BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JAMES D. DICKERSON, Claimant, vs. JOHN DEERE DAVENPORT WORKS, Employer, Self-Insured, Defendant.	:	File Nos. 5065073, 5065074 ARBITRATION DECISION Head Note Nos.: 1402.30; 1802; 1803; 1806; 2501; 2502; 2801; 3003; 4000.2

FILED
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WORKERS' COMPENSATION

STATEMENT OF THE CASE

Claimant, James Dickerson, filed petitions in arbitration seeking workers' compensation benefits from John Deere Davenport Works (Deere), self-insured, employer, as defendant. This matter was heard in Des Moines, Iowa, on December 11, 2017, with a final submission date of January 22, 2018.

The record consists of Joint Exhibits 1 through 12, Claimant's Exhibits 1 through 18, Defendants' Exhibits A through HH, and the testimony of claimant, and his sons Jamie Dickerson and Joshua Dickerson.

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.

ISSUES

For File No. 5065073 (Date of injury March 24, 2014):

1. The extent of claimant's entitlement to permanent partial disability benefits.

2. Rate.

3. Whether claimant is entitled to reimbursement of an independent medical evaluation (IME) under Iowa Code section 85.39.

For File No. 5065074 (Date of injury April 14, 2016):

1. Whether claimant sustained an injury that arose out of and in the course of employment.

2. Whether claimant's claim for benefits is barred by application of Iowa Code section 85.23.

3. Whether claimant's injury is the cause of temporary disability.

4. Whether claimant's injury is the cause of a permanent disability; and if so,

5. The extent of claimant's entitlement to permanent partial disability benefits.

6. Rate.

7. Whether claimant is due reimbursement of an IME.

8. Whether claimant is entitled to alternate medical care.

9. Whether defendants are liable for a penalty under Iowa Code section 86.13.

The parties stipulated on the hearing report for File No. 5065074, that if the employer is liable for this injury, benefits paid for claimant's 2014 injury would be applied as an offset, or apportioned, under Iowa Code section 85.34(7)(b)(1).

FINDINGS OF FACT

Claimant was 58 years old at the time of hearing. He graduated from high school. Claimant has worked as a die cast operator, a meat cutter, a farmer, a custodian, and a welder.

Claimant began with Deere in 2003. For almost his entire career at Deere, claimant has worked as a welder. Claimant testified his job as a welder required him to work quickly to meet quotas. Claimant said his job often required him to make approximately 1,000 welds per day. Claimant said he also trained other welders.

Claimant's prior medical history is relevant. In September of 2007, claimant was evaluated for neck pain following a right shoulder surgery. Claimant complained of pain radiating down his right upper extremity. Claimant was assessed as having a probable right upper extremity cervical radiculopathy. An MRI was recommended. (Joint Exhibit 1, page 3)

Claimant was seen in October 2007 for an MRI. The MRI showed disc protrusions at C3 through C6. Claimant was assessed as having a right upper extremity cervical radiculopathy. (Jt. Ex. 1, p. 4)

Records from late October 2007 indicated an EMG study showed evidence of a C6 radiculopathy. Records indicate that an epidural steroid injection (ESI) greatly improved claimant's pain. (Jt. Ex. 1, p. 5)

In April 2008, claimant was seen by Todd Wenck, M.D., for neck pain and headaches. Claimant was assessed as having chronic neck pain and treated with medication. (Jt. Ex. 4, pp. 46-47)

Claimant returned to Dr. Wenck in April 2009. Claimant had neck pain and headaches. An MRI of the head and neck was recommended. (Jt. Ex. 4, pp. 48-49)

A cervical MRI, taken April 14, 2009, showed disc bulges at the C3-C6 levels with degenerative changes. (Jt. Ex. 5, pp. 7-8)

In September 2012 claimant hit his helmet on a cross member at work and jammed his neck. Physical therapy was recommended to treat claimant's neck pain. (Jt. Ex. 2, pp. 37-40)

On March 24, 2014, claimant injured his chest at work dislocating his xiphoid process while trying to straighten out a load on a fork truck. (Tr. pp. 82-83)

On September 29, 2014, claimant was evaluated by George Kontos, M.D. Claimant was recommended to have surgery. (Jt. Ex. 6, p. 79)

On October 24, 2014, claimant had an excision of the xiphoid process. The surgery was performed by Dr. Kontos. (Jt. Ex. 6, p. 81; Jt. Ex. 7, p. 85)

Claimant testified at hearing that surgery resolved the problems for his chest injury. (Tr. p. 88) Claimant testified he did not miss work following surgery due to his xiphoid process injury. On December 1, 2014, claimant was evaluated by Dr. Kontos. Claimant was returned to work with no restrictions beginning on December 16, 2014. (Jt. Ex. 6, p. 84)

In a March 4, 2016 report, Christine Deignan, M.D., gave her opinions of claimant's condition following an examination. Dr. Deignan opined claimant had a five percent permanent impairment to the body as a whole based upon the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition. (Ex. H, pp. 61-62)

Claimant testified that, on April 14, 2016, he injured his neck at work. Claimant testified he was welding while sitting on a stool. Claimant testified as he was welding, he moved from right to left on the stool. Claimant said while moving from right to left, he struck his head on the left side against a steel fixture. Claimant was wearing his welding helmet. Claimant testified he felt an immediate pain in his neck. Claimant referred to this pain as a "stinger". (Tr. pp. 58-59, 91-94)

Claimant said he went to his locker to get some Ibuprofen to shake off his stinger.

Claimant said he saw a Deere inspector, Eugene "Gino" Miller. Claimant told Mr. Miller, he struck his head and Mr. Miller suggested claimant fill out a "Near Miss" report. Claimant said Mr. Miller helped him fill out the report on a computer terminal.

Claimant testified he did not go to the nurse regarding the stinger as he did not think the stinger was a serious injury. (Tr. p. 67) Claimant said he routinely hit his head at work but did not believe the April 14, 2016 blow would lead to a serious injury.

The Near Miss report is found at claimant's exhibit 1, page 4. The report indicates an incident happening on April 14, 2016. The report was filed on April 15, 2016. The report indicates the incident happened when claimant "... was working on an unfamiliar fixture from normal daily task when I was moving from one weld to another on my stool and hit my head on the fixture." (Cl. Ex. 1, p. 4)

Claimant said that after he submitted the report, Kitty Spicer, claimant's supervisor, asked him about this report. Claimant said he told Ms. Spicer he hit his head on the fixture at issue. (Tr. pp. 65, 99)

On May 3, 2016, claimant was evaluated by Dr. Wenck for a general examination. There is no note of a neck injury in this visit. (Jt. Ex. 4, pp. 64-66)

On May 10, 2016, claimant left a message at Dr. Wenck's office indicating he thought he had a pinched nerve in his neck. (Jt. Ex. 4, p. 68) Claimant indicated excruciating pain in the neck into the right shoulder with numbness into the right arm. Claimant requested an appointment. (Jt. Ex. 4, p. 69)

In a clinic note from John Deere Health, Debra Slater, RN, indicates that claimant asked for advice regarding his neck pain. Claimant indicated his pain was not work related, but wanted to know about going home. Claimant was told that even if the nurse sent him home, claimant would still be counted as absent. (Jt. Ex. 2, p. 29)

On May 11, 2016, claimant was evaluated by Tracy Rockey, ARNP, with complaints of right-sided neck pain. Records indicate there was "no known injury". Claimant indicated he woke up on Monday with a stiff neck and it had worsened. Claimant had numbness in the right arm and loss of strength in the right arm. Claimant was assessed as having neck pain and right arm numbness. Nurse Practitioner Rockey felt that claimant's problem was due to muscle spasm. Claimant was referred to physical therapy and treated with medication. (Jt. Ex. 4, pp. 70-72)

On May 11, 2016, claimant contacted Deere and requested a Weekly Indemnity (WI) Disability Notice. (Ex. K, p. 67; Ex. AA, p. 189)

Claimant testified he completed section A of the WI Disability Notice. The notice was signed and dated by claimant on May 16, 2016. The WI Disability Notice is for non-occupational injuries. (Ex. L; Ex. AA, p. 205; Tr. pp. 101-106)

Claimant began physical therapy for his neck, shoulder, and arm pain on May 19, 2016. Claimant completed a physical therapy form on that date. He indicated on the form that his condition got worse on May 2, 2016. Claimant indicated he was not sure what caused his condition. (Jt. Ex. 8, p. 87)

Claimant returned to Nurse Practitioner Rockey on June 1, 2016 with complaints of neck pain. Claimant had no known injury and indicated that he had symptoms for three weeks. (Jt. Ex. 4, p. 74)

On June 9, 2016, claimant was evaluated by John Tryon, PA-C, for progressively worsening neck and right arm pain. Claimant noted progressively worsening pain over the last several months. Claimant related his pain to being in a crunched position at work as a welder. (Jt. Ex. 1, p. 7)

Claimant had a cervical MRI on June 15, 2016. It showed a broad-based bulging discs at C3-C6 levels, mild to moderate stenosis at C3-C7. (Jt. Ex. 10, p. 130)

Claimant was evaluated by Myles Luszczyk, M.D., with ORA Orthopedics on June 30, 2016. A review of the MRI revealed moderate stenosis at C3-C7 levels. Claimant was showing radicular symptoms in the right arm. Surgery was discussed and chosen as a treatment option. (Jt. Ex. 1, pp. 10-11)

On September 21, 2016, Dr. Luszczyk performed surgery consisting of an anterior cervical discectomy and fusion at the C3-C7 levels. (Jt. Ex. 11, p. 143; Jt. Ex. 12, p. 147)

Claimant returned in follow up with ORA Orthopedics from September 2016 through December 2016. The records during that time indicate claimant had resolved cervical radiculopathy with no arm pain and improving symptoms. Claimant still had neck pain. (Jt. Ex. 1, pp. 14-18)

Claimant saw Dr. Luszczyk on March 21, 2017 in follow up. Claimant still had neck pain. Claimant did not have arm symptoms. Claimant indicated he liked barbequing and grilling and occasionally did it with a catering operation. Dr. Luszczyk found it was okay for claimant to work with the barbequing business as long as claimant did not lift more than 25 pounds. (Jt. Ex. 1, p. 21)

In an affidavit dated February 28, 2017, claimant indicated that upon reflection, he now believed his work injury of April 14, 2016 was a cause of his neck condition and need for surgery. Claimant indicated he had not returned to work since May 10, 2016. (Cl. Ex. 1)

In a February 28, 2017 letter, written by claimant's counsel, Dr. Luszczyk indicated he believed claimant had an injury to his neck while working at Deere on April 14, 2016. He opined the accident aggravated claimant's right arm radiculopathy. He believed this injury aggravated a pre-existing condition. He opined claimant's treatment for his neck was reasonable and necessary to cure the effects of the April 14, 2016 work injury. He opined claimant would need permanent work restrictions as a result of the injury he sustained at Deere. (Cl. Ex. 1)

In deposition, Dr. Luszczyk testified he was not aware that claimant had a May 3, 2016 examination when no mention was made of a work injury. (Ex. 3, p. 7; Depo. p. 26) Dr. Luszczyk testified he had not seen the note from the May 10, 2016

examination, the May 11, 2016 report, nor the WI Disability Report. (Ex. 3, pp. 7-8; Depo. pp. 27-31)

Dr. Luszczyk testified that there was nothing on the intake examination with ORA Orthopedics indicating claimant had a traumatic injury. (Ex. 3, p. 9, Depo. pp. 34-36)

Dr. Luszczyk testified there was nothing that he had seen of new records, in his deposition, that changed his opinion of causation. He testified he recommended claimant perform a different position, than as a welder with Deere. (Ex. 3, pp. 10-11; Depo. pp. 40-45)

Claimant returned to Dr. Luszczyk on June 27, 2017. Claimant did not have radicular symptoms. Claimant still had neck pain and headaches. Claimant indicated he was going to do an inspecting job at Deere. (Jt. Ex. 1, p. 23)

In an October 31, 2017 report, Dr. Deignan, gave her opinions of claimant's condition following an IME. Claimant indicated no problems with his neck until he hit his head at work on April 14, 2016. Claimant indicated he had a stinger after his injury at work. Claimant had pain and stiffness in the neck and headaches. Claimant said his right upper extremity symptoms had resolved. (Ex. BB, pp. 219-220)

Dr. Deignan opined that claimant's alleged injury of April 14, 2016 did not arise out of and in the course of his employment with Deere. She based this opinion on medical records, prior to surgery, that did not refer to a work injury. She based her opinion, in part, on the belief that if claimant had a stinger type of injury as described by claimant, claimant would have known he had an acute and painful work injury. She based her opinion, in part, on 2012 records showing claimant had symptoms of a C6 radiculopathy. (Ex. BB, pp. 221-229)

In a November 9, 2017 report, Sunil Bansal, M.D., gave his opinions of claimant's condition following an IME. Claimant had continued pain in the xiphoid region when pressure was applied. Claimant had continued neck pain and constant headaches. Claimant had loss of range of motion in his neck. Claimant had issues with swallowing following his surgery. Dr. Bansal agreed that claimant had a 5 percent permanent impairment to the body as a whole due to the xiphoid process injury. He found claimant had no permanent restrictions regarding his xiphoid process injuries. (Cl. Ex. 6, pp. 19-40)

Dr. Bansal opined that claimant's striking injury at work caused an aggravation of underlying cervical spondylosis. He found claimant developed a dysphagia due to his surgery. He found claimant at maximum medical improvement (MMI) as of June 27, 2017. He restricted claimant to lifting up to 25 pounds and to avoid lifting over 15 pounds overhead. He found claimant had a 25 percent permanent impairment due to his cervical fusion and 3 percent permanent impairment to the body as a whole based on dysphagia. (Cl. Ex. 6, pp. 40-45)

Claimant testified that he did not initially make the connection that his head injury of April 14, 2016 caused his neck pain. He said that based on his prior history, he thought his neck problems were caused by a pinched nerve. (Tr. pp. 67, 72-73) Claimant said he was unsure what initially caused his neck pain until after surgery. (Tr. p. 77)

Claimant testified he has not applied for work since coming off work from Deere.

Claimant operates Dickerson's BBQ with his sons. He said the business is a catering company that barbeques and grills for bars and parties. Claimant said Dickerson's BBQ has had several paying jobs since he left Deere. He said that without his sons, he could not operate Dickerson's BBQ. Claimant said before the surgery, he did all the work for the barbequing business. He said that since the surgery he has only given the orders regarding preparing the food.

Jamie Dickerson is claimant's son. He said that because of his father's neck condition, his dad is limited in his ability to drive. His dad has problems with eating food and difficulty with swallowing since his surgery. Jamie Dickerson said his father was very active before the accident but was not very active following surgery.

Joshua Dickerson testified he is one of claimant's sons. He said his father was very physical before his injury. He said that since his injury, his dad is not able to hunt or fish. His father cannot climb or walk on uneven ground due to his limitations. Joshua Dickerson said that before his injury, his father was very active in the barbequing business. He said that since surgery, his father does very little for the catering company.

The thirteen weeks before the March 24, 2014 injury, claimant had the following earnings.

Week	Hours	Earnings	W/E date
1	48	$1,003.81	3/23/2014
2	42	$878.34	3/16/2014
3	48	$1,003.82	3/9/2014
4	49	$1,027.83	3/2/2014
5	36	$755.14	2/23/2014
6	40	$839.04	2/16/2014
7	40	$839.13	2/9/2014
8	40	$839.05	1/19/2014
9	40	$845.04	1/12/2014
10	38	$797.09	12/22/2013
11	47	$985.87	12/15/2013
12	47	$985.88	12/8/2013
13	38	$797.28	11/17/2013

(Ex. A, p. 1)

The thirteen weeks before the April 14, 2016 injury, claimant had the following earnings:

Week	Hours	Earnings	W/E date
1	40	$862.04	4/3/2016
2	56	$1,206.85	2/14/2016
3	40.5	$872.77	2/7/2016
4	40	$862.04	12/13/2015
5	48	$1,003.53	7/12/2015
6	40	$836.37	6/28/2015
7	40	$836.28	6/21/2015
8	44	$919.91	6/14/2015
9	57.5	$1,202.24	6/7/2015
10	44.5	$928.92	5/17/2015
11	42	$876.65	5/3/2015
12	53	$1,106.25	4/12/2015
13	57	$1,196.33	3/22/2015

(Ex. O, p. 1)

CONCLUSIONS OF LAW

The first issue to be determined is whether claimant sustained an injury to his neck on April 14, 2016 that arose out of and in the course of employment.

The party who would suffer loss if an issue were not established has the burden of proving that issue by a preponderance of the evidence. Iowa R. App. P. 6.14(6).

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).

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).

Claimant alleges he injured his neck on April 14, 2016 when he hit his head at work while welding. Claimant filed a Near Miss report on April 15, 2016 indicating he hit his head on a fixture while welding at work on April 14, 2016. (Cl. Ex. 1, p. 4)

Three experts have opined regarding the causal relation between claimant's hitting his head at work and his subsequent neck injury. Dr. Luszczyk treated claimant for an extended period. He is an orthopedic surgeon. Dr. Luszczyk performed claimant's surgery. Dr. Luszczyk opined claimant's incident at work aggravated a pre-existing condition and led to his need for surgery. (Cl. Ex. 2, Ex. 3, Depo. pp. 40-42)

Dr. Bansal also opined that claimant's April 2016 incident aggravated a pre-existing condition. (Cl. Ex. 7)

Dr. Deignan opined that claimant's need for surgery was consistent with his history of cervical degeneration and that claimant's neck condition did not arise out of his employment. (Ex. B, p. 229)

There are problems with Dr. Deignan's opinion. It is true claimant had a history of problems with the cervical spine. The most recent incident appears to have occurred in 2012. Dr. Deignan evaluated claimant in March of 2016 for the xiphoid process injury. In her report, made one month before claimant's injury, there is no mention that

claimant had any neck or upper extremity symptoms. (Ex. H) The record indicates that since 2012, claimant had not sought any medical care for neck problems. Claimant was symptom free approximately one month before the April 2016 incident. Dr. Deignan offers no explanation why claimant sought no treatment for four years before the April 2016 date of injury, and yet his neck pain was due to cervical degeneration. She offers no explanation why claimant's symptoms began shortly after the April 14, 2016 incident. Because of this discrepancy, it is found Dr. Deignan's opinion regarding causation are not convincing.

Dr. Luszczyk is an accredited orthopedic surgeon. He opined claimant's April 14, 2016 incident at work aggravated his pre-existing condition. Dr. Luszczyk treated claimant for an extended period of time and performed claimant's surgery. Dr. Bansal's opinions corroborate Dr. Luszczyk's opinions. Dr. Deignan's opinions regarding causation are found not convincing. Based on this, it is found Dr. Luszczyk and Dr. Bansal's opinions regarding causation are more convincing than that of Dr. Deignan.

Claimant had a general examination in May 2016. There is no mention in this examination regarding a neck injury at work. (Jt. Ex. 4, pp. 64-66) Claimant was also evaluated in May on at least two other occasions for neck problems. There is no mention in either of these examinations regarding a neck injury at work. (Jt. Ex. 4, pp. 69-72) Claimant completed the WI Disability Notice. There is no indication on this notice that claimant had a work-related injury. (Ex. L)

Claimant had physical therapy for his neck and shoulders. Claimant indicated in physical therapy records that he is not sure what caused his symptoms. (Jt. Ex. 8, p. 87)

Claimant was evaluated by ORA Orthopedics in June 2016 on two occasions. There is no mention in these records that claimant had a work-related neck injury. (Jt. Ex. 1, pp. 7-11)

Claimant had follow up evaluations with Dr. Luszczyk from September 2016 through December 2016 following his surgery. There is no indication in any of these records that claimant's injury was work-related. (Jt. Ex. 1, pp. 14-18)

Claimant did not indicate that he believed his injury was related to his work injury until February of 2017. He testified this was because he thought his problems were due to a pinched nerve, given his prior history. Claimant said he hit his head at work every day. He testified that he did not make the connection between the April 2016 incident and his subsequent neck pains and surgery, until after his surgery.

It is true that there are numerous medical records between the date of injury and the February 2017 affidavit, that make no reference to a work injury. The Near Miss report does corroborate claimant's testimony that he hit his head while welding. Claimant credibly testified that he routinely hit his head at work and thought he had a pinched nerve, given his prior neck history. Claimant's explanation of his injury is consistent in his Affidavit, his deposition, and his testimony at hearing. Given this

record, I find that claimant's account of not understanding the causal connection of his neck injury until after his surgery credible.

Claimant testified he hit his head at work while welding. His testimony in his Affidavit is corroborated by the Near Miss report. Dr. Luszczyk and Dr. Bansal opine that claimant's condition of his neck and subsequent need for surgery is aggravated by the April 2016 incident. Claimant credibly testified he did not make the connection of his April 2016 injury to his neck problems until after he had surgery. Based on this record, it is found claimant carried his burden of proof his neck injury arose out of and in the course of his employment.

I recognize defendants have misgivings regarding the causal connection between claimant's April 14, 2016 incident and claimant's neck injury and subsequent surgery. I understand claimant had a number of evaluations with health care providers, over a period of six months, yet he did not relate his symptoms to a work-injury. I understand claimant did not inform his employer he was seeking workers' compensation benefits until March of 2017. Because of these discrepancies, there is concern with the reliability of claimant's story and with the causation opinions of Dr. Luszczyk and Dr. Bansal.

However, the facts are:

1. There is documentation that claimant hit his head at work;

2. There is unrebutted testimony that claimant told his supervisor he hit his head at work;

3. Although he had prior neck problems, claimant's neck condition was not symptomatic until soon after the April 14, 2016 event;

4. The surgeon who treated claimant and performed claimant's surgery opined that claimant's neck problems and his need for surgery were connected with the April 14, 2016 injury.

Given these facts, and the evidence detailed above, claimant has carried his burden of proof he sustained a neck injury on April 14, 2016, that arose out of and in the course of employment.

The next issue to be determined is whether claimant's claim for benefits is barred by application of Iowa Code section 85.23.

Iowa Code section 85.23 requires an employee to give notice of the occurrence of an injury to the employer within 90 days from the date of the occurrence, unless the employer has actual knowledge of the occurrence of the injury.

The purpose of the 90-day notice or actual knowledge requirement is to give the employer an opportunity to timely investigate the facts surrounding the injury. The actual knowledge alternative to notice is met when the employer, as a reasonably

conscientious manager, is alerted to the possibility of a potential compensation claim through information which makes the employer aware that the injury occurred and that it may be work related. Dillinger v. City of Sioux City, 368 N.W.2d 176 (Iowa 1985); Robinson v. Department of Transp., 296 N.W.2d 809 (Iowa 1980).

Failure to give notice is an affirmative defense which the employer must prove by a preponderance of the evidence. DeLong v. Highway Commission, 229 Iowa 700, 295 N.W. 91 (1940).

The record indicates claimant completed a Near Miss report with Deere on April 15, 2016, the day after the accident. The report indicates the date of injury of April 14, 2016. The report indicates the claimant hit his head on a fixture while welding. (Ex. A, p. 4) Claimant testified that after he submitted his report, his supervisor asked him about the report. The claimant's unrebutted testimony is he told his supervisor that he hit his head on a fixture at work while welding. (Tr. p. 65, 99)

Defendants contend that the Near Miss report does not contain the word "injury". Defendants suggest that because the Near Miss report does not refer to an injury, claimant has failed to give notice as required in Iowa Code section 85.23. Claimant's offer no legal precedent to support this position.

The Near Miss report indicates claimant had an occurrence while at work when he hit his head welding. Failure to give notice is an affirmative defense. Given this record, defendants have failed to prove by a preponderance of the evidence that claimant failed to give notice.

The next issue to be determined is the extent of claimant's entitlement to temporary benefits for the April 14, 2016 date of injury.

Healing period compensation describes temporary workers' compensation weekly benefits that precede an allowance of permanent partial disability benefits. Ellingson v. Fleetguard, Inc., 599 N.W.2d 440 (Iowa 1999). Section 85.34(1) provides that healing period benefits are payable to an injured worker who has suffered permanent partial disability until the first to occur of three events. These are: (1) the worker has returned to work; (2) the worker medically is capable of returning to substantially similar employment; or (3) the worker has achieved maximum medical recovery. Maximum medical recovery is achieved when healing is complete and the extent of permanent disability can be determined. Armstrong Tire & Rubber Co. v. Kubli, Iowa App., 312 N.W.2d 60 (Iowa 1981). Neither maintenance medical care nor an employee's continuing to have pain or other symptoms necessarily prolongs the healing period.

Claimant's last day of work with Deere was May 10, 2016. He was found to be at MMI for his neck injury as of June 27, 2017. Claimant is due healing period benefits found May 11, 2016 through June 27, 2016.

The next issue to be determined is the extent of claimant's entitlement to permanent partial disability benefits.

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.

Regarding the March 24, 2014 injury to the xiphoid process, both Dr. Deignan and Dr. Bansal found claimant had a 5 percent permanent impairment to the body as a whole. (Ex. H, pp. 61-62; Cl. Ex. 6, p. 40)

Claimant has no restrictions regarding his injury to the xiphoid process. (Id.) Claimant missed no work from the xiphoid injury from December 16, 2014 through May 10, 2016. Claimant testified the surgery regarding xiphoid process was successful and that claimant had no residual problems. Claimant returned to work full duty following his chest injury. There is no evidence that claimant had any loss of earnings from the xiphoid process injury. Given this record, claimant is found to have a 5 percent loss of earning capacity of industrial disability regarding the March 24, 2014 date of injury.

The next issue to be determined is the extent of claimant's entitlement to permanent partial disability benefits regarding the April 14, 2016 date of injury.

Claimant was 59 years old at the time of hearing. Claimant graduated from high school. Claimant has worked as a die cast operator, a meat cutter, a custodian, and a welder. Claimant also operates a catering business that does barbequing and grilling.

Dr. Bansal is the only expert to offer a rating for claimant's neck condition. He opined claimant had a 25 percent permanent impairment to the body as a whole regarding the neck and a 3 percent permanent impairment regarding claimant's dysphagia. According to the combined values chart of the Guides, a 25 percent

permanent impairment and a 3 percent permanent impairment result in a 27 percent permanent impairment to the body as a whole. Guides at p. 604. It is found claimant has a 27 percent permanent impairment to the body as a whole.

Dr. Bansal has limited claimant to lifting no more than 25 pounds. (Cl. Ex. 6, p. 44) Dr. Luszczyk also advocates that claimant not lift over 25 pounds. (Cl. Ex. 3, p. 11; Depo. p. 44) It is found that claimant has a 25 pound lifting restriction.

The record indicates that given claimant's lifting restrictions, he could not return to work as a welder. The record indicates that claimant may be eventually allowed to return to work at Deere as an inspector. The record is unclear regarding claimant's return to work as an inspector.

Claimant testified he has not looked for work since leaving work at Deere.

A loss of earning capacity due to voluntary choice or lack of motivation to return to work is not compensable. Rus v. Bradley Puhrmann, File No. 5037928 (App. December 16, 2014); Gaffney v. Nordstrom, File No. 5026533 (App. September 8, 2011); Snow v. Chevron Phillips Chemical Co., File No. 5016619 (App. October 25, 2007). Copeland v. Boone Book and Bible Store, File No. 1059319 (App. November 6, 1997). See also Brown v. Nissen Corp., 89-90 IAWC 56, 62 (App. 1989) (no prima facie showing that claimant is unemployable when claimant did not make an attempt for vocational rehabilitation).

No doctor has opined claimant cannot return to work. No economic expert has opined that claimant is unable to work or that claimant has a total loss of earning capacity.

When all relevant factors are considered, it is found that claimant has a 60 percent loss of earning capacity or industrial disability due to his neck injury.

Claimant contends he is an odd-lot candidate. Because claimant has not looked for work since leaving Deere, because no expert has opined that claimant cannot return to work, or that claimant has a total loss of earning capacity, claimant has failed to carry his burden of proof that he is an odd-lot candidate. Based on the same factors, claimant has also failed to prove that he is permanently and totally disabled. Guyton v. Irving Jensen Co., 373 N.W.2d 101, 106 (Iowa 1985). See also Bennett v. Dexter Company, No. 6-1087, filed April 11, 2007 (Iowa Ct. App.). Unpublished, 734 N.W.2d 487 (Table). (Claimant failed to carry his burden of proof he was an odd-lot employee as he did not present expert opinion from a vocational consultant, an assessment from a physician, or any other expert he could not work.)

The next issue to be determined is rate.

Section 85.36 states the basis of compensation is the weekly earnings of the employee at the time of the injury. The section defines weekly earnings as the gross salary, wages, or earnings to which an employee would have been entitled had the employee worked the customary hours for the full pay period in which injured as the

employer regularly required for the work or employment. The various subsections of section 85.36 set forth methods of computing weekly earnings depending upon the type of earnings and employment.

If the employee is paid on a daily or hourly basis or by output, weekly earnings are computed by dividing by 13 the earnings over the 13-week period immediately preceding the injury. Any week that does not fairly reflect the employee's customary earnings that fairly represent the employee's customary earnings, however. Section 85.36(6).

Claimant contends that the profit sharing bonus that he receives once per year should be included in the determination of his rate.

In the recent declaratory ruling by the Commissioner, irregular bonuses that are dependent on variables such as the overall profitability of a company are improper to include in a rate calculation. Ruling on John Deere Des Moines Works, et al, Petition for Declaratory Order, (July 12, 2017).

Based on the declaratory ruling, claimant's profit sharing will not be included in the computation of claimant's rate.

Regarding the 2014 injury, claimant had an average weekly wage of $963.31 per week. Claimant was married with two exemptions. Claimant's rate is $611.51 per week.

Regarding the 2016 injury, claimant had an average weekly wage of $1,008.71 per week. Claimant was married with two exemptions. Claimant's rate is $638.91 per week.

The next issue to be determined is whether claimant is due reimbursement for the IME for Dr. Bansal.

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).

Regarding the IME, the Iowa Supreme Court provided a literal interpretation of the plain-language of Iowa Code section 85.39, stating that section 85.39 only allows the employee to obtain an independent medical evaluation at the employer's expense if dissatisfied with the evaluation arranged by the employer. Des Moines Area Reg'l Transit Auth. v. Young, 867 N.W.2d 839, 847 (Iowa 2015).

Under the Young decision, an employee can only obtain an IME at the employer's expense if an evaluation of permanent disability has been made by an employer-retained physician.

Iowa Code section 85.39 limits an injured worker to one IME. Larson Mfg. Co., Inc. v. Thorson, 763 N.W.2d 842 (Iowa 2009).

The supreme court, in Young noted that in cases where Iowa Code section 85.39 is not triggered to allow for reimbursement of an IME, a claimant can still be reimbursed at hearing the costs associated with the preparation of the written report as a cost under rule 876 IAC 4.33. Young at 846-847.

The record indicates that Dr. Deignan, the employer-retained physician, gave her opinions of claimant's impairment in an October 31, 2017 report. (Ex. BB, p. 181) Dr. Bansal, the employer-retained expert, gave his opinions in a report dated November 9, 2017. Given the chronology, claimant has proven he is entitled to reimbursement for Dr. Bansal's report.

Defendants contend that because Dr. Bansal's IME also addresses concerns regarding claimant's xiphoid process, defendants are not liable for the entire cost of the Dr. Bansal report. (Defendants Brief, p. 38, n.10)

I appreciate defendants' position in this matter. However, the supreme court gave no guidance regarding an apportionment of an IME cost in this situation. Applying the Young decision as detailed by the supreme court, I find that I can only award full cost of the Dr. Bansal IME in this case.

The next issue to be determined is whether defendants are liable for a penalty.

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).

Defendants contend, in their brief, they first became aware on March 6, 2017 that claimant was seeking workers' compensation benefits for his April 14, 2016 injury. This claim is not disputed by the claimant. (Ex. J, p. 65)

In an April 6, 2017 e-mail, defendants counsel denied claimant's claim for benefits. That e-mail indicates defendants were denying claimant's claim for benefits as claimant had seen numerous physicians in April, May, and June of 2016 and never indicated a work-related injury. As noted, claimant did complete a WI Disability Form. That form indicates that benefits are for non-work-related injuries. Claimant also saw physicians for examinations from September through December 2016 and never indicated that his neck condition was a work-related injury. (Ex. T)

Given this record, a penalty is not appropriate in this case.

The final issue to be determined is whether claimant is entitled to alternate medical care.

Iowa Code section 85.27(4) provides, in relevant part:

> For purposes of this section, the employer is obliged to furnish reasonable services and supplies to treat an injured employee, and has the right to choose the care. . . . The treatment must be offered promptly and be reasonably suited to treat the injury without undue inconvenience to the employee. If the employee has reason to be dissatisfied with the care offered, the employee should communicate the basis of such dissatisfaction to the employer, in writing if requested, following which the employer and the employee may agree to alternate care reasonably suited to treat the injury. If the employer and employee cannot agree on such alternate care, the commissioner may, upon application and reasonable proofs of the necessity therefor, allow and order other care.

An application for alternate medical care is not automatically sustained because claimant is dissatisfied with the care he has been receiving. Mere dissatisfaction with the medical care is not ample grounds for granting an application for alternate medical care. Rather, the claimant must show that the care was not offered promptly, was not reasonably suited to treat the injury, or that the care was unduly inconvenient for the claimant. Long v. Roberts Dairy Co., 528 N.W.2d 122 (Iowa 1995).

Defendants have not offered or paid for any of claimant's medical treatment. Dr. Luszczyk treated claimant for an extended period of time regarding his neck injury, and performed claimant's neck surgery. Claimant should be allowed to continue treatment with Dr. Luszczyk. Given this record, claimant has carried his burden of proof that he is entitled to continued care with Dr. Luszczyk.

ORDER

THEREFORE, IT IS ORDERED:

For File No. 5065073 (Date of injury, March 24, 2014):

That defendants shall pay claimant twenty-five (25) weeks of permanent partial disability benefits at the rate of six hundred eleven and 51/100 dollars ($611.51) per week commencing on December 16, 2014.

That defendants shall pay accrued weekly benefits in a lump sum.

That defendants shall pay any interest on any unpaid weekly benefits set forth in Iowa Code section 85.30.

That defendants shall receive a credit for benefits previously paid regarding this claim.

For File No. 5065074 (Date of injury, April 14, 2016):

That defendants shall pay claimant healing period benefits at the rate of six hundred thirty-eight and 91/100 dollars ($638.91) from May 11, 2016 through May 27, 2017.

That defendants shall pay claimant three hundred (300) weeks of permanent partial disability benefits at the rate of six hundred thirty-eight and 91/100 dollars ($638.91) per week commencing on June 28, 2017.

That defendants shall pay accrued weekly benefits in a lump sum.

That defendants shall pay interest on unpaid weekly benefits as ordered above and as set forth in Iowa Code section 85.30.

That defendants shall receive a credit for benefits previously paid under Iowa Code section 85.38(2).

That defendants shall receive an offset for benefits paid for File No. 5065073 under Iowa Code section 85.34(7)(b)(1) as stipulated in the hearing assignment order.

That defendants shall reimburse claimant for the costs associated with Dr. Bansal's IME.

That defendants shall pay claimant's medical expenses, including medical mileage.

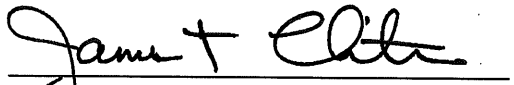
That defendants shall furnish claimant with alternate medical care consisting of continued treatment of claimant's neck injury with Dr. Luszczyk.

For both File Nos. 5065073 and 5065074:

That defendants shall pay costs.

That defendants shall file subsequent reports of injury as required by this Agency under rule 876 IAC 3.1(2).

Signed and filed this 30th day of April, 2018.



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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.