seeks to recover the $100.00 filing fee and $6.77 for service. The administrative rule expressly allows for the recovery of the filing and service fee. Hill is entitled to recover the cost of the filing and service fees.

ORDER

IT IS THEREFORE ORDERED, THAT:

Defendants shall pay the claimant twenty (20) weeks of permanent partial disability benefits, at the rate of four hundred seventy-three and 92/100 dollars ($473.92) per week, commencing on February 14, 2017.

Defendants shall take credit for all benefits previously paid.

Defendants shall pay accrued weekly benefits in a lump sum together with interest at the rate of ten percent for all weekly benefits payable and not paid when due which accrued before July 1, 2017, and all interest on past due weekly compensation benefits accruing on or after July 1, 2017, shall be payable at an annual rate equal to the one-year treasury constant maturity published by the federal reserve in the most recent H15 report settled as of the date of injury, plus two percent. See Gamble v. AG Leader Tech., File No. 5054686 (App. Apr. 24, 2018).

Defendants are responsible for all causally related medical bills set forth in this decision.

Defendants shall pay the claimant five hundred and 00/100 dollars ($500.00) in penalty benefits.

Defendants shall pay the claimant nine hundred three and 75/100 dollars ($903.75) for Dr. Sassman's independent medical examination, one thousand three hundred forty-four and 53/100 dollars ($1,344.53) for Sassman's report, one hundred and 00/100 dollars ($100.00) for the filing fee, and six and 77/100 dollars ($6.77) for service.

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

Signed and filed this 27th day of September, 2018.

HEATHER L. PALMER
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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HLP/sam

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.