

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JACOB M. WINSOR,

Claimant,

vs.

FAREWAY STORES, INC.,

Employer,

and

NATIONWIDE AGRIBUSINESS
INSURANCE COMPANY,

Insurance Carrier,
Defendants.

FILED
JAN 15 2019
WORKERS COMPENSATION

File No. 5058009

ARBITRATION

DECISION

Head Note Nos.: 1803, 4000.2

STATEMENT OF THE CASE

Claimant, Jacob Winsor, filed a petition in arbitration seeking workers' compensation benefits from Fareway Stores, Inc., employer, and Nationwide Agribusiness Insurance Company, insurance carrier, both as defendants, as a result of a stipulated injury sustained on March 4, 2016. This matter came on for hearing before Deputy Workers' Compensation Commissioner Erica J. Fitch, in Cedar Rapids, Iowa. The record in this case consists of joint exhibits 1 through 9, claimant's exhibits 1 through 4, defendants' exhibits A through G, and the testimony of the claimant, Jeffrey Winsor, and Lea Winsor.

ISSUES

The parties submitted the following issues for determination:

1. Whether the stipulated work injury of March 4, 2016 is a cause of permanent disability;
2. The extent of claimant's industrial disability;
3. Whether claimant is entitled to penalty benefits under Iowa Code section 86.13 and, if so, how much; and
4. Specific taxation of costs.

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

FINDINGS OF FACT

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

Claimant was 32 years of age at the time of hearing. He resides in Vinton, Iowa, with his wife and two minor children. (Claimant's testimony) Claimant graduated high school in 2003 and in 2006, obtained an associate's degree in business administration. (Claimant's testimony; JE8, pp. 147) Claimant began work at defendant-employer in 2002, at 16 years of age. (Claimant's testimony; JE8, p. 149) The job description for the position of grocery clerk at defendant-employer identified physical demands of the position, including: being on one's feet eight hours per day; repetitive lifting and bending; frequent lifting up to 20 pounds; and occasional lifting up to 50 pounds. (DEC, p. 3) While working at defendant-employer, claimant pursued and obtained his home inspection certificate, which included undertaking residential wiring coursework. (Claimant's testimony; JE8, pp. 147-148)

Claimant's relevant medical history is positive for back difficulties. Claimant sought evaluation and treatment at Vinton Family Medical Clinic (Vinton Family). In July 2004, claimant presented to Vinton Family and was examined by Harold Vanscoy, PA. He described a four-month history of left-sided hip, back, and leg pain. An MRI was ordered. (JE1, pp. 2, 6) Claimant returned to Mr. Vanscoy in April 2005. He reported ongoing back and iliac pain, as well as recently-developed left knee pain. (JE1, p. 2; JE2, pp. 7-8) A lumbar MRI revealed central disc bulging at the L3 through S1 levels. (JE2, p. 9)

On June 9, 2007, claimant's manager at defendant-employer transported claimant to Vinton Family for evaluation by Mr. Vanscoy after an incident at work. Claimant reported a 50-pound box slid from his hands and he developed upper back pain. Mr. Vanscoy assessed an upper back strain secondary to lifting and prescribed medication. (JE1, p. 3) Later that date, claimant presented to the emergency room at Virginia Gay Hospital (Virginia Gay). Claimant was again examined and underwent cervical x-rays. He was assessed with a cervical strain and advised to utilize the medications prescribed by Mr. Vanscoy. (JE2, pp. 10-12)

Claimant's medical records reveal he has sought periodic treatment with a chiropractor at Betterton Family Chiropractic dating to 2009. Claimant has sought care treatment for complaints to multiple body parts, including his back. In June and July 2009, claimant sought care for mid- and low-back pain; he underwent chiropractic adjustments. (JE3, pp. 29-30) In June and July 2010, claimant sought chiropractic

adjustment for mid- and low-back pain following an event lifting a case of eggs. (JE3, pp. 31-33) In April 2011, claimant received an adjustment for low back pain. (JE3, p. 34) In November 2011, claimant sought an adjustment for mid-back pain following an incident carrying water at work. (JE3, p. 35) In May 2012, claimant received an adjustment for upper thoracic pain. (JE3, p. 36) In July 2012, claimant sought an adjustment for cervical and lumbar pain, exacerbated by pouring concrete the prior weekend. (JE3, p. 37) In November and December 2012, claimant sought adjustments for generalized low back pain. (JE3, pp. 38-40) In March and April 2013, claimant sought adjustments for mid- to low-back pain. (JE3, pp. 31-32) In June 2013, claimant received chiropractic care for low back pain after lifting a case of bananas. (JE3, pp. 43-44) In September and October 2014, claimant sought care for upper back and cervical pain. (JE3, pp. 45-50) In January 2015, claimant sought treatment for lower thoracic and low back pain after lifting a box that morning. (JE3, p. 51) During January and February 2015, claimant underwent adjustments due to low back complaints. (JE3, pp. 52-55) He received adjustments for lumbar pain in April and October 2015. (JE3, pp. 56-58) On February 15 and February 17, 2016, claimant underwent adjustments for lower lumbar pain with radiation into the left iliac crest. (JE3, pp. 59-60)

On March 4, 2016, claimant was at work and attempted to maneuver a flat cart containing products. During a left-to-right cart motion, claimant felt a pop in his low back. He felt pain, numbness, and tingling of his low back and down into the left hip and leg. Claimant testified he knew he suffered an injury, but did not know it was serious. (Claimant's testimony) Immediately following the event, claimant telephoned Betterton Family Chiropractic to make an appointment. Claimant described this step as normal protocol for injuries and had provided him relief in the past. (JE7, p. 129) Claimant testified in the past, if he "tweaked" his back at work, he would inform his managers and present to the chiropractor. No manager objected to this process. (JE7, p. 134) Claimant testified he then informed assistant manager, Brian Speas, that he had injured himself and arranged a chiropractic appointment. Claimant asked if it would be acceptable to leave for the appointment and return thereafter; Mr. Speas agreed. (Claimant's testimony; JE7, p. 129) Claimant admitted he did not specifically tell Mr. Speas what had occurred or that his complaints were work-related. (Claimant's testimony; JE7, p. 130)

Claimant presented to Betterton Family Chiropractic on March 4, 2016. Claimant complained of acute lumbar pain with radiation into the left lower extremity after pushing a cart at work. Scott Barron, D.C., performed an adjustment. (JE3, p. 61) Claimant returned to work at defendant-employer following the appointment. (JE7, p. 130) Claimant returned to Dr. Barron on March 5, 2016 and received another adjustment. He reported 80 percent improvement. (JE3, p. 62) On March 7, 2016, claimant returned to Betterton Family Chiropractic and was seen by Matthew Betterton, D.C. Claimant reported relief for 48 hours following the prior adjustment, but a return of pain. Another adjustment was performed. (JE3, p. 63) Claimant received another adjustment by Dr. Betterton on March 8, 2016, at which time claimant reported increased left leg numbness. (JE3, p. 64) Thereafter, claimant informed his supervisor, Dave Kelcher, about the incident on March 4, 2016. (JE7, pp. 129-130)

On March 9, 2016, claimant presented to Virginia Gay and was examined by Michelle Elgin, D.O. Claimant complained of hip and back pain, with radiation to the left foot after an incident moving a cart at work five days prior. He also reported worsened symptoms following a pop in his back earlier that morning. (JE2, p. 19) Dr. Elgin removed claimant from work and prescribed medication. (JE2, pp. 20-21) She prescribed a lumbar spine MRI, which was completed that date and the radiologist opined it revealed a large left posterior disc herniation at L5-S1. Dr. Elgin referred claimant for neurosurgical consult. (JE2, pp. 21-23; JE4, p. 66) Dr. Elgin opined claimant could return to work, light duty, on March 14, 2016. (JE2, p. 27)

At Dr. Elgin's referral, claimant presented to board certified orthopedic surgeon, Cassim Igram, M.D., on March 11, 2016. (JE4, p. 67; CE3, p. 16) Claimant described a work injury the week prior and reported back pain with radiation into the left leg and foot, as well as numbness and tingling. (JE4, p. 70) Dr. Igram reviewed claimant's MRI and opined it revealed a herniation at L4-L5 on the left. (JE4, p. 72) On examination, Dr. Igram noted obvious foot drop on the left, reproducible radicular symptoms, and paresthesias in the left L4 and L5 dermatomes. (JE4, pp. 71-72) Dr. Igram opined claimant's complaints appeared work-related and removed claimant from work pending follow-up on March 21, 2016. (JE4, p. 72)

Claimant returned to Dr. Igram on March 21, 2016. At that time, Dr. Igram had reviewed claimant's prior medical and chiropractic records. He opined the work injury of March 4, 2016 aggravated a preexisting condition of claimant's spine. Dr. Igram recommended surgical intervention. (JE4, pp. 73, 75) The following date, Dr. Igram authored a letter opining claimant sustained a material aggravation of a preexisting condition of his lumbar spine, which required surgical intervention. (JE4, p. 80)

On March 24, 2016, claimant underwent a lumbar discectomy at L4-L5 on the left, performed by Dr. Igram. (JE4, pp. 81-83) Following surgery, claimant followed up periodically with Dr. Igram. On April 6, 2016, Dr. Igram released claimant to work under restrictions including a 5-pound lift; limited bending, twisting, and pulling; and an 8-hour maximum shift. (JE4, p. 89)

Following Dr. Igram's release, claimant returned to work light duty at defendant-employer. On April 7, 2016, a representative of defendant-employer authored correspondence to claimant. Thereby, claimant was notified his workers' compensation benefits had been converted to permanent partial disability (PPD) benefits. Although the extent of any permanent disability had not been determined, the representative stated she anticipated some permanent disability and volunteered 10 weeks of PPD benefits, to run from April 7, 2016 to June 15, 2016. She noted defendant-insurance carrier would continue to evaluate the extent of claimant's permanent disability as new information arose. (DEA, p. 1)

At follow up with Dr. Igram on May 11, 2016, claimant reported improvement in symptoms, with mild numbness and tingling of his foot and toes. Claimant reported experiencing minimal pain and no use of narcotic medications. Dr. Igram prescribed a

course of physical therapy and increased claimant's work restrictions to allow for a 20-pound lift and carry. (JE4, pp. 90-91, 95)

Claimant attended 12 sessions of physical therapy from May 23, 2016 through June 17, 2016. (JE6, p. 122) At physical therapy on May 23, 2016, claimant reported he returned to work on April 7, 2016 on light duty and was tolerating his duties. (JE2, p. 28)

Claimant returned to Dr. Igram on June 22, 2016. Claimant reported continued improvement, but continued mild numbness and tingling of his foot and toes. Dr. Igram noted claimant was experiencing left foot arch pain from the foot drop and required standing activities. He ordered a consult for shoe inserts to address foot pain. Dr. Igram imposed restrictions limiting claimant to a 40-pound lift for one month; after this time, Dr. Igram released claimant without restrictions. He noted claimant would call in one month to report his condition and if the month proved uneventful, Dr. Igram anticipated placing claimant at maximum medical improvement (MMI). Claimant was advised to return on an as-needed basis. (JE4, pp. 98, 100, 102)

In July, claimant resumed full duty work at defendant-employer. (Claimant's testimony)

On July 28, 2016, a representative from defendant-insurance carrier authored correspondence to Dr. Igram, requesting his opinions on questions of MMI, permanent impairment, and permanent restrictions. (JE4, pp. 103-104) Dr. Igram authored a response to these questions dated September 2, 2016. Thereby, Dr. Igram opined claimant achieved MMI as of July 22, 2016. He opined claimant fell within DRE Lumbar Category III of the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, warranting a permanent impairment rating of 11 percent whole person, due to the history of herniated disc, surgically treated with continued mild and intermittent numbness and tingling. He confirmed release of claimant to return to work without restrictions. Dr. Igram also opined future care might include nonsteroidal anti-inflammatories, nerve pain medication, corticosteroid injections, and physical therapy. (JE4, p. 105)

On October 12, 2016, claimant's counsel authored correspondence to defendant-insurance carrier. Thereby, counsel inquired if a permanent impairment rating had been received from Dr. Igram and requested additional discovery-related materials. (CE4, pp. 19-20) Counsel directed another letter to defendant-insurance carrier on October 27, 2016. Counsel represented he had now received Dr. Igram's report and noted Dr. Igram had opined an 11 percent whole person impairment. As claimant had received payment for the equivalent of 2 percent whole person, counsel requested issuance of additional permanent partial disability benefits. (CE4, p. 24)

Due to continued foot drop complaints, claimant returned to Dr. Igram on October 19, 2016. At that time, claimant reported symptoms including a cold sensation of the left foot, left ankle weakness, and difficulty ambulating on uneven ground. Claimant

reported he was working full time, without restrictions, and was utilizing the previously-provided shoe inserts. (JE4, p. 106) Dr. Igram examined claimant and noted: significant weakness of the extensor hallucis longus on the left, unchanged; and slight weakness of the anterior tip on the left. Dr. Igram identified continued residual left foot weakness which had not improved notably. Dr. Igram assessed post L4-L5 lumbar discectomy with left ankle and foot weakness. He recommended fitting for an ankle brace to provide stability. (JE4, pp. 108-109)

A representative of defendant-insurance carrier authored responsive correspondence to claimant's counsel dated November 17, 2016. Thereby, he set forth defendants' position that due to claimant's return to work without permanent restrictions, claimant had not sustained a loss of earning capacity equivalent to 11 percent whole person. (CE4, p. 27)

Claimant completed answers to interrogatories on March 2, 2017. Thereby, claimant admitted to suffering with occasional back discomfort due to work activities prior to the work injury of March 4, 2016, but denied any previous left lower extremity involvement. (JE8, p. 153) Claimant provided a listing of medical providers seen over the prior 15 years; no chiropractor is listed. (JE8, p. 155)

Defendants completed answers to interrogatories on May 31, 2017. Thereby, defendants contended claimant did not suffer any loss of earning capacity based upon his full duty work release. (JE9, p. 161)

Claimant provided deposition testimony on June 28, 2017. Claimant testified he remained employed at defendant-employer and earned \$16.25 per hour, a slightly higher rate than on the date of his injury. He typically worked 44 hours per week. Claimant testified prior to the work injury, he worked in the produce, freezer, and dairy departments. At the time of his injury, he held the position of freezer manager. After the injury, claimant began to work on the grocery floor. He now acts as section manager on the floor and handles items ranging from salad dressing to pop and juice. In his role, he orders, stocks, and cleans his section; sets up specials; and performs customer service. While he is assigned to his section, claimant also helps in other areas as needed. Claimant testified his duties as freezer manager and section manager were similar. The tasks were performed in different areas and claimant testified he informed defendant-employer after the injury that he did not want to work in the freezer due to left foot symptoms. (JE7, pp. 124-126)

Claimant testified he continues to experience symptoms after back surgery. Claimant testified his low back feels good; however, he has problems related to his left lower extremity, specifically from the shin and calf down into the foot and toes. Claimant testified he experiences some difficulties with his job duties. Claimant testified working on a concrete floor all day causes soreness throughout the day. When he arrives home after a shift, claimant testified he is required to sit, as it is too painful to walk or stand on his leg. He also deals with numbness and weakness daily, leading him to be on guard for incidents like tripping. (JE7, pp. 125-126, 134)

Claimant denied any restrictions on his ability to lift. He testified such tasks can be difficult, but he has not experienced back pain since healing from surgery. Claimant testified his need to lift at work varied, but estimated he was not required to lift in excess of 60 pounds. In the event items were heavy, claimant testified he requested assistance from others. Claimant testified it was fair to say he is physically capable of performing his job duties, but he does not perform duties in the same fashion because of his left leg symptoms. (JE7, pp. 125-126, 131)

Claimant testified he had no immediate plans to leave defendant-employer; he had not sought work elsewhere. While he obtained his home inspection license in hopes of starting a business, he has put that goal on hold due to his foot drop and insecurity surrounding his injury. Claimant has not performed a home inspection since obtaining his certification, but maintains hope such a business may be in his future. (JE7, p. 127)

At the arranging of claimant's counsel, on August 4, 2017, claimant presented to psychiatrist, Farid Manshadi, M.D., for an independent medical examination (IME). Dr. Manshadi performed a records review, interview, and physical examination. He authored a report containing his findings and opinions dated August 30, 2017. (CE1, p. 1)

Claimant reported on the date of his work injury, he immediately developed low back pain with radiation to the left lower extremity; he developed left foot drop a couple days later. (CE1, p. 2) Dr. Manshadi noted claimant's history of back problems dating to 2005, with chiropractic care since 2009. He noted that while the medical records made mention of some left hip and leg pain in 2004 and 2005, none of the subsequent chiropractic records denoted such complaints. (CE1, p. 1) Dr. Manshadi summarized claimant's post-injury care and noted Dr. Igram performed surgery, placed claimant at MMI effective July 22, 2016, and assigned an 11 percent whole person impairment rating. Claimant continued to complain of left foot drop, as well as numbness and tingling of the left leg. Claimant reported he utilized high-top shoes at work for ankle protection. He also reported pain ranging from level 1 to level 8 on a 10-point scale, which varied and was present primarily in the calf region. (CE1, p. 2) Dr. Igram performed a physical examination. (CE1, pp. 2-3)

Following records review, interview, and examination, Dr. Manshadi opined the March 4, 2016 injury resulted in an aggravation of claimant's lumbosacral region and resulted in a significant disc herniation, as well as the subsequent development of left-sided foot drop and numbness, tingling, and atrophy of the left calf and anterior tibialis. Dr. Manshadi opined the injury resulted in permanent conditions of the low back and left lower extremity. He opined claimant fell within the AMA Guides' DRE Lumbar Category III, warranting a permanent impairment of 13 percent whole person. Dr. Manshadi recommended permanent restrictions: no lifting greater than 40 pounds; avoidance of repetitious bending, twisting, and stooping; and avoidance of walking on uneven or slippery surfaces. Dr. Manshadi did not recommend further medical treatment, but noted claimant may require new left foot braces in the future. (CE1, p. 3)

At evidentiary hearing, claimant testified he continues to experience left foot drop issues and occasional back soreness. His primary concern is numbness and weakness of his left leg and foot, as it causes difficulty with movement and stability. He continues to wear the AFO brace prescribed by Dr. Igram in October 2016 when performing physical activities or ambulating on uneven ground. At work, claimant wears high-top boots to protect his ankle. (Claimant's testimony)

Claimant testified he remains employed by defendant-employer as a section manager. He testified he requested to avoid the cold departments he worked in preinjury, as he has difficulty keeping his left lower extremity warm following the work injury. He remains employed full time and has received raises since his work injury. Claimant typically works 8 hours per day, but can work 9 to 10 hours, if needed. Claimant testified he is on his feet 95 percent of his work day. This results in left foot pain during and after his shifts. Upon rising in the morning, claimant's foot is not particularly painful, but the pain worsens with continued standing and walking. Claimant testified when performing his job duties, he is now uncertain and cautious with activities requiring lifting and bending due to his foot and back conditions. He is able to lift up to 20 pounds without problems, although he is aware of his motions. When weights approach 50 pounds, claimant finds lifting too difficult; he becomes distracted and wary of reinjury. With heavier weights, claimant breaks down boxes of items into smaller weights or requests assistance from coworkers. Claimant admits he has not requested formal accommodation and did not personally provide defendant-employer with a copy of Dr. Manshadi's recommended restrictions. (Claimant's testimony)

Claimant testified he has not yet utilized his home inspection certification. Claimant testified his work injury played a role in this disuse, as claimant is concerned about his ability to safely perform certain tasks due to his foot condition. Specifically, claimant expressed concern about climbing ladders, traversing roofs, and ambulating on uneven surfaces. Claimant testified he is wary of such tasks due to uncertainty regarding his foot and his tendency to roll his ankle if he does not pay close attention to his foot placement. (Claimant's testimony)

Claimant's father, Jeffrey Winsor, owns and operates a residential concrete business. The business is in addition to his full time, regular employment as a heavy equipment operator. He does not, nor has he ever had, employees of the concrete business. (Mr. Winsor's testimony) Both claimant and Mr. Winsor testified claimant assists with concrete work on occasion, both before and after the work injury. On three occasions since his work injury, claimant has assisted his father with a concrete job. On each occasion, claimant worked for less than four hours and performed tasks such as raking and finishing. Claimant testified he did not handle any weights over 40 pounds and did not suffer with any increased discomfort. Mr. Winsor testified he would not permit claimant to perform any tasks which might result in injury. Claimant even arranged one job between his father and a coworker at defendant-employer. Claimant testified he was not paid for any of his assistance and was simply attempting to help his father. Mr. Winsor confirmed claimant was not paid for his efforts and the two simply

barter, with Mr. Winsor helping claimant with home improvement projects on occasion. (Mr. Winsor's testimony; Claimant's testimony)

Mr. Winsor testified he has observed changes in claimant following the work injury. Mr. Winsor testified he has, on numerous occasions, witnessed claimant stumble or trip. He has also observed claimant brace himself and have difficulty rising from a crouched position. Mr. Winsor described claimant as significantly more cautious since the work injury, with decreased stamina and increased frustration. (Mr. Winsor's testimony)

Mr. Winsor's testimony was clear, direct, and consistent with the evidentiary record. His demeanor was excellent and provided the undersigned with no reason to doubt his veracity. Mr. Winsor is found credible.

Claimant's wife, Lea Winsor, also testified at evidentiary hearing. She described claimant as active, healthy, and energetic prior to the work injury. Since the work injury, Ms. Winsor testified claimant has difficulty playing with their children and performing household tasks. At the end of a workday, Ms. Winsor testified claimant's foot is sore and he wants to sit down. She testified claimant is constantly aware of his foot and back conditions. Nevertheless, she has seen him stumble numerous times. She personally assists him in putting on his left sock and stretching his foot; she testified claimant's left foot is always cold to the touch. (Ms. Winsor's testimony)

Ms. Winsor's testimony was clear, direct, and consistent with the evidentiary record. Her demeanor was excellent and provided the undersigned with no reason to doubt her veracity. Ms. Winsor is found credible.

Defendants argue claimant is not a credible witness. Defendants cite to perceived discrepancies between claimant's deposition and hearing testimony, highlight claimant's failure to identify his chiropractor in interrogatory answers, and failure to disclose home repair and concrete activities. Following review of the entirety of the evidentiary record, I reject defendants' contention and find claimant was a credible witness.

Claimant's testimony at deposition and hearing were not verbatim, but were entirely consistent. Following the admitted work injury, claimant followed a previously-used pattern of seeking chiropractic care. Claimant's failure to specifically identify his chiropractor in answers to interrogatories was not in an effort to hide the existence of a treating relationship, as all chiropractor records were provided to defendants shortly following the incident. Claimant reported the injury to defendant-employer within one week and without any evidence of intervening act. His performance of home improvement activities and assistance to his father's concrete business do not undermine claimant's credibility, as claimant was not dishonest about his efforts and his actions do not exceed any permanent restrictions. Claimant's testimony was consistent as compared to the evidentiary record and his deposition testimony. His demeanor at

the time of evidentiary hearing gave the undersigned no reason to doubt claimant's veracity. Claimant is found credible.

CONCLUSIONS OF LAW

The first issue for determination is whether the stipulated work injury of March 4, 2016 is a cause of permanent disability.

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 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).

Claimant suffered a stipulated work-related injury on March 4, 2016 which required lumbar discectomy at L4-L5. Despite surgery, claimant continues to suffer with left lower extremity symptoms and left foot drop which impact his functionality. As a result of these symptoms and conditions, claimant utilizes shoe inserts and a left ankle brace with certain activities. Claimant's treating surgeon, Dr. Igram, opined claimant suffered permanent functional impairment of 11 percent whole person. Claimant's evaluating physician, Dr. Manshadi, opined claimant suffered permanent functional impairment of 13 percent whole person. Both physicians used the same rating methodology and placed claimant in the same ratable category. Given these consistent ratings and claimant's continued functional limitations, I find claimant has proven by a preponderance of the evidence that he sustained permanent disability as a result of the work injury of March 4, 2016.

The next issue for determination is the extent of claimant's industrial disability.

Under the Iowa Workers' Compensation Act, permanent partial disability is compensated either for a loss or loss of use of a scheduled member under Iowa Code section 85.34(2)(a)-(t) or for loss of earning capacity under section 85.34(2)(u). The parties have stipulated claimant's disability shall be evaluated industrially.

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.

Claimant suffered a work-related injury which required lumbar discectomy and left claimant with residual left lower extremity symptoms and left foot drop. These ongoing symptoms impact claimant's functionality. Drs. Igram and Manshadi rated claimant's functional impairments as 11 percent and 13 percent whole person, respectively. These opinions were reached utilizing the same rating methodology and result in consistent ratings which attempt to measure claimant's residual impairment.

Claimant was 32 years of age on the date of evidentiary hearing. He possessed a high school diploma, associate's degree, and home inspection certificate. Claimant clearly demonstrates the requisite intelligence and ability to learn new skills. Despite these achievements, however, claimant's employment and formal work experience is limited to his tenure with defendant-employer. Claimant began employment at defendant-employer at age 16 and has remained consistently employed ever since. During his 15 years of employment, claimant has acquired skills which are valuable to defendant-employer. Some of these skills are transferable to other occupations; however, claimant's skill-set is most valuable to defendant-employer given claimant's familiarity with defendant-employer's operations and standards.

Dr. Manshadi recommended permanent restrictions; however, Dr. Igram declined to impose permanent restrictions. It is Dr. Igram who is in the best position to assess claimant's need for permanent restrictions as he served as claimant's treating physician and was well-versed in claimant's limitations. As a result, I find claimant possesses no formal permanent restrictions upon his activities.

While claimant does not possess formal permanent restrictions, claimant's functionality has been impacted by his work injury. Claimant remains employed at defendant-employer in a position similar to that which he held on the date of his injury: manager of a specific area of a grocery store. Unlike preinjury, claimant now works on the grocery store floor, as he was unable to tolerate working in the freezer due to left foot symptoms. Defendant-employer accommodated claimant's request to work in a warmer area of the store. Claimant performs all his work duties, but credibly testified to self-accommodation and heightened self-awareness in performing his duties. Specifically, claimant testified he requests assistance with heavy lifting or breaks apart boxes to allow him to lift items of lesser weights. Additionally, claimant exercises vigilance with respect to his foot placement. Even with these self-accommodations, claimant's foot and lower extremity become painful and impact his ability to function outside of work.

Claimant's work history is limited to manual, physical employment at defendant-employer. Despite ongoing symptoms of his foot and lower extremity, claimant continues to work full time and without lost time due to the work injury. I find claimant is a motivated and hard-working individual. His hours remain consistent and his hourly rate of pay has increased post-injury.

Upon consideration of the above and all other relevant factors of industrial disability, it is determined claimant sustained a 20 percent industrial disability as a result of the stipulated work-related injury of March 4, 2016. Such an award entitles claimant to 100 weeks of permanent partial disability benefits (20 percent x 500 weeks = 100 weeks), commencing on the stipulated date of June 16, 2016. The parties stipulated at the time of the work injury, claimant's gross weekly earnings were \$688.08, and claimant was married and entitled to 4 exemptions. The proper rate of compensation is therefore, \$469.21.

The next issue for determination is whether claimant is entitled to penalty benefits under Iowa Code section 86.13 and, if so, how much.

Iowa Code 86.13, as amended effective July 1, 2009, states:

4. a. If a denial, a delay in payment, or a termination of benefits occurs without reasonable or probable cause or excuse known to the employer or insurance carrier at the time of the denial, delay in payment, or termination of benefits, the workers' compensation commissioner shall award benefits in addition to those benefits payable under this chapter, or chapter 85, 85A, or 85B, up to fifty percent of the amount of benefits that

were denied, delayed, or terminated without reasonable or probable cause or excuse.

b. The workers' compensation commissioner shall award benefits under this subsection if the commissioner finds both of the following facts:

(1) The employee has demonstrated a denial, delay in payment, or termination of benefits.

(2) The employer has failed to prove a reasonable or probable cause or excuse for the denial, delay in payment, or termination of benefits.

c. In order to be considered a reasonable or probable cause or excuse under paragraph "b", an excuse shall satisfy all of the following criteria:

(1) The excuse was preceded by a reasonable investigation and evaluation by the employer or insurance carrier into whether benefits were owed to the employee.

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

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

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

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

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

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

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

At claimant's release to return to work on April 7, 2016, defendants promptly authored correspondence to claimant volunteering the equivalent of a permanent impairment of 2 percent whole person. This action was done prior to achievement of MMI or issuance of a permanent impairment rating. After claimant achieved MMI in July 2016, defendants promptly requested an impairment rating and restrictions from Dr. Igram. Dr. Igram did not reply until September 2, 2016, a delay not attributable to defendants. There was, however, delay by defendants in providing a written explanation to claimant as to why no further permanent disability benefits were paid. This letter was not issued until November 17, 2016, in response to inquiry from claimant's counsel. However, this two-month delay may be explained by defendants' ongoing investigation into whether additional benefits were owed based upon a loss of earning capacity analysis.

The evidentiary record contains two functional impairment ratings, both finding notable functional impairment and ongoing symptoms. As set forth *supra*, I found claimant's loss of earning capacity exceeded both functional ratings and awarded industrial disability benefits. Despite my ultimate decision, defendants possessed viable argument with respect to whether claimant suffered a loss of earning capacity due to his full duty work release, return to work in a similar position, maintenance of work hours without lost time, and increased hourly rate of pay. Due to this viable argument as to whether claimant suffered a loss of earning capacity, I find defendants' liability for further permanent partial disability benefits was fairly debatable. As such, no award of penalty benefits is warranted.

The final issue for determination is a specific taxation of costs pursuant to Iowa Code section 86.40 and rule 876 IAC 4.33. Claimant requests taxation of the costs of: transcription fees associated with claimant's deposition (\$124.20). This is an allowable cost and is taxed to defendants.

ORDER

THEREFORE, IT IS ORDERED:

The parties are ordered to comply with all stipulations that have been accepted by this agency.

Defendants shall pay unto claimant one hundred (100) weeks of permanent partial disability benefits commencing June 16, 2016 at the weekly rate of six hundred eighty-eight and 08/100 dollars (\$688.08).

Defendants shall receive credit for benefits paid.

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

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

Costs are taxed to defendants pursuant to 876 IAC 4.33 as set forth in the decision.

Signed and filed this 15th day of January, 2019.


ERICA J. FITCH
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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EJF/kjw

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.