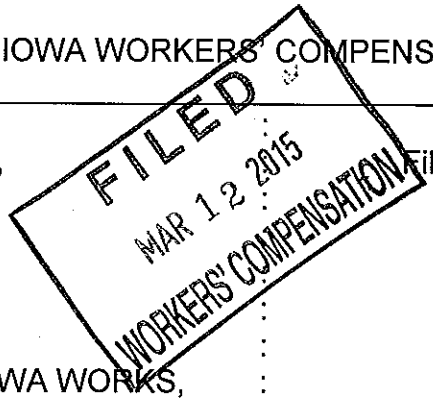
BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER



RICHARD HUBBARTT,

Claimant,

vs.

JOHN DEERE OTTUMWA WORKS,

Employer,
Self-Insured,
Defendant.

File Nos. 5048226, 5048227

ARBITRATION

DECISION

Head Note No.: 1803

STATEMENT OF THE CASE

Richard Hubbartt, the claimant, seeks workers' compensation benefits from defendant, John Deere Ottumwa Works, a self-insured employer, as a result of alleged work injuries on June 4, 2012 and April 26, 2013. Presiding in this matter is Larry P. Walshire, a deputy Iowa Workers' Compensation Commissioner. An oral evidentiary hearing commenced on February 11, 2015, but the matter was not fully submitted until the receipt of the parties' briefs and argument on February 27, 2015. Oral testimonies and written exhibits received into evidence at hearing are set forth in the hearing transcript.

Joint exhibits were marked numerically. Defendant's single exhibit was marked "A." Claimant did not offer any separate exhibits. References in this decision to page numbers of an exhibit shall be made by citing the exhibit number or letter followed by a dash and then the page number(s). For example, a citation to claimant's exhibit 1, pages 2 through 4 will be cited as, "Exhibit 1-2:4." References to a page of a transcript shall be to the actual page number of the original transcript, not to the page number of a copy containing multiple pages of the original transcript. Also, it should be noted that the joint exhibits were consecutively numbered throughout, regardless of the exhibit numbers. I used that number in referring to an exhibit page.

The parties agreed to the following matters in a written hearing report submitted at hearing:

1. An employee-employer relationship existed between claimant and John Deere at the time of the alleged injuries.

2. On June 4, 2012, claimant received an injury to the right shoulder arising out of and in the course of employment with John Deere, and claimant is entitled

to permanent disability benefits as a result of that injury, but the amount remains in dispute.

3. Claimant is seeking temporary total or healing period benefits from April 26, 2013.

4. If either alleged injury is found to have caused permanent disability, the type of disability is an industrial disability to the body as a whole.

5. If I award permanent partial disability benefits for the stipulated June 4, 2012 injury, they shall begin on June 5, 2012.

6. If I award permanent partial disability benefits for the alleged April 26, 2013 injury, they shall begin on April 27, 2013.

7. At the time of the stipulated injury on June 4, 2012, claimant's gross rate of weekly compensation was $910.68. Also, at that time, he was married and entitled to three exemptions for income tax purposes. Therefore, claimant's weekly rate of compensation is $602.87, according to the workers' compensation commissioner's published rate booklet for this date of injury.

8. At the time of the alleged injury on April 26, 2013, claimant's gross rate of weekly compensation was $1,176.47. Also, at that time, he was married and entitled to two exemptions for income tax purposes. Therefore, claimant's weekly rate of compensation is $749.46, according to the workers' compensation commissioner's published rate booklet for this date of injury.

9. Medical benefits are not in dispute.

10. Entitlement to temporary total, temporary partial or healing period benefits is not in dispute.

11. Defendant's entitlement to a credit for weekly benefits already paid to claimant for the stipulated injury of June 4, 2012 is not in dispute.

ISSUES

At hearing, the parties submitted the following issues for determination:

I. Whether claimant received an injury to his back on April 26, 2013 arising out of and in the course of employment;

II. Whether the back injury claim is barred by a lack of timely notice of the injury or barred by the two-year statute of limitations.

III. The extent of claimant's entitlement to permanent, industrial disability benefits; and,

IV. The extent of claimant's entitlement to reimbursement for an independent disability evaluation of the alleged back injury on April 26, 2013 by Jacqueline Stoken, D.O. Defendant has paid one-half of the fees of Dr. Stoken attributable to the evaluation of the stipulated work injury to the right shoulder.

V. Claimant's entitlement to penalty benefits for an unreasonable underpayment of permanent disability benefits prior to hearing.

Defendant did not specifically address the penalty issue in the post-hearing brief. However, the hearing report for the shoulder injury clearly presents this as an issue.

FINDINGS OF FACT

In these findings, I will refer to the claimant by his first name, Richard, and to the defendant employer as Deere.

Richard worked for Deere from April 1998 until April 26, 2013, at which time he was involuntarily terminated for absenteeism. Initially, he performed the job of robotic welder, but for the last nine years at Deere, he was a press operator. Richard asserts that his work injuries occurred while performing the press operator job. According to Richard, the press operator job required loading four by eight feet sheets of steel, weighing 100-140 pounds each, with a co-worker, into a large press machine. He testified that the sheets would be lifted about six to eight inches using suction cups with the right hand to allow his left hand to grab the sheets and then with both hands place the sheets into the press machine. Richard states that each sheet had to be placed into the machine twice. Holes would be cut the first time and second time the sheets were formed. After the machine processed the sheets, the formed product would then be manually removed from the press with both hands and then placed on end into a nearby rack. The rack was then transported by a third worker to a holding area using a fork lift truck. Consequently, each sheet had to be handled four times. Richard states that about 100 sheets per day were processed, which means that his lifting occurred about 350-400 times a day. Richard asserts that he also was required to twist his back and hips as he placed the sheets into the machine and then remove them from the machine. Richard is right handed.

Richard asserts that he suffered two cumulative trauma or gradual work injuries, first to his right shoulder, and, then to his back, from his press operator duties. He stated that his two coworkers on that job also suffered similar work injuries.

Deere's safety director described the press operator job from his observations of a video of workers performing the job. This description differed from Richard's description in that the director did not believe it was necessary to twist one's torso to load the sheets into the machine. He also stated that the sheets are too heavy to be lifted by just a suction cup. These cups were only used to break the seal between sheets. The director asserted that the average weight of the sheets was 89 pounds.

He agreed with Richard that the job has now been changed by providing a mechanized loader or manipulator for the press machine, and now only one person is needed to feed the press machine. This director stated that from his computations from Deere records, Richard averaged only 28 work hours per week during his last 838 days at Deere. He also disagreed with Richard's claim at hearing that his coworkers in his job suffered similar work injuries. Both of Richard's coworkers at the time of the alleged injury denied to him they suffered similar work injuries to the director. He added that Richard never reported a back injury, and his first notice of the back claim was when the workers' compensation claim was filed.

Richard testified that when he first experienced shoulder and back problems at work, he did not believe the problems were serious, and he did not immediately report the injuries or seek treatment from Deere. However, he states these problems gradually became worse over time. When he could no longer sleep and adequately perform his job due to his pain, Richard finally reported the right shoulder injury to Deere on June 4, 2012 and sought treatment for the shoulder symptoms. He first reported the back injury shortly after he was terminated. Richard testified that he had no shoulder or back problems before working at Deere. Richard attributes his absenteeism, which led to his termination, to these work injuries. He was earning over $22.00 per hour at Deere when he was terminated.

After leaving Deere, Richard worked briefly for Earl Wertz as a welder and auto repairman. He then was hired by Davencorp as a welder in August 2013. Richard testified that this job also required heavy pushing or pulling of large parts on an overhead hoist, but this was somewhat lighter duty than at Deere. Richard was involuntarily terminated from this job on September 19, 2013. Richard stated the termination occurred because he was not performing up to their standards and speed. He also attributes his lack of performance to his work injuries at Deere. The portion of Davencorp's termination notice in evidence referring to the reasons for the termination is difficult to read, but the first two words begin "Bad Welds." (Ex. 12-183)

Richard subsequently was hired to perform welding work by Zimmerman Trailers. He was still working in this job at the time of hearing. Although Richard stated that his work at Zimmerman is lighter than the work at Davencorp, he still has trouble with over shoulder work and repetitive lifting parts into fixtures used for welding. He does not believe he will be able to continue in that job due to right shoulder and back problems.

Richard earned about $10.00 per hour at Wertz and at Davencorp. He is currently earning $12.00 per hour at Zimmerman.

Back Injury

I will first address the asserted back injury. The record reveals that Richard has a significant history of back problems prior to April 2013. Richard only sought treatment for his back problems from his personal or family physician, Donald Wirtanen, D.O. Between February 2002 and May 2012, Richard periodically sought treatment for back

or low back pain about 40 times, and he received various treatment modalities such as manipulations and medications. At hearing, Richard stated that his back problems were due to his job at Deere. The records of Dr. Wirtanen report off-work injuries such as being hit by a truck tail gate in April 2007 and shoveling snow in February 2010. (Ex. 3-35:60) Furthermore, between November 2001 and April 2013, Richard submitted about 16 non-occupational disability notices to Deere completed by Dr. Wirtanen, each time reporting the disability was due to injuries or incidents at home or while off work. (Ex. 6-86a:105)

The only supportive medical opinion relied upon by Richard for his back injury claim comes from Jacqueline Stoken, D.O., a specialist in physical medicine and rehabilitation. Dr. Stoken opines from the history provided to her by Richard, that Richard suffered a cumulative trauma on April 26, 2013 with chronic low back pain from his work at Deere. In her deposition, Dr. Stoken was asked to explain her conclusion that Richard's past medical history was unremarkable. The doctor stated that she was not aware of any non-work related injuries to his shoulder or back, despite claiming that she reviewed the records of Dr. Wirtanen and the disability notices to Deere. (Ex. 15-23) Although not particularly relevant to this claim, Richard failed to tell Dr. Stoken of his past problems with alcohol dependence. About the time that he suffered his right shoulder problems, he was admitted to a rehabilitation facility, but did not complete the program. He has been convicted of drunk driving more than once. He admitted at hearing to continued "recreational" use of alcohol.

Given this record, I am unable to find that claimant's back condition when he was terminated from Deere on April 26, 2013 was any different than his longstanding prior back condition, which was mostly due to non-work related injuries, according to information Richard and his family doctor provided to Deere in the disability notices. Richard may have lied to Deere about these disabilities to avoid reporting work injuries and risk losing his job, but that certainly would not improve his credibility in this claim.

Therefore, I am unable to find that Richard suffered a back injury on or about April 26, 2013 which arose out of and in the course of his employment at Deere. This renders moot the issues of lack of notice and the timeliness of the claim.

Right Shoulder Injury

Defendant stipulated to the occurrence of a right shoulder injury and that this injury is a cause of some degree of permanent industrial disability. Defendant provided light duty when necessary to accommodate for activity restrictions imposed by treating physicians for the right shoulder.

The primary treating orthopedic physician for the right shoulder condition was Steven Aviles, M.D. He performed arthroscopic surgery in September 2012. The post-surgery diagnosis was partial-thickness rotator cuff repair and substantial impingement of the supraspinatus at the AC level. (Ex. 8-127:128) On January 15, 2013, Dr. Aviles reports that Richard was doing well and feels able to return to unrestricted work. (Ex. 8-

132:134) He then placed Richard at maximum medical improvement (MMI) as of January 21, 2013 and released him back to full-duty work. Despite the release to full duty, Dr. Aviles provided a permanent impairment rating for the right shoulder injury of 2 percent to the right upper extremity, which converts to a 1 percent body as a whole impairment under the AMA Guides, fifth edition. (Ex. 8-136) Defendant subsequently paid claimant five weeks of permanent disability benefits as a result of this impairment rating.

Richard admits he returned to full-duty work after being released by Dr. Aviles, but stated that he continued to have right shoulder and back difficulties, which lead to his termination. He states that Dr. Aviles told him "let pain be your guide" as to what activities he should or should not perform.

I do not find Richard credible, given his downplaying of the role his alcohol dependence and depression problems as the reason for his many unexcused absences. Richard initially claimed at hearing that he quit drinking after the Deere termination, which indicates to me that drinking may have contributed to his termination. Richard then testified that he continues to drink alcohol. In his deposition, Richard testified that he had no back injuries outside of Deere. This is clearly inconsistent with the disability notices he gave to Deere. Given Richard's lack of credibility, I am unable to determine how many absences, if any, were due to shoulder or back problems from work activity. Consequently, I am unable to find that any of the claimed work injuries were a cause of his absenteeism that lead to his termination.

At the direction of his attorney, Richard underwent a functional capacity evaluation (FCE) by Charles Goodhue, M.S., a licensed physical therapist. This FCE only evaluated the right shoulder condition. As a result of testing, which was found valid after passing all validity criteria, Richard was placed into the lower end of the medium work category. He was to limit his activity according to an abilities table, which generally prohibited lifting, pushing and pulling more than 60-70 pounds rarely, 55 pounds occasionally, 35 pounds frequently, and 20 pounds constantly. Richard is also to limit elevated work activities of his right upper extremity with prolonged use and repetitive reaching to no more than an occasional basis. (Ex. 2-28:29)

As stated before, Dr. Stoken evaluated Richard's right shoulder condition. Dr. Stoken opines that Richard suffered a cumulative trauma injury to his right shoulder from his work at Deere resulting in chronic pain. The doctor also provided a permanent impairment rating pursuant to the AMA Guides, fifth edition. Due to deficits to range of motion, Dr. Stoken opines that Richard suffered a 4 percent permanent impairment to the whole person as a result of his right shoulder injury. She agrees with the valid FCE recommendations.

Although Dr. Aviles did not impose formal activity restrictions, he agreed with the FCE recommendations. (Ex. 8-137)

Richard admitted at hearing that he has not provided the FCE restrictions to his current employer because his job exceeds them.

Based on the opinions of Drs. Stoken and Aviles, I find the work injury of June 4, 2012 is a cause of a 2-4 percent permanent impairment to the body as a whole. I, also, find as a result of this work injury, Richard now has permanent restrictions on his work activity, as recommend by the FCE.

There is no medical evidence that Richard had any chronic right shoulder problems before his shoulder injury in this case. Richard is now limited to the lower end of medium physical capacity work. No vocational expert provided opinions in this case as to Richard's loss of employment opportunities as a result of the permanent work restrictions found in the FCE.

Richard is 49 years of age. He has two years of liberal arts schooling at a community college, but earned no degrees. His past work experience does include a brief job as an EMT for an ambulance service, but his lifting restrictions likely prohibit a return to that type of work. He has been a welder since 1990. His current restrictions would likely adversely impact his ability to perform many welding jobs. His current restrictions would disqualify him from his former press operator job at Deere, regardless of his absenteeism. However, he is currently working as a welder, albeit at less wages than at Deere. Richard claims he cannot continue in this job. However, there is no evidence that Zimmerman is accommodating for his disability. What will happen to Richard in the future would be speculation at this point.

Richard has substance abuse problems that are not work related and consequent driving problems, which also limit his employment opportunities.

From examination of all of the factors of industrial disability, I find the work injury of June 4, 2012 to be a cause of a 40 percent loss of earning capacity.

CONCLUSIONS OF LAW

I. The claimant has the burden of proving by of 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.

When the injury develops gradually over time, the cumulative injury rule applies. The date of injury for cumulative injury purposes is the date on which the disability manifests. Manifestation is best characterized as that date on which both the fact of injury and the causal relationship of the injury to the claimant's employment would be plainly apparent to a reasonable person. The date of manifestation inherently is a fact based determination. The fact-finder is entitled to substantial latitude in making this determination and may consider a variety of factors, none of which is necessarily dispositive in establishing a manifestation date. Among others, the factors may include missing work when the condition prevents performing the job, or receiving significant medical care for the condition. For time limitation purposes, the discovery rule then becomes pertinent so the statute of limitations does not begin to run until the employee, as a reasonable person, knows or should know, that the cumulative injury condition is serious enough to have a permanent, adverse impact on his or her employment. Herrera v. IBP, Inc., 633 N.W.2d 284 (Iowa 2001); Oscar Mayer Foods Corp. v. Tasler, 483 N.W.2d 824 (Iowa 1992); McKeever Custom Cabinets v. Smith, 379 N.W. 2d 368 (Iowa 1985).

In the case sub judice, I found that claimant failed to carry the burden of proof and demonstrated by the greater weight of the evidence that he suffered a back injury as claimed.

II. 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).

A treating physician's opinions are not to be given more weight than a physician who examines the claimant in anticipation of litigation as a matter of law. Gilleland v. Armstrong Rubber Co., 524 N.W.2d 404.408 (Iowa 1994); Rockwell Graphic Systems, Inc. v. Prince, 366 N.W.2d 187, 192.

The extent of claimant's entitlement to permanent disability benefits is determined by one of two methods. If it is found that the permanent physical impairment or loss of use is limited to a body member specifically listed in schedules set forth in one of the subsections of Iowa Code section 85.34(2)(a-t), the disability is considered a scheduled member disability and measured functionally. If it is found that the permanent physical impairment or loss of use is to the body as a whole, the disability is unscheduled and measured industrially under Code subsection 85.34(2)(u). Graves v. Eagle Iron Works, 331 N.W.2d 116 (Iowa 1983); Simbro v. Delong's Sportswear, 332 N.W.2d 886, 887 (Iowa 1983); Martin v. Skelly Oil Co., 252 Iowa 128, 133, 106 N.W.2d 95, 98 (1960).

Industrial disability was defined in Diederich v. Tri-City Ry. Co., 219 Iowa 587, 258 N.W.2d 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. However, consideration must also be given to the injured workers' medical condition before the injury, immediately after the injury and presently; the situs of the injury, its severity, and the length of healing period; the work experience of the injured worker prior to the injury, after the injury, and potential for rehabilitation; the injured worker's qualifications intellectually, emotionally and physically; the worker's earnings before and after the injury; the willingness of the employer to re-employ the injured worker after the injury; the worker's age, education, and motivation; and, finally the inability because of the injury to engage in employment for which the worker is best fitted; Thilges v. Snap-On Tools Corp., 528 N.W.2d 614, 616, (Iowa 1995); McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Olson v. Goodyear Serv. Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963); Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961).

The parties agreed in this case that the June 4, 2012 work injury is a cause of permanent impairment to the body as a whole, a nonscheduled loss of use. Consequently, this agency must measure claimant's loss of earning capacity as a result of this impairment.

A showing that claimant has not lost employment as a result of the work injury does not preclude a finding of industrial disability. Loss of access to the labor market is often of paramount importance in determining loss of earning capacity. Ellingson v. Fleetguard, Inc., 599 N.W.2d 440 (Iowa 1999); Bearce v. FMC Corp., 465 N.W.2d 531 (Iowa 1991); Collier v. Sioux City Comm. Sch. Dist., File No. 953453 (App. February 25,

1994); Michael v. Harrison County, Thirty-fourth Biennial Rep. of the Industrial Comm'r, 218, 220 (App. January 30, 1979).

Although claimant is closer to a normal retirement age than younger workers, proximity to retirement cannot be considered in assessing the extent of industrial disability. Second Injury Fund of Iowa v. Nelson, 544 N.W.2d 258 (Iowa 1995).

A release to return to full-duty work by a physician is not always evidence that an injured worker has no permanent industrial disability, especially if that physician has also opined that the worker has permanent impairment under the AMA Guides. Such a rating means that the worker is limited in the activities of daily living. See AMA Guides to The Evaluation of Permanent Impairment, Fifth Edition, Chapter 1.2, p. 2. Work activity is commonly an activity of daily living. This agency has seen countless examples where physicians have returned a worker to full duty, even when the evidence is clear that the worker continues to have physical or mental symptoms that limit work activity, *e.g.* the worker in a particular job will not be engaging in a type of activity that would cause additional problems, or risk further injury; the physician may be reluctant to endanger the workers' future livelihood, especially if the worker strongly desires a return to work and where the risk of re-injury is low; or, a physician, who has been retained by the employer, has succumbed to pressure by the employer to return an injured worker to work. Consequently, the impact of a release to full duty must be determined by the facts of each case.

Assessments of industrial disability involve a viewing of loss of earning capacity in terms of the injured workers' present ability to earn in the competitive labor market without regard to any accommodation furnished by one's present employer. Quaker Oats Co. v. Ciha, 552 N.W.2d 143, 158 (Iowa 1996); Thilges v. Snap-On Tools Corp., 528 N.W.2d 614, 617 (Iowa 1995).

In the case sub judice, I found that claimant suffered a 40 percent loss of his earning capacity as a result of the work injury. Such a finding entitles claimant to 200 weeks of permanent partial disability benefits as a matter of law under Iowa Code section 85.34(2)(u), which is 40 percent of 500 weeks, the maximum allowable number of weeks for an injury to the body as a whole in that subsection.

III. Claimant seeks reimbursement for the evaluation of the alleged back injury by Dr. Stoken. 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.

Defendant has only paid for one-half of Dr. Stoken's evaluation, the portion they attributed to the right shoulder condition. Defendant asserts that this Code provision is not available to claimant for the back evaluation because claimant did not establish

defendant's liability for the back injury evaluated by Dr. Stoken. City of Davenport v. Newcomb, 820 N.W.2d 882, 892-893 (Iowa App. 2012). However, the Newcomb case dealt with the application of Iowa Code 85.39 when employers deny liability for an injury, but request claimant to submit to examination of that injury. The Court's discussion as to the availability of 85.39 examinations to claimant was dicta in Newcomb, and the Court did not overrule its earlier decision in Dodd v. Fleetguard, Inc., 759 N.W.2d 133 (Iowa App. 2008), which specifically provided for such reimbursements to claimant for independent examinations despite the lack of an adjudication of liability for the condition evaluated. A full reimbursement to claimant will be awarded.

IV. Claimant seeks additional weekly benefits under Iowa Code section 86.13(4). That provision states that if a delay in commencement or termination of benefits occurs without reasonable or probable cause or excuse, the industrial commissioner shall award extra weekly benefits in an amount not to exceed 50 percent of the amount of benefits that were unreasonably delayed or denied if the employee demonstrates a denial or delay in payment or termination of benefits and the employer has failed to prove a reasonable or probable cause or excuse for the denial, delay or termination of benefits. (Iowa Code section 85.13(4)(b)) A reasonable or probable cause or excuse must satisfy the following requirements:

(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 of the denial, delay in payment, or termination of benefits to the employee at the time of the denial, delay or termination of benefits.

(Iowa Code section 86.13(4)(c))

The employer has the burden to show a reasonable and probable cause or excuse. A "reasonable basis" for denial of the claim exists if the claim is "fairly debatable." Christensen v. Snap-on Tools Corp., 554 N.W.2d 254 (Iowa 1996); Robbennolt v. Snap-on Tools Corp., 555 N.W.2d 229 (Iowa 1996).

In this case, claimant asserts that a payment of only the one percent impairment rating by Dr. Aviles or only five weeks of permanency benefits prior to hearing was unreasonable. Defendant apparently relies upon the initial release to full duty by Dr. Aviles and claimant's return to his job until he was fired. I would agree with defendant that a voluntary payment for a 1 percent industrial disability or even no payment of any benefits would be reasonable had not Dr. Aviles subsequently adopted

the restrictions in the valid FCE testing. Also, there is no expert causation opinion provided by the defense that these restrictions are not related to the stipulated shoulder injury. I find, at the very least, claimant suffered a 15 percent loss of earning capacity, which is equivalent to 75 weeks, even with his lack of credibility. Only an industrial disability beyond 15 percent is fairly debatable. A 50 percent penalty in this case would be 37.5 weeks less the five weeks that were paid. Due to the fact that there is no showing of prior penalties imposed on this employer, I will limit the penalty to 20 weeks. Given the stipulated rate of compensation, the penalty is $12,057.40.

ORDER

Defendant shall pay to claimant two hundred (200) weeks of permanent partial disability benefits at the stipulated rate of six-hundred two and 87/100 dollars ($602.87) per week from the stipulated date of June 5, 2012.

Defendant shall pay accrued weekly benefits in a lump sum and shall receive credit against this award for the weekly benefits previously paid.

Defendant shall pay the balance of fees charged by Dr. Stoken for her disability evaluation.

Defendant shall pay to claimant a penalty of $12,057.40.

Defendant shall pay interest on unpaid weekly benefits awarded herein pursuant to Iowa Code section 85.30.

Defendant shall pay the costs of this action pursuant to administrative rule 876 IAC 4.33, including reimbursement to claimant for any filing fee paid in this matter.

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

Signed and filed this 12th day of March, 2015.

LARRY WALSHIRE
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.