BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

KIRBY KAHLER, Claimant, vs. MENARD, INC., a/k/a MIDWEST MANUFACTURING, Employer, and XL INSURANCE, Insurance Carrier, Defendants.	File No. 1629501.01 ARBITRATION DECISION Head Note Nos.: 1108, 1803, 2500

STATEMENT OF THE CASE

The claimant, Kirby Kahler, filed a petition for arbitration on March 26, 2020, and seeks workers' compensation benefits from Menard, Inc. (hereafter, Midwest Manufacturing), employer, and XL Insurance, insurance carrier. The claimant was represented by Joshua Moon. The defendants were represented by Charles Blades.

The matter came on for hearing on January 21, 2021, before Deputy Workers' Compensation Commissioner Joe Walsh in Des Moines, Iowa via Court Call videoconferencing system. The record in the case consists of Joint Exhibits 1 through 10; Claimant's Exhibits 1 through 12; and Defense Exhibits A through H. The claimant testified at hearing, in addition to Troy Franke. Lucinda Winslow-Haidsiak served as the court reporter. The matter was fully submitted on February 15, 2021 after helpful briefing by the parties.

ISSUES & STIPULATIONS

Prior to hearing, the parties filed a Hearing Report which was approved and became an Order. The stipulations contained in that Order are binding.

The parties have stipulated that the claimant was an employee of the employer and he sustained an injury which arose out of and in the course of his employment on February 17, 2017. The injury is a cause of some temporary and permanent disability. The claimant is alleging he is entitled to some additional temporary disability benefits between December 7, 2020, and December 11, 2020. Defendants dispute claimant is entitled to any temporary benefits in this timeframe. The primary issue is the extent of

claimant's industrial disability. Claimant contends he is entitled to industrial disability benefits. Defendants dispute this, however, the parties have stipulated that the disability is industrial and the commencement date for such benefits is February 26, 2018.

The gross earnings are disputed although the parties have stipulated to marital status and exemptions. Affirmative defenses have been waived.

Claimant is seeking medical expenses which are outlined in Claimant's Exhibit 12. Defendants dispute claimant's entitlement to any such benefits on the basis of causal connection and authorization. Claimant also seeks alternate medical care.

Defendants assert that prior to hearing, claimant was paid 35 weeks of compensation at the rate of compensation calculated by defendants. Claimant disputed this at the time of hearing.

Claimant seeks interest and penalty for late payments. Defendants dispute this claim. Defendants have raised the issue of causal connection between claimant's current back condition and the original work injury. Finally, the claimant seeks the costs outlined in Claimant's Exhibit 10.

FINDINGS OF FACT

Claimant, Kirby Kahler was 53 years old as of the date of hearing. He testified live and under oath (via Court Call). I find his testimony to be credible. There was nothing unusual about his testimony or demeanor that caused me any concern for his truthfulness. It generally coincides with the remainder of the record. He was a relatively good historian.

Mr. Kahler resides in Allison, Iowa. He is divorced with three children. He graduated from Waverly Shell-Rock High School in 1986. He has a little over four years of college between Waldorf, Ellsworth and Upper Iowa University. He never earned a college degree. (Claimant's Exhibit 6, page 2) After college, Mr. Kahler worked for short periods in different industries, including construction drilling (water wells) and building maintenance before securing employment with Bertch Cabinets. He worked at Bertch from 1994 to 2008 building kitchen cabinets, earning up to $15.00 per hour. (Cl. Ex. 6, p. 3) He testified he performed a number of jobs at Bertch which were mostly manual labor. Toward the end of his employment he bid into a computer job doing custom coding to assist with production. (Transcript, pages 15, 20) In 2008-2009, he performed employment performing some basic coding work for Smart Software, earning $40,000 per year. Smart Software filed for bankruptcy in 2009 and Mr. Kahler became unemployed.

For about three years, Mr. Kahler performed some work for Waverly Redemption Center, redeeming bottles and cans. This was a business owned by his brother which paid him on a contract basis. Mr. Kahler testified he earned $10-$12,000.00 per year.

(Tr., p. 22) He then worked three years for Custom Millwork and Finishing running a machine and earning about $16.50 per hour. He worked for Crown Group hanging parts on a finish line for a short time. He started working at Menard/Midwest Manufacturing in 2016. He testified that he was a production laborer and his job was to load and unload trucks. (Tr., p. 26) He earned approximately $13.00 per hour.

Prior to working at Midwest Manufacturing, Mr. Kahler was generally healthy. There is a dispute about whether his back condition at the time of hearing, is causally connected to his work injury, and the defendants specifically contend that he has a bad back which is not connected to his employment at Midwest. Mr. Kahler did, in fact, have periods of intermittent back treatment beginning in approximately 2006. He suffered an injury while lifting a bag of cement at home and was unable to stand upright. (Tr., p. 17) He testified he sought chiropractic care and then saw a specialist. He testified he ultimately received a series of epidural steroid injections, which he testified controlled his pain. There are no medical reports in evidence of treatment from the 2006 cement bag incident. He testified that following this injury, he experienced symptoms in his low back from time to time. "I had some issues with my back where I would get fits of tightness of feeling that I was out of alignment or out of whack, and I would seek the care of a chiropractor." (Tr., p. 19) He testified that between his "cement bag" injury and his work injury of 2017, he did not have symptoms into his buttocks or leg and he did not miss any work from his low back symptoms. (Tr., pp. 19-20)

The only medical notes in evidence related to his past treatment are recorded from his chiropractor, James Brooks, DC, demonstrating he received treatment for left-sided radiculopathy in 2012 and 2013. (Jt. Ex. 10, pp. 1-4) On cross-examination, Mr. Kahler acknowledged this was correct. (Tr., pp. 57-58) The records show he continued to treat sporadically thereafter with various low back complaints, including right side leg pain and just back pain. (Jt. Ex. 10, pp. 5-13) He even saw Dr. Brooks on February 10, 2017, for back and neck pain with no mention of any radiating symptoms or leg pain on either side. (Jt. Ex. 10, p. 13) The evidence supports a finding that Mr. Kahler had ongoing, chronic low back pain at the time he suffered his work injury described below. Other than the period of time in 2013 and 2014, this did not cause significant radicular symptoms in his left leg.

Mr. Kahler sustained an injury to his low back on February 17, 2017, which arose out of and in the course of his employment with Midwest Manufacturing. Again, this fact is stipulated. On that date, he was lifting a box at work and had a sudden onset of pain. He was evaluated at Waverly Health Center the same day and the following is documented.

> Patient is a 49-year-old male that presents for lower left back pain persisting for two hours. Patient has a history of chronic low back pain that has been previously managed with injections/pain control dating back to 2006. Patient today was lifting a box at work at Midwest Manufacturing and felt severe left back pain. Patient described pain that started in his left lower back and radiated down his lateral left leg and into his foot.

> Describes weakness in his left leg. Patient describes numbness/tingling in his LLE. Patient had MRI scans in 2006, managed by Dr. Buchanon. He did take ibuprofen before coming to the ER. …

(Jt. Ex. 1, p. 1) X-rays were taken which showed degenerative disc disease and he was prescribed Hydrocodone.

Mr. Kahler followed up with Covenant Clinic on February 22, 2017. The following history was documented at Covenant.

> He is here for back pain that started mid Friday morning at work. He was lifting and twisting. He felt like his low back went into a vice. He reports pain down the back of his left leg and tingling down to his left foot. The pain medication does help with that. He has had some residual back pain from an injury like this in 2007. He had been seen Dr. Buchanan after that and he wanted to hold off on surgery because he wasn't having weakness in his foot. He was told he has bulging disks at L4 and L5. He will see Dr. Brooks for adjustments when he is having trouble. It seems like he has been there a lot lately. He feels better after he has been there.

(Jt. Ex. 2, p. 1) He was provided a work excuse and conservative treatment, including a physical therapy referral, at the clinic. He eventually had an MRI on March 12, 2017, and was referred to a specialist, Chad Abernathey, M.D.

Dr. Abernathey evaluated Mr. Kahler on April 14, 2017. Dr. Abernathey documented the following.

> HISTORY: Mr. Kirby Kahler is a 47 year old white male who presents with approximately a two month history of low back pain with radiation into the left lower extremity. He reports pain, numbness, and tingling along the lateral aspect of the left thigh, calf, and foot with weakness on dorsiflexion and plantar flexion of the ankle and toes. He denies right-sided symptoms, bladder or bowel dysfunction or other neurologic symptoms and signs. He has undergone conservative management under the care of Angie Gingrich, NP and Dr. Kirkle. To date, medical management including physical therapy has not alleviated his symptomatology. He is referred to me for a neurosurgical opinion. The patient states that his symptoms began when he was lifting boxes of metal shelving at work.

(Jt. Ex. 5, p. 1) Dr. Abernathey noted that the MRI "demonstrates left L4-5 and left L5-S1 lateral recess stenosis with disc protrusions." (Jt. Ex. 5, p. 2) He recommended surgery.

Surgery was performed on May 11, 2017. It was described as "left L4-L5 and L5-S1 partial hemilaminectomies, discectomies, decompression." Jt. Ex. 6, p. 1) Mr. Kahler was off work from the date of surgery through June 26, 2017 when he was

approved to return to work on light-duty. Mr. Kahler testified that Dr. Abernathey provided prescriptions for an ergonomic chair and a TENS unit which were not honored. (Tr., p. 32) Otherwise, Mr. Kahler had a normal course of post-operative treatment including physical therapy. (Jt. Ex. 3, p. 12) Mr. Kahler testified that the surgery was successful. (Tr., p. 30) His left leg pain and numbness had essentially resolved. He still had low back pain. In December 2017, Dr. Abernathey placed Mr. Kahler at maximum medical improvement (MMI) and opined that he had sustained a functional impairment rating of 7 percent of the whole body. (Jt. Ex. 5, p. 6) He released Mr. Kahler without restrictions.

Following his release to work, Mr. Kahler continued to work in the parts department. He transferred to a new position as a parts buyer and he received pay raises. He was in charge of purchasing parts for repairs and building within the maintenance department. This position was lighter and involved a good deal of computer work. (Tr., p. 47) Mr. Kahler followed up with Dr. Abernathey in July 2018. He was given a prescription for an ergonomic chair and a TENS unit, however, it was noted that he was working "without significant difficulty." (Jt. Ex. 5, p. 4) Mr. Kahler testified the employer did not honor these prescriptions. He continued to work for the employer through September 2018 when he quit because he "wasn't comfortable working there anymore." (Tr., p. 36)

Troy Franke testified on behalf of the employer. Mr. Franke was the site manager for Midwest Manufacturing. His testimony is generally credible. He testified that when Mr. Kahler returned to the parts buyer position, he was unaware of any difficulties performing this work. (Tr., p. 75) He testified that he did not recall getting any prescriptions for an ergonomic chair or TENS unit. He testified that when Mr. Kahler quit, he indicated that he was going to work for his brother who owned rental properties. (Tr., p. 74) On cross examination, Mr. Franke acknowledged that Mr. Kahler complained about his back hurting him. (Tr., p. 78)

The employer's records suggest that Mr. Kahler was terminated for no call no show. (Def. Ex. H, p. 44) It appears that Mr. Kahler provided a two-week notice and then stopped showing up.

Mr. Kahler quickly obtained employment with Richway Industries in September 2018. He was still employed with Richway at the time of hearing, earning $14.40 per hour. He works in "pinch valve assembly" which is essentially light manufacturing assembly work.

In February 2018, Mr. Kahler had initiated treatment with Calease Chiropractic complaining of significant pain. (Jt. Ex. 9, p. 2) The chiropractic note indicates that Mr. Kahler had chronic left-sided low back pain, as well as some acute right-sided pain from a "slip this morning." (Jt. Ex. 9, p. 2) Mr. Kahler began receiving fairly regular chiropractic treatment thereafter.

In October 2018, Mr. Kahler returned to Dr. Abernathey with chronic left lower extremity paresthesia and intermittent sciatica. (Jt. Ex. 5, p. 5) He was referred for a repeat MRI. (Jt. Ex. 6, p. 5) After the MRI, Dr. Abernathey opined that the MRI showed a good decompression without significant recurrent disc extrusion or significant stenosis. He advised against further surgery and referred Mr. Kahler to a pain clinic for epidural steroid injections. This treatment was never scheduled. Instead, the defendants scheduled an independent medical exam (IME) with Trevor Schmitz, M.D., on April 3, 2019. After reviewing medical records and examining Mr. Kahler, Dr. Schmitz opined the following in a report dated May 3, 2019:

> I should note that the patient was placed at maximum medical improvement on December 20, 2017 and subsequently represented [sic] 9 months later for follow up with Dr. Abernathy [sic]. At that time, Dr. Abernathy [sic] recommended an epidural steroid injection noting that there was only minimal lateral recess stenosis on the left at L4-L5. I should note that the patient appeared to have a successful decompression and did have a 9-month gap in treatment where he did not seek any specific treatment. He is now presenting once again with low back and left leg pain. He does have a chronic history of low back pain as well as leg discomfort and had previously seen surgeons. In addition, in his records, there is documentation of being seen for chronic manipulations. I would state that it appears as though he had a successful decompression. I would state that he had received injections for low back and left leg pain prior. Thus, overall I would state that he did likely aggravate his underlying medical condition, and I certainly think he was at his baseline state and was at maximum medical improvement on December 20, 2017.

(Def. Ex. B, p. 6) Dr. Schmitz further opined that Mr. Kahler did not require any further treatment as it related to his work injury. (Def. Ex. B, p. 7)

Mr. Kahler continued to follow up with chiropractic care thereafter. He had numerous visits between October 2018 and December 2020, where he reported a number of complaints, including some minor injuries and incidents which aggravated his low back condition. (Jt. Ex. 9, pp. 2-7) Based upon these records, it appears Mr. Kahler was quite active during this time period. Generally, his back condition worsened during this period of time.

Sunil Bansal, M.D., examined Mr. Kahler and prepared an IME report dated November 4, 2019. (Cl. Ex. 1) He opined the following.

> In my medical opinion, Mr. Kahler incurred acute disc herniations at L4-L5 and L5-S1 on February 17, 2017 while working at Midwest Manufacturing. The above mechanism of bending, twisting, and lifting boxes is consistent with his L4-L5 and L5-S1 disc herniations.

> Disc pressure is increased 100 to 400% in the forward flexed spine position, greatly increasing the likelihood of disc bulging and annular tearing.

(Cl. Ex. 1, p. 10) Dr. Bansal assigned a 13 percent whole body impairment rating and recommended no lifting more than 20 pounds occasionally and 10 pounds frequently, as well as limiting his bending and twisting, and alternating standing and sitting. (Cl. Ex. 1, p. 11)

At the time of hearing, Mr. Kahler described his symptoms in detail. He has back pain which feels like pressure with a "pins-and-needles" feeling that goes down into his left buttocks and hip down into his foot. His symptoms vary depending upon his activity level, including how well he sleeps and how much he stands during the day. (Tr., pp. 35-36) He uses ibuprofen for the pain as needed. He testified the chiropractic care helps.

CONCLUSIONS OF LAW

The primary question submitted is the nature and extent of claimant's disability. The parties agree that claimant sustained an injury which arose out of and in the course of his employment and that it caused some permanent disability. Defendants stipulated to this and have paid the impairment rating in this case. The issue is whether Mr. Kahler has any disability beyond the 7 percent rating assigned by Dr. Abernathey. The defendants do rely upon the opinion of Dr. Schmitz that the claimant's disability largely preexisted his work injury, thus raising quasi-causation or apportionment issues as well.

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).

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 Ry. Co. of Iowa, 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.

It has long been the law of Iowa that Iowa employers take an employee subject to any active or dormant health problems and must exercise care to avoid injury to both the weak and infirm the strong and healthy. Hanson v. Dickinson, 188 Iowa 728, 176 N.W. 823 (1920). A material aggravation, worsening, lighting up or acceleration of any prior condition has been viewed as a compensable event ever since initial enactment of our workers' compensation statutes. Ziegler v. United States Gypsum Co., 252 Iowa 613; 106 N.W.2d 591 (1961). While a claimant must show that the injury proximately caused the medical condition sought to be compensable, it is well established in Iowa that a cause is "proximate" when it is a substantial factor in bringing about that condition. It need not be the only causative factor, or even the primary or the most substantial cause to be compensable under the Iowa workers' compensation system. Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417 (Iowa 1994); Blacksmith v. All-American, Inc., 290 N.W.2d 348 (Iowa 1980).

Defendants argue that claimant's disability is limited to the impairment rating, noting that he had a back condition long before the work injury and relying on the opinion of Dr. Schmitz who opined that his current condition is in no way related to the February 17, 2017, work injury. Claimant argues he has a significant industrial disability.

The greater weight of evidence supports a finding that the claimant has sustained a moderate industrial disability as a result of his work injury. Dr. Abernathey assigned a 7 percent permanent whole body rating as a result of the work injury. He assigned no work or activity restrictions. Mr. Kahler underwent surgery for this condition, which initially had good results alleviating his severe radicular symptoms. The results were excellent from maximum medical improvement and for a period of time. As Mr. Kahler

went on living his life, his symptoms did worsen, which is not uncommon. I reject the opinions of Dr. Schmitz as an effort to apportion out claimant's preexisting condition. I find the defendants are fully responsible for the claimant's back condition. Mr. Kahler did have a back condition prior to his work injury. The record is not entirely well-defined as it relates to exactly how bad his back was, however, there is no indication he had any work limitations, impairment, or that it in any way interfered with his capacity to work. In other words, while the record is clear that he had some back symptoms prior to the work injury it is equally clear that he had no industrial disability prior to the stipulated work injury. Dr. Schmitz simply used this fact to explain a way claimant's current condition as though the work injury had no impact upon it. This does not comport with the record or, for that matter, the stipulation of the parties.

For this reason, I find the opinions of Dr. Bansal, which are generally supported by the notes of the treating surgeon, that Mr. Kahler did sustain a moderate permanent disability. Mr. Kahler was 53 at the time of hearing with some college and numerous transferrable work skills. He has some experience with computers. While I doubt he has a future in the field of IT, he is at least not burdened with no computer skills at all. He is bright and employable. He easily obtained new, higher paying employment which is even within the restrictions recommended by Dr. Bansal. Mr. Kahler has remained quite active as demonstrated by his chiropractic records.

Mr. Kahler's disability, however, is not insignificant. He underwent a successful back surgery, however, he has permanent functional impairment of 13 percent of the whole body. While his treating physician released him with no restrictions, such release was provided at a point in time when his symptoms were less significant. The claimant likely should have some medical restrictions at least to prevent recurrence. Dr. Bansal has recommended significant work restrictions which would significantly limit claimant in the competitive job market. He testified that he has shared these restrictions with his current employer and they are working with him (although it appears he was doing the job before the restrictions were even recommended). The claimant's testimony regarding his current condition was compelling and believable. In the competitive job market at age 53, he is a somewhat less attractive employment candidate. Considering all of the relevant factors of industrial disability, I find claimant has sustained a 30 percent loss of earning capacity. I conclude that he is therefore entitled to 150 weeks of benefits commencing on February 26, 2018, as stipulated by the parties.

The next issue is whether claimant is entitled to a few days of healing period benefits from December 7, 2020, through December 11, 2020.

Section 85.34(1) provides that healing period benefits are payable to an injured worker who has suffered permanent partial disability until (1) the worker has returned to work; (2) the worker is medically capable of returning to substantially similar employment; or (3) the worker has achieved maximum medical recovery. The healing period can be considered the period during which there is a reasonable expectation of improvement of the disabling condition. See Armstrong Tire & Rubber Co. v. Kubli, 312

N.W.2d 60 (Iowa App. 1981). Healing period benefits can be interrupted or intermittent. Teel v. McCord, 394 N.W.2d 405 (Iowa 1986).

I find that claimant has failed to prove that his time off in December 2020, was causally-connected to his work injury.

The next issue is gross wages.

Section 85.36 states the basis of compensation is the weekly earnings of the employee at the time of the injury. The section defines weekly earnings as the gross salary, wages, or earnings to which an employee would have been entitled had the employee worked the customary hours for the full pay period in which the employee was injured as the employer regularly required for the work or employment. The various subsections of section 85.36 set forth methods of computing weekly earnings depending upon the type of earnings and employment.

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

The issue is whether certain weeks were "representative" of claimant's gross earnings. The wages are set forth in Claimant's Exhibit 7 at page 9. The wage records are contained in Defendants' Exhibit E. The claimant's calculation is in Claimant's Exhibit 3.

Having reviewed all of this documentation, I find that Mr. Kahler typically worked 35 to 41 hours per week in the quarter leading up to his work injury. I find that, while both calculations are reasonable, the defendants' calculation is the best representation of claimant's average earnings prior to his work injury. Consequently, I find Mr. Kahler had average gross earnings of $467.01 per week. I conclude therefore that his weekly rate of compensation is $325.32.

The next issue is medical expenses.

The employer shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance, and hospital services and supplies for all conditions compensable under the workers' compensation law. The employer shall also allow reasonable and necessary transportation expenses incurred for those services. The employer has the right to choose the provider of care, except where the employer has denied liability for the injury. Section 85.27. Holbert v. Townsend Engineering Co., Thirty-second Biennial Report of the Industrial Commissioner 78 (Review-Reopening, October 1975).

I find that the defendants are responsible for the medical expenses set forth in Claimant's Exhibits 11 and 12, excluding any mileage for unauthorized treatment (i.e., chiropractic care).

The next issue is penalty.

Claimant also seeks an award of penalty benefits pursuant to Iowa Code section 86.13. Iowa Code section 86.13(4) provides:

> a. If a denial, a delay in payment, or a termination of benefits occurs without reasonable or probable cause or excuse known to the employer or insurance carrier at the time of the denial, delay in payment, or termination of benefits, the workers' compensation commissioner shall award benefits in addition to those benefits payable under this chapter, or chapter 85, 85A, or 85B, up to fifty percent of the amount of benefits that were denied, delayed, or terminated without reasonable or probable cause or excuse.
>
> b. The workers' compensation commissioner shall award benefits under this subsection if the commissioner finds both of the following facts:
>
> (1) The employee has demonstrated a denial, delay in payment, or termination in benefits.
>
> (2) The employer has failed to prove a reasonable or probable cause or excuse for the denial, delay in payment, or termination of benefits.
>
> c. In order to be considered a reasonable or probable cause or excuse under paragraph "b," an excuse shall satisfy all of the following criteria:
>
> (1) The excuse was preceded by a reasonable investigation and evaluation by the employer or insurance carrier into whether benefits were owed to the employee.
>
> (2) The results of the reasonable investigation and evaluation were the actual basis upon which the employer or insurance carrier contemporaneously relied to deny, delay payment of, or terminate benefits.
>
> (3) The employer or insurance carrier contemporaneously conveyed the basis for the denial, delay in payment, or termination of benefits

> to the employee at the time of the denial, delay, or termination of benefits.

Claimant seeks a penalty for the underpayment of rate. Claimant was paid all benefits at a rate of $298.89. The defendants stipulated at hearing to a higher rate of $325.32. The defendants actually conceded the higher rate in June 2020, but failed to provide a reasonable excuse for the underpayment. No reasonable excuse was articulated at hearing. A penalty is mandatory. Using the appropriate factors to assess the amount of the penalty, I find a penalty of $500.00 is appropriate to deter defendants from making this type of mistake in the future.

ORDER

THEREFORE, IT IS ORDERED:

Defendants shall pay the claimant one hundred and fifty (150) weeks of permanent partial disability benefits at the rate of three hundred and twenty-five and 32/100 ($325.32) per week commencing February 26, 2018.

Defendants shall pay accrued weekly benefits in a lump sum.

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

Defendants shall be given credit for the thirty-five (35) weeks previously paid.

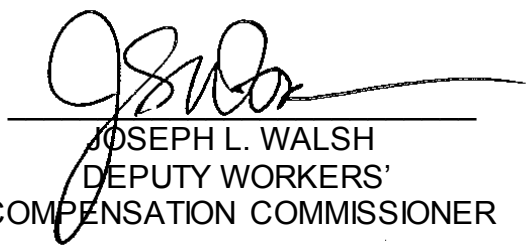
Defendants shall reimburse or pay the medical expenses set forth in Claimant's Exhibits 11 and 12.

Defendants shall pay a penalty in the amount of five hundred dollars ($500.00).

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

Costs are taxed to defendants in the amount of four hundred twenty-six and 40/100 dollars ($426.40).

Signed and filed this 12th day of October, 2021.



JOSEPH L. WALSH
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Joshua Moon (via WCES)

Charles Blades (via WCES)

Right to Appeal: This decision shall become final unless you or another interested party appeals within 20 days from the date above, pursuant to rule 876-4.27 (17A, 86) of the Iowa Administrative Code. The notice of appeal must be filed via Workers' Compensation Electronic System (WCES) unless the filing party has been granted permission by the Division of Workers' Compensation to file documents in paper form. If such permission has been granted, the notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 150 Des Moines Street, Des Moines, Iowa 50309-1836. The notice of appeal must be received by the Division of Workers' Compensation within 20 days from the date of the decision. The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or legal holiday.