BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

TERRY SANDBERG,

Claimant,

vs.

CROELL REDI-MIX, INC.,

Employer,

and

OLD REPUBLIC INSURANCE COMPANY,

Insurance Carrier,
Defendants.

File No. 5060861

ARBITRATION

DECISION

Head Note Nos.: 1108, 1402, 1703, 1804, 2600, 4000

STATEMENT OF THE CASE

Terry Sandberg, claimant, filed a petition in arbitration seeking workers' compensation benefits from defendants Croell Redi-Mix, Inc., employer, and Old Republic Insurance Company, insurer. The hearing occurred before the undersigned on January 17, 2019, in Cedar Rapids, Iowa.

The parties filed a hearing report at the commencement of the arbitration hearing. In 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.

The evidentiary record consists of: Joint Exhibits 1 through 7, Claimant's Exhibits 8 through 12, and Defendants' Exhibits A through C. Claimant testified on his own behalf. Chuck Stockdale, a representative of defendant-employer, also testified. The evidentiary record closed on January 17, 2019. The case was considered fully submitted upon receipt of the parties' briefs on February 8, 2019.

ISSUES

The parties submitted the following disputed issues for resolution:

1. Whether claimant sustained any permanent disability and, if so, the extent of his industrial disability.

2. The extent of defendants' credits, if any, for weekly benefits paid prior to hearing.

3. Whether claimant is entitled to penalty benefits.

4. Costs.

FINDINGS OF FACT

Claimant, who was 56 years old at the time of the hearing, sustained a stipulated work injury on December 29, 2014, when he bent over and picked up a replacement gas tank on a forklift. (Hearing Transcript, p. 21) At the time of the injury, claimant was working as a mechanic doing "top to bottom" engine work on defendant-employer's trucks. (Tr. p. 39) This was rigorous work that involved heavy lifting of 80 to 100 pounds. (Tr., p. 39)

After the lifting injury on December 29, 2014, claimant presented to Jeffrey Westpheling, M.D., at St. Luke's Work Well clinic. Dr. Westpheling diagnosed claimant with a right inguinal hernia and referred him to a Kerri Nowell, M.D., for surgery. (JE 1, p. 1)

Dr. Nowell performed a right inguinal hernia repair with mesh on January 15, 2015. (JE 3, p. 18) At claimant's follow-up appointment with Dr. Nowell on February 11, 2015, Dr. Nowell instructed claimant to remain on light duty for two more weeks before resuming normal activity as tolerated. (JE 2, p. 6)

Claimant was able to return to his regular job with defendant-employer without restrictions in late-February of 2015. (Tr., p. 24) He continued working without any restrictions or additional medical treatment until he voluntarily quit his job with defendant-employer. (Tr. p. 24) On June 5, 2015, after an argument with his supervisor regarding a truck engine, claimant walked off the job. (Tr. pp. 26, 40) Claimant testified he would not have quit his job with defendant-employer had he not gotten in an argument with his supervisor. (Tr. pp. 40-41)

After he voluntarily quit, claimant was evaluated by Dr. Nowell on June 23, 2016. Dr. Nowell referred claimant to a pain clinic for possible injections. (JE 2, p. 7) No work restrictions were assigned. (JE 2, p. 7)

Claimant pursued the pain management referral and received his first nerve block injection on July 8, 2015. (JE 4, p. 21) Claimant then underwent a "tap block" injection block on July 29, 2015. (JE 4, p. 26) While the initial injection briefly resolved claimant's symptoms, the second injection made claimant feel worse. (JE 4, pp. 24, 26). Claimant was then referred back to Dr. Nowell.

When claimant returned to Dr. Nowell on August 19, 2015, Dr. Nowell suggested a right inguinal exploration surgery and possible mesh removal. (JE 2, p. 9) That surgery was performed on August 31, 2015. (JE 3, p. 19) Claimant was apparently restricted from returning to work after his surgery until his next appointment with Dr. Nowell on September 18, 2015.

At that September 18, 2015 appointment, claimant was reporting only mild discomfort. (JE 2, p. 10) As a result, Dr. Nowell released claimant to return to work on a graduated basis on September 21, 2015 with an eventual full-duty return by October 19, 2015. (JE 2, p. 11) More specifically, Dr. Nowell indicated claimant could return to work as of September 21, 2015 with a five-pound lifting restriction. (JE 2, p. 11) By October 5, 2015, claimant was allowed to observe a 25-pound lifting restriction, and by October 19, 2015, claimant was released full-duty without restrictions. (JE 2, p. 11)

By November of 2015, however, claimant returned to Dr. Nowell's office with more pain complaints. (JE 2, p. 12) After a CT scan he was eventually evaluated by Dionne Skeete, M.D., at the University of Iowa Hospitals and Clinics. (JE 5) Dr. Skeete recommended physical therapy and a pain clinic referral. (JE 5, p. 29) Dr. Skeete imposed a five-pound lifting restriction. (JE 5, p. 29)

Claimant participated in physical therapy from December 14, 2015 through February 5, 2016. (JE 6) At his final therapy session on February 5, 2016, claimant reported a "99.9% improvement overall" and that he was "10x better than when he first started coming to PT." (JE 6, p. 36) He rated his then-current pain at "3/10," with his worst pain at "6/10." (JE 6, p. 36) Claimant was able to complete "sustained kneel and sustained squatting" and several lifting tasks, including a two-hand lift of 50 pounds to waist level, 40 pounds from waist to shoulder, and 35 pounds from shoulder to overhead. (JE 6, p. 37)

On February 16, 2016, Dr. Skeete responded to a letter from claimant's nurse case manager, in which she opined that claimant had reached maximum medical improvement given claimant's positive response to physical therapy. (JE 4, p. 31)

It does not appear from the records that claimant ever returned to Dr. Skeete or any other physician for ongoing treatment of his hernia symptoms. Instead, it appears claimant's most recent medical treatment was his final physical therapy appointment on February 5, 2016. (See Tr., p. 22) I therefore find that August 31, 2015 through September 20, 2015 was the only period after claimant voluntarily quit that a doctor (Dr. Nowell) prohibited claimant from returning to work. Defendants paid temporary total disability/healing period (TTD/HP) benefits for this period of time. (Def. Ex. A, pp. 2-3)

Claimant participated in a functional capacity evaluation (FCE) at his attorney's request on March 7, 2017. (Cl. Ex. 8) The FCE placed claimant in the "lower medium" physical demand category, which is "up to 30 lbs. on an occasional basis with front carry." (Cl. Ex. 8, pp. 2-3) The therapist who oversaw the FCE also recommended that claimant limit his lifting, carrying, standing work, and walking to "no more than 50% of

his workday" and that he limit any pushing/pulling to an occasional basis. (Cl. Ex. 8, p. 3)

The only impairment ratings in the record came from Dr. Westpheling at defendants' request. As mentioned, Dr. Westpheling was the first physician to evaluate claimant after his injury, but Dr. Westpheling never evaluated claimant again. (JE 1, p. 1) In other words, Dr. Westpheling's impairment rating was based solely on a records review. (Cl. Ex. 9, p. 11; see Tr., p. 49) In a November 19, 2018 letter to a claims adjuster, Dr. Westpheling opined claimant was "in a class 2 category of impairment due to herniation" pursuant to Table 6-9 on page 136 of the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition. (Cl. Ex. 9, p. 11) Under the Guides, an individual falls within a Class 2 impairment when there is a "[p]alpable defect in supporting structures of abdominal wall" and "frequent or persistent protrusion at site of defect" or "frequent discomfort, precluding heavy lifting but not hampering some activities of daily living." (Guides, Table 6-9, p. 136) Based on claimant's Class 2 impairment, Dr. Westpheling assigned a 10 percent whole body impairment rating. (Cl. Ex. 9, p. 11) Using claimant's FCE, Dr. Westpheling also assigned restrictions of no lifting or carrying greater than 20 pounds and limiting crouching and kneeling to a rare basis (less than 5 percent of the workday). (Cl. Ex. 9, p. 11)

However, on January 8, 2019, just days before hearing, Dr. Westpheling sent defendants' counsel an e-mail in which he rescinded his impairment rating. He explained:

> Upon review of my prior rating, I realize that I misinterpreted table 6-9 on page 136 of the Guides. Given that there are no clinical records indicating that the claimant has a "palpable defect in supporting structures of abdominal wall," his impairment rating is 0%. There is no rating based on symptoms alone. According to the table, the first criterion, as quoted, must be met AND then include the second OR third criterions.

(Def. Ex. C, p. 12) Dr. Westpheling indicated his restriction recommendations remained unchanged. (Def. Ex. C, p. 12)

With this history in mind, the first issue to be decided is whether claimant sustained a permanent disability as a result of his work-related hernia. I do not find Dr. Westpheling's zero percent rating to be credible. In Dr. Westpheling's November 19, 2018 letter, when he assigned a 10 percent whole body impairment rating, he specifically cited to Table 6-9 on page 136 of the Guides. (Cl. Ex. 9, p. 11) In other words, Dr. Westpheling was aware of the criteria contained in Table 6-9 when he originally assigned his 10 percent rating. Further, it is not clear which of claimant's medical records Dr. Westpheling reviewed.

Perhaps more importantly, Dr. Westpheling stood by his fairly significant restrictions even after he retracted his impairment rating. If claimant truly had no permanent impairment as a result of his work-related hernia and resulting surgeries, it is

difficult to imagine why claimant would require permanent restrictions. Claimant's permanent restrictions have permanently changed, and ultimately limited, the work he can perform in the future. For this reason, I find claimant sustained a permanent disability as a result of his work-related hernia.

The next issue to address is the extent of claimant's permanent disability due to his work-related hernia. Regarding claimant's functional impairment, claimant reported near-complete resolution of his symptoms at his final physical therapy appointment in February of 2016. (JE 6, p. 36) However, he testified both at hearing and his deposition that he tries to follow a lifting restriction of 50 pounds. (Tr., p. 49; Defendants' Ex. B, pp. 5, 10 [Cl. Deposition Tr. pp. 5, 28])

I acknowledge the self-imposed 50-pound limitation is in excess of the FCE and Dr. Westpheling's restrictions and that claimant demonstrated the ability to perform sustained squatting and kneeling at his final physical therapy appointment, which also exceeds Dr. Westpheling's recommendation to limit kneeling and crouching to a rare basis. However, claimant credibly testified this 50-pound limit prevents him from performing some of the mechanic work he previously performed. (See Tr., p. 47) For example, while performing the mechanic work for defendant-employer, claimant was required to lift transmissions that weighed more than 80 pounds. (Tr., p. 39) Even assuming claimant can lift 50 pounds, claimant would be precluded from doing his work without assistance.

In fact, claimant testified that when he was hired by Batcheler Logistics in the spring of 2016 as a mechanic he "couldn't handle doing the mechanical part of it without help." (Tr., pp. 27, 46-47) He ultimately left his position as a mechanic and transitioned into a full-time semi driving role when one of the former drivers left. (Tr., p. 47) Claimant required assistance tarping his loads. (Def. Ex. B, p. 10 [Cl. Depo. Tr., p. 26])

Claimant eventually quit his driving job with Batcheler because it required him to be away from home too often. (Tr. p. 48) He then found another semi driving job with Wieland & Sons Lumber. (Tr. p. 48) While claimant's job with Wieland & Sons is primarily driving, he is also expected to do as much of the mechanical work on his truck as possible. (Tr. p. 30) He requires assistance with some of these duties, particularly when lifting heavy items such as tires. (See Tr. p. 31) His load requires no lifting because his trailer is run hydraulically. (Tr. p. 48)

Thus, I find that while claimant is physically capable of performing outside of Dr. Westpheling's recommendations, his work-related hernia caused permanent physical limitations, specifically lifting limitations, that prevent him from returning to some of his past work.

Claimant testified that he was earning "hundreds" less per week with Wieland & Sons than he was earning while working with defendant-employer. (Tr., p. 59) However, claimant voluntarily quit his job with defendant-employer after an argument. While claimant's restrictions would preclude him from performing some aspects of his

mechanic job without assistance, claimant's voluntary decision to walk off the job eliminated any possibility of defendant-employer accommodating claimant's restrictions.

Claimant's work history is limited primarily to manual labor. (Tr. pp. 12-16) In addition to his mechanic and truck driving work, claimant spent several years stringing drainage tile and running heavy equipment. (Tr. pp. 14-15) Because of his work-related hernia and permanent restrictions, he is no longer able to perform some of the aspects of the mechanic work that he used to perform. Further, claimant, who has no high school diploma or GED (Tr., pp. 10-11), is not likely to be a good candidate for retraining.

Significantly, however, given that claimant obtained two truck driving positions since quitting defendant-employer, claimant is clearly capable of truck driving—work with which claimant is familiar and for which he is fitted. Claimant missed no work with Batcheler or Wieland & Sons due to his work-related hernia. (Tr. p. 48) While claimant's work-related hernia has precluded him from performing some of the heavy physical duties of a mechanic, he is still capable of performing light maintenance, and he is fully capable of truck driving so long as he is not handling more than 50 pounds. With these and all relevant factors in mind, I find claimant sustained a 25 percent industrial disability.

Claimant is also seeking penalty benefits for claimant's rate miscalculation. At hearing, the parties stipulated to a rate of $715.73. (Hearing Report, p. 1) However, defendants paid several weeks of claimant's weekly benefits at a rate much lower than $715.73.

I find that during the four-week period from January 15, 2015 through February 11, 2015, for which defendants acknowledge they owed TTD/HP benefits, defendants paid at a weekly rate of $470.16, which is an underpayment of $245.57 per week (a total of $982.28 not paid when due). (Def. Ex. A, p. 2)

Defendants acknowledge an underpayment of temporary partial disability (TPD) benefits of $512.09 for the period of February 12, 2015 through February 22, 2015. (Def. Ex. A, p. 1)

I further find that in the two-week period from August 31, 2015 to September 13, 2015, for which defendants acknowledge they owed TTD/HP benefits, defendants again paid at a weekly rate of $470.16, which is an underpayment of $245.57 per week (a total of $491.14 not paid when due). (Def. Ex. A, pp. 2-3)

Then, during the 5.714-week period from September 14, 2015 through October 23, 2015, defendants paid TTD/HP benefits at a rate higher than the stipulated rate.

However, defendants subsequently returned to paying a rate lower than the stipulated rate. I find that in the ten-week period from December 9, 2015 through February 16, 2016, for which defendants acknowledge they owed TTD/HP benefits,

defendants again paid at a weekly rate of $470.16, which is an underpayment of $245.57 per week (a total of $2,455.70 not paid when due). (Def. Ex. A, p. 3)

Defendants also paid claimant's permanent partial disability (PPD) benefits at a rate lower than the stipulated rate. I find that in the 3.286-week period from February 17, 2016 through March 10, 2016, defendants paid at a weekly rate of $470.16, which is an underpayment of $245.57 per week (a total of $806.94 not paid when due). (Def. Ex. A, p. 3)

In sum, I find that defendants paid at a rate lower than the stipulated rate for roughly 20 weeks, resulting in roughly $5,000.00 of TTD/HP, TPD, and PPD benefits that were not fully paid when due.

CONCLUSIONS OF LAW

The threshold issue to be decided is whether claimant sustained a permanent disability due to his work-related hernia.

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).

I did not find Dr. Westpheling's zero percent impairment rating to be persuasive. Instead, I found claimant has permanent limitations that permanently limit the work he previously performed and can perform in the future. Based on these findings, I found claimant sustained a permanent disability. I therefore conclude claimant satisfied his burden to prove a permanent disability.

Having concluded claimant sustained a permanent disability and in light of the parties' stipulations that any permanent disability would be industrial in nature, the next question to be considered is the extent of claimant's industrial disability.

Because 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. Iowa Code § 85.34.

Based on the fact findings above, and considering all factors appropriate in the determination of industrial disability, I conclude claimant satisfied his burden to show he sustained a 25 percent industrial disability as a result of his work-related hernia. I therefore conclude he is entitled to 125 weeks of benefits to commence on the stipulated commencement date of February 16, 2016, at the stipulated rate of $715.73.

The parties also dispute the extent of credits to which defendants are entitled for weekly benefits paid prior to hearing. Claimant's Exhibit 10 and Defendants' Exhibit A are consistent with respect to the weeks and amounts paid by defendants. In total, defendants paid 23 weeks and 2 days (23.286 weeks) of TTD/HP benefits. Many of these weeks were paid at a rate much lower than the $715.73 rate stipulated to at hearing, and some were paid at a rate higher than the stipulated rate. In total, defendants paid $13,903.32 of TTD/HP benefits to claimant. (Def. Ex. A, p. 1; Cl. Ex. 10, p. 12)

The issue is whether defendants actually owed the TTD/HP benefits they paid from September 21, 2015, through November 3, 2015 (6 weeks and 2 days or 6.286 weeks). (Def. Ex. A, p. 1; Cl. Ex. 10, p. 12) Assuming defendants owed the full 23.286 weeks of TTD/HP benefits, they ultimately underpaid TTD/HP benefits (23.286 x $715.73 = $16,666.49). If, however, defendants did not owe benefits during the 6.286-week span in question, they ultimately overpaid TTD/HP benefits (17 x $715.73 = $12,167.41).

The 6.286-week span at issue is the period after Dr. Nowell released claimant to a graduated return to work. Defendants argue that but for claimant voluntarily walking off the job in June of 2015, defendant-employer would have had work for claimant to perform.

In Schutjer v. Algona Manor Care Center, 780 N.W.2d 549 (Iowa 2010), the Iowa Supreme Court held that a voluntary resignation of employment is a refusal of all suitable work from the date of the resignation forward. Therefore, to the extent that the employer is able to offer suitable work after the date of the resignation, claimant cannot obtain healing period benefits. Id.

As the Commissioner stated in a 2011 appeal decision:

> The court has opined that an employer's acceptance of an employee's voluntary quit from suitable employment is a rejection of suitable work on that date and any future date. Schutjer v. Algona Manor Care Center, 780 N.W.2d 549, 559 (Iowa 2010). The court does not identify any mechanism for curing a refusal of a voluntary quit as ordered within the arbitration decision. Under the court's holding it can only be possible for claimant to receive temporary disability benefits if she undergoes further treatment and is removed from all employment for a period of healing. Once restricted duty is allowed, such healing period would end. In summation, the employer is not required to make work available to cure the workers' prior voluntary rejection of suitable work.

Carrillo v. Sam's Club, File No. 5028491 (Appeal July 13, 2011).

Pursuant to the court's decision in Schutjer and the Commissioner's decision in Carrillo, claimant's voluntary resignation on June 5, 2015 constituted a refusal of suitable work on that date and for all dates into the future. Only if claimant can establish he was removed entirely from work would claimant again qualify for healing period benefits because at that point suitable work would become an impossibility.

Claimant voluntarily quit his job on June 5, 2015. I found the period of August 31, 2015 through September 20, 2015 was the only period of time during which claimant was entirely removed from work after his voluntary quit on June 5, 2015. I therefore conclude August 31, 2015 through September 20, 2015 is the only period after claimant's voluntary quit for which he is entitled to an award of healing period benefits. Defendants already paid TTD/HP benefits during this time.

Despite not owing benefits after September 20, 2015, defendants continued to pay TTD/HP benefits through November 3, 2015. I therefore conclude defendants paid but did not owe TTD/HP benefits for this 6.286-week period.

Defendants do not dispute they owed TTD/HP benefits consisting of four weeks from January 15, 2015 to February 11, 2015; three weeks from August 31, 2015 through September 20, 2015; and 10 weeks from December 9, 2015 through February 16, 2016, for a total of 17 weeks. (Def. Ex. A, p. 1) At the proper rate of $715.73, I therefore conclude defendants owed $12,167.41 of TTD/HP benefits (17 weeks x $715.73). Defendants paid $13,903.32. (Def. Ex. A, p. 1) I therefore conclude defendants overpaid TTD/HP benefits in the amount of $1,735.91. Subtracting the underpayment of TPD benefits in the amount of $512.09,I conclude defendants are entitled to a credit of $1,223.82 against their liability for a subsequent injury. See Iowa Code section 85.34(4),(5).

My conclusion that defendants ultimately overpaid TTD/HP benefits does not eliminate claimant's penalty claim, however.

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.

In this case, claimant's weekly compensation benefits were not fully paid when due, as required by Iowa Code section 86.13. More specifically, I found that defendants paid at a rate lower than the stipulated rate for roughly 20 weeks, resulting in roughly $5,000.00 of benefits that were not fully paid when due.

Defendants offered no reasonable basis for paying weekly benefits at a rate significantly below the rate stipulated to at hearing. Defendants bore the burden to establish a reasonable basis, or excuse, and to prove the contemporaneous conveyance of those bases to the claimant. Defendants failed to carry their burden of proof on the penalty issues, and a penalty award is appropriate. Iowa Code § 86.13.

The purpose of Iowa Code section 86.13 is both punishment for unreasonable conduct but also deterrence for future cases. Id. at 237. In this regard, the Commission is given discretion to determine the amount of the penalty imposed with a maximum penalty of 50 percent of the amount of the delayed, or denied, benefits. Christensen v. Snap-On Tools Corp., 554 N.W.2d 254, 261 (Iowa 1996). In exercising its discretion, the agency must consider factors such as the length of the delays, 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. Meyers v. Holiday Express Corp., 557 N.W.2d 502, 505 (Iowa 1996).

Defendants did not present any evidence to justify why they paid at a rate significantly below the rate stipulated to at hearing. Given this failure to offer any justification, I conclude a significant penalty is warranted.

The TTD/HP benefits that were not fully paid when due total roughly $5,000.00. Considering the purposes of Iowa Code section 86.13, I conclude that a penalty totaling $2,000.00 is appropriate under the facts and circumstances of this case. This amount should be sufficient to punish defendant's conduct and also deter similar future conduct.

Claimant also seeks assessment of his costs. Assessment of costs is a discretionary function of the agency. Iowa Code section 86.40. Because claimant was generally successful in his claim, I conclude it is appropriate to assess claimant's costs in some amount.

Claimant requests assessment of his filing fee ($100.00); service fees ($13.54); and deposition transcript ($48.00). These requests are reasonable and are assessed to defendants pursuant to 876 IAC 4.33 subsections (1), (3), and (7).

Claimant also seeks assessment of the FCE in the amount of $900.00. The FCE was commissioned at the direction of claimant's attorney and not at the direction of any physician. However, Dr. Westpheling ultimately relied on the FCE when rendering his opinions, which came at defendants' request. I therefore find that the facts of this case are distinguishable from Sainz v. Tyson Fresh Meats, Inc., File No. 5053964 (App. Sept. 28, 2018). I conclude the cost of the FCE report should be assessed under rule 876 IAC 4.33(6).

Pursuant to the Supreme Court's direction in Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839 (Iowa 2015), only the cost of a report—and not the underlying examination—is taxable under 876 IAC 4.33(6). While claimant seeks an assessment of $900.00, the billing statement for the FCE indicates the report charge

was $350.00, while the examination charge was $550.00. (Cl. Ex. 12, p. 19) I therefore conclude only $350.00 can be taxed to defendants pursuant to rule 876 IAC 4.33(6).

In total, defendants are taxed costs in the amount of $511.54.

ORDER

THEREFORE, IT IS ORDERED:

Defendants shall pay claimant one hundred twenty-five (125) weeks of permanent partial disability benefits commencing on the stipulated date of February 16, 2016 at the stipulated weekly rate of seven hundred fifteen and 73/100 dollars ($715.73).

Defendants are entitled to a credit of one thousand seven hundred thirty-five and 91/100 dollars ($1,735.91) against claimant's permanent partial disability for their overpayment of temporary total disability/healing period benefits.

Defendants are also entitled to a credit for benefits previously paid.

Defendants shall pay accrued weekly benefits, including but not limited to the underpayment of the weekly rate, 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 pay penalty benefits in the amount of two thousand and 00/100 dollars ($2,000.00).

Defendants shall reimburse claimant's costs totaling five hundred eleven and 54/100 dollars ($511.54).

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

Signed and filed this 21st day of February, 2019.

STEPHANIE J. COPLEY
DEPUTY WORKERS'
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SJC/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.