BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

THOMAS T. SCHOOLEY, Claimant, vs. RUNNER FREIGHT SERVICES, LLC, Employer, and EMC INSURANCE COMPANY Insurance Carrier, Defendants.	FILED MAR 07 2019 WORKERS' COMPENSATION File No. 5060773 ARBITRATION DECISION Head Note Nos.: 1402.30, 1802, 1803, 2501, 4000.2

STATEMENT OF THE CASE

Claimant, Thomas Schooley, filed a petition in arbitration seeking workers' compensation benefits from Runner Freight Services, LLC (Runner), employer and EMC Insurance Company, insurer, both as defendants.

This case was heard in Des Moines, Iowa on January 24, 2019 with a final submission date of February 14, 2019.

The record in this case consists of Joint Exhibits 1-8, Claimant's Exhibits 1-5, Defendants' Exhibits A through F, and the testimony of claimant.

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

ISSUES

1. Whether claimant sustained an injury that arose out of and in the course of employment

2. Whether the injury resulted in a temporary disability.

3. Whether the injury resulted in permanent disability; and if so

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

5. Whether there is a causal connection between the injury and the claimed medical expenses.

6. Whether defendants are liable for a penalty under Iowa Code section 86.13.

FINDINGS OF FACT

Claimant was 57 years old at the time of the hearing. Claimant graduated from high school. He has online doctorate degrees in business administration, philosophy and religion. (Claimant's Exhibit 5)

Claimant has been in the Air National Guard and in the Air Force. He has been self-employed as a business consultant. He worked for a delivery service, called Beavex, as a night dispatcher and a terminal manager. The job required claimant to supervise warehouse employees, load trucks, file orders and answer phones. Claimant also worked as a dispatcher and a delivery driver. Claimant has worked as a telemarketer. (Cl. Ex. 2)

Claimant began employment with Runner on November 2, 2017. Claimant's job was to deliver auto parts to various NAPA stores in Iowa. Claimant's shift ran at night. Claimant testified the job took him between 10-12 hours to deliver parts to all of his stops in Iowa.

Claimant testified before he began with Runner he underwent a DOT physical. Claimant said when he began at Runner he had no permanent restrictions.

Claimant underwent training with Runner beginning on November 2, 2017. On November 9, 2017 claimant said he was driving his first shift by himself.

Claimant's prior medical history is relevant. In January of 2014 claimant was treated for bilateral lower back pain caused by a fall on ice. (Joint Ex. 1, p. 4)

In July of 2014 claimant underwent a full bone scan for neck, lower back, right shoulder and right ankle pain. (Jt. Ex. 3, p. 48)

In August of 2014 and September of 2014 claimant was evaluated for continuous lower back pain. (Jt. Ex. 1, pp. 8, 16)

In October of 2014 claimant was treated for chronic lower back pain radiating to the toe in his left foot. (Jt. Ex. 1, p. 20)

In April of 2015 claimant was treated for chronic lower back pain from a fall two years prior. (Jt. Ex. 1, p. 34)

Claimant testified that, on November 9, 2017, he was driving his delivery truck for Runner when he hit a large pothole. Claimant said he was wearing a seatbelt. Claimant said he flew off the driver's seat, and the seat cushion came off the seat. Claimant said he landed on the metal frame of the seat. (Ex. A, pp. 3-4) Claimant said he also hit his head and left shoulder on the cab window. (Ex. A, p. 4)

The claimant said he finished his shift that night. He testified he told his employer of his injury that evening as well. Claimant testified his supervisor told him the seat had been scheduled for repair the next week.

Claimant testified he stayed off work and iced his back.

In a November 28, 2017 letter defendant insurer informed claimant they were still investigating his workers' compensation claim and the insurer was, at that time, unable to determine if claimant's injury arose out of and in the course of employment. (Cl. Ex. 3, p. 13)

Claimant testified his employer never offered him any medical care. Claimant testified that until the time he hired his attorney, he never asked for any medical care.

On November 30, 2017 claimant was evaluated by Susan Snyder, D.O. for pain in the buttocks and back caused by a November 9, 2017 injury. Claimant said he went to see Dr. Snyder on his own. Claimant indicated his injury occurred when he hit a pothole, flew off the seat and landed on metal. Claimant had lower back pain radiating into his left leg. Claimant denied previous injuries to his back. Claimant was assessed as having acute left-sided lower back pain with left-sided sciatica. Claimant was given anti-inflammatories and recommended to have physical therapy. (Jt. Ex. 5, pp. 52-54)

In a December 8, 2017 letter William Chase, M.D. recommended claimant have an MRI. Dr. Chase believed claimant had prior back history. Claimant was to remain off work until his MRI. (Jt. Ex. 5, p. 55)

In a December 20, 2017 letter from Runner, claimant was informed he was terminated for failure to provide, after multiple requests, documentation from medical providers regarding his work-related incident. Claimant was terminated as of December 20, 2017. (Ex. E)

In a January 18, 2018 report, Tracy Bohlen, an employee of EMC, detailed his investigation of claimant's workers' compensation claim. Mr. Bohlen's report indicates he made a recorded statement with claimant on December 19, 2017. He said claimant recalled the NAPA store where the pothole was white and next to a bank. (Ex. C) There is no copy of the recorded statement in the exhibits.

Claimant testified at hearing he had no recollection which NAPA store the incident occurred at. (Transcript pp. 18-19)

On January 18, 2018, Mr. Bohlen went to Forest City, Iowa to take photos and investigate a NAPA store. The report indicates Mr. Bohlen interviewed the NAPA store manager. The report indicates Mr. Bohlen believed the NAPA store in Forest City was where the accident occurred, as it best fit claimant's description of where the accident occurred. He also identified the Forest City NAPA store as where the accident occurred using GPS information from Runner. (Ex. C)

Mr. Bohlen indicates in the report he did not see any deep potholes around the building. Mr. Bohlen indicated in his report photos found at Exhibit D are allegedly photos of the Forest City parking lot. (Ex. C, D)

The photos in Exhibit D are date stamped December 17, 2017. This is inconsistent, as the report at Exhibit C indicates they were taken January 18, 2018. (Ex. C, D)

On January 19, 2018 claimant underwent a lumbar MRI. It showed mild multi-level spondylosis, and no evidence of an acute fracture. It also showed an intervertebral disc herniation at L4 and S1. (Jt. Ex. 6)

In a January 23, 2018 report, claimant's counsel was notified defendants were denying claimant's claim for benefits based on Mr. Bohlen's investigation. (Ex. D)

An alternate medical care petition filed with this agency was dismissed when defendants denied liability for claimant's injury.

On March 16, 2018 claimant was evaluated by Dr. Chase. Claimant had continued lower back pain. Claimant was assessed as having degenerative disc disease. Claimant was recommended to undergo physical therapy. He was limited to lifting up to ten pounds. (Jt. Ex. 5, pp. 56-58)

From approximately March 27, 2018 through April 16, 2018 claimant underwent physical therapy. (Jt. Ex. 7, pp. 73-84) Claimant was discontinued from physical therapy for being a no-show after missing five straight appointments. (Jt. Ex. 7, p. 85)

Claimant returned to Dr. Chase on May 28, 2018. Claimant was assessed as having chronic lower back pain without sciatica. He was recommended to have acupuncture or consult with a chiropractor. (Jt. Ex. 5, pp. 62-64) At a subsequent visit with Dr. Chase, referrals were made for claimant for chiropractic treatment and acupuncture. (Jt. Ex. 5, p. 67)

Claimant saw Dr. Chase on August 15, 2018 in follow up. Claimant had continued back discomfort. Claimant was told to use intermittent Tramadol and to continue massage and physical therapy. (Jt. Ex. 5, pp. 69-71)

Claimant was evaluated by Derek Reicks, D.C. on September 21, 2018. Claimant had moderate to severe lower back pain. Claimant was given electrical muscle stimulation therapy. (Jt. Ex. 8)

In a December 18, 2018 report, Sunil Bansal, M.D., gave his opinions of claimant's condition following an independent medical evaluation (IME). Claimant had continued lower back pain radiating down the left leg. Claimant had difficulty sitting for more than 20 minutes. Dr. Bansal noted claimant had fallen on ice two to three years prior. Claimant indicated no back pain at that time and that he was never diagnosed with having back pain. (Cl. Ex. 1, pp. 1-8)

Dr. Bansal assessed claimant as having an aggravation of his lumbar spondylosis. He opined claimant's lumbar spine problems were related to his November 9, 2017 injury. Dr. Bansal found claimant had a seven percent permanent impairment to the body as a whole based upon a finding that claimant met criteria for a DRE Category II impairment from the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition. He limited claimant to no lifting more than ten pounds and no prolonged sitting more than 30 minutes. He recommended claimant have additional medication and epidural injections. (Cl. Ex. 1, pp. 8-10)

In a January 11, 2019 report, Trevor Schmitz, M.D., gave his opinions of claimant's condition following an IME. Claimant complained of lower back pain and left thigh pain. He assessed claimant as having lower back pain consistent with sacroiliitis and degenerative changes. Dr. Schmitz opined claimant had underlying degenerative changes aggravated by the work injury of November 9, 2017. He found claimant at MMI as of April 16, 2018. Dr. Schmitz opined claimant had a five percent permanent impairment to the body as a whole based upon a finding that claimant met criteria for DRE Category II impairment. (Ex. B)

Dr. Schmitz found claimant had no permanent restrictions. He recommended claimant be sent to a physical therapist for two to three times to learn home exercise programs. Dr. Schmitz noted claimant denied any prior back problems, but records show claimant had prior history of lower back problems. (Ex. B)

Claimant testified he had difficulty standing for an extended period of time. Claimant testified he does not believe he could not return to work at Runner or Beavex given his limitations.

Claimant testified he has looked for work on Craigslist. He said he has also set up an account on a temporary job list called People's Choice. Claimant said since leaving Runner he has worked one day as a flagger. He testified he quit the job, as he could not stand the extended standing. Claimant said he is still looking for work.

Claimant was found guilty of a domestic sexual abuse charge and spent two and half years in prison in Illinois. Claimant is on the Iowa sexual predator website. This information is noted in the finding of facts only because claimant's counsel mentioned it at hearing and in the post-hearing brief.

CONCLUSIONS OF LAW

The first issue to be determined is whether claimant sustained an injury that arose out of and in the course of employment.

The party who would suffer loss if an issue were not established has the burden of proving that issue by a preponderance of the evidence. Iowa R. App. P. 6.14(6).

The claimant has the burden of proving by a preponderance of the evidence that the alleged injury actually occurred and that it both arose out of and in the course of the employment. Quaker Oats Co. v. Ciha, 552 N.W.2d 143 (Iowa 1996); Miedema v. Dial Corp., 551 N.W.2d 309 (Iowa 1996). The words "arising out of" referred to the cause or source of the injury. The words "in the course of" refer to the time, place, and circumstances of the injury. 2800 Corp. v. Fernandez, 528 N.W.2d 124 (Iowa 1995). An injury arises out of the employment when a causal relationship exists between the injury and the employment. Miedema, 551 N.W.2d 309. The injury must be a rational consequence of a hazard connected with the employment and not merely incidental to the employment. Koehler Electric v. Wills, 608 N.W.2d 1 (Iowa 2000); Miedema, 551 N.W.2d 309. An injury occurs "in the course of" employment when it happens within a period of employment at a place where the employee reasonably may be when performing employment duties and while the employee is fulfilling those duties or doing an activity incidental to them. Ciha, 552 N.W.2d 143.

The claimant has the burden of proving by a preponderance of the evidence that the injury is a proximate cause of the disability on which the claim is based. A cause is proximate if it is a substantial factor in bringing about the result; it need not be the only cause. A preponderance of the evidence exists when the causal connection is probable rather than merely possible. George A. Hormel & Co. v. Jordan, 569 N.W.2d 148 (Iowa 1997); Frye v. Smith-Doyle Contractors, 569 N.W.2d 154 (Iowa App. 1997); Sanchez v. Blue Bird Midwest, 554 N.W.2d 283 (Iowa App. 1996).

The question of causal connection is essentially within the domain of expert testimony. The expert medical evidence must be considered with all other evidence introduced bearing on the causal connection between the injury and the disability. Supportive lay testimony may be used to buttress the expert testimony and, therefore, is also relevant and material to the causation question. The weight to be given to an expert opinion is determined by the finder of fact and may be affected by the accuracy of the facts the expert relied upon as well as other surrounding circumstances. The expert opinion may be accepted or rejected, in whole or in part. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); IBP, Inc. v. Harpole, 621 N.W.2d 410 (Iowa 2001); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995). Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417 (Iowa 1994). Unrebutted expert medical testimony cannot be summarily rejected. Poula v. Siouxland Wall & Ceiling, Inc., 516 N.W.2d 910 (Iowa App. 1994).

Claimant contends he hit a large pothole while driving a truck for Runner, which caused the seat cushion to fly off and caused him to land on metal framing of the seat. Claimant said he injured his lower back from this accident.

Claimant testified he told his employer of the injury the night of his shift. He testified his supervisor told him the seat was due for repair. Defendants do not dispute that claimant notified his employer of the accident the night it occurred. Claimant's testimony indicates defendant employer knew the seat at issue was a problem and needed repaired. Defendants did not dispute this testimony.

Claimant's expert, Dr. Bansal, and defendants' expert, Dr. Schimtz, opined claimant aggravated a preexisting condition as a result of his November 9, 2017 incident. (Cl. Ex. 1, p. 9; Defendants' Ex. B, p. 6)

It is true claimant had a preexisting back condition before the November 9, 2017 injury. However, both Dr. Bansal and Dr. Schmitz were aware of claimant's preexisting problems and yet both opine claimant had a work-related injury occurring on November 9, 2017. (Cl. Ex. 1, p. 9; Def. Ex. B, p. 6)

Defendant insurer did have Mr. Bohlen conduct an investigation of the accident. Mr. Bohlen's report indicates he was unable to find any large potholes outside the NAPA store in Forest City, Iowa. Based on that report, defendants denied liability for claimant's claim for benefits. (Ex. C, D)

There are several problems with Mr. Bohlen's report. First, Mr. Bohlen did not examine the Forest City NAPA store for over two months after the date of injury. The photos shown in Exhibit D are of a parking lot with asphalt, gravel and snow. Other than the report in Exhibit C, there is little foundation to establish that the photos in Exhibit D are from the Forest City lot. There is no foundation the photos taken on January 18, 2018 reflect the conditions of the lot on November 9, 2017, the date of the incident.

Second, the report indicates the photos were taken November 18, 2018. (Ex. C) The date stamps on the photos read December 17, 2017. (Ex. D) This discrepancy in dates makes me further question the veracity of the report and the photos.

Third, claimant testified in hearing he did not recall where the accident happened on his stops. In his report, Mr. Bohlen indicates based upon claimant's recorded statement, and claimant's GPS drive route, he believed the accident happened at the Forest City, Iowa NAPA store. Claimant's recorded statement is not in the record. The GPS information mentioned in Mr. Bohlen's report is also not in the record. The report is at odds with claimant's testimony, which further leads to questioning the veracity of the report.

Many of the problems and concerns detailed above could have been handled by Mr. Bohlen's testimony, either in deposition or at hearing. Mr. Bohlen did not testify in either capacity.

There is little foundation that the pictures shown in Exhibit D reflect the actual conditions of the lot on the date of injury. There is little foundation that the pictures shown at Exhibit D are actually from the Forest City lot. There is discrepancy in the dating of the photos. There is discrepancy between claimant's testimony of where the accident happened, and what Mr. Bohlen said claimant told him. Mr. Bohlen did not testify to address these concerns or problems. Based upon this, I find the report and photos, found at Exhibit C and D, are not convincing evidence claimant's accident did not happen.

I recognize the story of claimant's injury to his lower back, when a seat flew off after hitting a pothole, is slightly incredible. However, claimant has consistently told the story to all providers, defendant insurer, and in testimony. Claimant testified defendants knew the seat and the truck at issue needed repaired. This has not been rebutted by defendants. Both experts have opined claimant sustained an injury that arose out of and in the course of employment. The report and photos found at Exhibit C and D are not convincing evidence the accident did not occur. Based on this, claimant has carried his burden of proof he sustained an injury that arose out of and in the course of employment on November 9, 2017.

The next issue to be determined is the extent of claimant's entitlement to temporary benefits.

When an injured worker has been unable to work during a period of recuperation from an injury that did not produce permanent disability, the worker is entitled to temporary total disability benefits during the time the worker is disabled by the injury. Those benefits are payable until the employee has returned to work, or is medically capable of returning to work substantially similar to the work performed at the time of injury. Section 85.33(1).

Healing period compensation describes temporary workers' compensation weekly benefits that precede an allowance of permanent partial disability benefits. Ellingson v. Fleetguard, Inc., 599 N.W.2d 440 (Iowa 1999). Section 85.34(1) provides that healing period benefits are payable to an injured worker who has suffered permanent partial disability until the first to occur of three events. These are: (1) the worker has returned to work; (2) the worker medically is capable of returning to substantially similar employment; or (3) the worker has achieved maximum medical recovery. Maximum medical recovery is achieved when healing is complete and the extent of permanent disability can be determined. Armstrong Tire & Rubber Co. v. Kubli, Iowa App., 312 N.W.2d 60 (Iowa 1981). Neither maintenance medical care nor an employee's continuing to have pain or other symptoms necessarily prolongs the healing period.

After his injury, claimant did not report to work at Runner. He first sought medical treatment on November 30, 2017. (Jt. Ex. 5, p. 54)

Claimant saw Dr. Chase on December 8, 2017. At that time Dr. Chase restricted claimant from work. (Jt. Ex. 5, p. 55)

Dr. Bansal found claimant at maximum medical improvement (MMI) as of August 15, 2018. (Cl. Ex. 1, p. 8) For that reason claimant is due temporary benefits from December 8, 2017 through August 15, 2018.

The next issue to be determined is whether the injury resulted in a permanent disability.

Claimant testified he still has lower back pain over a year after the date of injury. Both Dr. Bansal and Dr. Schmitz opine claimant has a permanent impairment. (Cl. Ex. 1; Def. Ex. B) Based on this record, claimant has carried his burden of proof he sustained a permanent disability.

The next issue to be determined is the extent of claimant's entitlement to permanent partial disability benefits.

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

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

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

Claimant was 57 years old at the time of hearing. He graduated from high school. Claimant has an online doctorate and master's degrees in business administration, philosophy and religion. Claimant has been in the Air National Guard and the Air Force. He sold insurance. He was self-employed as a business consultant. He worked as a night dispatcher and terminal manager at a company named Beavex. Claimant has worked as a telemarketer.

Both experts have found claimant met criteria for a DRE Category II impairment for the lumbar spine. Dr. Bansal opined claimant had a seven percent permanent impairment to the body as a whole. Dr. Schmitz found claimant had a five percent permanent impairment to the body as a whole. As both experts opine claimant met criteria for a DRE II Category impairment, I find it unnecessary to make a finding of fact whether Dr. Bansal's seven percent or Dr. Schmitz's five percent permanent impairment is more convincing. Claimant has a five to seven percent permanent impairment to the body as a whole.

Dr. Chase gave claimant a ten-pound lifting restriction. It is true Dr. Chase never lifted this restriction. The records suggest Dr. Chase believed this limitation not to be permanent.

Dr. Bansal gave claimant a ten-pound lifting restriction. (Cl. Ex. 1, p. 10) Other than the fact that Dr. Bansal's restrictions mirror those of Dr. Chase, there is nothing in Dr. Bansal's report indicating what that ten-pound restriction is based upon. Claimant did not have a functional capacity evaluation (FCE). There is no record Dr. Bansal performed any testing regarding claimant's ability to lift, carry, push or pull. Dr. Schmitz, who is an orthopedic surgeon, opined claimant has no permanent restrictions. (Ex. B, pp. 6-7)

For the reasons detailed above, it is found Dr. Schmitz's opinion regarding claimant's permanent restrictions are more convincing than those of Dr. Bansal. Based upon this, it is found claimant has no permanent restrictions.

The record indicates claimant worked for Runner on the date of injury. He did not return to work. Claimant was eventually terminated from Runner after being off work for an extended period of time, and failing, on numerous occasions, to produce documentation from a physician regarding his condition. (Ex. E, p. 74) Claimant made no attempt to return to work at Runner in any capacity.

Claimant has had no surgery. No expert is recommending surgery. No doctor has indicated claimant cannot work.

Claimant testified since leaving Runner, he has looked for work on Craigslist and has put his name on a temporary job search company called People's Choice. There is no evidence in the record, other than this testimony, if claimant has applied to any employers. For a year and two months claimant has been off of work from Runner. Claimant testified that during that entire period of time, he has held only one job, a one-day position as a flagger. The record suggests claimant tells all employers he has a ten-pound lifting restriction. As noted, it is found claimant has no permanent restrictions.

No doctor has opined claimant cannot work. Claimant has had a one-day job in over the 440 days since leaving Runner. This evidence suggests claimant is not entirely motivated to return to work of any kind.

A loss of earning capacity due to voluntary choice or lack of motivation to return to work is not compensable. Malget v. John Deere Waterloo Works, File No. 5048441 (Remand Dec. May 23, 2018); Rus v. Bradley Puhrmann, File No. 5037928 (App. December 16, 2014); Gaffney v. Nordstrom, File No. 5026533 (App. September 1, 2011); Snow v. Chevron Phillips Chemical Co., File No. 5016619 (App. October 25, 2007). Copeland v. Boone's Book and Bible Store, File No. 1059319 (App. November 6, 1997). See also Brown v. Nissen Corp., 89-90 IAWC 56, 62 (App. 1989) (no prima facie showing that claimant is unemployable when claimant did not make an attempt for vocational rehabilitation).

No vocational expert has opined claimant has loss of earning capacity or loss of access to the labor market.

Claimant has numerous masters and post-doctorate degrees. (Ex. 5) Claimant's counsel suggests claimant is limited to manual labor positions because of his criminal history. (Cl. Post-hearing brief, p. 2) A worker's criminal history is not a factor that can be weighed in determining if claimant has an increased loss of earning capacity.

Claimant is highly educated. He has a five to seven percent permanent impairment to his body as a whole. He has no permanent restrictions. The record suggests claimant has not been motivated in attempting to return to work. When all relevant factors are considered it is found claimant has a 15 percent industrial disability or loss of earning capacity.

The next issue to be determined is if there is a causal connection between the injury and the claimed 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).

Claimant received medical care for his November 9, 2017 work injury. The medical expenses for this care are found at Exhibit 4. There is no evidence that the medical bill summary found at Exhibit 4 is not related to treatment claimant received for his November of 2017 work injury. There is no evidence in the record that charges made by providers were not fair and reasonable. Defendants are liable for the claimed medical expenses.

The final issue to be determined is whether defendants are liable for a penalty under Iowa Code section 86.13.

In Christensen v. Snap-on Tools Corp., 554 N.W.2d 254 (Iowa 1996), and Robbennolt v. Snap-on Tools Corp., 555 N.W.2d 229 (Iowa 1996), the supreme court said:

> Based on the plain language of section 86.13, we hold an employee is entitled to penalty benefits if there has been a delay in payment unless the employer proves a reasonable cause or excuse. A reasonable cause or excuse exists if either (1) the delay was necessary for the insurer to investigate the claim or (2) the employer had a reasonable basis to contest the employee's entitlement to benefits. A "reasonable basis" for denial of the claim exists if the claim is "fairly debatable."

Christensen, 554 N.W.2d at 260.

The supreme court has stated:

> (1) If the employer has a reason for the delay and conveys that reason to the employee contemporaneously with the beginning of the delay, no penalty will be imposed if the reason is of such character that a reasonable fact-finder could conclude that it is a "reasonable or probable cause or excuse" under Iowa Code section 86.13. In that case, we will defer to the decision of the commissioner. See Christensen, 554 N.W.2d at 260 (substantial evidence found to support commissioner's finding of legitimate reason for delay pending receipt of medical report); Robbennolt, 555 N.W.2d at 236.
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> (2) If no reason is given for the delay or if the "reason" is not one that a reasonable fact-finder could accept, we will hold that no such cause or excuse exists and remand to the commissioner for the sole purpose of assessing penalties under section 86.13. See Christensen, 554 N.W.2d at 261.
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> (3) Reasonable causes or excuses include (a) a delay for the employer to investigate the claim, Christensen, 554 N.W.2d at 260; Kiesecker v. Webster City Meats, Inc., 528 N.W.2d at 109, 111 (Iowa 1995); or (b) the employer had a reasonable basis to contest the claim—the "fairly debatable" basis for delay. See Christensen, 554 N.W.2d at 260 (holding two-month delay to obtain employer's own medical report reasonable under the circumstances).
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> (4) For the purpose of applying section 86.13, the benefits that are underpaid as well as late-paid benefits are subject to penalties, unless the employer establishes reasonable and probable cause or excuse. Robbennolt, 555 N.W.2d at 237 (underpayment resulting from application of wrong wage base; in absence of excuse, commissioner required to apply penalty).

> If we were to construe [section 86.13] to permit the avoidance of penalty if any amount of compensation benefits are paid, the purpose of the penalty statute would be frustrated. For these reasons, we conclude section 86.13 is applicable when payment of compensation is not timely . . . or when the full amount of compensation is not paid.

Id.

(5) For purposes of determining whether there has been a delay, payments are "made" when (a) the check addressed to a claimant is mailed (Robbennolt, 555 N.W.2d at 236; Kiesecker, 528 N.W.2d at 112), or (b) the check is delivered personally to the claimant by the employer or its workers' compensation insurer. Robbennolt, 555 N.W.2d at 235.

(6) In determining the amount of penalty, the commissioner is to consider factors such as the length of the delay, 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. Robbennolt, 555 N.W.2d at 238.

(7) An employer's bare assertion that a claim is "fairly debatable" does not make it so. A fair reading of Christensen and Robbennolt, makes it clear that the employer must assert facts upon which the commissioner could reasonably find that the claim was "fairly debatable." See Christensen, 554 N.W.2d at 260.

Meyers v. Holiday Express Corp., 557 N.W.2d 502 (Iowa 1996).

Weekly compensation payments are due at the end of the compensation week. Robbennolt, 555 N.W.2d 229, 235.

Penalty is not imposed for delayed interest payments. Davidson v. Bruce, 593 N.W.2d 833, 840 (Iowa App. 1999). Schadendorf v. Snap-On Tools Corp., 757 N.W.2d 330, 338 (Iowa 2008).

When an employee's claim for benefits is fairly debatable based on a good faith dispute over the employee's factual or legal entitlement to benefits, an award of penalty benefits is not appropriate under the statute. Whether the issue was fairly debatable turns on whether there was a disputed factual dispute that, if resolved in favor of the employer, would have supported the employer's denial of compensability. Gilbert v. USF Holland, Inc., 637 N.W.2d 194 (Iowa 2001).

Claimant was injured on November 9, 2017. He reported his injury on the night it occurred. The records indicate defendants did not interview claimant regarding the accident until December 17, 2017, approximately 39 days after the date of injury.

On January 18, 2018, Mr. Bohlen investigated a site he believed where claimant had his accident. This was approximately 70 days after the date of injury.

On January 23, 2018, over 75 days after the date of injury, defendants communicated with claimant's counsel indicating they were denying the claim based upon the report found at Exhibit C. As noted, the report is found to be unconvincing.

In a January 11, 2019 report Dr. Schmitz, defendants' expert, found claimant's underlying degenerative changes were aggravated by his November 9, 2017 injury. Defendants still deny liability for the claim.

Defendants did not offer claimant any care. Defendants did not interview claimant for approximately 39 days after the date of injury. Defendants did not investigate the alleged accident site until 70 days after the date of injury. They did not communicate their denial of the claim for 75 days after the date of injury. Their denial is based upon a report that is found not convincing. Defendants' own expert opines claimant's injury arose out of and in the course of employment. Defendants still deny liability for the claim.

Defendants' long delay in investigating the claim was not reasonable. Defendants do not have a reasonable basis for continuing to deny the claim, particularly when their own expert opined claimant's injury was causally related to the work injury. Given the record detailed above, defendants are liable for a penalty of 50 percent of all benefits due.

Claimant's rate is $448.91 per week. The period of time when claimant is due healing period benefits is from December 8, 2017 through August 15, 2018. This is approximately 35 weeks. Defendants are liable for $7,855.93 in penalty for delay in paying healing period benefits ($448.91 x 35 weeks x 50%).

Defendants' own expert, Dr. Schmitz, opined claimant had a five percent permanent impairment. Defendants are liable for $5,611.38 in penalty for failure to even pay the rating provided by Dr. Schmitz (25 weeks x $448.91 x 50%).

Defendants' total liability for penalty is $13,467.31 ($7,855.93 + $5,611.38).

ORDER

Therefore, it is ordered:

That defendants shall pay claimant healing period benefits at the rate of four hundred forty-eight and 91/100 dollars ($448.91) from December 8, 2017 through August 15, 2018.

That defendants shall pay claimant seventy-five (75) weeks of permanent partial disability benefits at the rate of four hundred forty-eight and 91/100 dollars ($448.91) commencing on August 16, 2018.

That defendants shall pay accrued weekly benefits in a lump sum.

Defendants shall pay accrued weekly benefits in a lump sum together with interest 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.

That defendants shall pay claimant thirteen thousand four hundred sixty-seven and 31/100 dollars ($13,467.31) in penalty.

That defendants shall pay claimant's medical expenses as detailed above.

That defendants shall pay costs.

That defendants shall file subsequent reports of injury as required by this agency under rule 876 IAC 3.1(2).

Signed and filed this 7th day of March, 2019.

JAMES F. CHRISTENSON
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.