BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

ELMER WILSON, Claimant, vs. TAMA PAPERBOARD, Employer, and ACE AMERICAN INSURANCE CO., Insurance Carrier, Defendants.	: : : : : : : : : : : : : : :	File No. 5060394 A P P E A L D E C I S I O N Head Notes: 1402.20; 1402.40; 1802; 1803; 1804; 2501; 2907; 4000

Defendants Tama Paperboard, employer, and its insurer, Ace American Insurance Company, appeal from an arbitration decision filed on January 12, 2022. Claimant Elmer Wilson responds to the appeal. The case was heard on January 27, 2021, and it was considered fully submitted in front of the deputy workers' compensation commissioner on April 12, 2021.

In the arbitration decision the deputy commissioner found claimant had reached maximum medical improvement (MMI) for the stipulated September 1, 2016, work injury and the deputy commissioner awarded claimant permanent total disability benefits commencing on "the date he stopped working for wages," at the stipulated weekly rate of $787.68. The deputy commissioner found the greater weight of the evidence supports a finding that over $4,000.00 worth of benefits were untimely paid or were underpaid, and the deputy commissioner awarded claimant $1,500.00 in penalty benefits. The deputy commissioner found defendants should pay claimant's costs of the arbitration proceeding itemized in Exhibit 8.

Defendants assert on appeal that the deputy commissioner erred in finding claimant reached MMI and in awarding claimant permanent total disability benefits. Defendants assert the deputy commissioner erred in failing to address which conditions are causally connected to the work injury, and defendants assert claimant's migraine

condition is the only causally related condition. Defendants assert the deputy commissioner erred in awarding claimant penalty benefits.

Claimant asserts on appeal that arbitration decision should be affirmed in its entirety.

Those portions of the proposed arbitration decision pertaining to issues not raised on appeal are adopted as part of this appeal decision.

I performed a de novo review of the evidentiary record and the detailed arguments of the parties. Pursuant to Iowa Code sections 17A.15 and 86.24, the arbitration decision filed on January 12, 2022, is affirmed in part, modified in part, and reversed in part, with the following additional and substituted analysis.

I affirm the deputy commissioner's finding that defendants should reimburse claimant for the costs itemized in Exhibit 8. I affirm and modify the deputy commissioner's finding that defendants should be assessed $1,500.00 in penalty benefits with the following additional analysis. I reverse the deputy commissioner's finding that claimant is at MMI and I reverse the award of permanent total disability benefits with the following additional and substituted analysis.

I. Arising Out of and in the Course of Employment

To receive workers' compensation benefits, an injured employee must prove, by a preponderance of the evidence, the employee's injuries arose out of and in the course of the employee's employment with the employer. 2800 Corp. v. Fernandez, 528 N.W.2d 124, 128 (Iowa 1995). An injury arises out of employment when a causal relationship exists between the employment and the injury. Quaker Oats Co. v. Ciha, 552 N.W.2d 143, 151 (Iowa 1996). The injury must be a rational consequence of a hazard connected with the employment, and not merely incidental to the employment. Koehler Elec. v. Wills, 608 N.W.2d 1, 3 (Iowa 2000). The Iowa Supreme Court has held, an injury occurs "in the course of employment" when:

> . . . it is within the period of employment at a place where the employee reasonably may be in performing his duties, and while he is fulfilling those duties or engaged in doing something incidental thereto. An injury in the course of employment embraces all injuries received while employed in furthering the employer's business and injuries received on the employer's premises, provided that the employee's presence must ordinarily be required at the place of the injury, or, if not so required, employee's departure from the usual place of employment must not amount to an abandonment of employment or be an act wholly foreign to his usual work. An employee does not cease to be in the course of his employment merely because he is not actually engaged in doing some specifically prescribed

task, if, in the course of his employment, he does some act which he deems necessary for the benefit or interest of his employer.

Farmers Elevator Co., Kingsley v. Manning, 286 N.W.2d 174, 177 (Iowa 1979).

An injury to one part of the body can later cause an injury to another. Mortimer v. Fruehauf Corp., 502 N.W.2d 12, 16-17 (Iowa 1993) (holding a psychological condition can be caused or aggravated by a scheduled injury). The claimant bears the burden of proving the claimant's work-related injury is a proximate cause of the claimant's disability and need for medical care. Ayers v. D & N Fence Co., Inc., 731 N.W.2d 11, 17 (Iowa 2007); George A. Hormel & Co. v. Jordan, 569 N.W.2d 148, 153 (Iowa 1997). "In order for a cause to be proximate, it must be a 'substantial factor.'" Ayers, 731 N.W.2d at 17. A probability of causation must exist, a mere possibility of causation is insufficient. Frye v. Smith-Doyle Contractors, 569 N.W.2d 154, 156 (Iowa App. 1997).

The question of medical causation is "essentially within the domain of expert testimony." Cedar Rapids Cmty. Sch. Dist. v. Pease, 807 N.W.2d 839, 844-45 (Iowa 2011). The commissioner, as the trier of fact, must "weigh the evidence and measure the credibility of witnesses." Id. The trier of fact may accept or reject expert testimony, even if uncontroverted, in whole or in part. Frye v. Smith-Doyle Contractors, 569 N.W.2d 154, 156 (Iowa 1997). When considering the weight of an expert opinion, the factfinder may consider whether the examination occurred shortly after the claimant was injured, the compensation arrangement, the nature and extent of the examination, the expert's education, experience, training, and practice, and "all other factors which bear upon the weight and value" of the opinion. Rockwell Graphic Sys., Inc. v. Prince, 366 N.W.2d 187, 192 (Iowa 1985).

In this case, the deputy commissioner found the work injury caused claimant's migraine condition and tremors. Defendants contend the deputy commissioner failed to address which conditions are causally connected to the work injury and defendants contend claimant's migraine condition is the only condition causally connected to the work injury. The deputy commissioner did not separately address causation of claimant's alleged conditions in the decision.

A. Migraines

The parties agree claimant's migraine condition is causally connected to the work injury, but the parties disagree as to whether claimant has reached MMI for this condition.

B. Spondylosis and Cervicalgia

Following the work injury, claimant complained of neck pain and headaches. Laurence Krain, M.D, a neurologist, initially treated claimant for his headaches and

diagnosed claimant with cervicalgia. (JE 5) Claimant was eventually referred to John Rayburn, M.D., a physiatrist, for his neck pain, in October 2018. (JE 10) Dr. Rayburn assessed claimant with chronic pain, cervical spondylosis without myelopathy, bilateral occipital neuralgia, and cervicalgia. (JE 10, pp. 183, 187, 192, 195, 200) Dr. Rayburn performed a number of injections and blocks, which did not provide any lasting relief for claimant, and Dr. Rayburn discharged claimant from care on March 27, 2019. (JE 10)

The parties obtained competing independent medical examinations (IMEs). On October 27, 2020, Farid Manshadi, M.D., a physiatrist, conducted an IME for claimant and opined the work injury aggravated claimant's preexisting spondylosis. (Ex. 3, pp. 36-37) Charles Mooney, M.D., an occupational medicine physician, conducted a records review IME for defendants on December 17, 2020, and opined claimant sustained an aggravation of his preexisting cervical spondylosis, migraines, and a possible cervicogenic headache caused by the work injury. (Ex. A, p. 10) The treating and expert physicians agree the work injury aggravated claimant's preexisting spondylosis. I find claimant has established the work injury aggravated his preexisting spondylosis causing him to have cervicalgia.

C. Cognitive/Mental Health Issues

The deputy commissioner noted that in June 2017, Brian Steiner, Psy.D., performed a mental health evaluation of claimant, and while Dr. Steiner did not offer a formal diagnosis, he recommended claimant attend mental health counseling. (JE 7, pp. 92-93) Dr. Steiner documented that aside from physiological complaints, he found no indication of emotional dysfunction or an actual physiological origin for claimant's neurological and pain complaints, but noted it was possible claimant's complaints are related to the injury, documenting that possible diagnoses could be anxiety or avoidant disorder related to claimant's social anxiety. (JE 7, p. 92) Dr. Steiner concluded claimant has "generally been a well-functioning individual psychologically, and there is no evidence to believe that psychological difficulties are adding to the symptoms he is experiencing." (JE 7, p. 93)

As noted by defendants, the deputy commissioner's decision does not mention the two neuropsychological evaluations conducted by Daniel Tranel, Ph.D., at the University of Iowa Hospitals and Clinics ("UIHC").

Dr. Tranel conducted his first neuropsychological evaluation of claimant on November 8, 2017, and Dr. Tranel issued his report on November 12, 2017. (JE 9) Dr. Tranel documented that since the work injury, claimant had complained of post-concussion-type symptoms, including headaches, dizziness, balance problems, and cognitive difficulties and that Michael Kitchell, M.D., a treating neurologist, had diagnosed claimant with post-concussion migraines related to the accident. (JE 9, p. 154) Dr. Tranel opined claimant did not have any permanent brain damage from the

work injury, but found "[claimant] has some cognitive weaknesses that are most likely related to depression, pain, and poor coping strategies," which are treatable problems. (JE 9, p. 154) Dr. Tranel noted:

> Mr. Wilson is reporting a highly elevated level of somatic symptoms, psychological distress, poor adjustment, and unhappiness with his general life situation. According to Dr. Kitchell's workup, Mr. Wilson apparently also has migraine headaches, and this is an ongoing neurological problem that interferes with his life qualify. His psychological maladjustment is notable, and sufficient to preclude him from effective work performance. It is our understanding that Mr. Wilson is not able to perform his previous job duties due to physical restrictions. Also, according to his report, he is not able to tolerate the noise in his former work environment, and thus there may not be any viable work for him at his former employer.

(JE 9, pp. 154-55)

Dr. Tranel recommended vocational rehabilitation services for retraining, and psychological counseling and accommodations, as follows:

> We also recommend that Mr. Wilson receive psychological counseling aimed at helping him to improve his coping and adjustment. . . About one year of counseling with a PhD level clinical psychologist with expertise in pain disorders is recommended. This treatment recommendation is related to the September 2016 accident. It is expected that with improvement in his overall distress, he may show at least modest improvement in his daily cognitive functioning.
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> Mr. Wilson may benefit from allowing himself extra time to complete tasks. To minimize memory difficulty and maximize concentration, Mr. Wilson should eliminate distractions when working or focusing attention on material that will be important for him to recall later. Mr. Wilson will be most effective when complex tasks are broken down into smaller, more manageable parts that he can focus on one-at-a-time to completion. He will also benefit from frequent rest breaks. These recommendations are related to the September 2016 work accident.

(JE 9, p. 155)

Claimant treated with Dr. Steiner from June 30, 2017, through October 12, 2020. (JE 7)

Claimant returned for a second neuropsychological evaluation with Dr. Tranel on February 12, 2020. (JE 9, p. 156) Dr. Tranel documented that during the original

evaluation he found claimant had mild weakness in processing speed and some mild deficits in complex decision-making, abstract reasoning, and concept formation. (JE 9, p. 160) Dr. Tranel noted claimant's cognitive weaknesses "were considered to be secondary to depression, pain, and poor coping strategies" and he had recommended vocational rehabilitation, psychotherapy, and cognitive compensatory strategies. (JE 9, p. 160)

Dr. Tranel noted claimant's repeat evaluation indicated a notable decline in verbal memory, along with a behavioral disturbance, in addition to his previously noted cognitive weaknesses. (JE 9, p. 160) Dr. Tranel again concluded claimant did not have any permanent brain damage from the work injury, and further noted:

> However, the noted cognitive weaknesses and interval declines in verbal memory and behavior, as well as the onset of a significant tremor, are concerning for the potential development of parkinsonism (unrelated to the work accident). Therefore, it is our recommendation that Mr. Wilson return to UIHC for a full neurological work-up with a movement disorder specialist (e.g., Nandakumar Narayanan, MD, PhD). This recommendation is not related to the September 2016 accident.
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> Mr. Wilson is also having difficulties with depression and pain, which are likely exacerbating cognitive weaknesses. He is receiving psychotherapy in Marshalltown, IA, which has reportedly been helpful. In addition to the therapy, we recommend consideration of psychiatric care to augment psychotherapy and to monitor his psychiatric medications. Finally, we recommend neuropsychological rehabilitation in order to provide him and his wife with education about cognitive changes in movement disorders and helpful compensatory strategies to assist with his demonstrated weaknesses. . .

(JE 9, p. 160)

Dr. Manshadi found claimant had issues with cognition, problems with decision-making, anxiety, and depression related to the work injury. (Ex. 3, p. 36) Dr. Mooney found there was no evidence claimant's "current somatic complaints including his endorsed mood disorder and cognitive dysfunction" are related to the work injury, noting:

> As it related to his cognitive dysfunction and mood changes, it is evident in the neuropsychological evaluation performed by Dr. Daniel Tranel initially on 11/8/17 that Mr. Wilson had some symptoms of mild depression and anxiety, however at the same time he had highly elevated somatic symptoms endorsement well above the level normally observed in

> patients with bona fide physiologically-based medical conditions. Although there were some findings noting 'weaknesses in complex decision making, abstract reasoning and concept formation" there was no evidence of higher cortical function disturbance, and it was Dr. Tranel's opinion that Mr. Wilson did not have permanent acquired impairments in brain function related to the September 2016 accident.

(Ex. A, p. 9)

I do not find Dr. Mooney's report to be convincing because he performed only a records review and did not examine claimant or perform any tests on him. Even Dr. Mooney recognized Dr. Tranel noted claimant had problems with mild depression and anxiety. Based on Dr. Tranel's objective testing, and recommendations for ongoing psychological counseling and psychiatric treatment, claimant has established he sustained depression, anxiety, and weaknesses in complex decision-making, abstract reasoning and concept formation caused by the work injury.

D. Bilateral Hand Tremors

The deputy commissioner found claimant's tremors were caused by the work injury, relying on the opinion of Christopher Groth, M.D., a neurologist at the University of Iowa Hospitals and Clinics (UIHC).

In December 2016, while treating with Dr. Krain, claimant complained of having problems with tremors in his hands. (JE 5, p. 64) Claimant was eventually referred to Dr. Groth at UIHC. (JE 9, p. 162) During an appointment in late June 2019, Dr. Groth documented he believed claimant's condition was most consistent with a diagnosis of Parkinson's disease, but noted with "his history of traumatic brain injury [it] is hard to determine how much of his symptoms could be related to that versus possibly a neuro degenerative condition." (JE 9, p. 162) Dr. Groth ordered a DaTscan to determine the etiology of the tremor. (JE 9, p. 162) The DaTscan was negative with no evidence of Parkinsonian syndrome. (JE 9, p. 166)

On October 9, 2019, Dr. Groth issued an opinion letter noting the DaTscan was negative and did not show any evidence the tremor is related to a non-work related condition, such as Parkinson's disease, and Dr. Groth opined "the tremor is unlikely to be medication related or related to Parkinson's disease, but rather related to the head injury he sustained." (JE 9, p. 176) Lara Lazarre, M.D., the treating neurologist at the time of the hearing, deferred to Dr. Groth's opinion in a response to a form letter from claimant's counsel on January 13, 2021. (JE 12, p. 238)

At the conclusion of the second neuropsychological exam, Dr. Tranel referred claimant to Nandakumar Narayanan, M.D., a neurologist, for his tremor. (JE 9, p. 160) Dr. Narayanan noted "[h]ead trauma is a known risk factor for Parkinson disease,

despite the facts that the DaT scan is equivocal and Sinemet at his prior dose (25/100, 1 pill TID) did not help his tremor. He may benefit from increasing the dose of Sinemet. However, the tremor and head trauma may be unrelated." (JE 9, p. 179)

Dr. Mooney opined there is no conclusive evidence claimant's current findings of tremor and Parkinson's are related to the work injury and the associated head trauma. (Ex. A, p. 10) Dr. Manshadi opined claimant's bilateral hand tremors were caused by the work injury as documented by Dr. Groth. (Ex. 3, p. 36)

As noted above, Dr. Mooney did not personally examine claimant. I do not find his opinion persuasive. Dr. Groth is an expert neurologist who has treated claimant. Dr. Lazarre, claimant's current treating neurologist also deferred to Dr. Groth's opinion. While Dr. Narayanan opined claimant's hand tremors and head trauma may be unrelated, he did not comment on Dr. Groth's opinion. I find claimant has established his hand tremors are related to the work injury.

E. Vision Problems

Claimant has complained of visual problems since the work injury. Prior to the work injury claimant treated for ocular hypertension in both eyes. (JE 4, pp. 37, 42)

On September 26, 2016, following the work injury, claimant attended an appointment with Susan Patin, O.D., with the Wolfe Eye Clinic, complaining of decreased, blurry vision in both eyes that was present most of the time and "most notable when driving." (JE 4, p. 37) Dr. Patin found claimant had no ocular health-related issues in relation to his recent head trauma and documented she explained to claimant his cataract condition was affecting the quality of his vision and he may eventually need cataract surgery. (JE 4, p. 39) When he returned to Dr. Patin on November 14, 2018, claimant reported his vision had been gradually deteriorating since his last visit and he reported having difficulty reading, which seemed to be related to frequent headaches, issues with his peripheral vision, and frequent dizziness. (JE 4, p. 40) Dr. Patin documented claimant had bilateral cataracts that were worsening and she found "[n]o significant visual field loss or ocular abnormalities on examination today. Visual discomfort likely of neurological etiology stemming from head trauma and is affecting ability to work and drive safely." (JE 4, p. 42)

On September 10, 2019, claimant attended an appointment regarding his vision with Randy Kardon, M.D., a neuro-ophthalmologist at UIHC. (JE 9, p. 168) Dr. Kardon concluded claimant's visual exam was normal and his visual complaints "seem to be a processing problem at a higher level and not due to a retinal or optic nerve or primary visual cortex location, but rather in higher visual centers that interface with cognitive functions, such as prefrontal cortex." (JE 9, p. 173)

Dr. Lazarre also documented claimant's neuro-ophthalmology evaluation showed his eyes were normal, but there was a disconnection between his brain and his eyes. (JE 12, p. 222) Claimant later worked on his vision in motion with DeAnn Fitzgerald, O.D., through the Pinnacle Program. Claimant attended the program from June 22, 2020, through July 3, 2020, but did not find the program effective. (Tr., p. 38)

Months later, when Dr. Manshadi conducted his IME, he documented he believed claimant would continue to benefit from additional treatment with Dr. Fitzgerald for his vision and dizziness. (Ex. 3, p. 37) Dr. Manshadi did not provide a diagnosis for claimant's visual condition. (Ex. 3) Dr. Mooney noted that while claimant had complained of visual disturbance, Dr. Patin did not find any abnormality in her assessment and Dr. Kardon found there was no evidence of visual field loss and his vision was correctable to 20/20. (Ex. A, p. 8)

No physician in this case has opined claimant sustained an injury to his eyes caused by the work injury. I find claimant has not established he sustained an injury to his eyes or visual system caused by the work injury independent of his migraine condition.

F. Vestibular Dysfunction/Dizziness

Claimant has complained of vestibular dysfunction and dizziness since the work injury. Dr. Lazarre, the treating physician, has not diagnosed claimant with any vestibular condition, but recommended treatment through the Pinnacle Program to work on vision in motion, as discussed above.

In his report Dr. Manshadi did not provide claimant with a specific diagnosis of the vestibular system but assigned claimant a permanent impairment rating for dizziness and vestibular cochlear issues. (Ex. 3) Dr. Mooney notes in his opinion that none of the treating neurologists diagnosed claimant with a vestibular function disorder and objective testing did not support a vestibular disorder. (Ex. A, p. 9)

No physician in this case has opined claimant sustained an injury to his vestibular system, independent from his migraine condition, caused by the work injury. I find claimant has not established he sustained a separate injury to his vestibular system caused by the work injury independent of his migraine condition.

II. Maximum Medical Improvement and Ripeness

Iowa Code section 85.33 (2016) governs temporary disability benefits, and Iowa Code section 85.34 governs healing period and permanent disability benefits. Dunlap v. Action Warehouse, 824 N.W.2d 545, 556 (Iowa App. 2012). As a general rule, "temporary total disability compensation benefits and healing-period compensation benefits refer to the same condition." Clark v. Vicorp Rest., Inc., 696 N.W.2d 596, 604

(Iowa 2005). The purpose of temporary total disability benefits and healing period benefits is to "partially reimburse the employee for the loss of earnings" during a period of recovery from the condition. Id. An award of healing period benefits or total temporary disability benefits is not dependent on a finding of permanent impairment. Dunlap, 824 N.W.2d at 556. The appropriate type of benefit depends on whether or not the employee has a permanent disability. Id.

"[A] claim for permanent disability benefits is not ripe until maximum medical improvement has been achieved." Bell Bros. Heating & Air Conditioning v. Gwinn, 779 N.W.2d 193, 201 (Iowa 2010). "Stabilization of the employee's condition 'is the event that allows a physician to make the determination that a particular medical condition is permanent.'" Dunlap, 824 N.W.2d at 556 (quoting Bell Bros. Heating & Air Conditioning, 779 N.W.2d at 200). If the employee has a permanent disability, then payments made prior to permanency are healing period benefits. Id. If the injury has not resulted in a permanent disability, then the employee may be awarded temporary total benefits. Id. at 556-57.

Iowa Code section 85.34(1) governs healing period benefits, as follows:

> If an employee has suffered a personal injury causing permanent partial disability for which compensation is payable as provided in subsection 2 of this section, the employer shall pay to the employee compensation for a healing period, as provided in section 85.37, beginning on the first day of disability after the injury, and until the employee has returned to work or it is medically indicated that significant improvement from the injury is not anticipated or until the employee is medically capable of returning to employment substantially similar to the employment in which the employee was engaged at the time of injury, whichever occurs first.

Under Iowa Code section 85.33(6), "'employment substantially similar to the employment in which the employee was engaged at the time of the injury' includes, for purposes of an individual who was injured in the course of performing as a professional athlete, any employment the individual has previously performed."

The deputy commissioner found claimant had reached maximum medical improvement, finding claimant's condition has plateaued and rejecting the opinion of Dr. Lazarre, the treating physician. The deputy commissioner found:

> . . . While this opinion is quite specific, it is not entirely clear. When read in conjunction with her November 2020, treatment note, it is quite clear that Dr. Lazarre is adamant that further treatments should be attempted to improve Mr. Wilson's symptoms. Her opinion of the likelihood of success, however, is murkier. I read her opinion to provide more of an optimistic and

> hopeful desire to attempt further treatment rather than an opinion that Mr. Wilson will be able to work if he simply tries the medications for a longer period of time. Moreover, the phrase maximum medical improvement was never specifically defined to Dr. Lazarre so it is somewhat unclear, at least to some degree, what she meant. While it is clear Dr. Lazarre believes that further medication treatments should be attempted and may provide significant benefits in controlling Mr. Wilson's symptoms, she has not provided an opinion that this will likely reduce his industrial disability. The reality is, Mr. Wilson has been off work for several years. At the time of the hearing he has attempted numerous medications from at least five different neurologists. Importantly, based on the record, I believe Mr. Wilson wants to get better and would prefer to be working.
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> Dr. Manshadi provided his own opinion regarding MMI. He provided an impairment rating and opined "Mr. Wilson will not be able to return to any gainful employment at this point due to all the above-mentioned diagnoses and symptoms." (Cl. Ex. 3, p. 37) Prior to hearing, Dr. Manshadi specifically opined that Mr. Wilson reached MMI on November 16, 2020. (Cl. Ex. 9, p. 185)
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> Having reviewed all of the evidence in the record, I find it is unlikely claimant's medical condition is likely to substantially improve. I find his condition, after four and a half years of treatment, is stable and there is no good reason to believe the further treatments recommended by Dr. Lazarre will bring substantial improvement to claimant's disability. Most likely, it could bring some minor improvement to some of his symptoms. Of course, I hope I am wrong. Fortunately, for all parties, if I am wrong there is a remedy. Defendants may file a petition for review-reopening to have the matter reassessed.

(Arb. Dec., p. 7-8)

Dr. Lazarre began treating claimant on December 20, 2019, 13 months before the hearing. (JE 12) During her initial meeting with claimant, Dr. Lazarre assessed claimant with chronic common migraine without aura with intractable migraine with status migrainosus and concussion with no loss of consciousness with mental confusion or disorientation. (JE 12, p. 219) Dr. Lazarre developed a plan for addressing and treating claimant's migraine headaches, recommending claimant limit his pain medication, avoid triggers, control his diet, control his sleep, control his stress, and attend physical therapy. (JE 12, pp. 219-21) Dr. Lazarre also planned to wean claimant off depakote, try lamotrigine, and if her initial recommendations failed, she planned to try Botox or Aimovig/Emgaility/Anjoy. (JE 12, p. 220) Dr. Lazarre commenced with her treatment plan, noting that while claimant had tried multiple medications it was unclear

whether claimant "actually took the medications long enough to find out if there was benefit" given he had been denied refills by defendants. (JE 12, p. 228)

Pursuant to a form letter provided by claimant's counsel, Dr. Lazarre opined claimant had not reached MMI as of January 13, 2021. (JE 12, p. 238) Dr. Lazarre also opined she believed if claimant's headaches could be significantly lessened or improved it would likely result in improvements to his vision, balance, and cognition. (JE 12, p. 237) In her office note from February 15, 2021, Dr. Lazarre documented claimant did not receive benefit from cyproheptadine or Emgality for his migraines and Botox was painful, so she planned to prescribe Aimovig/Ajovy. (Ex. C, p. 43)

Dr. Manshadi opined claimant reached maximum medical improvement, but Dr. Manshadi also found, "I also agree with Dr. Lazarre to try the newer medications for migraines including CGRPs as well as Botox if these have not been tried yet." (Ex. 3, p. 37) Dr. Manshadi did not address why he disagreed with Dr. Lazarre's opinion claimant had not reached MMI, and, in fact, Dr. Manshadi agreed with Dr. Lazarre's medication treatment recommendations. (Exs. 3, p. 37; 9, p. 185) While claimant has treated for his migraines for several years, he had treated with Dr. Lazarre for just over a year at the time of the hearing. Dr. Lazarre, the treating expert physician, does not believe claimant has reached MMI. Based on the foregoing, I find the deputy commissioner erred in finding claimant had reached MMI.

At the time of the hearing claimant was not working or capable of engaging in substantially similar employment. The record reflects defendants commenced paying claimant temporary total disability benefits on September 2, 2017. (Ex. 5) I find claimant is entitled to a running award of temporary benefits from September 2, 2017, through the time of the arbitration hearing and ongoing at the stipulated weekly rate of $787.68.

III. Penalty Benefits

Iowa Code section 86.13 governs compensation payments. Under the statute's plain language, if there is a delay in payment absent "a reasonable or probable cause or excuse," the employee is entitled to penalty benefits, of up to fifty percent of the amount of benefits that were denied, delayed, or terminated without reasonable or probable cause or excuse. Iowa Code § 86.13(4); see also Christensen v. Snap-On Tools Corp., 554 N.W.2d 254, 260 (Iowa 1996) (citing earlier version of the statute). "The application of the penalty provision does not turn on the length of the delay in making the correct compensation payment." Robbennolt v. Snap-On Tools Corp., 555 N.W.2d 229, 236 (Iowa 1996). If a delay occurs without a reasonable excuse, the commissioner is required to award penalty benefits in some amount to the employee. Id.

The statute requires the employer or insurance company to conduct a "reasonable investigation and evaluation" into whether benefits are owed to the

employee, the results of the investigation and evaluation must be the "actual basis" relied on by the employer or insurance company to deny, delay, or terminate benefits, and the employer or insurance company must contemporaneously convey the basis for the denial, delay, or termination of benefits to the employee at the time of the denial, delay, or termination of benefits. Iowa Code § 86.13(4). An employer may establish a "reasonable cause or excuse" if "the delay was necessary for the insurer to investigate the claim," or if "the employer had a reasonable basis to contest the employee's entitlement to benefits." Christensen, 554 N.W.2d at 260. "A 'reasonable basis' for denial of the claim exists if the claim is 'fairly debatable.'" Burton v. Hilltop Care Ctr., 813 N.W.2d 250, 267 (Iowa 2012). "Whether a claim is 'fairly debatable' can generally be determined by the court as a matter of law." Id. The issue is whether the employer had a reasonable basis to believe no benefits were owed to the claimant. Id. "If there was no reasonable basis for the employer to have denied the employee's benefits, then the court must 'determine if the defendant knew, or should have known, that the basis for denying the employee's claim was unreasonable.'" Id.

Benefits must be paid beginning on the 11th day after the injury, and "each week thereafter during the period for which compensation is payable, and if not paid when due," interest will be imposed. Iowa Code § 85.30. In Robbennolt, the Iowa Supreme Court noted, "[i]f the required weekly compensation is timely paid at the end of the compensation week, no interest will be imposed . . . . As an example, if Monday is the first day of the compensation week, full payment of the weekly compensation is due the following Monday." Robbennolt, 555 N.W.2d at 235. A payment is "made" when the check addressed to the claimant is mailed, or personally delivered to the claimant. Meyers v. Holiday Express Corp., 557 N.W.2d 502, 505 (Iowa 1996) (abrogated by Keystone Nursing Care Ctr. v. Craddock, 705 N.W.2d 299 (Iowa 2005) (concluding the employer's failure to explain to the claimant why it would not pay permanent benefits upon the termination of healing period benefits did not support the commissioner's award of penalty benefits)).

When considering an award of penalty benefits, the commissioner considers "the length of the delay, the number of the delays, the information available to the employer regarding the employee's injuries and wages, and the prior penalties imposed against the employer under section 86.13." Schadendorf v. Snap-On Tools Corp., 757 N.W.2d 330, 336 (Iowa 2008). The purposes of the statute are to punish the employer and insurance company and to deter employers and insurance companies from delaying payments. Robbennolt, 555 N.W.2d at 237.

The deputy commissioner assessed defendants $1,500.00 in penalty benefits, finding the greater weight of the evidence supports a finding that $4,000.00 in benefits were either untimely paid or were otherwise underpaid. Defendants assert they should not be assessed with penalty benefits in this case. I affirm the deputy commissioner's

finding that defendants should be assessed $1,500.00 in penalty benefits, as modified by the following additional analysis.

The evidence supports a finding that defendants made regular weekly benefit payments to claimant after the work injury, but from January 13, 2020, through February 3, 2020, defendants did not make weekly payments to claimant. (Ex. 5, pp. 129-31) On February 4, 2020, defendants issued a $2,273.04 payment to claimant. (Ex. 5, p. 119) The parties had agreed the correct rate was $787.68 per week, but when defendants issued the payment they paid benefits at the weekly rate of $757.68, for a shortage of $90.00 for the three weeks. Defendants did not offer any explanation for the late payment or the shortage.

Defendants continued to pay weekly benefits at the incorrect rate through May 3, 2020, resulting in an underpayment of $30.00 per week, or $480.00. Defendants issued a $360.00 check for the underpayment on May 7, 2020, and a second check in the amount of $120.00 on August 27, 2020. (Ex. 5, p. 118) Defendants did not offer any explanation for the underpayment of the benefits.

Defendants also paid benefits late for the week of December 7, 2020, through December 13, 2020, when they issued the $787.68 payment on December 16, 2020. Defendants did not offer any explanation for the late payment of benefits.

The evidence supports a finding that defendants made late payments and underpayments of benefits totaling $3,540.72. Defendants did not offer any explanation for the late and underpaid benefits. I agree with the deputy commissioner that defendants should be assessed $1,500.00 in penalty benefits to deter defendants and other employers and insurance carriers from engaging in similar conduct in the future.

ORDER

IT IS THEREFORE ORDERED that the arbitration decision filed on January 12, 2022, is affirmed in part, modified in part, and reversed in part, with the above-stated additional and substituted analysis.

Defendants shall pay claimant a running award of temporary disability benefits from September 2, 2017, at the stipulated weekly rate of seven hundred eighty-seven and 68/100 dollars ($787.68) until such time as such benefits shall cease pursuant to Iowa Code section 85.33.

Defendants shall receive credit for all benefits previously paid.

Defendants shall pay accrued benefits in a lump sum with interest as set forth in Iowa Code section 85.30 (2016).

Defendants shall pay claimant one thousand five hundred and 00/100 dollars ($1,500.00) in penalty benefits.

Pursuant to rule 876 IAC 4.33, defendants shall pay claimant's costs of the arbitration proceeding as set forth in Exhibit 8, and the parties shall split the costs of the appeal, including the cost of the hearing transcript.

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

Signed and filed on this 13th day of June, 2022.

Joseph S. Cortese II

JOSEPH S. CORTESE II
WORKERS' COMPENSATION
COMMISSIONER

The parties have been served, as follows:

Nate Willems (via WCES)

James Peters (via WCES)