BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

CHARLES FONDELL, Claimant, vs. JOHN DEERE DUBUQUE WORKS OF DEERE & COMPANY, Employer, Self-Insured, Defendant.	:	File No. 5054975 A R B I T R A T I O N D E C I S I O N Head Notes: 1802, 1803, 2502, 2907

STATEMENT OF THE CASE

Charles Fondell, claimant, filed a petition in arbitration and seeks workers' compensation benefits from defendant, John Deere Dubuque Works of Deere & Company (hereinafter referred to as "John Deere"), as the self-insured employer. Hearing occurred before the undersigned on January 11, 2018, in Waterloo.

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. 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 includes Joint Exhibits 1 through 9, Claimant's Exhibits 1 through 6, and Defendants' Exhibits A through L. All exhibits were received without objection.

Claimant testified on his own behalf. Defendants elected not to call any witnesses to testify. The evidentiary record closed at the conclusion of the January 11, 2018 hearing. However, counsel requested the opportunity to file post-hearing briefs. The parties' request was granted and counsel filed post-hearing briefs on February 19, 2018, at which time the case was considered fully submitted to the undersigned.

ISSUES

1. The extent of claimant's entitlement to healing period, if any.

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

3. The proper commencement date for permanent disability benefits.

4. Whether claimant is entitled to reimbursement for an independent medical evaluation pursuant to Iowa Code section 85.39.

5. Whether defendants are entitled to apportionment for prior permanent disability related to a right upper extremity injury.

6. Whether claimant should be awarded penalty benefits for defendants' failure to pay healing period benefits after claimant's surgeries.

7. Whether costs should be assessed against either party.

In their post-hearing brief, defendant withdrew any request for apportionment of permanent disability for a prior right arm injury. No prejudice will befall claimant through the withdrawal of this disputed issue. Therefore, defendant's request for apportionment is considered withdrawn and no factual findings or conclusions of law will be entered pertaining to this previously disputed issue.

FINDINGS OF FACT

Having considered all of the evidence and testimony in the record, recognizing that there may be competing or contradictory facts within this evidentiary record, I find the following facts:

At the time of the arbitration hearing, Charles Fondell was a 63-year-old gentleman. He presented at hearing well-spoken and appeared to be in good physical health and condition. Mr. Fondell worked at John Deere for almost 42 years. During that tenure, he had significant periods of lay-off and took employment with other employers during the lay-offs. However, for all practical purposes, Mr. Fondell's main employment skills are those he developed at John Deere.

Mr. Fondell worked as a fork lift driver and performing assembly at John Deere. However, during the last 30 years of his career at John Deere, Mr. Fondell performed welding duties of one sort or another. He has a high school diploma and took some courses at a local community college. However, he dropped out of college because he obtained employment and was recalled to that employment with John Deere. Mr. Fondell has obtained some certifications for various skills during his period of employment with John Deere, including robotics and welding. (Claimant's testimony; Defendant's Exhibit F, pages 42-45)

On January 27, 2014, claimant was attempting to report to work. He slipped on ice located on the employer's premises. He grabbed a handrail with his right hand and sustained injuries to his right arm and shoulder. He reported the injury and the company provided him medical treatment. Claimant was reassigned and returned to work performing light duty activities after his January 27, 2014 work injury.

Prior to the occurrence of the January 27, 2014 work injury, claimant had given notice of his intention to retire from John Deere. The company had offered aging workers the opportunity to obtain an early retirement buyout. Mr. Fondell elected to accept that buyout and was intending to retire in February 2014. He testified that his plan was to retire and accept employment from a co-worker at John Deere, who owned a scooter shop and wanted claimant to work repairing scooters.

After the injury occurred, claimant elected to proceed with the retirement because of the financial incentives. He concedes that he was not coerced or required to retire. He could have withdrawn his retirement notice even after the work injury. I find that claimant voluntarily retired from John Deere, as part of an early retirement offer from the company, on February 28, 2014.

As noted, after the work injury, the employer provided claimant medical treatment. Initial conservative treatment was not successful and the local plant physician referred claimant for orthopaedic evaluation by David S. Field, M.D. Dr. Field obtained consultation with a pain specialist and ultimately recommended surgical intervention on claimant's right shoulder and a right carpal tunnel release. Mr. Fondell requested a second opinion before proceeding with surgical intervention and the company consented.

John Deere sent claimant to be evaluated by Stephen Pierotti, M.D. for the second opinion. Dr. Pierotti concurred with the surgical recommendations and assumed care of claimant.

Dr. Pierotti took claimant to surgery and performed a right carpal tunnel release on July 22, 2014. Claimant returned to surgery and Dr. Pierotti performed a right shoulder arthroscopy with subacromial decompression, an arthroscopic rotator cuff repair and a biceps tenotomy on August 28, 2014. Unfortunately, the shoulder surgery did not entirely resolve claimant's shoulder symptoms. Dr. Pierotti performed a second shoulder surgery on claimant on July 9, 2015, specifically working on claimant's biceps tendon. (Joint Exhibit 3)

In October 2015, claimant obtained an independent medical evaluation, performed by Mark C. Taylor, M.D. Dr. Taylor opined that claimant was not yet at maximum medical improvement following shoulder surgery. However, he offered the opinion that claimant sustained a five percent permanent impairment of the whole person as a result of the combined effects of his right shoulder and right carpal tunnel injuries. He imposed restrictions, though again, did not indicate that claimant was at maximum medical improvement. (Joint Ex. 2)

Defendants asked Dr. Pierotti to ponder the impairment rating offered by Dr. Taylor. Dr. Pierotti concurred with and adopted Dr. Taylor's impairment rating. (Joint Ex. 6, p. 67)

Unfortunately, claimant continued to experience symptoms in his right shoulder following the second surgery. Claimant's care was ultimately transferred to James V. Nepola, M.D. at the University of Iowa Hospitals and Clinics. Dr. Nepola performed a third surgery on claimant's right shoulder, which included a right biceps tenodesis as well as repair of a partial-thickness tear of the claimant's right pectoralis major. (Joint Ex. 5, p. 44)

Dr. Nepola documented a good surgical recovery after his shoulder surgery. By September 5, 2017, Dr. Nepola was reporting claimant had very minor, if any, shoulder pain and that he was doing very well overall. He declared maximum medical improvement on September 5, 2017 and opined that claimant requires no restrictions for his right shoulder, although he recommended claimant lift with his shoulders at his sides. (Joint Ex. 5, p. 65)

In November 2017, Dr. Taylor issued a second independent medical evaluation report. He concurred with Dr. Nepola's assignment of maximum medical improvement on September 5, 2017. He documented ongoing positive EMG findings related to claimant's right carpal tunnel syndrome, and opined that claimant has a seven percent permanent impairment as a result of the combined effects of the right shoulder and right carpal tunnel injuries. (Joint Ex. 2, p. 16) Dr. Taylor opined that claimant requires lifting restrictions that preclude lifting more than 30 pounds occasionally and no more than 15-20 pounds at or above shoulder level. Dr. Taylor recommended lifting with claimant's right arm as close to his body as possible. Dr. Taylor also recommended that claimant crawl no more than occasionally, that he use vibratory or power tools no more often than rarely, and that he avoid forceful grip or grasp tasks, as well as forceful or repetitive supination or pronation of his right forearm. (Joint Ex. 2)

In December 2017, Dr. Nepola authored a report opining that claimant sustained a seven percent permanent impairment of the whole person as a result of the combined effects of his right carpal tunnel syndrome and right shoulder issues. (Joint Ex. 9, p. 91) Dr. Nepola confirmed again that claimant requires no activity restrictions for his right shoulder and that he was at maximum medical improvement. (Joint Ex. 9, p. 93)

Following his initial right shoulder surgery, Mr. Fondell was off work and provided medical restrictions precluding work from August 28, 2014 through November 11, 2014. (Joint Ex. 4, p. 24) I find no other medical restrictions in this evidentiary record that precluded Mr. Fondell from returning to work in some other capacity during other relevant claimed periods of healing period.

Mr. Fondell was not paid healing period benefits during the period from August 28, 2014 through November 11, 2014. Given the off work restrictions from Dr. Pierotti, I perceive no reasonable basis for defendants to deny or withhold healing period benefits during this period of time.

With respect to the competing medical opinions, I find that Dr. Nepola offers the most convincing opinion pertaining to claimant's permanent impairment. Dr. Pierotti

initially opined that claimant had no permanent impairment, despite having performed carpal tunnel release and two shoulder surgeries with ongoing symptoms. He later revised his opinion, without re-evaluating claimant, after Dr. Taylor issued a permanent impairment rating. Dr. Pierotti's initial impairment rating is not convincing, and the fact that he changed his impairment rating without re-evaluating claimant does not instill confidence that he really knows claimant's final impairment.

Dr. Taylor offered an impairment rating before claimant achieved maximum medical improvement. Dr. Taylor later had to document ongoing EMG findings and then increase his permanent impairment rating. Ultimately, defendant paid the seven percent impairment rating offered by Dr. Taylor, but now also wants to argue that Dr. Nepola's full-duty release is most convincing. I am not entirely convinced by Dr. Taylor's changing impairment rating, particularly since his rating, initially provided before Dr. Nepola, identified the additional pectoralis major defect.

Dr. Nepola inspected claimant's shoulder intra-operatively. He identified an injury that was not previously repaired. Dr. Nepola also had the opportunity to evaluate claimant at the time of maximum medical improvement. I accept Dr. Nepola's nine percent permanent impairment rating of the whole person as accurate.

With respect to claimant's permanent restrictions, I do not find Dr. Nepola's full release to be convincing. Even when he said claimant has no activity restrictions, Dr. Nepola recommends any lifting be done with claimant's shoulders against his sides. After three shoulder surgeries, a full-duty release is not likely a good idea or a realistic assessment of Mr. Fondell's residual functioning level.

On the other hand, Dr. Taylor's restrictions appear somewhat too restrictive. Dr. Taylor would restrict claimant's lifting to 30 pounds occasionally. However, at trial, claimant conceded in his testimony that he "could probably lift 50 pounds if I use both hands." (Transcript, p. 83) Dr. Taylor's restrictions are more cautious than the amounts claimant concedes he can lift. Therefore, I do not find Dr. Taylor's restrictions to be convincing.

Claimant has had a good result from his third shoulder surgery. He has minimal symptoms and minimal limitations as a result of that surgery. I find Dr. Nepola's recitation of claimant's recovery convincing and find that claimant has minimal, if any, residual shoulder pain. Yet, it is necessary for claimant to lift with his shoulders against his body, and claimant's estimate of a 50-pound lift is accepted as reasonable and likely accurate for his lifting capability following his three shoulder surgeries.

I also found Mr. Fondell's testimony about his residual difficulties with his right hand to be credible. He lacks some range of motion and strength in the right hand. He noted some ongoing numbness and a propensity to drop things with the right hand. Dr. Taylor's restrictions pertaining to crawling, vibratory or power tools, supination and pronation of the right forearm all seem reasonable and necessary for these types of carpal tunnel symptoms.

At claimant's age, retraining is not a likely vocational route. Given his lack of skills other than in manual labor such as welding, claimant has a significant reduction of his earning capacity following these injuries. He is not qualified to return to work at John Deere with the permanent restrictions he carries.

Mr. Fondell has not aggressively attempted to return to work or apply for full-time employment since the injury date. His plan upon retiring from John Deere was to work for a co-worker at John Deere at the co-worker's business repairing scooters. However, after his work injury, the co-worker did not ultimately provide claimant employment.

Mr. Fondell has worked part-time for a landscaping company, driving a truck to deliver supplies and operating machinery to perform grass seed spreading and fertilizing of lawns. He is not likely to perform landscaping work full-time and could not perform the full scope of landscaping work following this work injury. Claimant has not aggressively sought additional, or alternate, work.

Nevertheless, he does not have restrictions on the amount of hours he can work. He testified he is likely to seek full-time employment into the future and that he had hoped to work to age 66 or beyond before his injury and retirement from John Deere.

Mr. Fondell argued in his post-hearing brief that he is permanently and totally disabled. He did not prove he is permanently and totally disabled. In fact, he has demonstrated some residual ability to work and testified he will likely seek full-time employment into the future. I find that Mr. Fondell has not proven he is permanently and totally disabled.

On the other hand, the employer argues that claimant sustained a seven percent industrial disability. In essence, the employer argues that claimant is unmotivated to work because he retired from John Deere and takes both a pension and Social Security retirement benefits. The employer essentially argues that claimant has not applied for work, but has no permanent work restrictions from Dr. Nepola. Interestingly, the employer prefers to rely upon Dr. Taylor's seven percent impairment rating, while utilizing Dr. Nepola's release without restrictions. I find that claimant has proven a loss of future earning capacity significantly above that urged by the employer.

Considering claimant's age, his educational and employment backgrounds, his inability to return to work at John Deere, his permanent restrictions, his permanent impairment, the situs of his injuries, including the severity requiring multiple surgeries on his right shoulder, as well as all other factors of industrial disability outlined by the Iowa Supreme Court, I find that Mr. Fondell sustained a 50 percent loss of his future earning capacity as a result of the January 27, 2014 work injury at John Deere.

CONCLUSIONS OF LAW

The parties stipulate that claimant sustained a work-related injury on May 24, 2015. (Hearing Report) As a result of this work injury, Mr. Fondell asserts claims for

healing period benefits from July 22, 2014 through April 28, 2015, from July 9, 2015 through February 1, 2016, and November 16, 2016 through September 5, 2017. (Hearing Report) Claimant contends that healing period should be payable during these periods of time because he had surgery and did not return to work during these periods of time.

Defendant contends that claimant cannot qualify for any healing period benefits after February 28, 2014 because claimant voluntarily resigned his employment with John Deere on that date. Defendant contends that a voluntary resignation constitutes a refusal of suitable work from that date forward. Defendant, therefore, contends that claimant has declined suitable work and is disqualified from any healing period benefits after February 28, 2014.

I do not concur entirely with either party's analysis or argument on the healing period issue. 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. However, the Court did not suggest that a voluntary resignation was a waiver of all healing period benefits, including benefits that would be owed during a period when the claimant was entirely removed from work.

The Iowa Workers' Compensation Commissioner has specifically considered and rejected the employer's current argument. 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.

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

Pursuant to the Commissioner's decision in Carillo, the claimant's voluntary resignation on February 28, 2014, constituted a refusal of suitable work on that date and for all dates into the future. However, if claimant can establish that he was removed entirely from work, suitable work would become an impossibility and claimant would again qualify for healing period benefits.

In this case, I found that claimant proved only one period of time in this evidentiary record where he was entirely removed from work. Specifically, I found that claimant was off work after his surgery on August 28, 2014 through November 11, 2014. Using the analysis provided by the Commissioner in Carillo, I conclude that claimant is entitled to an award of healing period benefits from August 28, 2014 through November 11, 2014. Iowa Code section 85.34(1).

The next disputed issue is the extent of claimant's entitlement to permanent disability. Mr. Fondell argues that he is permanently and totally disabled, while defendant contends that claimant is entitled to nothing more than the seven percent permanent impairment rating already paid by defendant. Neither argument is terribly convincing.

Mr. Fondell testified that he has obtained subsequent employment and that he is likely to pursue full-time employment into the future. He has demonstrated very little motivation to return to work and has not been actively submitting applications or seeking employment. He has not proven he is permanently and totally disabled.

Defendant's argument is similarly unpersuasive. Mr. Fondell has had multiple shoulder surgeries as well as a carpal tunnel release. He credibly testified that he has ongoing symptoms in his hand, including issues with strength, lack of range of motion, numbness, and dropping items. His shoulder surgeries have resulted in his biceps tendon injury and repair. He had rotator cuff pathology as well as a pectoralis major repair performed.

Dr. Nepola opined that claimant has no functional limitations. Yet, he recommended lifting with his arms at his sides. Dr. Nepola opined that claimant's functional limitation exceeds the permanent disability urged by defendants. At Mr. Fondell's age, given his employment and educational backgrounds, it is not realistic to argue or conclude that this injury has had almost no impact on his future earning capacity. The truth lies somewhere between the extremes argued by the parties.

The parties stipulate that the injury should be compensated with industrial disability. (Hearing Report) 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.

Having considered claimant's age, the situs and severity of her injuries, her permanent impairment, permanent restrictions, ability to return to gainful employment, her motivation level, educational background, employment history, language barriers, and all other industrial disability factors identified by the Iowa Supreme Court, I found that claimant sustained a 50 percent loss of future earning capacity. This entitles claimant to a 50 percent industrial disability award, or 250 weeks of permanent disability benefits. Iowa Code section 85.34(2)(u).

The parties also dispute the proper commencement date for permanent disability benefits. Pursuant to Iowa Code section 85.34(2), permanent partial disability benefits commence upon the termination of the claimant's healing period. In Evenson v. Winnebago Industries, Inc., 881 N.W.2d 360, 372 (Iowa 2016), the Iowa Supreme Court made it clear that permanent disability benefits commence upon the earliest of the factors in Iowa Code section 85.34(1) occurring.

In Iowa Code section 85.34(1), healing period benefits terminate upon the earliest of claimant's return to work, claimant becoming medically capable of returning to substantially similar employment, or achieving maximum medical improvement. Returning to work and performing light duty work terminates the healing period. Evenson, 881 N.W.2d at 372.

In this instance, I found that Mr. Fondell returned to work and the employer provided him light duty work immediately after the work injury occurred. Accordingly, claimant's permanent partial disability benefits commence on January 28, 2014. Evenson v. Winnebago Industries, Inc., 881 N.W.2d 360, 372 (Iowa 2016).

Mr. Fondell seeks reimbursement of his independent medical evaluation fee pursuant to Iowa Code section 85.39. 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).

An employer is not obligated to reimburse a claimant's independent medical evaluation fee unless the claimant has complied with the necessary statutory process for obtaining that reimbursement. Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839, 844 (Iowa 2015). In this case, claimant has not established that defendant selected a physician or obtained a permanent impairment rating before claimant obtained Dr. Taylor's evaluation and impairment rating. Therefore, I conclude that claimant has not established entitlement to reimbursement of Dr. Taylor's evaluation pursuant to Iowa Code section 85.39.

In the hearing report, claimant also asserted a claim for penalty benefits pursuant to Iowa Code section 86.13 for defendant's failure to pay healing period benefits after his surgeries. Having concluded that claimant only proved entitlement to one of those asserted healing period claims, I conclude that no penalty benefits can be awarded for the remaining claims, as no weekly benefits were proven to be owed.

However, healing period benefits were awarded from August 28, 2014 through November 11, 2014. Therefore, the penalty benefit claim must be considered for this period of time.

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.

Focusing on the healing period awarded from August 28, 2014 through November 11, 2014, I perceive no reasonable basis in this evidentiary record upon which defendant could deny liability for these healing period benefits. Defendant denied benefits during this period of time under the theory that claimant forfeited all entitlement to healing period benefits through his voluntary resignation of employment at John Deere.

However, defendant's position and argument for this denial of benefits is in direct contradiction of an appeal decision issued by the Iowa Workers' Compensation Commissioner more than three years before the claimed healing period. Defendant provided no basis for denial in light of the commissioner's appeal decision in Carillo. Defendant bore the burden to establish a reasonable basis, or excuse, and to prove the contemporaneous conveyance of those bases to the claimant. Defendant failed to carry their burden of proof on the penalty issues, and a penalty award is appropriate. Iowa Code section 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).

In this case, defendant's asserted basis for denial of healing period benefits is in direct contradiction of an appeal decision issued by the Iowa Workers' Compensation Commissioner three years before this healing period occurred. Defendant did not present any evidence to justify withholding or denial of the healing period benefits, other than a mistaken understanding of the law at the time the denial was made. Given this failure to research the law to ensure compliance before denying benefits, a significant penalty is warranted.

Having awarded 10 weeks and 6 days of healing period benefits at the rate of $882.50, I conclude that the total of the healing period benefits unreasonably denied are $9,581.30. Considering the purposes of Iowa Code section 86.13, I conclude that a penalty totaling $3,000.00 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. Claimant sustained a

work-related injury and recovers an award in this case. I conclude that it is appropriate to assess claimant's costs in some amount.

Mr. Fondell requests assessment of his filing fee ($100.00). This request is reasonable and is assessed pursuant to 876 IAC 4.33(7).

Claimant also seeks assessment of the independent medical evaluation fees of Dr. Taylor pursuant to 876 IAC 4.33(6). This administrative rule permits the assessment of the reasonable costs of obtaining no more than two doctors' or practitioners' reports. This administrative rule has specifically been interpreted by the Iowa Supreme Court as permitting the assessment of the cost of drafting the report but not to include the examination fees associated with an independent medical evaluation. Des Moines Area Regional Transit Authority, 867 N.W.2d 839 (Iowa 2015).

I conclude that it is reasonable and appropriate to assess Dr. Taylor's charges for drafting his initial report. According to his billing statement, Dr. Taylor charged $1,805.00 for drafting his report. (Claimant's Ex. 4, p. 14) I find this amount to be reasonable and appropriate under the circumstances of this case. Therefore, I assess $1,805.00 of Dr. Taylor's charges to be reimbursed by defendant.

Claimant also seeks the expense of obtaining various medical records from eight different medical providers. Agency rule 4.33 does not permit the assessment of these expenses. I conclude that these expenses should not be assessed as costs.

ORDER

THEREFORE, IT IS ORDERED:

Defendant shall pay claimant healing period benefits from August 28, 2014 through November 11, 2014.

Defendant shall pay claimant two hundred fifty (250) weeks of permanent partial disability benefits commencing on January 28, 2014.

All weekly benefits shall be paid at the stipulated rate of eight hundred eighty-two and 50/100 dollars ($882.50).

All accrued weekly benefits shall be paid in lump sum with interest pursuant to Iowa Code section 85.30.

Defendant shall pay claimant three thousand dollars ($3,000.00) in penalty benefits pursuant to Iowa Code section 86.13.

Defendant shall reimburse claimant's costs totaling one thousand nine hundred five dollars ($1,905.00).

Defendant 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 5th day of April, 2018.

WILLIAM H. GRELL
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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Right to Appeal: This decision shall become final unless you or another interested party appeals within 20 days from the date above, pursuant to rule 876-4.27 (17A, 86) of the Iowa Administrative Code. The notice of appeal must be in writing and received by the commissioner's office within 20 days from the date of the decision. The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday. The notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 1000 E. Grand Avenue, Des Moines, Iowa 50319-0209.