BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

STEVE TASSINARI, Claimant, vs. MAXYIELD COOPERATIVE, Employer, and FIREMENS INSURANCE COMPANY OF WASHINGTON, D.C., Insurance Carrier, Defendants.	File No. 5059259 A R B I T R A T I O N D E C I S I O N Head Note Nos.: 1803, 4000.2, 4100

STATEMENT OF THE CASE

Steve Tassinari, filed a petition for arbitration seeking workers' compensation benefits from MaxYield Cooperative, employer, and Continental Western Group, the insurance carrier.

The matter came on for hearing on December 18, 2018, before deputy workers' compensation commissioner, Joseph L. Walsh, in Des Moines, Iowa. The record in the case consists of Joint Exhibits 1 through 15; Claimant's Exhibits 1 through 14 (Exhibit 4 was withdrawn); and Defense Exhibits A through H; as well the sworn testimony of claimant, and witness Keith Heim. Following a series of objections to exhibits, the record was held open. Chad Abernathey, M.D., testified via deposition on January 16, 2019. Overall the record is voluminous. Both parties were well-represented by zealous advocates. Amy Pedersen served as the court reporter. The parties argued this case and the matter was fully submitted on February 18, 2019.

ISSUES AND STIPULATIONS

Most of the issues have been stipulated by the parties through the hearing report and order. The stipulations submitted by the parties in that order are hereby accepted and are deemed binding upon the parties at this time.

Mr. Tassinari suffered an injury which arose out of and in the course of his

employment on or about April 16, 2015. This work injury is a cause of both temporary and permanent disability. Prior to hearing, claimant was paid both temporary and permanent benefits. The primary dispute before the agency is the extent of industrial disability caused by this work injury. The claimant has pled the odd-lot theory. The parties did stipulate that the disability is industrial. The parties also stipulated to the elements comprising the rate of compensation. The defendants waived any affirmative defenses. Claimant seeks medical expenses under section 85.27, outlined in Claimant's Exhibit 14, as well as an independent medical evaluation (IME) under section 85.39. The parties have stipulated to the amount of the credit which is set forth in Claimant's Exhibit 5, which is an accurate reflection of the payments made to claimant. The claimant also seeks penalty benefits, which are denied by defendants.

FINDINGS OF FACT

Steve Tassinari was 57 years old as of the date of hearing. He testified live and under oath at hearing. He was a talkative witness who explained the ins and outs of the agricultural industry in Wright County in painstaking detail. I find that Mr. Tassinari is not an entirely reliable witness. While much of his testimony was, in fact, credible and believable, based upon the totality of the evidence in the record, I find that it is likely that he has exaggerated some aspects of the extent of his disability.

Mr. Tassinari has a history of hard work and high motivation. He began working when he was very young to help his family. He is smart and articulate. He graduated from high school in New Hampshire and joined the United States Air Force. After his military service, Mr. Tassinari worked in construction, automotive, heavy equipment operating and worked for a water department. He also worked as a sales manager/customer service representative for a gas company.

Mr. Tassinari moved to a family farm in Iowa in 1993. At that time, he began working in the field of agriculture. He obtained a CDL with a Hazmat endorsement. He started working for Dows Co-Op in 1993 as a part-time feed truck driver. Within a short period of time, he became the full-time feed mill manager. He had a natural aptitude for this type of work, including the sales aspects. He worked for Dows until 2000. Mr. Tassinari next obtained employment with Cargill. He was hired as an account manager and salesperson. He held a similar position with responsibilities involving feed manager, grain origination and overseeing a portion of the manure department. He testified he developed his significant client base through cold calls and face-to-face visits.

MaxYield Cooperative hired Mr. Tassinari in 2004. He was hired into grain origination and sales. He testified that he brought business with him to MaxYield and also assisted with accounts receivable. Mr. Tassinari's position transitioned as he became involved in the chicken manure industry over time. He eventually became general manager of this joint LLC, known as GE-Max Nutrients. A job description in the record states that the ability to lift 50 pounds and the ability to bend and twist for extended periods of time are essential functions of the job. (Claimant's Exhibit 2,

page 3) Through his employment experience, Mr. Tassinari has become highly-skilled in sales and client management. His work included overseeing the entire operation of the chicken manure venture, which involved the dispatch and application of the chicken manure, as well as the account management of clients. In the early years as general manager, the position required more physical labor, however, over time the physical labor element of the position decreased. The record reflects Mr. Tassinari was highly successful in his work for the employer. He earned between $188,933 in 2013 and $179,606 in 2014, with bonuses. (Cl. Ex. 8)

On April 16, 2015, Mr. Tassinari suffered an injury which arose out of and in the course of his employment.[1] This is a stipulated fact which is described in detail in Claimant's Exhibit 2. The injury was reported on April 20, 2015. The injury is best described as a slip and near fall, which caused him to twist and jerk his back. He felt a pop and immediate pain in his low back.

The first treatment Mr. Tassinari received following his injury was with Angel Garcia Otano, M.D., who documented the following:

> Location of pain is middle back and lower back. Pain is radiated to the left thigh and right thigh. Symptoms are aggravated by bending, lifting, sitting and walking. Symptoms are relieved by heat and rest. Additional information: Patient reports "knot" in his back. He states he fell 4/6/15 while at work. He has taken some tramadol for the pain and it is somewhat helpful for the pain. He states he felt something "pop" when he fell. He states he had other health concerns to deal with and the back pain has not resolved. The intensity of the pain has not improved. He rates the pain 7-8/10. He states he is able to work with this pain. He denies incontinence of bowel and bladder. The pain radiates into his buttock and upper legs bilaterally.

(Jt. Ex. 4, p. 10) He was diagnosed with muscle spasm and prescribed a Toradol injection. (Jt. Ex. 4, p. 12) Mr. Tassinari initially continued working full-time without restrictions following the accident.

Howard Kim, M.D., examined Mr. Tassinari on June 17, 2015. He recommended an MRI of the lumbar spine and placed a five pound lifting restriction on him, as well as no repetitive bending and twisting. He prescribed Naprosyn. (Jt. Ex. 6, p. 1) Two

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[1] There is some confusion about the precise date of injury in the record. The petition listed the date of injury as 4/6/15, and many of the medical records documented this date as well. Mr. Tassinari also testified that he thought the date was 4/6/15. The hearing report listed the date of injury as 4/16/15, and noted a scrivener's error was the cause of the date discrepancy. The date 4/16/15 is well-documented by the employer in an injury report. (Cl. Ex. 3, p. 2) While it is possible that the injury occurred on April 6, 2015, the best evidence in the record is that the injury, which seemed relatively minor at the time, occurred on April 16, 2015.

weeks later, Dr. Kim documented the radicular nature of Mr. Tassinari's symptoms, noted that he was doing physical therapy and recommended an evaluation with a neurosurgeon. (Jt. Ex. 6, p. 3)

David Beck, M.D., a neurosurgeon, became Mr. Tassinari's treating physician in July 2015. Dr. Beck treated him conservatively with physical therapy, medications, restrictions and injections between July 2015, through May 2016. (Jt. Ex. 8, pp. 1-16) Dr. Beck performed an MRI in August 2015. In September 2016, he diagnosed "congenitally tight canal with a bulging disc at L4-5." (Jt. Ex. 8, p. 3) Dr. Beck took him off work and started another round of physical therapy, as well as an injection for the pain. In December 2015, Dr. Beck returned Mr. Tassinari to work, but only for four hours per day. (Jt. Ex. 8, p. 10) Mr. Tassinari stayed on this restriction up through the termination of his employment.

Ultimately, Dr. Beck did not recommend surgery and sent Mr. Tassinari for a second opinion with Lynn Nelson, M.D., in August 2016. Dr. Nelson's diagnoses included L4-5, L3-4 spinal stenosis, bilateral L5 foraminal stenosis and multilevel lumbar spondylosis and degenerative disc disease. (Jt. Ex. 10, p. 2) Dr. Nelson documented negative straight leg raising tests and that his gait was unremarkable. He advised against surgery, noting that his back pain was greater than the leg pain. (Jt. Ex. 10, pp. 2-3) Both Dr. Beck and Dr. Nelson placed Mr. Tassinari at maximum medical improvement (MMI) as of August 25, 2016, and provided a five percent body as a whole impairment rating. (Jt. Ex. 8, pp. 18-19; Jt. Ex. 10, pp. 11-14) Dr. Beck provided his expert medical opinion that this condition was a direct result of the work injury. (Jt. Ex. 8, p. 21)

Mr. Tassinari underwent an independent medical evaluation (IME) with Robin Sassman, M.D., on March 27, 2017. She diagnosed low back pain with radicular symptoms which was substantially aggravated by the work injury. (Jt. Ex. 11, p. 7) She assigned a 25 percent whole body impairment rating and distinguished her rating from the 5 percent assigned by Dr. Beck and Dr. Nelson. (Jt. Ex. 11, p. 9) Unlike Dr. Nelson, Dr. Sassman made significant radicular findings on examination, including positive straight leg raising (bilaterally) and decreased sensation in the L5 dermatome bilaterally. (Jt. Ex. 11, p. 7) She recommended Mr. Tassinari follow the 5 pound lifting restriction only working 4 hours per day, advised by Dr. Beck. (Jt. Ex. 11, p. 9)

On May 9, 2017, a functional capacity evaluation (FCE) was performed by Charles Goodhue, MS, MPT. (Jt. Ex. 12) Mr. Tassinari's efforts were deemed valid. The test placed Mr. Tassinari in the lower end of the medium work category. (Jt. Ex. 12, p. 6) His restrictions allowed him to work 8 hours per day, occasionally lifting 35 pounds from floor to waist, 25 pounds from waist to overhead, 35 pounds horizontally, pushing 30 pounds, pulling 35 pounds, right and left carries of 25 pounds and front carry of 30 pounds. (Jt. Ex. 12, pp. 8-9) On June 1, 2017, Dr. Beck essentially concurred with these restrictions with some slight modifications, in particular, he recommended that claimant continue to work for no more than 4 hours per day and alternate between standing and sitting. (Jt. Ex. 8, pp. 31-32)

As set forth above, the employer had accommodated all of Mr. Tassinari's medical restrictions following the injury. Dr. Beck had taken him off work for a period of time for some physical therapy in September 2015, but returned him to work on a restriction of no working more than 4 hours per day in December 2015, all the way up through his termination in July 2017. From the time of his injury up through the time of his termination, Mr. Tassinari was undoubtedly dealing with a number of serious personal and professional issues. He went through a divorce. The avian flu had created great uncertainty in the chicken manure industry. Mr. Tassinari was terminated on July 10, 2017. Mr. Tassinari testified that he was under the impression at the time that he was being groomed for a position in grain origination, but instead he was terminated unceremoniously. (Tr., p. 61; Jt. Ex. 6, pp. 1-2)

Keith Heim, CEO of MaxYield, testified live and under oath at hearing. His testimony was generally credible. He testified the position of general manager for GE-Max was primarily management and more sedentary, however, he acknowledged that Mr. Tassinari did perform physical labor when he was in the field. (Tr., p. 144) He testified that avian influenza came to Iowa in May or June 2015 and was devastating to the industry. The bird inventory was "decimated." (Tr., p. 148) GE-Max did not apply any litter that year. There were complicating legal factors in 2016, so by June 2017, GE-Max decided to dissolve and exit the litter business. (Tr., pp. 148-149) He testified no positions were open in grain origination at that time. (Tr., p. 151) Mr. Heim also downplayed the essential functions of lifting, bending and twisting set forth in the job description, stating that he believed not much lifting was really required. "We were actually coached by counsel to put that in a lot of job descriptions, because at some point in time at any one of your jobs sooner or later you probably lift something, so we were basically coached to do that." (Tr., pp. 145-146)[2]

After he was terminated, Mr. Tassinari applied for and was awarded unemployment benefits. He did a formal work search but testified that he was merely attempting to meet the minimum requirements. He did not feel there was much work he could do at that time. (Tr., pp. 126-127) It is noted he was under significant medical restrictions at this time. In July 2017, Mr. Tassinari moved to Florida.

In August 2017, Dr. Beck opined that Mr. Tassinari could eventually work up to an eight-hour shift. Dr. Beck checked the box that he agreed his previous restriction of working only four hours per day, was meant to be a transitional restriction, meaning he could gradually work up to eight hours per day. (Jt. Ex. 8, p. 38) In October 2017, Dr. Beck examined Mr. Tassinari again. He recommended weight loss and again recommended against surgery. (Jt. Ex. 8, p. 43)

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[2] It is noted that most of Mr. Heims' testimony was credible, I do not find his comments about the job description credible. He essentially testified that his lawyers coached him to write a false job description. The fact is, he acknowledged that Mr. Tassinari did fairly heavy manual labor while working in the field. To the extent there is any discrepancy, I find that the written job description is a more accurate reflection of Mr. Tassinari's job duties.

While he was on unemployment, Mr. Tassinari applied for and was quickly awarded Social Security Disability (SSD) benefits. Dr. Beck authored a letter to the Social Security Administration on his behalf. (Jt. Ex. 8, p. 48) SSD benefits were awarded on March 17, 2018, and found him to be totally disabled as of July 10, 2017, the date of his termination. (Jt. Ex. 9) Defendants had attempted to offer Mr. Tassinari vocational services through his attorney to help him become reemployed through Workfinders USA in February 2018. At hearing, Mr. Tassinari testified he was entirely unaware of these efforts. There is documentation in the record regarding these efforts presented by both parties. (*Compare* Cl. Ex. 7 *with* Def. Ex. B)

On July 9, 2018, Mr. Tassinari underwent a repeat IME with Dr. Sassman. She essentially confirmed her previous opinions, including the 5 pound lifting restriction which was especially important "given his frequent use of the cane." (Jt. Ex. 11, p. 24) On July 10, 2018, Mr. Tassinari underwent an FCE with Select Physical Therapy. A detailed, valid report was prepared indicating the ability to lift 15 pounds from 8 inches to waist, 25 pounds from waist to shoulder and carry up to 15 pounds, while pushing and pulling around 45 pounds. (Jt. Ex. 14, pp. 1-3) He was placed in the light to medium work range. (Jt. Ex. 14, p. 14) His use of a cane was noted in this report and "[a]erobic capacity was not tested with this evaluation due to his poor tolerance with ambulation activities and inability to ambulate without use of single tip cane." (Jt. Ex. 14, p. 5)

On July 13, 2018, Mr. Tassinari was examined by Chad Abernathey, M.D. (Jt. Ex. 15)

> Mr. Steven Tassinari clinically presents with chronic subjective low back pain and intermittent lower extremity pain and paresthesia His MRI does demonstrate multi-level stenosis primarily associated with short pedicle syndrome. . . . We discussed possible surgical decompression. He states that he would like to possibly consider this option. Therefore, I would favor new MRI of the lumbosacral spine to reassess his current status since his MRI is 3 years old. The patient states he fully understands the breadth of our conversation and concurs.

(Jt. Ex. 15, pp. 1-2)

The parties entered dueling vocational reports into evidence. Claimant presented a report from Carma Mitchell, M.S. (Cl. Ex. 10) She opined that he lost access to 100 percent of his job market. (Cl. Ex. 10, p. 5) This was based significantly upon the restrictions of no working more than 4 hours per day. (Jt. Ex. 10, p. 4) Defendants presented two vocational reports from Michelle Holtz, B.A. (Def. Ex. A) She primarily utilized the restrictions set forth in claimant's first FCE from Charles Goodhue and identified a number of jobs where claimant could earn good wages. (Def. Ex. A, pp. 22, 39-40)

In August and September 2018, defendants conducted surveillance on the claimant. Three edited video clips were submitted. (See Def. Ex. F) These videos showed Mr. Tassinari in August standing, walking, and getting in and out of vehicles. They show him lifting small items and doing some bending. He does not appear to have a limp or altered gait in the videos. He appears to move easily and quickly at times. They show him riding a bike and floating in a swimming pool. The video does not show Mr. Tassinari using a cane to go out in public. Mr. Tassinari testified that the video showed him doing things he was supposed to be doing, such as water therapy in a swimming pool, walking and riding a bike. (Tr., pp. 87-88) He testified that the surveillance was taken in the morning, which is usually when he feels the best. (Tr., p. 88)

The parties continued to gather last minute expert rebuttal reports from medical providers after the surveillance evidence was disclosed. In rapid succession, the parties obtained three reports from Dr. Abernathey, dated November 14, 2018, November 26, 2018 and December 13, 2018. (Jt. Ex. 15, pp. 3-9) Each of these reports were prepared on respective counsel's letterhead and in each case, Dr. Abernathey seemed to agree with virtually everything counsel asked him. (Jt. Ex. 15, pp. 3-9) There were objections to these reports, which were overruled, and the record was eventually held open for Dr. Abernathey's deposition. In addition, on December 3, 2018, Dr. Sassman issued a report after having reviewed the surveillance, which essentially stated she did not change her earlier opinions. (Jt. Ex. 11, p. 27) On December 11, 2018, Dr. Beck entered his final medical opinion stating that he saw nothing on the video demonstrating Mr. Tassinari violated his restrictions and that he recommended a five-pound lifting restriction for four hours per day. (Jt. Ex. 8, p. 62)

Dr. Abernathey's testimony essentially confirmed his previous reports, although it became clear how he reached his opinions. It is evident that after reviewing the video surveillance evidence, Dr. Abernathey determined that Mr. Tassinari's complaints were purely subjective. (Def. Ex. H, Abernathey Testimony, pp. 15-16) He essentially deferred to Dr. Beck's opinions as they relate to managing his ongoing care, however, in his estimation, he did not find any objective basis to assess any impairment or restrictions. (Def. Ex. H, Abernathey Testimony, pp. 8-14) He acknowledged that there could be reasons other than the objective observations to place Mr. Tassinari under permanent restrictions and assign an impairment rating, however, after seeing the video surveillance evidence, and from his perspective as an independent medical examiner, he would not do so. He did state that for consideration of any potential surgical intervention, he would need a new MRI, which was never done. (Def. Ex. H, Abernathey Testimony, p. 8)

CONCLUSIONS OF LAW

The primary fighting issues in this case revolve around the nature and extent of claimant's disability. The claimant alleges he is permanently and totally disabled and has pled and argued the odd-lot theory. The defendants have conceded that claimant has suffered a minor industrial disability, however, contend it is quite limited.

Since claimant has an impairment to the body as a whole, an industrial disability has been sustained. Industrial disability was defined in Diederich v. Tri-City R. Co., 219 Iowa 587, 258 N.W. 899 (1935) as follows: "It is therefore plain that the legislature intended the term 'disability' to mean 'industrial disability' or loss of earning capacity and not a mere 'functional disability' to be computed in the terms of percentages of the total physical and mental ability of a normal man."

Functional impairment is an element to be considered in determining industrial disability which is the reduction of earning capacity, but consideration must also be given to the injured employee's age, education, qualifications, experience, motivation, loss of earnings, severity and situs of the injury, work restrictions, inability to engage in employment for which the employee is fitted and the employer's offer of work or failure to so offer. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963); Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961).

Compensation for permanent partial disability shall begin at the termination of the healing period. Compensation shall be paid in relation to 500 weeks as the disability bears to the body as a whole. Section 85.34.

In 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.

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

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

Although claimant is close to a normal retirement age, proximity to retirement cannot be considered in assessing the extent of industrial disability. Second Injury Fund 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 parties have stipulated claimant suffered an injury which arose out of and in the course of his employment and that the injury is a cause of permanent disability. Having reviewed all of the evidence in the file, I find that the best evidence of claimant's medical condition at the time of hearing is from the first functional capacity evaluation of Charles Goodhue, undertaken in May 2017. His restrictions allowed him to work 8 hours per day, occasionally lifting 35 pounds from floor to waist, 25 pounds from waist to overhead, 35 pounds horizontally, pushing 30 pounds, pulling 35 pounds, right and left carries of 25 pounds and front carry of 30 pounds. (Jt. Ex. 12, pp. 8-9) He probably needed some work hardening to get to 8 hours per day. I find that if claimant had made appropriate efforts, he likely could have worked under those restrictions.

Claimant's treating physician, Dr. Beck, affirmed these restrictions. (Jt. Ex. 8, pp. 31-32) While Dr. Beck initially recommended claimant work no more than 4 hours per day, he also suggested that he could gradually progress up to 8 hours per day. (Jt. Ex. 8, p. 38) Mr. Tassinari, however, made no efforts whatsoever to become reemployed. This is not a criticism of his work ethic, rather, it is merely an acknowledgement of a rational choice he made. In other words, I am not attacking Mr. Tassinari's motivation. The record reflects that Mr. Tassinari has been a highly-motivated hard worker from a very young age. He undoubtedly worked very hard for this employer. (Tr., p. 155) Given his other health conditions, including heart problems and a significant history of PTSD, when the employer laid the claimant off, he made a rational decision to retire from employment. This is likely because he believed that there was no work available to him, at least which would pay anywhere near what he had become accustomed to.

I find that the odd-lot theory of recovery does not apply in this case.

Mr. Tassinari was a highly-skilled, highly successful salesman and manager. He possesses high-level sales, client/customer management and "people" skills. Consequently, there is no burden shifting analysis. Based upon all of the evidence in the record, I find it probable that, if claimant were to undertake sincere efforts to become reemployed, he could work within the restrictions set forth in the May 2017 FCE.

Mr. Tassinari was 57 years old at the time of hearing. While he does not have formal education beyond high school, he is a bright, articulate, highly skilled salesman with vast management and sales expertise. He had an unusually high earning capacity to begin with given his work experience and skills, including his ability to work in the field. The rating given by Dr. Beck of five percent whole body is the best estimate of his functional impairment. Given the success he had for the employer in this case, I find it is somewhat unusual that the employer made no effort to reemploy the claimant. Mr. Tassinari testified credibly that he believed he was being groomed for a position in grain origination and he was surprised when he was terminated. At the time of his unceremonious termination, the claimant was under a medical restriction of no working more than four hours per day. This medical restriction of hours, from his authorized treating physician, certainly hovers over this entire case as it seems likely that this was a factor in the employer's decision to not offer reemployment to the claimant. In fact, it would be a good reason.

It is noted that Mr. Tassinari was a working manager. In other words, while much of his work was on the phone or otherwise sedentary (e.g., managing clients), there were times when he had to work in the field to solve problems. Based upon the Goodhue FCE, as well as the video surveillance, I find that claimant could perform some level of physical work as set forth in the Goodhue FCE. In any event, given his significant sales skills, there are undoubtedly jobs he could perform, if he chose to reenter the workforce. If he had chosen to return to the workforce, however, he would have had to start at the bottom and his ability to earn wages was greatly diminished.

Having considered all of the appropriate industrial disability factors, I find that claimant has suffered a sixty (60) percent loss of earning capacity. At age 57, the claimant would undoubtedly be a significantly less attractive job applicant given his physical restrictions and impairment, particularly in the area of agricultural sales or client customer management. As evidenced by his income, claimant had a significant earning capacity prior to his injury. His ability to perform heavy work in the field undoubtedly contributed to his success. Claimant would have a much more difficult time even securing work in agricultural sales with his limitations and work restrictions. (Cl. Ex. 2)

Therefore, I conclude the claimant is entitled to 300 weeks of benefits commencing August 25, 2016.

The next issue to be decided is whether penalty benefits are applicable. Claimant is seeking a huge penalty for untimely payments while the defendants downplay the untimely payments and argue penalty is not appropriate.

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.

The claimant alleges that the vast majority of his payments have been late. In support of this, the claimant has provided Exhibit 5, a listing of payments made with the check number, issuance date, the period of compensation and gross amount of each payment. I have reviewed this exhibit and compared it with the other evidence in the record. I find Exhibit 5 is accurate. The claimant implicitly contends that each payment was "due" at the end of the period of compensation. "Without reasonable basis or excuse, however, the Insurance Carrier was late in the payment of weekly benefits to the Claimant on 95 of those 148 weekly benefit checks issue – or 53% of all weekly benefits checks they issued." (Claimant's Brief, p. 3) The claimant presented strong evidence that multiple attempts were made to communicate with the insurance carrier in

order to secure timely payments, even before claimant retained counsel. (Cl. Ex. 11) Claimant also presented a second theory, contending he was paid at an incorrectly low weekly rate from August 25, 2016, through June 29, 2017. (Cl. Ex. 11, pp. 9-13)

Defendants argue that each time claimant made a demand for payment, the defendants paid promptly.

> An inquiry was made as to an underpayment of weekly permanent disability on June 29, 2017. (Ex. 11, p. 13) A check for the underpayment was issued the same day. (Ex. 5, p. 3) Similarly, an inquiry was made as to permanent disability benefits on January 16, 2018. (Ex. 11, p. 14) The corresponding benefits were promptly issued the following day. (Ex. 5, p. 4) An inquiry as to May 2018 benefits was made on May 16, 2018. (Ex. 11, p. 16) A check was issued two days laster [*sic*] with another check issued May 30, 2018. (Ex. 5, p. 4) Ultimately, the carrier responded reasonably when advised of a delay or underpayment of benefits such that any delay was not unreasonable to warrant an assessment of penalty under the circumstances.

(Def. Brief, p. 26)

This, of course, is not a reasonable excuse for a late payment. If a payment was late, it does not matter if the defendants paid once the late payment was brought to their attention. A penalty is mandatory if the payment was late without reasonable excuse. The fact that the payments were made when pointed out can go to the amount of the penalty. It is noted that while defendants contend that each time they were made aware of a late payment they paid, the reality is, claimant's counsel sometimes inquired multiple times before a payment was issued.

The primary question presented in the evidence in the record is which payments were actually late. In order for the claimant to prove this, and it is his burden, he must establish when each payment was due. With regard to some of the payments listed in Claimant's Exhibit 5, it is not entirely clear to me in this record when the payment was actually due. For example, regarding Check Number 230933155, for the period of January 11, 2016 through January 18, 2016, the payment was issued on January 21, 2016. Claimant seems to contend that the payment was due on January 18, 2016. And it may have been. But from this record, I cannot conclude that claimant has proven this by a preponderance of evidence. Moreover, this is not a significant delay, so even if the payment was late, the penalty for this would be minimal. In addition, several of the payments are for a period of compensation which does not make sense on its face and is unexplained in the record. For example, Check Number 23091580 is for the period of May 12, 2015 through August 27, 2015 for the amount of $442.96. It is unclear what this payment is for at all.

Having reviewed the record in its entirety, I find claimant has proven the following

payments were late without reasonable excuse and a penalty (or partial penalty)[3] is owed:

Check No.	Period of Compensation	Issuance Date	Gross Amount
230918467	09/16/15-10/06/15	10/02/15	$4,039.92*
230927270	09/16/15-11/13/15	12/09/15	$627.90
230932741	12/27/15-01/10/16	01/19/16	$405.36
230934044	11/17/15-01/06/16	01/28/16	$474.95
230940892	02/07/16-03/04/16	03/16/16	$1,923.58
230947135	03/21/16-04/01/16	05/02/16	$2,057.79
230949092	04/04/16-04/29/16	05/17/16	$4,615.62
230974276	10/15/16-10/21/16	10/31/16	$1,153.90
230980825	12/09/16-12/09/16	12/19/16	$1,153.90
230988679	01/28/17-02/03/17	02/15/17	$1,153.90
231010580	02/14/17-06/23/17	06/29/17	$4,047.54
231041771	12/24/17-12/30/17	01/17/18	$1,346.64
231041772	12/31/17-01/06/18	01/17/18	$1,346.64
231064648	05/01/18-05/16/18	05/30/18	$3,119.57

(Cl. Ex. 5, pp. 1-5)

The total late payments without reasonable excuse amounts to in excess of $22,000.00. Based upon these late payments, I find the claimant is owed a penalty in the amount of $10,000.00 to deter defendants from engaging in this type of conduct in the future.

The next issue is medical expenses under Section 85.27.

The employer shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance, and hospital services

[3] This references a payment which is partially late and is denoted with an asterisk.

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 16, 1975).

Claimant seeks mileage for trips to the authorized physician as set forth in Claimant's Exhibit 14. I find he is entitled to these expenses in the amount of $2,417.08.

The final issue is IME expenses and costs.

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).

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).

I find claimant is entitled to IME expenses in the amount of $3,405.00. He is also entitled to the filing fee.

ORDER

THEREFORE, IT IS ORDERED

Defendants shall pay the claimant three hundred (300) weeks of permanent partial disability benefits at the rate of one thousand three hundred forty-six and 64/100 dollars ($1,346.64) per week from August 25, 2016.

Defendants shall pay accrued weekly benefits in a lump sum.

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

Defendants shall be given credit for the weeks previously paid.

Defendants shall pay medical mileage expenses to the claimant in the amount of two thousand four hundred seventeen and 08/100 dollars ($2,417.08).

Defendants shall reimburse claimant for the IME expenses of Dr. Sassman in the amount of three thousand four hundred five and 00/100 dollars ($3,405.00).

Defendants shall pay a penalty of ten thousand and 00/100 dollars ($10,000.00).

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 for the filing fee.

Signed and filed this 9th day of April, 2020.

JOSEPH L. WALSH
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Steven Durick (via WCES)

Matthew R. Phillips (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.