BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

ROBERT FLEMING, Claimant, vs. MARTIN MARIETTA MATERIALS, Employer, and INDEMNITY INS. CO. OF N.A., Insurance Carrier, SECOND INJURY FUND OF IOWA, Defendants.	File No. 5060956.01 A R B I T R A T I O N D E C I S I O N Head Note Nos.: 1803.1, 1804 4100, 4000.2

STATEMENT OF THE CASE

On November 12, 2019, the claimant, Robert Fleming, filed a petition for arbitration against Martin Marietta Materials (hereafter "Martin"), his employer, Indemnity Insurance Company of North America, its insurance company, and the Second Injury Fund of Iowa.

The claimant in this matter was represented by Tom Wertz. The defendants were represented by Rene Lapierre. The Second Injury Fund of Iowa was represented by Amanda Rutherford.

The matter came on for hearing on November 17, 2020, before Deputy Workers' Compensation Commissioner Joe Walsh in Des Moines, Iowa, via Court Call video conferencing system. The record in the case consists of Joint Exhibits 1 through 10, Claimant's Exhibits 1 through 11, Defense Exhibits A through E and Fund Exhibits AA through EE. The claimant testified under oath at hearing. Gina Castro served as court reporter. The matter was fully submitted on December 18, 2020, after helpful briefing by the parties.

ISSUES

The parties submitted the following issues for determination:

1. The first issue is the nature and extent of claimant's permanent disability. Claimant alleges his disability is industrial. Defendants contend it is scheduled. Claimant alleges he is permanently and totally disabled.

2. If the disability is scheduled, claimant alleges applicability of the Second Injury Fund for a prior injury. The Fund disputes whether claimant sustained a prior qualifying loss and whether the "second injury" is industrial. If the Second Injury Fund Act is applicable, there are a host of issues regarding credit.

3. The commencement date for permanency benefits is also disputed.

4. Claimant seeks temporary disability benefits from September 21, 2017, through October 25, 2017. Defendants deny responsibility for such benefits, although stipulate that claimant was off work during this period of time.

5. The claimant seeks payment for an independent medical evaluation under Section 85.39.

6. The claimant seeks medical expenses set forth in Claimant's Exhibit 8. These expenses are disputed by the defendants on the basis of causal connection, reasonable and necessary and authorization.

7. The employer's credit is disputed.

8. The claimant seeks a penalty.

9. Costs.

STIPULATIONS

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

1. The parties had an employer-employee relationship at relevant times.

2. Claimant sustained an injury which arose out of and in the course of employment on May 4, 2016.

3. The weekly rate of compensation is $624.06

4. Affirmative defenses have been waived.

FINDINGS OF FACT AND COURSE OF PROCEEDINGS

Claimant, Robert Fleming, was 66 years old as of the date of hearing. Mr. Fleming testified live and under oath at hearing. He is found to be a highly credible witness. His hearing testimony was consistent with his previous sworn testimony as well as the medical evidence. He is found to be an accurate historian. There was nothing about his demeanor at hearing which caused me any concern regarding his truthfulness.

Mr. Fleming attended high school in Creston, Iowa, and completed the 11th grade. In 1974, he enlisted in the United States Navy. He worked as a machinist in the Navy from 1974 to 1977. In 1979, he received his GED from Southwest Community College. He also attended a semester of computer courses at Indian Hills Community College. After the Navy, Mr. Fleming had a varied and interesting work history, performing railroad work, working as a groundskeeper for two different golf courses, delivering packages for UPS, selling cars for a dealership and performing quality control work for an aluminum casting plant in Fairfield. In 2002, Mr. Fleming began working for Martin Marietta Materials (hereafter, "Martin"), the employer in this case. He worked as a quality control technician. This position required him to collect rock samples and take them to a laboratory for testing. He had to walk on uneven ground and operate heavy machinery among other tasks. The job description is in evidence.

In 1986, Mr. Fleming sustained an injury to his right ankle. He testified he jumped off a horse and broke his right tibia. He was diagnosed with a comminuted distal tibial fracture and a fibula fracture. (Joint Exhibit 1, pages 1-2) He underwent three surgeries for this condition and was finally released from care in August 1989. (Jt. Ex. 1, p. 9) He was released without restrictions. He passed his preemployment physical with Martin in 2002.

On May 4, 2016, Mr. Fleming sustained a serious workplace injury when a skid loader bucket dropped onto his left foot. The injury itself is stipulated and well-documented by the employer. (Jt. Ex. 5, pp. 62-65) Mr. Fleming described the injury in detail at hearing. (Transcript, page 14) The bucket weighed 6 to 7 hundred pounds. He was taken to St. Luke's Emergency room where he was diagnosed with displaced fractures of the first and second metatarsals. (Jt. Ex. 4, p. 28) He was placed in a hard splint and followed up the next day at Work Well Clinic. (Jt. Ex. 6, pp. 51-52) Surgery was performed by Scott Eckroth, M.D., on May 19, 2016. (Jt. Ex. 3, p. 17) Unfortunately, the wound did not heal properly and he began treating with the Mercy Wound Clinic. He continued to follow up with Dr. Eckroth. By August 2016, because of the wound issues, he had still not begun physical therapy. Mr. Fleming testified credibly that he began having left hip pain resulting from his injury approximately three months after the work injury. (Tr., p. 15)

In October 2016, Mr. Fleming began some weightbearing on his heel while using a cane or crutches. (Jt. Ex. 7, p. 53) He underwent extensive physical therapy (a total of 47 appointments) between November 2016 and March 2017. (Jt. Ex. 7, p. 55)

During this timeframe, he was unable to wear a regular shoe due to pain and swelling and he continued to use a cane to get around. (Jt. Ex. 7, p. 53) His healing was quite slow because of repeated wound infections causing him to be treated with antibiotics.

Because of the slow healing and continued symptoms, Dr. Eckroth performed surgery to remove the hardware from the left first metatarsal on October 26, 2017. (Jt. Ex. 8, p. 60) Mr. Fleming followed up for treatment with Dr. Eckroth in November 2017. In December 2017, Martin terminated Mr. Fleming. (Cl. Ex. 6, p. 68) He had been on leave of absence and had not returned. "THIS WAS A WORK COMP CASE AND HAD WENT OVER THE 12 WEEK FMLA ALLOWED TIME. THE DECISION WA [sic] MADE TO TERM EMPLOYEE WITH ELIGIBILITY TO REHIRE ONCE RELEASE BY DR." (Cl. Ex. 6, p. 68)

In January 2018, Dr. Eckroth recommended a pain clinic referral to help with the chronic nerve pain which he described as having "elements of RSD." (Jt. Ex. 5, p. 44) "In terms of his work restrictions, I think that he's going to continue to need to be on sedentary work only, as I think he would struggle to do any sort of light duty or more labor-intensive position." (Jt. Ex. 5, p. 44)

The defendants arranged an independent medical examination for Mr. Fleming with Charles Broghammer, M.D., on January 8, 2018, just four months after his hardware removal surgery. Dr. Broghammer reviewed a great number of medical records and examined Mr. Fleming. He summarized the course of history and documented the following current complaints.

> Mr. Fleming complains that his foot swells up with any weightbearing. He reports his foot swells up significantly by the end of the day. He also reports decreased range of motion of his toes. He also reports pain in the foot with ambulation. He reports his toes are always cold. He reports he has numbness and tingling in the bottom of his left foot. He reports pain over the fracture sites. He reports no other pain in the foot. He does complain of right hip pain due to his antalgic gait. He reports changes in the weather increases his foot pain.

(Jt. Ex. 9, p. 69) The physical exam revealed some purplish discoloration. His left foot was notably cooler than the right foot. Dr. Broghammer opined that Mr. Fleming was not at MMI but agreed with Dr. Eckroth that he should only work in a sedentary position. (Jt. Ex. 9, p. 71) He declined to diagnose CRPS. He assigned an impairment rating of 13 percent of the left foot and made some treatment recommendations, including pain management evaluation. (Jt. Ex. 9, p. 73)

In April 2018, Tork Harman, M.D., evaluated Mr. Fleming at the Mercy Pain Clinic and assumed care. His examination appears quite thorough. (Jt. Ex. 10, pp. 75-76) Dr. Harman provided the following diagnosis: "Chronic neuropathic pain of the left foot. He has some features of CRPS and borderline meet criteria for CRPS." (Jt. Ex. 10, p. 76) Dr. Harman recommended escalating doses of gabapentin, on top of the narcotic pain

medications. "In regard to his right groin pain, I believe he has arthritis in his right hip. He has significant pain in the groin with internal rotation of the extended or flexed hip." (Jt. Ex. 10, p. 76) Dr. Harman opined that this "has been exacerbated by the offloading he does when he walks to favor his left foot." (Jt. Ex. 10, p. 76)

In May 2018, Dr. Harman performed a right trochanteric bursa injection for the diagnosis of trochanteric bursitis. (Jt. Ex. 10, p. 81) In July 2018, he performed a ketamine infusion. (Jt. Ex. 10, p. 82) Dr. Harman recommended physical therapy for the hip which was eventually authorized in September 2018. (Jt. Ex. 7, p. 57) Dr. Harman has continued to provide pain management treatment up through the date of hearing.

In September 2019, Dr. Eckroth evaluated Mr. Fleming. He documented a host of ongoing complaints and symptoms. (Jt. Ex. 5, p. 45) His diagnosis was complex regional pain syndrome (CRPS). (Jt. Ex. 5, p. 46) He had no further treatment to offer and opined that "this is likely to be the new normal". (Jt. Ex. 5, p. 45) In November 2019, Dr. Eckroth assigned a 22 percent lower extremity rating utilizing the relevant table for nerve deficits. (Jt. Ex. 5, p. 48)

Mark Taylor, M.D., examined Mr. Fleming on October 19, 2019, for an independent medical examination (IME) under Section 85.39. He performed a thorough examination and reviewed a number of appropriate medical records, summarizing the same. He provided expert medical opinions on causation and disability. Dr. Taylor diagnosed chronic left foot arthralgia and neuropathic pain/borderline CRPS from metatarsal fractures and right hip arthralgia-trochanteric bursitis. (Cl. Ex. 1, p. 15) He opined that both of these conditions are causally related to the May 4, 2016, work injury. (Cl. Ex. 1, p. 17) Mr. Fleming's right hip complaints are well-documented by the treating medical providers. I find his opinions compelling and convincing. He assigned a 15 percent whole person rating for the left lower extremity and a 3 percent rating for the right hip. (Cl. Ex. 1, p. 19) He also assigned a 7 percent right lower extremity rating for the 1986 injury to his right ankle. (Cl. Ex. 1, p. 19) He recommended sedentary work restrictions.

Mr. Fleming continued to treat with Dr. Harman, last seeing him in person in early 2020, and then via telehealth in September 2020.

> Robert is seen today for telehealth visit. He is on gabapentin 400 mg 3 times daily nortriptyline 30 mg at bedtime for chronic neuropathic pain in his left foot. It helps control his pain but does not relieve it. His pain is worse with weightbearing. He does use a cane as needed. He has burning dyseathetic pain predominant top of his left foot. ... His sleep is somewhat more broken with the increased pain. He has found that if he abruptly stops is medications that he feels jittery and anxious.

(Jt. Ex. 10, p. 88)

Mr. Fleming testified that his current condition is not good. He still has significant symptoms in his left foot and ankle and his right hip. He testified he could not return to any of his prior jobs in the condition he is in. He has not looked for work because he does not feel there is any gainful employment he could perform. (Tr., p. 25) Both claimant and defendants secured expert vocational opinions. (Cl. Ex. 7; Def. Ex. A)

CONCLUSIONS OF LAW

The first question is the nature of the claimant's disability. The claimant contends his disability is industrial because the proper diagnosis is CRPS and the condition includes a sequela aggravation of his right hip which extends his disability into his body as a whole. The Fund agrees with this. The defendants contend that claimant's condition is limited to the left foot and ankle and must be calculated as a scheduled disability under Iowa Code Section 85.34(2)(n) (2015).

The issue is one of medical causation.

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).

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).

When an injury occurs in the course of employment, the employer is liable for all of the consequences that "naturally and proximately flow from the accident." Iowa Workers' Compensation Law and Practice, Lawyer and Higgs, section 4-4. The Supreme Court has stated the following. "If the employee suffers a compensable injury and thereafter suffers further disability which is the proximate result of the original injury, such further disability is compensable." Oldham v. Scofield & Welch, 222 Iowa 764, 767, 266 N.W. 480, 481 (1936). The Oldham Court opined that a claimant must present sufficient evidence that the disability was naturally and proximately related to the original work injury.

An injury to a scheduled member may, because of after effects or compensatory change, result in permanent impairment of the body as a whole. Such impairment may in turn be the basis for a rating of industrial disability. It is the anatomical situs of the permanent injury or impairment which determines whether the schedules in section 85.34(2)(a) - (t) are applied. Lauhoff Grain v. McIntosh, 395 N.W.2d 834 (Iowa 1986); Blacksmith v. All-American, Inc., 290 N.W.2d 348 (Iowa 1980); Dailey v. Pooley Lumber Co., 233 Iowa 758, 10 N.W.2d 569 (1943). Soukup v. Shores Co., 222 Iowa 272, 268 N.W. 598 (1936).

In Collins v. Department of Human Services, 529 N.W.2d 627 (Iowa Ct. App. 1995), the Iowa Court of Appeals held that an injury to the sympathetic nervous system is an injury to the body as a whole. The claimant "suffered an injury to a scheduled member, her hands, and also to a part of the body not included in the schedule, her nervous system. Reflex sympathetic dystrophy is a dysfunction of the sympathetic nervous system." Id. at 629.

A hip injury is generally an injury to the body as a whole and not an injury to the lower extremity. The lower extremity extends to the acetabulum or socket side of the hip joint. For a hip injury to be industrially ratable, disability in the form of actual impairment to the body must be present. Lauhoff Grain v. McIntosh, 395 N.W.2d 834 (Iowa 1986); Dailey v. Pooley Lumber Co., 233 Iowa 758, 10 N.W.2d 569 (1943).

The greater weight of evidence supports a finding that the proper diagnosis of Mr. Fleming's left foot and ankle condition is CRPS. This is based upon the opinions of Dr. Taylor, Dr. Eckroth and Dr. Harman. While all of the physicians noted that the CRPS diagnosis was borderline, they have treated him in a manner consistent with treatment of CRPS.

In any event, I find the evidence overwhelmingly supports a finding that the claimant sustained a sequela injury to his right hip. This is based again upon the opinions of Dr. Taylor, which is supported generally by Dr. Eckroth and Dr. Harman. This is not a case where the claimant showed up to hearing complaining of undocumented hip symptoms. The claimant's hip symptoms are well-documented throughout the treating providers' records. Dr. Taylor's opinion that this condition was lit up by the work injury is essentially unrebutted in the record. The defendants are absolutely correct that the fact that they paid for claimant's hip treatment is not evidence that the condition is work-connected. The problem for the employer is that there is really no evidence in the record which disputes that the sequela hip condition is work-related. Even Dr. Broghammer documented the significant right hip symptoms.

For these reasons, I find that the claimant's disability is industrial and shall be calculated under Iowa Code Section 85.34(2)(u) (2015). Therefore, all issues relating to the Second Injury Fund are moot, including the first qualifying injury and all credit issues.

The next issue is the extent of industrial disability. The claimant alleges permanent and total disability and has pled odd-lot. The defendants dispute this.

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).

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.

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). 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 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. Boones 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 greater weight of evidence supports a finding that Mr. Fleming is permanently and totally disabled. It is unnecessary to apply the odd-lot procedures to reach this finding. Mr. Fleming is 66-years-old at the time of hearing. He has a GED. He underwent a lengthy healing period during which time he was terminated. It is highly unlikely that Mr. Fleming would have ever been able to return to any employment at Martin in any event. The best evidence of his medical impairment, condition and restrictions are the opinions of Dr. Taylor. Dr. Taylor limited Mr. Fleming to sedentary work. This opinion was supported by both Dr. Harman and Dr. Eckroth. This restriction would prevent Mr. Fleming from working in any of his past employment. I find the vocational assessment of Barb Laughlin to be compelling. She opined that there is really no work for him in the competitive labor market. (Cl. Ex. 7, p. 78) His use of a cane and significant increase of symptoms with weightbearing activities makes it highly unlikely that he could ever secure or maintain gainful competitive employment.

The employer argues that Mr. Fleming has not attempted to seek employment or cooperate with their vocational expert. I find that it would likely make no difference if claimant had performed an exhaustive work search. A 66-year-old manual laborer with sedentary work restrictions would be unlikely to find work.

Permanent total disability benefits commence as of the date of injury and the employer is entitled to a credit against all benefits paid since that date, regardless of how the payments were coded.

The next issue is medical expenses. Claimant seeks the expenses set forth in Claimant's Exhibits 8 and 9. Defendants resist.

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 have reviewed the out of pocket expenses submitted by the claimant and find that these expenses are reasonable and necessary, causally connected to the work injury and provided by authorized physicians. The defendants are responsible for all of the expenses set forth in Claimant's Exhibit 8 and 9, including medical mileage.

The next issue is whether the claimant is entitled to IME expenses from Mark Taylor under Iowa Code Section 85.39.

Iowa Code 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. Iowa Code section 85.39(2) (2016). The section also permits reimbursement for reasonably necessary transportation expenses incurred and for any wage loss occasioned by the employee attending the subsequent examination. Id.

Defendants are responsible only for reasonable fees associated with claimant's independent medical examination. Iowa Code section 85.39(2) (2016). 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).

I find that all conditions precedent for the IME were met in this case. Therefore, I find that claimant is entitled to reimbursement of Dr. Taylor's IME in the amount of $3,882.50. (Cl. Ex. 11, p. 163)

The next issue is credit. All of the indemnity payments made to claimant are contained in Claimant's Exhibit 10. Since I have found claimant to be permanently and totally disabled, it is unnecessary to determine maximum medical improvement. The claimant is entitled to permanent total disability payments from the date of injury through the date of hearing and forward. The employer is entitled to a credit for all payments made through the date of hearing.

The next 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.
>
> 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.

Claimant advances several penalty theories. First, claimant contends that the rate was initially paid at an improperly low rate and there was no reasonable excuse for this error. (Cl. Ex. 10, p. 148) Second, claimant contends that at least nine TTD checks were unreasonably delayed between 1 and 11 days. (Cl. Ex. 10, p. 153) Third, claimant contends that TTD payments between September 21, 2017, and October 25, 2017, were unreasonably delayed or denied and finally paid just days before hearing. Fourth, claimant contends that PPD was underpaid to the claimant. (Cl. Ex. 10, p. 145) Finally, claimant contends that the employer's decision to pay the permanency on the basis of a scheduled member is unreasonable given the unrebutted evidence in this case.

Rate Underpayment

Payment records show that claimant was paid at an improperly low rate of $599.99 from the date of injury through June 8, 2018. The parties stipulated at hearing to the elements comprising the rate of compensation and agreed upon a rate of $624.06. On June 12, 2018, the employer took reasonable steps to correct this underpayment, issuing a check for the full underpayment in the amount of $2,896.06. This is the full amount of the underpaid benefits. At hearing, defendants offered no reasonable excuse for the underpayment. I find a penalty is mandatory and is assessed in the amount of $600.00, to deter defendants from this type of mistake in the future.

Late TTD Checks

A review of the payments set forth in the payment log demonstrates that 9 payments were delayed between 1 and 11 days from due date. (Cl. Ex. 10, p. 153) No excuse has been articulated for this delay. I find a penalty is mandatory and assessed in the amount of $1,000.00 to deter defendants from this type of mistake in the future.

TTD from 9/21/17 through 10/25/17

Claimant was paid no benefits from September 21, 2017, through October 25, 2017 (5.667 weeks) in the amount of $3,536.34. The defendants contend that payments were not owed during this period because Dr. Eckroth had placed claimant at maximum medical improvement as of August 23, 2017. (Jt. Ex. 5, p. 41) The employer then began paying disability benefits again after claimant had another surgery on October 21, 2017. Defendants argue that no payments were owed during this period of time because there was no impairment rating and the medical evidence at that time showed claimant at MMI. I agree with the defendants on this point. At the time, defendants had a reasonable basis for stopping the payments. The question is whether further investigation revealed that the payments were in fact owed, and if so, when. The defendants apparently ended up making a payment for this period of time just prior to hearing. There is no evidence in the record as to why this payment was made when it was made. I find that while the defendants did have a reasonable basis for denying the payments at the time, over the course of time it became inescapably obvious that payments were owed to the claimant from September 21, 2017, through October 25, 2017, either as temporary disability or as permanency. The defendants' failure to correct this underpayment until days before hearing is without reasonable excuse. A penalty is mandatory and assessed in the amount of $1,750.00 to deter defendants from failing to make timely payments in the future.

Underpayment of PPD

The claimant alleges that the employer indicated it would pay 48.4 weeks of PPD. (Cl. Ex. 10, p. 145) Claimant contends the employer then only paid 46.714 weeks of compensation between December 2, 2019, and October 24, 2020. Claimant was expecting benefits to continue through November 5, 2020 based upon the letter indicating he would be paid 48.4 weeks. A careful examination of the payment logs shows the last payment to the claimant on June 7, 2020, which is not correct based upon the testimony of the claimant. (See Cl. Ex. 10, p. 146) Without the remaining payment records it is not possible for claimant to sustain his penalty claim on this two week period.

Improper Payment for Scheduled Disability

While I have found that the evidence is very strong that claimant sustained a body as a whole injury, I cannot find, as a matter of law, that it was unreasonable to pay benefits on a scheduled member basis. While the opinions of Dr. Eckroth, Dr. Harman

and even Dr. Broghammer all generally supported the proposition that claimant's disability was industrial, none of them actually provided a causation opinion which, on its own would have mandated a finding of industrial disability. (See Jt. Ex. 9, p. 69; Cl. Ex. 2, pp. 31-32; Cl. Ex. 2, p. 26) It was the opinion of Dr. Taylor, which is generally supported by those other physicians, that resulted in the finding that claimant's injury is unscheduled. I find that this issue was fairly debatable.

Having reviewed all of the evidence in the file, I find that claimant is owed a penalty of $3,350.00 for late paid benefits.

Iowa Code section 86.40 states:

> **Costs.** All costs incurred in the hearing before the commissioner shall be taxed in the discretion of the commissioner.

Iowa Administrative Code Rule 876—4.33(86) states:

> **Costs.** Costs taxed by the workers' compensation commissioner or a deputy commissioner shall be (1) attendance of a certified shorthand reporter or presence of mechanical means at hearings and evidential depositions, (2) transcription costs when appropriate, (3) costs of service of the original notice and subpoenas, (4) witness fees and expenses as provided by Iowa Code sections 622.69 and 622.72, (5) the costs of doctors' and practitioners' deposition testimony, provided that said costs do not exceed the amounts provided by Iowa Code sections 622.69 and 622.72, (6) the reasonable costs of obtaining no more than two doctors' or practitioners' reports, (7) filing fees when appropriate, (8) costs of persons reviewing health service disputes. Costs of service of notice and subpoenas shall be paid initially to the serving person or agency by the party utilizing the service. Expenses and fees of witnesses or of obtaining doctors' or practitioners' reports initially shall be paid to the witnesses, doctors or practitioners by the party on whose behalf the witness is called or by whom the report is requested. Witness fees shall be paid in accordance with Iowa Code section 622.74. Proof of payment of any cost shall be filed with the workers' compensation commissioner before it is taxed. The party initially paying the expense shall be reimbursed by the party taxed with the cost. If the expense is unpaid, it shall be paid by the party taxed with the cost. Costs are to be assessed at the discretion of the deputy commissioner or workers' compensation commissioner hearing the case unless otherwise required by the rules of civil procedure governing discovery. This rule is intended to implement Iowa Code section 86.40.

Iowa Administrative Code rule 876—4.17 includes as a practitioner, "persons engaged in physical or vocational rehabilitation or evaluation for rehabilitation." A report or evaluation from a vocational rehabilitation expert constitutes a practitioner report under

our administrative rules. Bohr v. Donaldson Company, File No. 5028959 (Arb. November 23, 2010); Muller v. Crouse Transportation, File No. 5026809 (Arb. December 8, 2010) The entire reasonable costs of doctors' and practitioners' reports may be taxed as costs pursuant to 876 IAC 4.33. Caven v. John Deere Dubuque Works, File Nos. 5023051, 5023052 (App. July 21, 2009).

Having reviewed the file, I find claimant is entitled to expenses in the amount of $1,805.50.

ORDER

THEREFORE IT IS ORDERED

The Second Injury Fund of Iowa shall pay nothing.

Defendants (employer and insurance carrier) shall pay permanent total disability benefits at the rate of six hundred and twenty-four and 06/100 ($624.06) per week commencing from the date of injury.

Defendants shall pay accrued weekly benefits in a lump sum.

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

Defendants shall be given credit for the weeks previously paid.

Defendants shall pay the medical expenses set forth in Claimant's Exhibits 8 and 9.

Defendants shall pay the IME expense in the amount of three thousand eight hundred eighty-two and 50/100 dollars ($3,882.50).

Defendants shall pay a penalty in the amount of three thousand three hundred fifty and no/100 dollars ($3,350.00).

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

Costs are taxed to defendants as set forth in this decision in the amount of one thousand eight hundred five and 50/100 dollars ($1,805.50).

Signed and filed this 6th day of July 2021.

JOSEPH L. WALSH
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Thomas Wertz (via WCES)

Rene Charles Lapierre (Via WCES)

Amanda Rutherford (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.