BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

FILED
JAN 24 2018
WORKERS' COMPENSATION

MICHAEL BEARD, Claimant, vs. INTERIOR DEMOLITION SERVICES, INC. dba S & H DEMOLITION and/or STRATTON AND HENDERSON DEMOLITION, Employer, and RIVERPORT INSURANCE COMPANY, Insurance Carrier, Defendants.	File No. 5056310 AMENDED AND SUBSTITUTED ARBITRATION DECISION Head Note Nos.: 1802, 1803, 1804, 4000

On January 10, 2018 I issued an arbitration decision before the parties had an opportunity to submit briefs. I issued an order on January 10, 2018 withdrawing the arbitration decision so that briefs could be submitted and considered. The parties have done so and this decision follows.

STATEMENT OF THE CASE

Michael Beard, claimant, filed a petition in arbitration seeking workers' compensation benefits from Interior Demolition Services, Inc. dba S & H Demolition and/or Stratton and Henderson Demolition (hereinafter Interior) and its insurer, Riverport Insurance Company as a result of an injury he sustained on January 7, 2016 that arose out of and in the course of his employment. This case was heard in Waterloo, Iowa and fully submitted on January 16, 2018. The evidence in this case consists of the testimony of claimant, Joint Exhibits 1 through 6, Claimant's Exhibits 1 through 6 and Defendants' Exhibits A and B. Defendants were allowed two weeks from the hearing date to submit any documentation concerning notice to claimant as to why no benefits had been paid. Defendants notified the undersigned by email on December 14, 2017 that they did not have any additional documentation to submit. Both parties submitted briefs which were reviewed along with the evidence in this case.

ISSUES

1. Whether the alleged injury is a cause of temporary disability and, if so, the extent;
2. Whether the alleged injury is a cause of permanent disability and, if so;
3. Whether the alleged disability is a scheduled member disability or an unscheduled disability.
4. The extent of claimant's disability.
5. Whether claimant is permanently and totally disabled.
6. Whether claimant is an odd-lot employee.
7. Commencement dates of temporary, permanent partial and permanent total benefits.
8. Whether claimant is entitled to payment of certain medical expenses.
9. Whether claimant is entitled to the payment of an independent medical examination.
10. Whether penalties should be assessed.
11. Assessment of costs.

STIPULATIONS

The parties filed a hearing report at the commencement of the arbitration hearing. On the hearing report, the parties entered into various stipulations. All of those stipulations were accepted and are hereby incorporated into this arbitration decision and no factual or legal issues relative to the parties' stipulations will be raised or discussed in this decision. The parties are now bound by their stipulations.

FINDINGS OF FACT

The deputy workers' compensation commissioner having heard the testimony and considered the evidence in the record finds that:

Claimant, Michael Beard, (hereinafter Michael) was 42 years old at the time of the hearing. Michael completed 11th grade in high school and later obtained a GED. Michael has taken business courses at a community college. (Exhibit 2, pages 12, 13) He did not receive any degree or certification for this course work.

Michael started his employment with Interior in either September or October 2015. His job was to supervise a crew and perform demolition. (Ex. 2, p. 14) Michael has been off work since the date of his work injury on January 7, 2016.

Michael's past work history is relevant to his current claim. From approximately 2011 through 2015 he was self-employed as a handyman/property manager in Texas. From 2007 through 2009 Michael was a supervisor of a concrete crew, also performing concrete work. From 2005 through 2007 Michael was a laborer and supervisor of a construction crew. Michael worked on off shore oil rigs from 2003 through 2005. In this position he received training in firefighting, marine survival, well control and helicopter egress. From 2001 through 2003 Michael performed office work involving collection of liens and subrogation claims. Michael operated his own pressure washing business from 1999 through 2001. Michael was incarcerated from 1997 through 1999. (Ex. 2, pp. 15, 16)

On January 7, 2016 Michael was working on a project for Interior at the University of Northern Iowa campus doing demolition work. Michael was instructed to cut out a power breaker box. Michael was assured the proper lock-out tag-out procedure had been performed. It had not. Michael cut into a live power line and was thrown backwards. Michael described a blue ball of flame when he cut into the power line. (Transcript, page 14) Michael said a coworker took him to the emergency department. Michael said that the electric shock eliminated all body hair from the neck down, that he had back and hip pain and was unable to stop shaking.

After the work injury Michael was taken to occupational health. He was then taken to the emergency department at Covenant Medical Center. In the emergency department Michael reported that he felt like he had been kicked by a mule and complained of lower back and right hip pain as well as uncontrollable shaking. (Joint Ex. 1, p. 2) He was diagnosed with non-fatal electric shock. Michael was discharged by the emergency department after he had been there about four hours and told to follow up with his primary care physician. (JEx. 1, pp. 4, 5)

Michael has not returned to work for Interior or any other work since the day of his injury. (Transcript p. 18) Michel said his current symptoms include abdominal tremors, back pain, right hip pain, lack of sleep, dizziness and erectile dysfunction. (Tr. pp. 22, 25)

On January 11, 2016 Michael went to his primary care physician, Gregory Harter, M.D., for a follow up. Michael reported he was doing well. He reported he feels shaky when he sits and his abdomen just continually spasms. (JEx. 2, p. 14) Dr. Harter's assessment was shaky, electrocution, non-fatal effects of electric current and depression. Dr. Harter kept Michael off work at that time. (JEx. 2, p. 15) On a follow up visit of January 18, 2016 Dr. Harter continued his recommendation that Michael continue to be off work and referred him to a neurologist. (JEx. 2, p. 19)

On May 26, 2016 Dr. Harter assessed Michael with "Major depressive disorder with single episode, in partial remission." (JEx. 2, p. 33) On October 10, 2016, Dr. Harter wrote, "Michael Beard is a patient in this office. He has not been working due to an injury and is not released to go back to work at this time." (JEx. 2, p. 37) On November 11, 2014 Dr. Harter provided a form to the Iowa Department of Human Services. In this form Dr. Harter wrote that Michael had a permanent condition of persistent muscle spasms due to the electrocution and that he was unable to work. He also noted Michael was unable to provide care for himself or his children. (JEx. 2, p. 40)

On February 15, 2017 Dr. Harter responded to a letter and questions from Michael's counsel. Dr. Harter's diagnosis was electrocution and non-fatal effects of electrical current movement disorder, memory loss and anxiety. Dr. Harter agreed that the work injury was the cause of his tremors and abdominal spasms. And it worsened his anxiety and depression. (JEx. 2, p. 43) Dr. Harter did not believe his medical condition would improve. Lastly, Dr. Harter wrote, "I don't believe he can hold a job with his current medical problems." (Ex. JEx. 2, 44)

On January 27, 2016 Sangeeta Shah, M.D. conducted a neurological examination of Michael. Dr. Shah's assessment was,

> Abdominal tremors after electrocution. There is some psychogenic component to that. Anxiety is making them worse. Neurological examination is normal. CT of the lumbar spine was negative in the ER.

(JEx. 3, p. 48) On February 10, 2016 Dr. Shah recommended a referral to the University of Iowa Hospitals and Clinics (UIHC). (JEx. 3, p. 52) On March 4, 2016 Dr. Shah noted Michael still has severe jerking of his abdominal muscles. (JEx. 3, p. 53) On April 15, 2016 Michael reported to Dr. Shah that his current medication has helped him calm down some of his jerking, but he continues to have jerking that causes severe fatigue and that he is unable to do his job and has back pain. Dr. Shah considered referring Michael to the Mayo Clinic for his abdominal jerking, which was disabling him. (JEx. 3, p. 57, 60) On June 28, 2016 Michael reported to Dr. Shah that he was having memory problems and severe erectile dysfunction. (JEx. 3, p. 61) Dr. Shah discussed with Michael his subjective memory problem was because of stress and medication, and a referral was to be made to the Movement Clinic at UIHC. (JEx. 3, p. 64)

On November 15, 2016 Dr. Shah noted that Michael reported difficulty in buttoning and unbuttoning his pants due to jerking and that he complained of severe fatigue in the daytime. Dr. Shah noted that UIHC suggested that Botox might be helpful. (JEx. 3, pp. 65, 68)

Michael was seen at the UIHC by neurologist Torage Shivapour, M.D. on August 13, 2016. Dr. Shivapour's impression was,

1. Electrocuted while at work on January 7, 2016.

2. Memory difficulties, jerking/twitching of abdominal muscles, and erectile dysfunction secondary to #1.

(JEx. 6, p. 85) He recommended neuropsychological testing and a referral to the Movement Disorder Clinic. (JEx. 6, p. 86)

On October 5, 2016 Michael was seen at the Neurological Movement Clinic at UIHC. Annie Killoran, M.D. assessed Michael with Propriospinal Myoclonus, recommended medication and suggested acupuncture or massage, and if those treatments fail, a trial of Botox. (JEx. 6, p. 90)

On December 5, 2016 Michael went to the emergency department at Covenant due to a persistent headache for two days, stating that he was photophobic and his girlfriend[1] found Michael shaking and unresponsive. (JEx. 6, p. 92) The emergency department notes reflect Michael reported chronic shaking due to his electrocution. The discharge summary noted that Michael had a possible new onset of seizure. (JEx. 1, p. 10)

On May 10, 2017 Daniel Tranel, Ph.D. performed an independent neuropsychology consultation and cognitive assessment at the request of the defendants. (Ex. B, pp. 11 – 19) Dr. Tranel performed a number of psychological and neuropsychological tests on Michael. (Ex. B, pp. 15, 16) The testing result was deemed valid. His intellectual functioning was average. His attention, working memory and speed processing was average; however, his speed processing was low average. (Ex. B, p. 16) Speech and language, visuoperceptual and visuospatial abilities, learning and memory, and executive functioning were all shown to be without defects. (Ex. B, p. 7)

Dr. Tranel wrote:

> Our conclusion that Mr. Beard does not have acquired cognitive or behavioral deficits related to the January 2016 incident is consistent with the medical history. The records indicate that he did not sustain a head injury or brain injury in the work-related incident. The salient feature in this case is psychological. In the realm of emotional and psychological functioning, Mr. Beard has notable emotional distress related to the January 2016 incident. It is our impression that the incident was a stressful event that has contributed to Mr. Beard's current psychological distress and emotional upheaval. His ongoing problems with twitching/contraction in his abdominal muscles, as well as his "spells," are most likely manifestations of stress. Other factors, such as ongoing sleep

[1] The records sometimes refer to claimant's wife. Claimant's counsel during the hearing stated the legal relationship was that of a girlfriend.

> disturbance, life stressors, and chronic pain, undoubtedly also add to his experienced difficulties. His problems with psychological distress are treatable and should recover fully with appropriate therapy (see below).
>
> We have several recommendations for Mr. Beard: (1) Intensive individual psychotherapy (counseling, psychotherapy) from a mental health care provider in his area (a licensed PhD or PsyD level psychologist) preferably once per week and on a reliable schedule, is strongly recommended. A highly structured cognitive-behavioral intervention focusing on coping and stress management would likely be the most beneficial to him. Ideally, he will develop insight into the relationship between emotional reactions/tension and cognitive phenomena. He would benefit from attention to enhancing adaptive coping strategies for managing symptoms of emotional distress and maximizing adaptive behaviors for self-care. (2) Psychiatric consultation for medication management of his depression, anxiety, and sleep problems is recommended. (3) Given that Mr. Beard is continuing to report chronic pain and he does not regularly use pain management strategies, he may benefit from participation in a comprehensive, multidisciplinary pain management program.

(Ex. B, pp. 18, 19) Dr. Tranel suggested some facilities and programs that could provide the recommended care to Michael. (Ex. 19) There is no evidence that defendants are providing such care.

On September 12, 2017 Dr. Tranel signed off on a letter prepared by defendants, with modification he made to the letter. (Ex. B. pp. 20, 21) Dr. Tranel agreed that the January 7, 2016 injury did not cause permanent cognitive or psychological injury. Dr. Tranel struck through the portion of the letter that said, "2. Recommendations from your 5/16/17 report are not related to the 1/07/16 work incident." (Ex. B, p. 20)

Dr. Tranel agreed with the statement that he refers to Mr. Beard as having a maladaptive psychological adjustment to the incident and that, "Mr. Beard's maladaptive psychological adjustment to the incident is related to his many stressors he had ongoing in his life as well as his preexisting personality characteristics as opposed to the 1/07/16 incident." (Ex. B, p. 20) Dr. Tranel stated to a reasonable degree of neuropsychological certainty his recommendations in the May 16, 2017 report were not related to his work injury. (Ex. B. p. 20)

I find that Michael sustained a physical-mental injury as a result of the work injury of January 7, 2016. His electrocution and stress caused by this injury has caused both physical and mental injury.

On September 13, 2017 Stanley Mathew, M.D. performed an independent medical examination (IME). (Ex. 1, pp. 4 – 8) Dr. Mathew's impressions and diagnoses were,

1. Anoxic brain injury.
2. Cognitive and memory deficits.
3. Tremors.
4. Possible seizure disorder.
5. Erectile dysfunction.
6. Chronic low back pain.
7. Gait and balance dysfunction.
8. Anxiety.
9. Chronic pain related to depression.
10. Headaches.

(Ex. 1, p. 7) Dr. Mathew opined that Michael's conditions were causally related to his January 7, 2016 work injury. Dr. Mathew stated, "I do not feel Mr. Beard is capable of gainful employment due to the unpredictability of his muscle spasms, tremors, cognitive deficits. I agree with his primary care physician who found him to be disabled. I do not feel he will be able to work in any competitive work environment." (Ex. 1, p. 7) Dr. Mathew's opinion was that Michael was totally disabled. (Ex. 1, p. 8) Dr. Mathew charged Michael $1,063.20 for the IME. (Ex. 6, p. 58) I find the charge to be reasonable. I find the IME was performed after defendants requested an examination by Dr. Tranel.

Michael is not employed by Interior. (Request for admission #10, Ex. 3, p. 35) Defendants have paid no temporary or permanent benefits to Michael. (Ex. 3, p. 26; Tr. p. 7) Defendants have not authorized any medical treatment for Michael. (Ex. 3, p. 24; Tr. p. 17) Michael has submitted medical bills for his treatments. (Ex. 5, pp. 43 – 57) I find these bills were for treatment causally related to his work injury of January 7, 2016. I find the treatment was reasonable and necessary and the charges were reasonable.

Michael currently receives mental health counseling through New Directions. He goes about once a week. (Tr. p. 42)

The tremor of Michael's abdomen was visible to the undersigned during the hearing.

Dr. Harter and Dr. Mathew attribute Michael's abdominal tremors, increase in anxiety and depression, back and hip pain and erectile dysfunction to his work injury of January 7, 2016. Both physicians are of the opinion Michael cannot work. Dr. Harter has not released Michael to work.

I find that Michael is unable to work due to his January 7, 2016 work injury at Interior. The injury arose out of and in the course of his employment with Interior. I find that he has suffered a 100 percent loss of earning capacity. Michael has continuous abdominal tremors, back and hip pain, erectile dysfunction, episodic seizures and difficulty sleeping from his work injury. I find his anxiety and depression have been exacerbated by his work injury. I find that all of these injuries and symptoms are permanent.

I find that Michael does not have cognitive deficits directly due to the electric shock, but his memory issues are sequelae due to stress and medication, as noted by Dr. Shah. (JEx 3, p. 64)

RATIONALE AND CONCLUSIONS OF LAW

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).

Mental injuries arising out of physical injuries are compensable as "physical-mental injuries." Mortimer v. Fruehauf Corp., 502 N.W.2d 12 (Iowa 1993).

Michael has proven by a preponderance of the evidence that he is totally and permanently disabled as a result of his January 7, 2016 work injury. I find the opinions of physicians Harter, Mathew, Shah, Richardson, Shivapor and Killoran are convincing as permanent impairments as a result of his work injury. He has not been medically released to return to work by his primary care physician.

The only opinion that is somewhat counter to those opinions are from neuropsychologist Dr. Tranel. Dr. Tranel opined Michael did not have permanent cognitive or psychological injuries from the work injury. His testing did not show significant cognitive injury. I accept that finding, as Dr. Tranel performed the neuropsychological testing. However, Dr. Tranel wrote,

> The salient feature in this case is psychological. In the realm of emotional and psychological functioning, Mr. Beard has notable emotional distress related to the January 2016 incident. It is our impression that the incident was a stressful event that has contributed to Mr. Beard's current psychological distress and emotional upheaval. His ongoing problems with twitching/contraction in his abdominal muscles, as well as his "spells," are most likely manifestations of stress. Other factors, such as ongoing sleep disturbance, life stressors, and chronic pain, undoubtedly also add to his experienced difficulties. His problems with psychological distress are treatable and should recover fully with appropriate therapy. (see below).

(Ex. B, pp. 18, 19) Dr. Tranel crossed out in his September 12, 2017 letter that the recommendations for treatment were not related to a work injury.

Dr. Tranel opined that Michael's condition was amenable to treatment. No treatment has been provided, as he recommended, and there was no evidence that the defendants offered or plan to offer such treatment. Claimant has undergone mental health treatment and is still totally disabled, albeit the treatment is not the same type of counseling recommended by Dr. Tranel. Dr. Harter and Dr. Mathew have opined that Michael has a permanent impairment that and that he is not capable of working. Claimant's primary care physician, who has treated claimant and had the opportunity to see the claimant multiple times has stated claimant's impairment is permanent. This was confirmed by Dr. Mathew. Looking at the evidence at the time of the hearing I find that his injury is permanent.

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.

In assessing an unscheduled, whole-body injury case, the claimant's loss of earning capacity is determined as of the time of the hearing based upon industrial disability factors then existing. The commissioner does not determine permanent disability, or industrial disability, based upon anticipated future developments. Kohlhaas v. Hog Slat, Inc., 777 N.W.2d 387, 392 (Iowa 2009).

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). 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).

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 R. Co., 219 Iowa 587, 258 N.W.2d 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.

Michael has not been released to work. I previously found he had a 100 percent loss of earning capacity.

He clearly cannot work construction, demolition or on oil rigs. He also cannot perform his work in collection with his constant abdominal tremors, back and hip pain. Michael has a limited education. His anxiety and depression also make work problematic and limit his coping skills concerning his symptoms. Based upon the record and testimony I find Michael permanently and totally disabled. Permanent total benefits shall commence on January 8, 2016 and shall continue for as long as Michael is permanently and totally disabled.

In Iowa, a claimant may establish permanent total disability under the statute, or through the common law odd-lot doctrine. Michael Eberhart Constr. v. Curtain, 674 N.W.2d 123, 126 (Iowa 2004) (discussing both theories of permanent total disability under Idaho law and concluding the deputy's ruling was not based on both theories, rather, it was only based on the odd-lot doctrine). Under the statute, the claimant may establish the claimant is totally and permanently disabled if the claimant's medical impairment together with nonmedical factors totals 100 percent. Id. The odd-lot doctrine applies when the claimant has established the claimant has sustained something less than 100 percent disability, but is so injured that the claimant is "unable to perform services other than 'those which are so limited in quality, dependability or quantity that a reasonably stable market for them does not exist.'" Id. (quoting Boley v. Indus. Special Indem. Fund, 130 Idaho 278, 281, 939 P.2d 854, 857 (1997)).

As I have found claimant permanently and totally disabled I make no finding as to whether he is an odd-lot employee and entitled to permanent total disability under that legal theory.

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).

I found that the medical expenses submitted by Michael were causally related to his work injury. The expenses are reasonable and necessary. Defendants shall pay the medical costs found in Claimant's Exhibit 5. Defendants shall pay Michael any out-of-pocket expenses directly as well as any medical mileage he has incurred.

Under Iowa Code section 249A.6 recipients of Medicaid assign the right to payment of medical care from any third party. Federal Medicaid law requires states operating Medicaid programs to ascertain whether there is third party liability for costs paid for by Medicaid and to seek reimbursement for such costs – as Medicaid is a

"secondary payer", so that it pays only where a primary payer does not exist. 42 U.S.C. § 1396a(a)(25)(A) and (B). These "secondary payer" requirements are set forth in greater detail in Medicaid's underlying regulations. 42 CFR § 433.137, § 433.139, § 433.140, and § 433.145. In 1987, the Iowa legislature adopted Iowa Code section 249A.6, which implemented federal law regarding a state's obligation to seek recovery of Medicaid benefits from liable third parties. Under Iowa law, claimant is not allowed to waive the rights to Medicaid reimbursement for medical care received under Medicaid.

Although Medicaid has paid for treatments, the defendants are liable for such costs and should pay any and all Medicaid costs and satisfy any Medicaid lien in this case.

Section 85.39 permits an employee to be reimbursed for subsequent examination by a physician of the employee's choice where an employer-retained physician has previously evaluated "permanent disability" and the employee believes that the initial evaluation is too low. The section also permits reimbursement for reasonably necessary transportation expenses incurred and for any wage loss occasioned by the employee attending the subsequent examination.

Defendants are responsible only for reasonable fees associated with claimant's independent medical examination. Claimant has the burden of proving the reasonableness of the expenses incurred for the examination. See Schintgen v. Economy Fire & Casualty Co., File No. 855298 (App. April 26, 1991). Claimant need not ultimately prove the injury arose out of and in the course of employment to qualify for reimbursement under section 85.39. See Dodd v. Fleetguard, Inc., 759 N.W.2d 133, 140 (Iowa App. 2008).

Defendants shall pay the cost of the IME performed by Dr. Mathew, as defendants obtained a rating by Dr. Tranel.

I award Michael the filing fee of $100.00 pursuant to 876 IAC 4.33.

Michael also asserts a claim for penalty benefits for the failure to pay any temporary or permanent benefits and failure to provide notice as to why Michael was denied.

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 benefits were owed to the employee.

(2) The results of the reasonable investigation and evaluation were the actual basis upon which the employer or insurance carrier contemporaneously relied to deny, delay payment of, or terminate benefits.

(3) The employer or insurance carrier contemporaneously conveyed the basis for the denial, delay in payment, or termination of benefits to the employee at the time of the denial, delay, or termination of benefits.

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

Based on the plain language of section 86.13, we hold an employee is entitled to penalty benefits if there has been a delay in payment unless the employer proves a reasonable cause or excuse. A reasonable cause or excuse exists if either (1) the delay was necessary for the insurer to investigate the claim or (2) the employer had a reasonable basis to contest the employee's entitlement to benefits. A "reasonable basis" for denial of the claim exists if the claim is "fairly debatable."

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

The Supreme Court has stated:

(1) If the employer has a reason for the delay and conveys that reason to the employee contemporaneously with the beginning of the delay, no penalty will be imposed if the reason is of such character that a reasonable fact-finder could conclude that it is a "reasonable or probable

cause or excuse" under Iowa Code section 86.13. In that case, we will defer to the decision of the commissioner. See Christensen, 554 N.W.2d at 260 (substantial evidence found to support commissioner's finding of legitimate reason for delay pending receipt of medical report); Robbennolt, 555 N.W.2d at 236.

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

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

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

> If we were to construe [section 86.13] to permit the avoidance of penalty if any amount of compensation benefits are paid, the purpose of the penalty statute would be frustrated. For these reasons, we conclude section 86.13 is applicable when payment of compensation is not timely . . . or when the full amount of compensation is not paid.

Id.

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

(6) In determining the amount of penalty, the commissioner is to consider factors such as the length of the delay, the number of delays, the information available to the employer regarding the employee's injury and

wages, and the employer's past record of penalties. Robbennolt, 555 N.W.2d at 238.

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

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

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

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

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

Michael has proven a denial of benefits. The defendants have not shown a reasonable or probable cause or excuse for the denial, delay in payment, or termination of benefits. Michael was electrocuted at work on January 7, 2016. He has not returned to work. He has not been released to return to work. The defendants have not paid Michael any indemnity benefits. There is no evidence which shows that Interior or Riverport Insurance Company ever contemporaneously conveyed the basis for the denial of benefits.

It was not until the May 2017 report of Dr. Tranel that defendants had any medical evidence that could arguably support denying this claim. There was a lack of a reasonable investigation up until that date. The record shows a lack of good faith on behalf of the defendants. Even when the defendants had a medical report they did not convey the reason for the denial. Defendants in their brief state that the medical reports of Dr. Tranel were provided to claimant, but the defendants did not provide any evidence at the hearing they have provided these reports. Argument in a brief is not evidence.

Defendants argue that the answer filed in response to the original notice and petition was legally sufficient notice citing Ruden v. Wells Enterprises Inc. File No. 5046180 (Arb., Apr. 21 2015) I find this case inapplicable. In Ruden

claimant had returned to work. Claimant's petition was amended 42 days before the arbitration hearing and claimant's counsel conceded at the hearing that there was only one traumatic injury, and therefor in Ruden the claimant knew why the claimant was denied. In this case the claimant never returned to work. Defendants were served an original notice on April 11, 2016. An answer was not filed until December 20, 2016. The answer does not provide information as to why the claimant was denied, especially in light of the fact that the employer knew claimant had been electrocuted at work, was taken to the hospital by a co-worker and had not returned to work.

In Iowa, much of the workers' compensation system is self-effectuating. Employers and insurance carriers recognize and carry out their legal obligations to provide medical care and indemnity benefits to Iowa workers who suffer injuries that arise out of and in the course of employment. In this case the employer and insurance carrier have not lived up to their legal obligations.

I find that a penalty is required in this case.

I find that defendants shall pay a penalty of 50 percent of the indemnity benefits that are due as of the date of this decision. Penalty is not assessed on the interest due on the back award or lack of medical care. Given the lack of compliance with all aspects of Iowa Code 86.13, I find that this penalty should be at the maximum amount to help ensure future compliance with the law.

ORDER

Defendants shall pay claimant permanent total disability benefits on a weekly basis from January 8, 2016 through the date of the arbitration hearing and continuing into the future during the period of claimant's total disability. Defendants shall pay claimant at the weekly rate of four hundred three and 88/100 dollars ($403.88).

Defendants shall pay a penalty of fifty (50) percent for all indemnity benefits that are due as of the date of this decision.

Defendants shall pay the costs of the filing fee of one hundred dollars ($100.00).

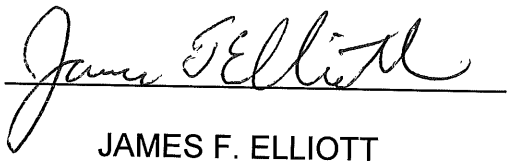
Defendants shall pay medical expenses listed in Claimant's Exhibit 5 and all others that are causally related to the work injury.

Defendants shall pay the IME expense of one thousand sixty three and 20/100 dollars ($1,063.20).

All accrued benefits shall be paid in a lump sum with interest as provided by law.

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

Signed and filed this 24th day of January, 2018.



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DEPUTY WORKERS'
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JFE/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.