BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

MARC ZORZI, Claimant, vs. OSAGE EGG COMPANY, Employer, and UNKNOWN, Insurance Carrier, Defendants.	File No. 20700500.03 REVIEW-REOPENING DECISION Head Note Nos: 1402.40, 1803, 1804, 2403, 2907, 4000.2, 4100

STATEMENT OF THE CASE

On April 22, 2022, Mark Zorzi, claimant, filed a petition seeking review-reopening of a prior decision of this agency. Specifically, claimant seeks to review and reopen an October 5, 2021 arbitration decision.

In the underlying arbitration decision, the undersigned found that claimant sustained injuries to his body as a whole and awarded temporary total disability benefits until he returns to work, or it was demonstrated that he was medically capable of returning to substantially similar employment. Defendant was also ordered to pay past medical expenses related to the work injury.

Claimant filed a review-reopening petition on April 22, 2022, seeking additional workers' compensation benefits. This review-reopening proceeding came on for hearing before the undersigned on June 30, 2023 via a live video hearing.

Claimant was the only witness that testified live at the time of the review-reopening hearing. The evidentiary record also includes Joint Exhibits 1-14 and Claimant's Exhibit 1. Defendant did not offer any separate exhibits. All exhibits were received without objection. The evidentiary record closed at the conclusion of the review-reopening hearing.

The parties filed a hearing report at the commencement of the review-reopening hearing. On the hearing report, the parties entered into various stipulations. All of

those stipulations were accepted and are hereby incorporated into this review-reopening decision. The parties are now bound by their stipulations[1].

Defendant submitted a post-hearing brief on July 3, 2023. Claimant submitted a post-hearing brief on July 28, 2023, at which time the case was fully submitted to the undersigned.

ISSUES

The parties submitted the following disputed issues for resolution:

1. The extent of claimant's current industrial disability and resulting entitlement to permanent partial disability benefits, including a claim for permanent total disability under either the traditional industrial disability analysis or under the odd-lot doctrine.

2. The appropriate commencement date for any permanent disability benefits.

3. Whether penalty benefits are appropriate for unreasonable denial and/or delay of benefits.

4. Assessment of costs.

FINDINGS OF FACT

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

In an October 5, 2021 arbitration decision, the undersigned concluded that claimant sustained injuries to his body as a whole that were causally related to his work injury at Osage Egg Company on March 8, 2018. Claimant was awarded a running award of temporary total disability benefits. These benefits were classified as temporary total disability benefits because the issue of whether claimant had sustained any permanent disability as the result of the work injury was not ripe for determination. The parties now agree that the issue of permanency is ripe for determination. The parties stipulate that the claimant did sustain permanent disability as the result of the work injury. I find this constitutes a change in condition.

Claimant, Mark Zorzi, was 61 years old at the time of the review-reopening hearing. His educational and employment background are summarized on pages 2 and 3 of the arbitration decision filed on October 5, 2021 and will not be reiterated here. Mr. Zorzi has not held any employment since his March 8, 2018 work injury with Osage Egg Company. Due to his work injury, Mr. Zorzi was awarded Social Security Disability (SSD) benefits beginning in September 2018. He was awarded a monthly benefit

[1] It should be noted that in the hearing report claimant seeks payment of past medical expenses that the defendant was ordered to pay in the October 12, 2021 arbitration decision. Those past medical expenses have already been ruled on and will not be addressed in this decision.

amount of $2,567.00. (Joint Exhibit 12, p. 181; Hearing Transcript pp. 25-26) In October 2021, after the arbitration hearing, Mr. Zorzi moved from Iowa to West Monroe, Louisiana, due to his inability to handle the cold Iowa winters. (Tr. pp. 11-14)

The facts surrounding Mr. Zorzi's injury on March 8, 2018, are summarized on page 3 of the arbitration decision and will not be reiterated here. The medical treatment Mr. Zorzi received after the work injury is summarized on pages 3 through 7 of the arbitration decision and will not be reiterated here.

Prior to the arbitration hearing, at the request of his attorney, Mr. Zorzi saw Mark Taylor, M.D. for an independent medical examination (IME). In his March 25, 2021 report Dr. Taylor stated Mr. Zorzi was not at maximum medical improvement (MMI) for his lumbar spine. (JE5, p. 137) His report was submitted prior to the arbitration decision and is summarized in the arbitration decision on pages 6 and 7 and will not be fully reiterated here.

At the request of his attorney, Mr. Zorzi saw Dr. Taylor again on June 8, 2022. In his June 30, 2022 report Dr. Taylor placed Mr. Zorzi at MMI for his cervical spine on or about December 6, 2018. Regarding the lumbar spine Dr. Taylor stated,

> Mr. Zorzi was unable to undergo surgery and he was not planning to pursue surgery, at least as of the date of his follow-up evaluation on June 8, 2022. Currently, I recommend maximum medical improvement as of the date of his last appointment with Dr. Bhangoo, on April 23, 2019.

(JE6, p. 144)

Based on the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, Dr. Taylor stood by the 26 percent whole person impairment related to the cervical spine that he assigned in his March 2021 report. Regarding the lumbar spine, he assigned 9 percent of the body based on Table 15-3, p. 384. Dr. Taylor utilized the Combined Values Chart on page 604 to determine Mr. Zorzi's total permanent functional impairment was 33 percent of the whole person. (JE5, p. 144)

In his June 30, 2022 report Dr. Taylor addressed the issue of restrictions for Mr. Zorzi. He estimated a 25-pound lifting limit on a rare to occasional basis, and the lifting should occur between knee and chest level. He recommended 10-15 pounds or less below knee level or above shoulder level due to his ongoing cervical lumbar spine issues. Dr. Taylor also felt Mr. Zorzi must have the ability to alternate sitting, standing, and walking as needed for comfort. He recommended that Mr. Zorzi avoid ladders, climb stairs on an infrequent basis, and rare to occasional overhead tasks due to his cervical spine issues and surgery. Dr. Taylor stated that Mr. Zorzi can travel, but due to his low back and neck issues, he may not be able to operate certain types of vehicles or equipment. He should also avoid forceful gripping, grasping, or pinching with the right hand. He recommended occasional gripping, grasping, and pinching with the right hand if it is not forceful. He should also avoid use of vibratory or power tools with the right hand. (JE6, pp. 144-145)

Dr. Taylor's opinions regarding permanent functional impairment are based on the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, and are unrebutted. I find Mr. Zorzi sustained 33 percent functional impairment of the whole person as the result of the work injury.

Dr. Taylor is the only medical expert to express an opinion regarding permanent restrictions since the time of the arbitration hearing. (JE6, pp. 144-45) I find that as the result of the work injury Mr. Zorzi has permanent restrictions as set forth by Dr. Taylor in his June 30, 2022 report.

At the time of the review-reopening hearing Mr. Zorzi was still experiencing symptoms which he attributes to the work injury. Since the injury, his neck has never been the same and has caused him trouble with his right arm and hand. His right hand has tremors, numbness, and it locks up. He feels he has minimal control over his right hand; he struggles to write. He has atrophy in his right arm. Mr. Zorzi also has problems with his low back. He has tingling all the way down his right leg into his foot, almost like his leg is asleep. He must be careful when he is walking to make sure to put one foot in front of the other because everything feels asleep. He describes major atrophy in his right leg. He has difficulty getting comfortable. Some days are better than others. He tries to sit on his left butt cheek because that provides him some relief. Mr. Zorzi testified that he can only stand for 15-30 minutes before he needs to sit or lay down. He can only sit for approximately 30 minutes before he needs to get up, move around, or change his seating. Since his injury, Mr. Zorzi does not kneel. He has difficulty getting off the commode. He also has difficulty with his balance. He tries not to participate in activities that involve twisting at his hips because it bothers his low back. He also tries to avoid bending over. When he overdoes it, he suffers consequences for a couple of weeks. He experiences cold sweats, numbness, tingling and his symptoms are aggravated. He cannot comfortably lift over 25 to 30 pounds. He also has difficulty reaching, pushing, and pulling. Mr. Zorzi has difficulty sleeping; he only sleeps for a couple hours at a time, then gets up for a bit and then returns to bed. (Tr. pp. 26-36)

Mr. Zorzi testified that he is not physically capable of performing any of his prior jobs. He testified that he could not perform the job of a pick-up and delivery (PUD) at the Teamsters. He worked as a PUD driver for approximately eighteen years. That job involved driving a truck, loading and unloading a trailer, and completing paperwork. Due to his work injuries, he believes he is not capable of performing these duties. Additionally, he does not believe he has enough control over his right hand to complete hand-written paperwork or enter information on a computer. (Tr. pp. 36-37) Mr. Zorzi testified that he is not physically capable of performing his prior duties at Osage Egg Company. This work required too much hands-on work. (Tr. pp. 37-38) The plant manager position required Mr. Zorzi to perform constant maintenance and repair of electrical gear boxes, motors, manure belts, auger troughs, augers, and cooling fans. On average he worked 70 hours per week. As noted on pages 2 and 3 of the arbitration decision, in June 2017 it was agreed that Mr. Zorzi would be paid $120,000 to work as

the plant manager for one year through June 8, 2018. (JE1, Tr. p. 18, line 20 – p. 19, lines 1-13).

Mr. Zorzi met with Barbara Laughlin, a vocational counselor, via telephone three times. Ms. Laughlin issued an employability assessment report dated March 10, 2023. (JE8) In her report Ms. Laughlin set forth her understanding of the restrictions assigned by Dr. Taylor in his June 2022 report. She also set forth Mr. Zorzi's educational and vocational background. Ms. Laughlin performed a transferable skills analysis. Ms. Laughlin conducted labor market research to identify potential occupations available to Mr. Zorzi. She also considered factors such as age, education, computer abilities, injury, and medically determined restrictions. Ms. Laughlin did identify one position for MCR Hotels in West Monroe, Louisiana which paid $90,000 per year. The first listed requirement of the job is a minimum of 3 years' experience as a General Manager in the hotel industry. (JE8, p. 165) Ultimately, Ms. Laughlin opined that "Mr. Zorzi, given the combination of age, injury, and restrictions, will be unable to obtain work in any quantity, quality or dependability." (JE8, p. 162) Ms. Laughlin's vocational opinions are unrebutted.

Since the arbitration hearing, Mr. Zorzi has applied for work in Louisiana. He applied for a job at Taco Bell. He received an interview, but did not receive a job offer. Mr. Zorzi believes he was not offered a job because the interviewer knew he was on SSD and viewed him as a high risk. Based on the interview, Mr. Zorzi did not believe he was physically capable of performing the work. He believed the job would require too much standing, too much movement with his right hand, and would be too fast-paced. He applied for this job in the fall of 2021 or early 2022. (Tr. pp. 38-39)

In the spring of 2022 Mr. Zorzi applied to work at Jimmie Davis State Park in Louisiana. The job was driving a lawn mower for the park services. During the interview Mr. Zorzi was unable to climb on the mower and was told there was no way he could pass a physical through the State. He was not offered the job. (Tr. p. 40)

In February 2023 Mr. Zorzi applied for a job as a gas station attendant. The job involved sitting in a little booth collecting money and selling items such as drinks. He felt that his interview went well until the interviewer learned of Mr. Zorzi's injury. The interviewer advised Mr. Zorzi that it would be a big risk to hire him. Regardless, Mr. Zorzi does not believe he was capable of physically performing the job because it was too much standing, sitting, or writing. (Tr. pp. 40-41)

Mr. Zorzi has applied for three jobs and was turned down for all three of them. He testified that this has been rough on his psyche. Up until the time of the work injury he was active and able to do what he wanted. Since the injury he has isolated himself. (Tr. pp. 43-43)

Based on the testimony of the claimant, the medical opinions of Dr. Taylor, and the vocational opinions of Ms. Laughlin, I find that Mr. Zorzi is not employable in the competitive labor market. He produced a vocational report that opined that "Mr. Zorzi, given the combination of age, injury, and restrictions, will be unable to obtain work in

any quantity, quality or dependability." (JE8, p. 162) The one job that the vocational counselor identified in her report was a general manager for a hotel. However, this job required a minimum of 3 years' experience as a General Manager in the hotel industry. I find Mr. Zorzi is not qualified for this position; the job identified is outside of claimant's qualifications. (JE8, pp. 164-166) I further find that the types of services Mr. Zorzi can perform are so limited in quality, dependability or quantity that a reasonable stable market for him does not exist.

We now turn to the issue of penalty benefits. Prior to the arbitration hearing defendant paid 45 weeks of weekly benefits to the claimant. There is no dispute that the defendant has not paid any additional weekly benefits. (Hearing Report) Defendant filed an appeal of the arbitration decision, but voluntarily dismissed the appeal on December 8, 2021. (See Agency File No. 20700500.02) In the arbitration decision defendant was ordered to pay claimant one thousand two hundred eighteen and 81/100 dollars ($1,218.81) per week. I find that since the date the appeal was dismissed there was not a reasonable basis to deny or delay the weekly benefits to the claimant. Since the date the appeal was dismissed until the date of the review-reopening hearing, 81.286 weeks have elapsed. I find that as of the date of the review-reopening hearing defendant had unreasonably denied 81 weeks of benefits to the claimant. I further find that defendant failed to communicate any basis or reason for the denial of the benefits to the claimant. I find defendant offered no cause or excuse for the delay or denial of the benefits to the claimant.

CONCLUSIONS OF LAW AND REASONING

Claimant brings this review-reopening proceeding. A review-reopening proceeding is appropriate whenever there has been a substantial change in condition since a prior arbitration award or settlement. Kohlhaas v. Hog Slat, Inc., 777 N.W.2d 387 (Iowa 2009). Under Iowa Code section 86.14(2), this agency is authorized to reopen a prior award or settlement to inquire about whether the condition of the employee warrants an end to, diminishment of, or increase of compensation. Id. In this case, the parties agree that the claimant has sustained permanent disability as the result of the work injury and that the issue of permanency is ripe for determination. I conclude this constitutes a change in condition since the prior arbitration award. Therefore, I conclude that claimant has established entitlement to reopening, or increase, of his prior award. Iowa Code section 86.14(2).

We now turn to the issue of permanent disability. Claimant asserts he is permanently and totally disabled as a result of the March 8, 2018 work injury. Claimant asserts this claim under the traditional industrial disability analysis and also claims that he is an odd-lot employee.

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).

Dr. Taylor opined that claimant's permanent impairment and restrictions are the result of the work injury. Dr. Taylor's opinions are supported by the evidence as a whole and are unrebutted. I conclude that claimant's permanent impairment and restrictions, as assigned by Dr. Taylor, are the result of the work injury.

We now turn to the question of the extent of permanent disability claimant sustained as the result of the work injury. Claimant has asserted an odd-lot claim. In Guyton v. Irving Jensen Co., 373 N.W.2d 101 (Iowa 1985), the Iowa court formally adopted the "odd-lot doctrine." Under that doctrine a worker becomes an odd-lot employee when an injury makes the worker incapable of obtaining employment in any well-known branch of the labor market. An odd-lot worker is thus totally disabled if the only services the worker can perform are "so limited in quality, dependability, or quantity that a reasonably stable market for them does not exist." Id. at 105. Under the odd-lot doctrine, the burden of persuasion on the issue of industrial disability always remains with the worker. Nevertheless, when a worker makes a prima facie case of total disability by producing substantial evidence that the worker is not employable in the competitive labor market, the burden to produce evidence showing availability of suitable employment shifts to the employer. If the employer fails to produce such evidence and the trier of facts finds the worker does fall in the odd-lot category, the worker is entitled to a finding of total disability. Guyton, 373 N.W.2d at 106. Factors to be considered in determining whether a worker is an odd-lot employee include the worker's reasonable but unsuccessful effort to find steady employment, vocational or other expert evidence demonstrating suitable work is not available for the worker, the extent of the worker's physical impairment, intelligence, education, age, training, and potential for retraining. No factor is necessarily dispositive on the issue. Second Injury Fund of Iowa v. Nelson, 544 N.W.2d 258 (Iowa 1995). Even under the odd-lot doctrine, the trier of fact is free to determine the weight and credibility of evidence in determining whether the worker's burden of persuasion has been carried, and only in an exceptional

case would evidence be sufficiently strong as to compel a finding of total disability as a matter of law. Guyton, 373 N.W.2d at 106.

In this case, Mr. Zorzi satisfied his initial evidentiary burden-shifting requirements under the odd-lot doctrine. Based on the above findings of fact, I conclude he proved a prima facie case of total disability by producing substantial evidence that he is not employable in the competitive labor market. I conclude that the types of services the claimant can perform are so limited in quality, dependability or quantity that a reasonable stable market for him does not exist. I conclude claimant falls in the odd-lot category. I further conclude that defendant has failed to produce evidence showing availability of suitable employment for the claimant. Thus, because the employer failed to produce such evidence, the claimant is entitled to a finding of total disability. I conclude claimant is permanently and totally disabled under the odd-lot doctrine. Having reached this conclusion, I do not consider or rely upon the traditional industrial disability analysis.

The next issue for consideration is the appropriate commencement date for payment of permanent benefits. The facts of this case are unusual. At the time of the May 27, 2021 arbitration hearing Dr. Taylor opined that claimant had not reached MMI; his opinion was unrebutted. The undersigned ordered defendant to pay temporary total disability (TTD) benefits from June 9, 2018 through September 4, 2018 and from July 18, 2019 until claimant returned to work or it was demonstrated that he is medically capable of returning to employment substantially similar to the employment in which he was engaged at the time of the injury. It should be noted that prior to the arbitration hearing, defendant had voluntarily paid weekly benefits beginning September 5, 2018 through July 17, 2019. (JE2, p. 88) Because claimant had not reached MMI and the issue of permanent disability was not ripe for determination, the weekly benefits defendant was ordered to pay were classified as temporary total disability benefits (TTD).

In this review-reopening proceeding the parties have stipulated that the work injury did cause permanent disability. On June 30, 2022, Dr. Taylor opined that the claimant actually reached MMI on April 23, 2019. Through this proceeding it has now been determined that claimant is entitled to permanent total disability (PTD) benefits. Thus, we now know that the weekly benefits that were previously paid and ordered to be paid, should have been classified as permanent total disability benefits rather than temporary total disability benefits. Thus, I conclude defendant shall pay unto claimant permanent total disability benefits at the rate of one thousand two hundred eighteen and 81/100 dollars ($1,218.81) commencing on June 9, 2018 and continuing during the period of permanent total disability. Defendant shall be given credit for the 45 weeks of weekly benefits paid prior to the arbitration hearing. (JE2, p. 91)

Claimant has asserted a claim for penalty benefits. Iowa Code section 86.13(4) provides:

> *a.* If a denial, a delay in payment, or a termination of benefits occurs without reasonable or probable cause or excuse known to the

> employer or insurance carrier at the time of the denial, delay in payment, or termination of benefits, the workers' compensation commissioner shall award benefits in addition to those benefits payable under this chapter, or chapter 85, 85A, or 85B, up to fifty percent of the amount of benefits that were denied, delayed, or terminated without reasonable or probable cause or excuse.
>
> *b.* The workers' compensation commissioner shall award benefits under this subsection if the commissioner finds both of the following facts:
>
> (1) The employee has demonstrated a denial, delay in payment, or termination of 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.

Delay attributable to the time required to perform a reasonable investigation is not unreasonable. Kiesecker v. Webster City Custom Meats, Inc., 528 N.W.2d 109 (Iowa 1995).

It also is not unreasonable to deny a claim when a good faith issue of law or fact makes the employer's liability fairly debatable. An issue of law is fairly debatable if viable arguments exist in favor of each party. Covia v. Robinson, 507 N.W.2d 411 (Iowa 1993). An issue of fact is fairly debatable if substantial evidence exists which would support a finding favorable to the employer. Gilbert v. USF Holland, Inc., 637 N.W.2d 194 (Iowa 2001).

An employer's bare assertion that a claim is fairly debatable is insufficient to avoid imposition of a penalty. The employer must assert facts upon which the commissioner could reasonably find that the claim was "fairly debatable." Meyers v. Holiday Express Corp., 557 N.W.2d 502 (Iowa 1996).

If the employer fails to show reasonable cause or excuse for the delay or denial, the commissioner shall impose a penalty in an amount up to 50 percent of the amount unreasonably delayed or denied. Christensen v. Snap-on Tools Corp., 554 N.W.2d 254 (Iowa 1996). The factors to be considered in determining the amount of the penalty include the length of the delay, the number of delays, the information available to the employer and the employer's past record of penalties. Robbennolt, 555 N.W.2d at 238.

Weekly compensation payments are due at the end of the compensation week. If weekly compensation benefits are not fully paid when due, section 86.13 requires that additional benefits be awarded unless the employer shows reasonable cause or excuse for the delay or denial. Robbennolt v. Snap-on Tools Corp., 555 N.W.2d 229 (Iowa 1996).

The purpose of Iowa Code section 86.13 is both punishment for unreasonable conduct but also deterrence for future cases. The Commission is given discretion to determine the amount of the penalty imposed with a maximum penalty of 50 percent of the amount of the delayed, or denied, benefits. Christensen v. Snap-On Tools Corp., 554 N.W2d 254, 261 (Iowa 1996).

Since the arbitration award defendant has not paid any weekly benefits to the claimant despite being ordered to pay claimant weekly benefits. The arbitration decision was issued on October 5, 2021. Defendant filed an appeal of the arbitration decision, but voluntarily dismissed the appeal on December 8, 2021. (See Agency File No. 20700500.02) In the arbitration decision defendant was ordered to pay claimant one thousand two hundred eighteen and 81/100 dollars ($1,218.81) per week. I conclude that since the date the appeal was dismissed there was no reasonable basis to deny or delay the weekly benefits to the claimant. Since the date the appeal was dismissed until the date of the review-reopening hearing, 81.286 weeks have elapsed. I conclude that as of the date of the review-reopening hearing defendant had unreasonably denied 81 weeks of benefits to the claimant. This amounts to over $98,500.00 in unreasonably delayed or denied benefits. I further find that defendant failed to communicate any basis or reason for the denial of the benefits to the claimant. I conclude defendant offered no cause or excuse for the delay or denial of the benefits to the claimant. I conclude an award of penalty is appropriate in this case.

Considering the length of the delay, the number of delays, the information available to the employer, and the other factors set forth by the Iowa Supreme Court, I exercise my discretion and find that a penalty in the ballpark of 50 percent is in order. I note the employer's complete failure to contemporaneously convey the basis for the denials and delays to Mr. Zorzi. I also note the lack of payments to the claimant despite the fact that this agency ordered weekly payments be made. I hereby award penalty benefits against the employer in the amount of forty-nine thousand and no/100 dollars ($49,000.00). It should be noted that this award of penalty benefits is in addition to the $60,000 penalty benefits ordered in the arbitration decision. (JE2, p. 88-90, 92)

Next, claimant seeks an award of medical expenses as outlined and itemized in claimant's exhibit 1. 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).

The medical bills claimant is seeking are contained in Claimant's Exhibit 1. These are the same medical bills that were submitted in the underlying arbitration decision as Joint Exhibit 10. In the underlying arbitration decision defendant was ordered to pay the medial providers directly, reimburse claimant for all charges paid, and otherwise hold claimant harmless for all of those medical charges. (Arb. Dec. Agency File No. 20700500.02) Defendant was already ordered to pay these charges. No additional findings are made regarding these charges. These charges remain the responsibility of the defendant.

Finally, claimant seeks an assessment of costs. Assessment of costs is a discretionary function of the agency. Iowa Code section 86.40. I conclude claimant was successful in his claim. Therefore, exercising the agency's discretion, I conclude that an assessment of costs against the defendant is appropriate.

First, claimant is seeking costs in the amount of $103.00 for the filing fee. (JE13) I find this is an appropriate cost under 876 IAC 4.33(7). Defendant is assessed costs in the amount of $103.00.

Claimant is also seeking an assessment of costs in the amount of $750.00 for the July 1, 2022 IME with Dr. Taylor. (JE13) Iowa Code section 85.39 is the sole method for reimbursement of an exam by a physician of the employee's choice. If an injured worker seeks reimbursement for an IME, the provisions established by the legislature, under Iowa Code section 85.39, must be followed. Only the costs associated with preparation of the written report of a claimant's IME can be reimbursed as a cost at hearing under rule 876 IAC 4.33. Des Moines Regional Transit Authority v. Young, 867 N.W.2d 839, 846-847 (Iowa 2015). Dr. Taylor's bill in the amount of $750.00 is for "Follow up exam." (JE13, p. 186). Thus, I conclude this is not an appropriate expense to be assessed as a cost.

Therefore, defendant is assessed costs totaling one hundred three and no/100 dollars ($103.00).

ORDER

THEREFORE, IT IS ORDERED:

All weekly benefits shall be paid at the rate of one thousand two hundred eighteen and 81/100 dollars ($1,218.81).

Defendant shall pay permanent total disability benefits commencing on June 9, 2018 and continuing during the period of permanent total disability.

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

Defendant shall pay accrued weekly benefits in a lump sum together with interest 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.

Defendant shall pay the medical providers, reimburse claimant, reimburse all third-party payers, or otherwise satisfy and hold claimant harmless for medical expenses as set forth in claimant's exhibit 1.

Defendant shall pay penalty benefits in the amount of forty-nine thousand and no/100 dollars ($49,000.00).

Defendant shall reimburse claimant costs as set forth above.

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

This case is referred to the Iowa Workers' Compensation Commissioner for determination of whether further investigation or action is needed pursuant to Iowa Code section 87.19.

Signed and filed this __5th___ day of October, 2023.

ERIN Q. PALS
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

James Fitzsimmons (via WCES)

David Brian Scieszinski (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.