BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

WYATT BAUMGARTNER,

Claimant,

vs.

MIDWESTERN TRADING INC.,

Employer,

and

INTEGRITY MUTUAL INSURANCE COMPANY,

Insurance Carrier,
Defendants.

File No. 5054484

ARBITRATION DECISION

Head Note Nos.: 1402.30, 1802, 1803, 2907, 4000.2

STATEMENT OF THE CASE

Wyatt Baumgartner, claimant, filed a petition for arbitration against Midwestern Trading, Incorporated (hereinafter referred to as "Midwestern Trading"), as the employer and Integrity Mutual Insurance Company as the insurance carrier. An in-person hearing occurred on October 4, 2016.

The evidentiary record includes Claimant's Exhibits 1 through 17 and Defendants' Exhibits I through R. The parties stipulated that Exhibit O contains hearsay evidence on a surveillance report. Defendants agreed to admit Exhibit O only for purposes of the photographs, or pictures, contained in the document. Exhibit O was received for that limited purpose.

Claimant testified on his own behalf. Claimant also called his wife, Nicole Baumgartner, to testify. Defendants called Shawn Marsden, claimant's former supervisor, to testify.

The evidentiary record closed at the end of the October 4, 2016 hearing. However, counsel for the parties requested the opportunity to file post-hearing briefs. The parties were given until October 18, 2016 to serve their post-hearing briefs, at which time the case was considered fully submitted to the undersigned.

The parties filed a hearing report at the commencement of the hearing. On the hearing report, the parties entered into numerous stipulations. Those stipulations were

accepted and no factual or legal issues relative to the parties' stipulations will be made or discussed in either file. The parties are now bound by their stipulations.

ISSUES

The parties submitted the following disputed issues for resolution:

1. Whether claimant sustained an injury arising out of and in the course of his employment activities with Midwestern Trading on March 7, 2013.

2. Whether the alleged injury caused temporary disability during a period of recovery.

3. Whether the alleged injury caused permanent disability and, if so, the extent of claimant's entitlement to permanent disability benefits.

4. Whether defendants should be assessed for penalty benefits for an alleged unreasonable underpayment of weekly benefits pursuant to Iowa Code section 86.13.

5. Whether costs should be assessed against either party.

FINDINGS OF FACT

The undersigned, having considered all of the evidence and testimony in the record, finds:

Wyatt Baumgartner is a 46-year-old man. He was 45 years of age at the time of the arbitration hearing and was 42 years of age at the time of the alleged work injury on March 7, 2013. He has a high school education, though he required special education assistance to matriculate through the secondary education system. Mr. Baumgartner attempted further education but dropped out of business college after one semester. (Claimant's testimony)

After high school, claimant served in the Army. He received a General Discharge from the Army after he was involved in a conflict with his superior officer. (Exhibit P, page 9) Since leaving the military, claimant has worked primarily manual labor requiring minimal training or skills.

Specifically, claimant worked for his father roofing houses. He worked as a courier for Federal Express. He was an over-the-road truck driver for 14 years for Worley Warehousing. However, he lost that job after being arrested for suspected intoxication while operating a motor vehicle.

Mr. Baumgartner started working for Midwest Trading in May 2010. (Ex. 16) He worked as a fork truck driver for Midwest Trading in a warehouse setting. (Ex. 16; Ex. N, pp. 12-14)

On March 7, 2013, claimant alleges he injured his right shoulder while working. Specifically, claimant asserts that he was attempting to transfer starch product from one large bag into another bag when he injured his right shoulder. Claimant described the re-bagging process and the manner in which he was injured in detail at hearing. (Transcript, pp. 3-8, 51) Defendants pointed out some discrepancies in claimant's description of the events between the medical records, claimant's recorded statement, his deposition testimony, and his hearing testimony. However, the discrepancies defendants identify are relatively minor and the major events described by claimant involved a large rush of starch out of the upper bag, pushing his right arm down and backwards.

Defendants introduced a video demonstrating the procedure for re-bagging. (Ex. R) Defendants also called Shawn Marsden to testify. Mr. Marsden also described the re-bagging process.

The process described by Shawn Marsden and demonstrated in Exhibit R was relatively controlled, did not cause a significant mess, and demonstrated a relatively controlled release of starch from the top bag into the lower bag. This is clearly not what happened when claimant attempted to re-bag some starch on March 7, 2013.

Claimant testified that he had never seen a top bag drop its starch as quickly or in the manner that occurred on March 7, 2013. Nevertheless, the video in Exhibit Q clearly demonstrated a quick and sudden discharge of starch from the top bag onto the dock floor. Claimant's description of events, as outlined in his trial testimony, is generally accepted as accurate and consistent with the event depicted in Exhibit Q.

The dock video from the employer's premises on March 7, 2013 depicts a large dump of a white powdery substance at approximately the time claimant asserts he was injured. Although the specific actions of claimant or the event is not depicted on the video, it is evident that there was a fast and significant downward rush of starch product that occurred at the time claimant asserted he was injured. A large white cloud bursts forth in the video in a short period of time and the floor is almost immediately covered in a white dusty material, presumably the starch described at hearing. (Exhibit Q)

Defendants also question the severity of the injury if caused by the March 7, 2013 incident. Defendants correctly point out that claimant completed his entire shift on March 7, 2013. Defendants also produce evidence that tends to suggest claimant only raised the issue of an injury after he was confronted by the supervisor the day after the incident and was being disciplined. Once that confrontation occurred, claimant reported his right shoulder injury and the employer told him to get medical care.

Mr. Baumgartner sought medical care on March 8, 2013 through his personal physician, Jeffrey F. Jones, M.D. Dr. Jones believed claimant's injury was likely muscular, but noted that it could involve a torn rotator cuff. (Ex. 1, p. 1) The employer redirected claimant's medical care to a medical provider of its choosing. On March 11, 2013, claimant was evaluated by William J. Manely, PA-C. Mr. Manely diagnosed claimant with right shoulder pain and a strain of that shoulder. However, Mr. Manely

noted there was "possible internal derangement" based on his examination. (Ex. 2, p. 2)

Mr. Manely recommended an MRI of the right shoulder, which was accomplished on March 26, 2013. The MRI demonstrated a possible tear in the superior labrum and recommended an MR arthrogram be performed on claimant's right shoulder. (Ex. 3, p. 6) After receipt of the MRI results, Mr. Manely referred claimant for orthopaedic evaluation by James M. Pape, M.D. (Ex. 2, p. 9)

Dr. Pape initially evaluated claimant on May 2, 2013. He diagnosed claimant with probable rotator cuff tendinopathy and thought it was less likely that claimant had any significant labral pathology. (Ex. 4, p. 2) Unfortunately, the conservative measures attempted by Dr. Pape did not resolve claimant's problems. Dr. Pape performed arthroscopic surgery on claimant's right shoulder on August 19, 2013. Specifically, Dr. Pape performed a right shoulder arthroscopy with debridement of the superior labral fraying he found as well as a release and repair of the biceps tendon. (Ex. 6, pp. 1-2)

The initial surgery did not resolve all of claimant's symptoms. Dr. Pape returned claimant to surgery on December 6, 2013. In this second surgery, Dr. Pape removed some scar tissue and provided additional suturing of the biceps tendon, but found no significant pathology to explain claimant's ongoing symptoms. (Ex. 4, p. 15; Ex. 6, pp. 6-7) Once again, claimant contends that the second surgery did not resolve his symptoms.

Dr. Pape ultimately ordered EMG and an evaluation by a pain specialist. None of the additional treatment options ultimately resolved claimant's symptoms and he was referred back to Dr. Pape. (Ex. 7, 8, 9) Dr. Pape declared maximum medical improvement on January 20, 2015. (Ex. 4, p. 36)

The evidentiary record is clear that claimant had no pre-existing symptomatic shoulder pathology. Defendants attempted to establish that the injury could not or did not occur as described by claimant based on the positioning of his arms and the bags of starch at the time of the alleged injury. That attempt was not terribly convincing.

No alternative explanation is presented in this record as to a cause of claimant's right shoulder injury. The most likely and most believable scenario presented under the evidentiary record demonstrates that claimant sustained a right shoulder injury on March 7, 2013 as a result of his work incident as he described it at hearing, although I acknowledge the variances described by defendants.

I find that claimant sustained a right shoulder injury as a result of his efforts to re-bag starch on March 7, 2013. I find that the right shoulder injury of March 7, 2013 caused claimant to need two surgical procedures. I find that the March 7, 2013 incident caused both temporary and permanent disability.

After declaring maximum medical improvement, Dr. Pape opined that claimant requires a five pound permanent lifting restriction for his right arm and was medically precluded from overheard work with the right arm. (Ex. 4, p. 38) Dr. Pape opined that

claimant sustained a 10 percent permanent impairment of the whole person as a result of his right shoulder injury. (Ex. 4, p. 37) He released claimant from his care and claimant had no ongoing or future treatment scheduled at the time of the arbitration hearing.

Although Dr. Pape was an authorized physician, defendants elected to obtain an independent medical evaluation with Lloyd John Luke, M.D. on April 20, 2015. Dr. Luke confirmed the history of an injury at work and the surgical procedures performed on claimant's right shoulder, but he was unable to provide a definitive diagnosis for claimant's ongoing right shoulder symptoms. Dr. Luke opined that there was no objective evidence to support claimant's subjective complaints. (Ex. 10, pp. 1-2)

However, Dr. Luke concurred that claimant was at maximum medical improvement. He opined that claimant sustained a nine percent impairment of the whole person as a result of his right shoulder injury. Dr. Luke opined that claimant requires a permanent work restriction that precludes any pushing, pulling, or lifting greater than five pounds. Dr. Luke also opined that all work performed by claimant should be performed between shoulder and waist level and that claimant should only work with his right elbow against the lateral chest. (Ex. 10, p. 2)

Dr. Luke was also deposed by the parties before trial. Dr. Luke testified that he imposed permanent work restrictions on claimant as a humane concession to protect claimant from his subjective pain complaints. However, Dr. Luke confirmed that he identified no objective findings that substantiate the need for permanent work restrictions. (Ex. J, p. 11) Dr. Luke also opined that his permanent impairment rating was based upon claimant's subjective complaints and was not objectively supported. (Ex. J, p. 11)

Although he did not necessarily find objective indicators to explain claimant's subjective complaints, Dr. Luke did note that claimant has mild hypertension, which is a medical condition that is consistent with chronic pain. (Ex. J, p. 8) Dr. Luke also confirmed that claimant requires permanent restrictions, including no pushing, pulling or lifting over five pounds. (Ex. J, p. 19) When asked about the cause of claimant's right shoulder injury, Dr. Luke was surprised that causation was a disputed issue and indicated that he has no causation opinion, other than the mechanism of injury that has been reported to him. (Ex. J, pp. 16-17)

I find that the medical evaluations did not disclose objective findings to definitively explain claimant's subjective complaints. I also find that claimant is likely exaggerating his symptoms and abilities to some extent. Nevertheless, claimant submitted to two surgical procedures and had objective defects in his shoulder joint that were repaired surgically. He has an objectively supportable permanent impairment rating according to Dr. Pape, which I accept as credible and accurate. (Ex. 12, p. 2) Dr. Pape and Dr. Luke offered similar impairment ratings. I find the impairment rating offered by the surgeon, Dr. Pape, most convincing. Therefore, I find claimant has proven by a preponderance of the evidence that he sustained a 10 percent permanent impairment of the whole person as a result of his right shoulder injury on March 7, 2013.

I also find that Mr. Baumgartner has ongoing symptoms and limitations, though he likely exaggerates his symptoms and limitations to some extent.

Claimant has not worked since the date of injury, March 7, 2013. Mr. Baumgartner has applied for jobs since March 7, 2013, and believes he could perform the jobs for which he has applied. I find that claimant would be capable of more than he has demonstrated in medical evaluations and could perform at least some of the employment positions for which he has applied. I find that Mr. Baumgartner remains capable of performing gainful employment within the competitive labor market. However, I find that he has sustained a significant loss of future earning capacity as a result of the March 7, 2013 injury.

Having considered claimant's age, educational background, employment history, ability to continue in his pre-injury job, his permanent medical restrictions should he seek other employment, his permanent functional impairment rating, his level of motivation, as well as all other relevant industrial disability factors outlined by the Iowa Supreme Court, I find that claimant has proven an 80 percent loss of future earning capacity as a result of his March 7, 2013 work injury at Midwestern Trading.

CONCLUSIONS OF LAW

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 Elec. 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).

Having found that Mr. Baumgartner proved by a preponderance of the evidence that he sustained a right shoulder injury as a result of his work activities on March 7, 2013, I conclude that claimant has established a compensable work injury claim.

His initial claim is for healing period benefits. Having found that the injury caused temporary disability, I now consider the healing period claim. The parties stipulated that "Claimant was paid weekly benefits from 3/18/13 to 3/11/15. The parties agree that Claimant was paid $11.31 less than his correct rate." (Hearing Report) Similarly, the parties stipulated, "[i]f an award is made, the parties agree Claimant was underpaid $11.31 per week and is due $1,187.55 in underpayment plus interest."

No other claim for healing period benefits is asserted. Defendants will, therefore, be ordered to pay claimant the additional $11.31 per week for the established healing period of March 18, 2013 through March 11, 2015, pursuant to the parties' stipulation, as well as applicable interest pursuant to Iowa Code section 85.30.

Mr. Baumgartner next asserts a claim for permanent disability benefits. Claimant's injury involves his right shoulder. When disability is found in the shoulder, a body as a whole situation may exist. Alm v. Morris Barick Cattle Co., 240 Iowa 1174, 38 N.W.2d 161 (1949). In Nazarenus v. Oscar Mayer & Co., II Iowa Industrial Commissioner Report 281 (App. 1982), a torn rotator cuff was found to cause disability to the body as a whole. Therefore, the parties appropriately stipulated that the injury, if it caused permanent disability, should be compensated industrially pursuant to Iowa Code section 85.34(2)(u). (Hearing Reports)

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.

I found that Mr. Baumgartner submitted to two surgical procedures on his right shoulder and that he sustained permanent impairment and requires permanent restrictions as a result of the March 7, 2013 work injury. Therefore, I conclude that Mr. Baumgartner has established entitlement to permanent disability benefits in some amount. Iowa Code section 85.34(2).

Having considered all of the relevant industrial disability factors outlined by the Iowa Supreme Court, I found that claimant has proven an 80 percent loss of future earning capacity. This is equivalent to a 80 percent industrial disability and entitles claimant to an award of 400 weeks of permanent partial disability benefits. Iowa Code section 85.34(2)(u).

Claimant also seeks an award of penalty benefits pursuant to Iowa Code section 86.13 for an alleged unreasonable underpayment of weekly healing period and permanent disability benefits. Iowa Code section 86.13(4) provides:

> a. If a denial, a delay in payment, or a termination of benefits occurs without reasonable or probable cause or excuse known to the employer or insurance carrier at the time of the denial, delay in payment, or termination of benefits, the workers' compensation commissioner shall award benefits in addition to those benefits payable under this chapter, or chapter 85, 85A, or 85B, up to fifty percent of the amount of benefits that were denied, delayed, or terminated without reasonable or probable cause or excuse.
>
> b. The workers' compensation commissioner shall award benefits under this subsection if the commissioner finds both of the following facts:
>
> (1) The employee has demonstrated a denial, delay in payment, or termination in benefits.
>
> (2) The employer has failed to prove a reasonable or probable cause or excuse for the denial, delay in payment, or termination of benefits.

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.

(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.

(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).

(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).

In this case, claimant clearly demonstrated (and defendants ultimately stipulated) an underpayment of the weekly rate. As such, claimant clearly demonstrated a delay in payment of benefits. Once that delay was established, it became defendants' burden to establish that they had a reasonable basis for the delay and that they contemporaneously conveyed their basis for delay to claimant. Iowa Code section 86.13(4).

I found that defendants did not offer a reasonable excuse for the underpayment of benefits and ultimately stipulated to the higher weekly rate asserted by claimant.

Iowa Code section 86.13(4)(b)(2). Defendants did not contemporaneously convey any bases for their denial or delay of benefits. Iowa Code section 86.13(4)(c)(3). Defendants bore the burden to establish a reasonable basis, or excuse, and to prove the contemporaneous conveyance of those bases to the claimant. Defendants failed to carry their burden of proof on the penalty issues, and a penalty award is appropriate. Iowa Code section 86.13.

The purpose of Iowa Code section 86.13 is both punishment for unreasonable conduct but also deterrence for future cases. Id. at 237. In this regard, the Commission is given discretion to determine the amount of the penalty imposed with a maximum penalty of 50 percent of the amount of the delayed, or denied, benefits. Christensen v. Snap-On Tools Corp., 554 N.W.2d 254, 261 (Iowa 1996).

In exercising its discretion, the agency must consider factors such as the length of the delays, the number of delays, the information available to the employer regarding the employee's injury and wages, and the employer's past record of penalties. Meyers v. Holiday Express Corp., 557 N.W.2d 502, 505 (Iowa 1996). In this case, defendants stipulate that claimant is entitled to a higher weekly rate than was voluntarily paid by defendants.

Although defendants ultimately disputed whether claimant proved he sustained an injury that arose out of and in the course of his employment, defendants did not possess or assert their basis for denial when weekly benefits were voluntarily paid to claimant. Claimant challenged the weekly rate paid via correspondence from his counsel to Integrity Mutual Insurance on April 23, 2015. Defendants did not remedy the weekly rate at that time.

Defendants did not challenge whether the injury arose out of and in the course of employment until January 28, 2016, when they filed an amended and substituted answer with this agency. Defendants did not possess a reasonable basis for denial of the higher weekly rate as of April 23, 2015. Yet, they did not voluntarily pay benefits at the higher weekly rate. Defendants clearly violated Iowa Code section 86.13(4)(c)(3) and defendants' payment at the lower weekly rate was found to be unreasonable.

No evidence is contained within this record to suggest these defendants have any history of penalty benefits. Defendants did make voluntary payments and the underpayment was not substantial on a weekly basis. Yet, defendants provide no basis for denial, or underpayment, and did not rectify their underpayment even when challenged by claimant. Claimant asserts a total underpayment of $1,753.05.

A 50 percent penalty is not warranted under these circumstances given the relatively small underpayment and given the lack of any evidence of prior penalty benefit awards against these defendants. Yet, a substantial penalty is warranted given the lack of any basis for the underpayment and failure to rectify the underpayment after challenged by claimant.

Having considered the relevant factors and the purposes of the penalty statute, I conclude that a section 86.13 penalty in the amount of $500.00 is appropriate in this

case. Such an amount is appropriate to discourage similar conduct into the future, to punish defendants for their failure to put forth a reasonable basis for denial, and for their failure to contemporaneously communicate any of their alleged bases for denial to the claimant.

Finally, claimant seeks assessment of his costs. Costs are assessed at the discretion of the agency. Iowa Code section 85.40. Exercising the agency's discretion and recognizing that claimant has prevailed on all disputed issues, claimant's filing fee of $100.00 in each file shall be assessed pursuant to 876 IAC 4.33(7).

Claimant also seeks assessment of the cost of his service fees totaling $13.91. These fees will be assessed pursuant to 876 IAC 4.33(2). Finally, claimant seeks assessment of the cost of depositions for claimant and Dr. Luke. Both deposition transcripts were introduced into the evidence record. Therefore, I find that it is appropriate to assess these combined costs totaling $119.05 pursuant to 876 IAC 4.33(2).

ORDER

THEREFORE, IT IS ORDERED:

Defendants shall pay claimant for their underpayment of healing period benefits pursuant to their stipulation on the hearing report.

Defendants shall pay claimant four hundred (400) weeks of permanent partial disability benefits commencing on April 1, 2016 at the stipulated weekly rate of four hundred twenty-nine and 99/100 dollars ($429.99).

Defendants shall pay interest on all accrued weekly benefits pursuant to Iowa Code section 85.30.

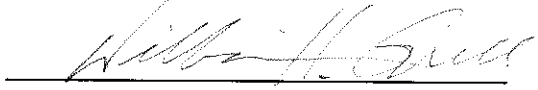
Defendants shall receive the credit to which the parties stipulated on the hearing report.

Defendants shall pay claimant penalty benefits totaling five hundred and 00/100 dollars ($500.00).

Defendants shall reimburse claimant's costs totaling two hundred thirty-two and 96/100 dollars ($232.96).

Defendants shall file subsequent reports of injury (SROI) as required by this agency pursuant to rules 876 IAC 3.1(2) and 876 IAC 11.7.

Signed and filed this 9th day of January, 2016.



WILLIAM H. GRELL
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

Copies To:

Sara Lynne Riley
PO Box 998
Cedar Rapids, IA 52406-0998
sarar@trlf.com

E.J. Giovannetti
Attorney at Law
2700 Grand Ave., Ste. 111
Des Moines, IA 50312-5215
ejgiovannetti@hhlawpc.com

WHG/srs

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.