BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

ELMER WILSON, Claimant, vs. TAMA PAPERBOARD, Employer, and ACE AMERICAN INSURANCE CO., Insurance Carrier, Defendants.	File No. 5060394 ARBITRATION DECISION Head Note No. 1803

STATEMENT OF THE CASE

The claimant, Elmer Wilson, filed a petition for arbitration seeking workers' compensation benefits from Tama Paperboard, employer, and Ace American Insurance Company, insurance carrier. The claimant was represented by Nate Willems. The defendants were represented by James Peters.

The matter came on for hearing on January 27, 2021, before Deputy Workers' Compensation Commissioner Joe Walsh in Des Moines, Iowa via Court Call videoconferencing system. The voluminous record in the case consists of Joint Exhibits 1 through 14; Claimant's Exhibits 1 through 9; and Defense Exhibits A through C. It should be noted that at the conclusion of hearing, the record was held open for a period of thirty days to allow defendants to obtain and submit Defendants' Exhibit C.

The claimant testified at hearing, in addition to his spouse, Chris Wilson. Marla Happel was appointed and served as court reporter for the proceeding. The matter was fully submitted on April 12, 2021 after helpful briefing by the parties.

ISSUES

The parties submitted the following issues for determination:

1. Whether the claimant sustained any permanent disability.

2. If the claimant has sustained any permanent disability, the extent of disability is disputed. Defendants contend claimant is not at maximum medical improvement. Claimant contends he is permanently and totally disabled. Alternatively, claimant contends he is in healing period.

3. Whether the claimant is entitled to penalty benefits.

4. Whether the claimant is entitled to costs.

STIPULATIONS

Through the hearing report, the parties stipulated to the following:

1. The parties had an employer-employee relationship.

2. Claimant sustained an injury which arose out of and in the course of employment on September 1, 2016.

3. The injury is a cause of temporary disability.

4. The weekly rate of compensation is $787.68.

5. Medical expenses are not in dispute.

6. Credit is not in dispute.

7. Affirmative defenses have been waived.

FINDINGS OF FACT

Claimant, Elmer Wilson, was 63 years old as of the date of hearing. He resides in Toledo, Iowa. He sustained a serious injury which arose out of and in the course of his employment on or about September 1, 2016. The primary issue in this proceeding is to determine whether he is at maximum medical improvement at the time of hearing.

Mr. Wilson testified live and under oath at the video hearing. He wore dark glasses and was shaking with apparent tremors during his testimony. His affect was subdued. I find his testimony to be credible. He was a reasonably good historian under the circumstances. His testimony generally coincides with the other evidence in the record. There was nothing about his demeanor which caused me any concern about his truthfulness. On the contrary, he appeared truthful and forthright.

Mr. Wilson has worked at Tama Paperboard (hereafter, “Tama”) since 1991. He has a high school education (South Tama County High, 1976) and has worked in physical, manual labor jobs for his entire life. He served honorably in the United States Navy. It is noted that he served on the Toledo City Council for 12 years. At Tama, he worked numerous positions before he became a maintenance worker. He was physically capable of performing all aspects of his job before his injury. The parties

stipulated that on September 1, 2016, Mr. Wilson sustained an injury which arose out of and in the course of his employment. He was climbing down an anchored ladder into a pit on that date. A bolt on the ladder broke and he fell backward hitting his head against the wall of the pit and then falling to the ground. (Transcript, pages 21-22)

The injury is well documented in the medical records and Mr. Wilson received treatment the same day. (Jt. Ex. 1; Jt. Ex. 2) He was treated through Mercy Care Tama where his symptoms were documented as head, neck and right hip pain, slow mental activity, blurry vision, loss of peripheral vision and dizziness. (Jt. Ex. 3, pp. 22-23) He was returned to work by the employer relatively quickly on light-duty. By the end of September 2016, he started treating with a neurologist at Physicians' Clinic of Iowa (PCI), Laurence Krain, M.D. (Jt. Ex. 5) At that time, the medical notes documented symptoms including dull headache, occasional stabbing headache, persistent neck pain, difficulty concentrating, dizziness and word finding difficulties when speaking. Dr. Krain diagnosed post-traumatic headache, post-traumatic amnesia, postconcussion syndrome, mild traumatic brain injury and cervicalgia. (Jt. Ex. 5, p. 53) Dr. Krain prescribed nortriptyline for the persistent headache and recommended a course of physical therapy.

Mr. Wilson testified he never had any of these symptoms prior to the work injury. He testified that other than the hip pain initially documented, all of these symptoms have persisted since his work injury. Mr. Wilson continued to treat with Dr. Krain throughout 2016. In December 2016, Dr. Krain noted a mild tremor. (Jt. Ex. 5, p. 62) The tremor initially began in his fingers but gradually went up to his hands and arms. He testified at hearing that he cannot use silverware normally or carry a plate without spilling. (Tr., pp. 26-27)

In February 2017, Mr. Wilson was evaluated by a second neurologist, Michael Kitchell, M.D. Dr. Kitchell performed a full evaluation and reviewed the history of his injury. He documented the following symptoms at that time:

> Mr. Wilson has had some continued headaches, vision trouble, and dizziness as well as some concentration and memory problems since the head injury. He says his headaches have never gone away, though they do get down to about a 2 on a 10-point scale at times. He says in the morning when he awakens they are not as severe, but by the end of the day they can be more severe about 5 to 6. He says the headaches seem to be worse when he is in crowds or with motion. He says that when he is riding in a car he gets motion sickness now. He says when he looks at the corn it makes him more dizzy. He says the dizziness is like he is seasick or getting over a drunken period of time. He says that it is a little bit of a motion or spinning sensation and it is worse when he has a headache. The dizziness and headache seem to go together. His visual disturbance is like he has a loss of peripheral vision and he says he does not drive on the highway now because of that. He says he does drive around town, but he is afraid that when he turns he does not seem to see as well, it is hard for him to see objects.

(Jt. Ex. 6, p. 78) From February 2017 through March 2018, Dr. Kitchell attempted six different medications for headaches which were all basically unsuccessful. (Jt. Ex. 6, p. 89)

In June 2017, he was referred to Brian Steiner, Psy.D., for a mental health evaluation. Dr. Steiner performed an MMPI, however, a formal diagnosis was not provided at the initial visit. (Jt. Ex. 7, p. 92) Dr. Steiner opined that Mr. Wilson is "a well-functioning individual psychologically and that there is no evidence to believe that psychological difficulties are adding to the symptoms which he is experiencing." (Jt. Ex. 7, p. 93) He has received mental health counseling through the date of hearing; his progress notes document symptoms experienced at the time of each visit. (Jt. Ex. 7, pp. 94-136)

Tama continued to provide light-duty for Mr. Wilson for about a year after the injury. He was able to do some cleaning, however, he could not be near spinning equipment, lift heavy weights or go up and down stairs. Chris Wilson, claimant's spouse, testified that on occasion, his safety director had to drive him home from work. (Tr., p. 76) Mr. Wilson testified that the safety manager eventually informed him he was too high a safety risk for falling. (Tr., p. 29) The parties submitted no other documents or evidence regarding the termination from employment other than the hearsay testimony of his wife. (Tr., p. 79)

Mr. Wilson's spouse of 37 plus years, Chris Wilson, also testified at hearing. Her testimony is highly credible and compelling. She testified that after his termination, she helped him apply for jobs online with no success. (Tr., p. 79) In 2018, he sought assistance from Iowa Vocational Rehabilitation. The IVR notes documented that Mr. Wilson "struggled to maintain focus during each of our meetings." (Cl. Ex. 4, p. 55) The Social Security Administration determined Mr. Wilson was totally disabled as of April 2018. (Cl. Ex. 6, p. 156)

John Rayburn, M.D., treated Mr. Wilson from October 2018, through March 2019. He diagnosed cervicalgia, chronic pain and cervical spondylosis. (Jt. Ex. 10, p. 183) He attempted various nerve blocks and injections, which did not provide much relief.

In June 2019, Mr. Wilson was evaluated by a third neurologist, Christopher Groth, M.D., at University of Iowa Hospitals and Clinics (UIHC). Dr. Groth primarily evaluated Mr. Wilson's tremor. (Jt. Ex. 9, p. 162) After a full work-up, including a DaT scan, he ultimately opined that the tremor was most likely caused by his head injury, rather than Parkinson's disease or a medication side effect. (Jt. Ex 9, p. 176) The appropriate diagnosis is Parkinsonism. I find Dr. Groth's opinion compelling as it relates to the tremors.

In September 2019, Randy Kardon, M.D., of UIHC Neuro-Ophthalmology Clinic evaluated Mr. Wilson. He opined that the headaches were the main factor affecting Mr. Wilson's vision issues. He recommended attempting to address and reduce the migraines in order to control these symptoms. (Jt. Ex. 9, p. 173)

In December 2019, a fourth neurologist, Lara Lazarre, M.D., examined Mr. Wilson. Dr. Lazarre primarily focused on the treatment of Mr. Wilson's migraines. She diagnosed "chronic common migraine without aura with intractable migraine with status migrainous." (Jt. Ex. 12, p. 214) She recommended a strict diet, sleep goals, stress control, including exercise and physical therapy. (Jt. Ex. 12, p. 215) She has continued to treat Mr. Wilson since December 2019 up through the date of hearing. She attempted different medications and even Botox injections. None of these treatments have truly worked to date. Dr. Lazarre has opined broadly that Mr. Wilson is not at maximum medical improvement for his headaches. This opinion will be discussed further below. Dr. Lazarre examined Mr. Wilson on November 3, 2020, documenting the following opinions:

> 62 yo with concussion and chronic migraines that developed after a fall on 9/2016 at work. Has tried multiple medications- but it's unclear he actually took the medications long enough to find out if there was a benefit given that workman's compensation department has denied him refills many times. While many people can have migraines for many years after an injury, it is low frequency of occurrence and I suspect in his case that a significant reason of why he hasn't improved all these years later and has needed continued medical treatment is that he hasn't had a chance to try medications long enough for it to prove effective or not. He and his wife will collect information on the length of treatment of the prior medicines and we may retry prior treatments if he didn't have a sufficient trial.
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> This is frustrating for both the patient and myself. Micromanagement from decision makers in the workman's compensation [*sic*] department and legal team who have not graduated medical school and a neurology residency lack the knowledge base and experience to knowledgably weigh in on treatment options. Other parties who do not meet this level of training should withhold exerting power over the treatment of my patient. I believe doing so has been detrimental to the care of my patient and wildly irresponsible.

(Jt. Ex. 12, p. 234) Dr. Lazarre went on to recommend new medications to attempt to control Mr. Wilson's symptoms.

In June 2020, Mr. Wilson began a vision treatment program through Dr. D.M. Fitzgerald & Associates. He participated in twenty-two visits which attempted to improve hand-eye coordination and improve his tremors. (Jt. Ex. 14, pp. 243-247) Mr. Wilson did not feel this treatment was effective. (Tr., p. 38)

In October 2020, Mr. Wilson underwent a valid functional capacity evaluation (FCE) to determine his physical limitations. The FCE placed him in the "lower medium" category allowing him to lift up to 25 pounds on an occasional basis. (Cl. Ex. 2, p. 7) He was found to be unable to crouch and had significant deficits in using stairs. (Cl. Ex. 2, p. 7) He was evaluated by Farid Manshadi, M.D., also in October 2020. Dr. Manshadi reviewed the relevant medical records and examined Mr. Wilson. He opined

Mr. Wilson had sustained a 45 percent whole body impairment rating as a result of the work injury. (Cl. Ex. 3, p. 37) Dr. Manshadi recommended prohibitive restrictions which would likely eliminate Mr. Wilson from gainful employment altogether. (Cl. Ex. 3, p. 37) He also rendered opinions regarding maximum medical improvement, which will be discussed in greater detail below.

Charles Mooney, M.D., performed an independent medical record review at the request of defendants on December 17, 2020. (Def. Ex. A) He reviewed a number of appropriate records and opined that many of Mr. Wilson's symptoms or conditions were not, in fact, related to his work injury. For example, he opined that the tremors, dizziness and cognitive difficulties were likely unrelated to the work injury. (Def. Ex. A, pp. 8-10) He did opine that "his only diagnosis related to the work injury is aggravation of underlying cervical spondylosis, migraine and possible cervicogenic headache." (Def. Ex. A, p. 10) For his work-related conditions, he opined Mr. Wilson sustained an 8 percent whole body impairment and no restrictions. (Def. Ex. A, p. 11) I do not find the medical opinions of Dr. Mooney to be compelling. His opinions are out of line with the opinions of the treating providers.

In December 2020, Mr. Wilson was evaluated by a fifth neurologist, Nandakumar Narayanan, M.D., at UIHC, to follow up on the diagnosis of Parkinsonism. He restarted the medication Sinemet and recommended some physical therapy specific to his condition. (Jt. Ex. 9, pp. 179-180)

In addition to all of the foregoing evidence, the claimant obtained an expert vocational report from Barbara Laughlin. She opined that Mr. Wilson has lost access to 100 percent of the job market. (Cl. Ex. 4, p. 84) Vanessa May provided opinions for the defendants. She opined that Mr. Wilson is employable in a variety of sedentary and light jobs. (Def. Ex. B, p. 33)

The first and primary issue in this case is whether Mr. Wilson is at maximum medical improvement as of the date of hearing. While this issue shall be discussed in greater detail in conjunction with the law set forth in the next section, I find that the claimant's condition has plateaued at the time of hearing and he is at maximum medical improvement. While his current authorized treating physician, Dr. Lazarre, has provided hope that his condition will substantially improve, there is no good reason in this record to believe it will. He has been treating for his condition since September 2016, mostly with various trials of medications, and nothing has helped. His symptoms have only progressed over time. By a preponderance of evidence, I find that claimant reached maximum medical improvement as of November 16, 2020. It may have even been earlier than this, however, this is the best date I can find in the record before me. I further find that a greater weight of the evidence supports a finding that Mr. Wilson is permanently and totally disabled.

CONCLUSIONS OF LAW

The first question submitted is whether the claimant is at maximum medical improvement and, if so, when.

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).

In this case, defendants argue that claimant is not at maximum medical improvement. Up through the date of hearing, defendants continued to pay healing period benefits. Claimant argues his healing period ended as of November 2020, and permanency must be assessed.

The imposition of a rating of permanent impairment is equivalent to an opinion that further significant improvement from the injury is not expected. Absent a showing that further improvement was expected, healing period ends when a permanent rating is given. Brown v. Weitz Company, File No. 830840 (App. March 13, 1990); Miller v. Halletts Materials, File No. 861983 (App. November 23, 1992). The persistence of pain does not prevent a finding that the healing period is over, provided the underlying condition is stable. Pitzer v. Rowley Interstate, 507 N.W.2d 389 (Iowa 1993). Medical stability is viewed in terms of industrial disability; if it is unlikely that further treatment of pain will decrease the extent of permanent industrial disability, continued pain management will not prolong healing period. Id. at 392. Specifically, when a condition is stable medically further treatment "may extend the length of the healing period if a substantial change in industrial disability is also expected to result. Id. at 391. On the other hand, if the continued treatment is merely expected to assist with the symptoms rather than "decrease the extent of permanent disability" then the healing period should end. Id.

The expert medical opinions are conflicted to some degree on this issue. Dr. Lazarre provided a very specific opinion to claimant's counsel regarding "maximum medical improvement." In a form report on counsel's letterhead, she opined that she did not believe "Elmer has yet reached maximum medical improvement." (Jt. Ex. 12, p. 238) While this opinion is quite specific, it is not entirely clear. When read in conjunction with her November 2020, treatment note, it is quite clear that Dr. Lazarre is adamant that further treatments should be attempted to improve Mr. Wilson's symptoms. Her opinion of the likelihood of success, however, is murkier. I read her opinion to provide more of an optimistic and hopeful desire to attempt further treatment rather than an opinion that Mr. Wilson will be able to work if he simply tries the medications for a longer period of time. Moreover, the phrase maximum medical improvement was never specifically defined to Dr. Lazarre so it is somewhat unclear, at least to some degree, what she meant. While it is clear Dr. Lazarre believes that further medication treatments should be attempted and may provide significant benefits in controlling Mr. Wilson's symptoms, she has not provided an opinion that this will likely reduce his industrial disability. The reality is, Mr. Wilson has been off work for several

years. At the time of hearing he has attempted numerous medications from at least five different neurologists. Importantly, based upon the evidence in the record, I believe Mr. Wilson wants to get better and would prefer to be working.

Dr. Manshadi provided his own opinion regarding maximum medical improvement. He provided an impairment rating and opined "Mr. Wilson will not be able to return to any gainful employment at this point due to all the above-mentioned diagnoses and symptoms." (Cl. Ex. 3, p. 37) Prior to hearing, he specifically opined that Mr. Wilson reached MMI on November 16, 2020. (Cl. Ex. 9, p. 185)

Having reviewed all of the evidence in the record, I find that it is unlikely that the claimant's medical condition is likely to substantially improve. I find his condition, after four and a half years of treatment, is stable and there is no good reason to believe that the further treatments recommended by Dr. Lazarre will bring substantial improvement to his disability. Most likely, it could bring some minor improvement to some of his symptoms. Of course, I hope I am wrong. Fortunately, for all parties, if I am wrong there is a remedy. Defendants may file a petition for review-reopening to have the matter reassessed.[1]

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).

[1] It is noted that, in some ways, this case is a highly academic exercise. Since the phrase maximum medical improvement is assessed in terms of an injured worker's industrial disability, the issue is whether there is likely to be a change of his condition which would prolong healing period. This is essentially the same issue which would be presented in any review-reopening case.

It has long been the law of Iowa that Iowa employers take an employee subject to any active or dormant health problems and must exercise care to avoid injury to both the weak and infirm and the strong and healthy. Hanson v. Dickinson, 188 Iowa 728, 176 N.W. 823 (1920). A material aggravation, worsening, lighting up or acceleration of any prior condition has been a viewed as a compensable event ever since initial enactment of our workers' compensation statutes. Ziegler v. United States Gypsum Co., 252 Iowa 613; 106 N.W.2d 591 (1961). While a claimant must show that the injury proximately caused the medical condition sought to be compensable, it is well established in Iowa that a cause is "proximate" when it is a substantial factor in bringing about that condition. It need not be the only causative factor, or even the primary or the most substantial cause to be compensable under the Iowa workers' compensation system. Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417 (Iowa 1994); Blacksmith v. All-American, Inc., 290 N.W.2d 348 (Iowa 1980)

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 Ry. Co. of Iowa, 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 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.

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

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

Although claimant is close to a normal retirement age, 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. Boone's Book and Bible Store, File No. 1059319, Appeal Decision (November 6, 1997). Loss of earning capacity due to voluntary choice or lack of motivation is not compensable. Id.

The refusal of defendant-employer to return claimant to work in any capacity is, by itself, significant evidence of a lack of employability. Pierson v. O'Bryan Brothers, File No. 951206 (App. January 20, 1995). Meeks v. Firestone Tire & Rubber Co., File No. 876894, (App. January 22, 1993); See also, 10-84 Larson's Workers' Compensation Law, section 84.01; Sunbeam Corp. v. Bates, 271 Ark. 609 S.W.2d 102 (1980); Army & Air Force Exchange Service v. Neuman, 278 F. Supp. 865 (W.D. La. 1967); Leonardo v. Uncas Manufacturing Co., 77 R.I. 245, 75 A.2d 188 (1950). An employer who chooses to preclude an injured worker's re-entry into its workforce likely demonstrates by its own action that the worker has incurred a substantial loss of earning capacity. As has previously been explained in numerous decisions of this agency, if the employer in whose employ the disability occurred is unwilling to accommodate the disability, there is no reason to expect some other employer to have more incentive to do so. Estes v. Exide Technologies, File No. 5013809 (App. December 12, 2006).

Viewing the entire case file before me as a whole, I find that the claimant has proven permanent and total disability by a preponderance of evidence.

Mr. Wilson was 63 years old at the time of hearing. He has a high school diploma and a manual labor work history. He is intelligent, industrious and hard working. He has maintained successful, gainful employment for his entire working life up until this work injury. Since the work injury, he was never able to resume true, gainful work.

His overall condition is best summarized in the report of Dr. Manshadi, who set forth his diagnoses and impairment, as well as prohibitive restrictions, which include no stairs, no uneven or slippery surfaces, avoid bright lights and crowds, 10 pounds lifting, avoid stress, avoid bending, stooping and crouching. (Cl. Ex. 3, pp. 36-37) He also had a valid functional capacity evaluation which documents his physical abilities of no lifting greater than 25 pounds and limiting elevated work. (Cl. Ex. 2) Furthermore, I find the vocational opinions of Barbara Laughlin to be compelling and credible. (Cl. Ex. 4, p. 68)

The only evidence in the record regarding claimant's separation from employment suggests he was terminated for being a safety risk, which he likely was due to his condition. It is noted that there is some dispute in the record regarding the medical causation of claimant's tremor. I have found that the tremors are likely related to the work injury based upon the opinion of Dr. Groth. The symptom of tremors itself undoubtedly has a significant impact on his ability to work, however, he would be considered permanently and totally disabled regardless of this specific

symptom/condition.

Having found claimant is permanently and totally disabled, I conclude Mr. Wilson is entitled to permanent total disability benefits from the date he stopped working through the date of hearing and continuing.[2]

The final issue is penalty.

Claimant also seeks an award of penalty benefits pursuant to Iowa Code section 86.13. 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.
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> 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 benefits were owed to the employee.
>
> (2) The results of the reasonable investigation and evaluation were the actual basis upon which the

[2] Ordinarily permanent total disability benefits commence as of the date of injury. I find that the claimant worked light-duty for the employer for approximately one year after his work injury. The exact date he was terminated is not in the record. During this period of time, the claimant was paid wages while performing highly accommodated work. He is, of course, not entitled to receive benefits during the period of time he was actually working. Since the precise date of his termination is not in the record, the commencement date is the date he stopped working for wages.

> 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.

Claimant alleges that a total of 11 checks were issued late and 13 checks contained underpayments. Claimant alleges the total amount of late or underpaid benefits exceeds $8,000.00. Defendants argue a continuous stream of benefits has been paid since claimant went off work and that, overall, the defendants record of timely payments is good.

The record demonstrates that a number of checks were paid a few days, up to a few weeks late. (Cl. Ex. 5, p. 118-122) With a few of these payments it is difficult to ascertain exactly when the payment was due. In addition, in early 2020, payments were made for a period of time at an incorrect rate which was roughly $30.00 per week underpaid. Claimant's counsel aggressively sought to correct this problem but it took nearly three months to correct this error. The greater weight of evidence supports a finding that over $4,000.00 worth of benefits were untimely or otherwise underpaid. I find that a penalty of $1,500.00 is appropriate to deter defendants from this type of conduct in the future.

ORDER

THEREFORE IT IS ORDERED

The defendants shall pay claimant permanent total disability benefits at the stipulated and adjudicated rate of seven hundred eighty-seven and 68/100 ($787.68) commencing from the date of injury and continuing.

Defendants shall pay accrued weekly benefits in a lump sum.

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

Defendants shall be given credit for weeks previously paid.

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

Defendants shall pay a penalty in the amount of $1,500.00.

Costs are taxed to defendants as set forth in Claimant's Exhibit 8.

Signed and filed this 12th day of January 2022.

JOSEPH L. WALSH
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Nate Willems (via WCES)

James Peters (via WCES)

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 filed via Workers' Compensation Electronic System (WCES) unless the filing party has been granted permission by the Division of Workers' Compensation to file documents in paper form. If such permission has been granted, the notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 150 Des Moines Street, Des Moines, Iowa 50309-1836. The notice of appeal must be received by the Division of Workers' Compensation 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 legal holiday.