BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

BENJAMIN RYAN HANSEN, Claimant, vs. HOLVERSON WELDING & MACHINE, LLC, Employer, and AMERICAN HOME ASSURANCE CO., Insurance Carrier, Defendants.	File Nos. 5063269, 5063338 A R B I T R A T I O N D E C I S I O N Head Note Nos.: 1803, 2701, 4000.2

STATEMENT OF THE CASE

Claimant, Benjamin Hansen, filed petitions in arbitration seeking workers' compensation benefits from Holverson Welding & Machine, LLC (Holverson), employer, and National Union Fire Insurance Company, insurer, both as defendants.

This case was heard in Des Moines, Iowa on September 17, 2019 by Deputy Workers' Compensation Commissioner Michelle McGovern. By order of delegation of authority, Deputy Workers' Compensation Commissioner Jim Christenson was appointed to prepare the findings of fact and proposed decision of this case.

The record in this case consists of Joint Exhibits 1-14, Claimant's Exhibits 1-16, Defendants' Exhibits A-O, and the testimony of claimant.

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

ISSUES

For File No. 5063338 (date of injury September 17, 2015):

Whether the injury is a cause of a permanent disability; and if so,

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

The commencement date of permanent partial disability benefits;

Whether claimant is entitled to alternate medical care under Iowa Code section 85.27;

Whether defendants are liable for penalty under Iowa Code section 86.13; and,

Whether apportionment under Iowa Code section 85.34(7)(b) is applicable.

For File No. 5063269 (date of injury February 1, 2016):

Whether the injury is a cause of a permanent disability; and if so,

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

The commencement date of permanent partial disability benefits;

Rate;

Whether claimant is entitled to alternate medical care under Iowa Code section 85.27;

Whether defendants are liable for a penalty under Iowa Code section 86.13; and,

Whether apportionment under Iowa Code section 85.34(7)(b) is applicable.

The parties identified claimant's entitlement to an independent medical evaluation (IME) and the payment of medical bills as issues in dispute in this matter. In the post-hearing brief, defendants indicated they would reimburse claimant for costs associated with the IME and would pay claimant's medical bills. (Defendants' Post-Hearing Brief, page 6) As defendants have assumed liability for these costs, these two issues are not issues in dispute in this matter.

In a December 11, 2019 motion, defendants indicated they had paid all of claimant's underpaid temporary total disability benefits and permanent partial disability benefits at the rate of $602.26. As a result, the issue of underpayment of claimant's temporary total disability benefits is only discussed in this case as it relates to penalty.

FINDINGS OF FACT

Claimant was 39 years old at the time of the hearing. Claimant has a GED.

Claimant has worked in fast-food restaurants. Claimant has worked installing drywall and laying concrete. Claimant worked in a laundry. Claimant has done maintenance for apartments. He has worked as a manager at a liquor store. Claimant has worked as a welder since 1999. (Exhibit 3, pp. 31-33; Transcript pp. 19-20)

Claimant began working for Holverson in 2014. Claimant worked as a welder/machinist. (Ex. F, p. 36; Ex. 3, p. 31)

Claimant testified his job with Holverson required him to go to different job sites to perform pipe and structural welding. Claimant described the job as a physically demanding position. (Ex. 3, p. 32; Tr. p. 30-36)

On September 17, 2015, claimant was working for Holverson on a job site in Merrill, Iowa. Claimant was working at a corn extracting plant. Claimant said he was trying to move a large valve, approximately the size of a fire hydrant, when he sustained a hernia. (Tr. pp. 40-42)

On October 6, 2015, claimant was evaluated by Mark Abraham, M.D., for pain after lifting. Claimant was assessed as having a left inguinal hernia. Surgery was discussed and chosen as a treatment option. (Joint Ex. 1, pp. 1-2)

On October 16, 2015, claimant underwent laparoscopic repair of a left inguinal hernia. Surgery was performed by Dr. Abraham. (Jt. Ex. 2, p. 8)

Claimant was released to return to work without restrictions by Dr. Abraham on November 12, 2015. (Ex. 1, p. 5)

Claimant testified that when he returned to work he felt a pulling sensation in the left testicle. He believed this was due to mesh implanted for his hernia. He said that when he returned to work, the area of the surgery never felt right. (Tr. pp. 44-45)

Claimant said he switched job sites with Halvorson and he was moved to a location in Dakota City, Nebraska. Claimant said he reinjured himself when crawling through a power conduit when installing pipe. (Tr. p. 45-46)

On July 22, 2016, claimant was evaluated by Jeffrey Zoelle, M.D., for inguinal pain. Claimant was referred to a general surgeon. (Jt. Ex. 4, pp. 27-30)

On July 28, 2016, claimant was seen by Aditya Gupta, M.D. Claimant was prescribed medication for potential epididymitis and given pain medication. (Jt. Ex. 5, pp. 33-34)

Claimant returned to Dr. Gupta with complaints of continued inguinal pain. A CT scan of the abdomen was recommended. (Jt. Ex. 5, p. 35)

A CT scan was performed on September 9, 2016. It showed evidence of a potential small recurrent hernia. (Jt. Ex. 3, pp. 10-11)

Claimant returned to Dr. Gupta on September 13, 2016. He was recommended to stay off his feet. (Jt. Ex. 5, p. 36)

In September and October 2016, claimant saw physicians for pain medication for his condition. (Jt. Ex. 4, p. 31; Jt. Ex. 7, pp. 52-60)

Claimant returned to Dr. Gupta in December 2019. Surgery was discussed and chosen as a treatment option. (Jt. Ex. 5, p. 37)

On February 20, 2017, claimant underwent surgery performed by Dr. Gupta and Craig Block, M.D. Records indicate part of the surgery included removal of most of the original mesh and replacing it with new mesh. (Jt. Ex. 5, p. 37; Jt. Ex. 3, pp. 16-17)

Claimant returned in follow-up with Dr. Gupta on March 6, 2017. Claimant was assessed as having a recurrent left inguinal hernia. Claimant was told to start lifting and increase activities slowly. (Jt. Ex. 5, pp. 39-40)

On April 10, 2017, Dr. Gupta evaluated claimant. Claimant did not have groin pain and was able to do heavy lifting. Dr. Gupta noted, "He is pretty much without any restrictions now." Claimant was returned to work without restrictions. (Jt. Ex. 5, p. 41)

In a June 12, 2017 letter, Dr. Gupta found claimant had no permanent impairment. Notes indicate claimant was found to be at maximum medical improvement (MMI) as of April 10, 2017. (Jt. Ex. 5, p. 42)

On June 12, 2018, claimant saw Joseph Morris, M.D. Claimant had inguinal pain. Claimant was assessed as having recurrent left groin pain. Surgery was recommended to remove the mesh. (Jt. Ex. 9, pp. 75-77)

On July 27, 2018, claimant underwent a third surgery performed by Dr. Morris. Surgery consisted of repair of a recurrent left inguinal hernia. (Jt. Ex. 3, pp. 19-20)

A few days after surgery, claimant developed a surgical infection. Records indicate the area of the mesh was infected and the mesh was removed. The surgery to remove the mesh occurred on August 2, 2018. Records indicate Dr. Morris removed the mesh from claimant and also did a resection of the sigmoid colon. (Jt. Ex. 3, pp. 24-26; Jt. Ex. 9, p. 82)

Pictures of claimant's incision and abdomen from this period can be found at Exhibit 1, page 6. (Tr. p. 54) Claimant testified that during this time, he lost approximately 50 pounds as he was on IVs and was limited to what he could eat. (Tr. pp. 56-57)

Claimant saw Dr. Morris in follow-up from August 2018 through October 2018. (Jt. Ex. 9, pp. 80-87) In August of 2018, Dr. Morris indicated it would be difficult for claimant to do heavy lifting in the future. (Jt. Ex. 9, p. 82) In October 2018, Dr. Morris noticed that claimant had depressive symptoms and recommended claimant see a therapist. Claimant was put on lifting restrictions of no more than 15 pounds. (Jt. Ex. 9, p. 86)

Between December 2018 and March 2019, claimant received mental health counseling. Claimant was assessed as having anxiety and post-traumatic stress disorder (PTSD). Claimant was also taking Zoloft. (Jt. Ex. 11)

Claimant returned to Dr. Morris on February 14, 2019. Dr. Morris believed claimant could return to work on regular duty. Claimant still had groin pain. Dr. Morris indicated he would see claimant in two months and believed he would be at MMI at that time. (Jt. Ex. 9, p. 92)

In a February 28, 2019 report, Bruce Gutnik, M.D., a psychiatrist, gave his opinion of claimant's condition following an independent psychological evaluation. Dr. Gutnik opined claimant had PTSD unrelated to the work injury. He opined claimant's PTSD was likely due to abuse from a stepfather or stepbrother. (Ex. A, p. 10) Dr. Gutnik opined that claimant exaggerated symptoms and any ongoing complaints of pain were caused by either a somatic symptom disorder or malingering. Dr. Gutnik opined these disorders were not related to claimant's work injury. (Ex. A, pp. 10-11) Dr. Gutnik opined claimant did not require further mental health treatment. (Ex. A, p. 11)

In a March 7, 2019 note, written by claimant's attorney, Dr. Morris agreed claimant would benefit from undergoing a functional capacity evaluation (FCE). (Jt. Ex. 9, p. 94)

On March 28, 2019, claimant underwent an FCE administered by Marcus Winter, PT. Claimant's testing indicated claimant could work at a medium physical demand level. However, claimant's test results were considered invalid. (Ex. 13)

In a May 30, 2019 report, John Kuhnlein, D.O, gave his opinions of claimant's condition following an IME. Claimant complained of pain in a line just above the pubic area. Claimant had returned to work in approximately January of 2019 and was doing light welding with minimal lifting. Claimant indicated his symptoms had improved over the last few months and he was more functional than he was in November of 2018. (Ex. 2, pp. 1-18)

Claimant was assessed as having a left inguinal hernia. Claimant sustained a left inguinal hernia on September 17, 2015 with Holverson Welding. Dr. Kuhnlein opined the February 1, 2016 injury was a new injury. Dr. Kuhnlein opined claimant's diverticulitis was more likely than not, due to complications with his mesh. (Ex. 2, pp. 20-21)

Dr. Kuhnlein did not believe claimant had reached MMI. Dr. Kuhnlein gave a provisional permanent impairment rating. He opined claimant had a 15 percent permanent impairment to the body as a whole for the hernia. He opined that claimant had a 5 percent permanent impairment due to the sigmoid colon resection. Based on the Combined Values Chart in the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, claimant had a 19 percent permanent impairment to the body as a whole. (Ex. 2, p. 22) Dr. Kuhnlein opined that claimant should have a 50 pound lifting restriction. (Ex. 2, p. 23)

On June 13, 2019, claimant was terminated from his employment with Holverson for seven consecutive days of no-call, no-show. Records from Holverson indicated

claimant had routine absences from work beginning in March of 2019. (Ex. H, pp. 44-45)

Claimant testified his work environment at Holverson had deteriorated and he felt it was best if he left their employment. (Tr. p. 68)

In a June 12, 2019 report, Douglas Martin, M.D., gave his opinions of claimant's condition following an IME. Dr. Martin notes that claimant was continuing to deal with pain with medication. Dr. Martin noted that he lacked records relating to claimant's initial surgery of October 2015. (Ex. B, pp. 12-17)

Dr. Martin opined that the best method to assess claimant's permanent impairment was to rate his pain under the central nervous system chapter of the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition. Using that section, he found that claimant had a 3 percent permanent impairment to the body as a whole. Dr. Martin opined that claimant had reached MMI. He limited claimant to lifting 50 pounds. Dr. Martin could not find anything in his records regarding an incident of February 1, 2016 and was unable to offer any opinions regarding the February 1, 2016 date of injury. (Ex. B, pp. 18-19)

In a July 25, 2019 report, Krista Diehl, M.S., CRC, gave her opinions of claimant's vocational opportunities. Based on a labor market survey, Ms. Diehl identified approximately ten jobs she believed claimant could perform in his geographic labor market given his experience, education, and restrictions. (Ex. C)

On August 12, 2019, claimant began working as a welder/coach with Sabre. Claimant supervised 10 people, including welders and material handlers. Claimant also did welding. Claimant earned $19.00 an hour at this job. (Ex. 3, p. 31; Ex. 8) Claimant testified he can lift up to 50 pounds in his job with Sabre and is physically able to do the work. (Tr. pp. 70-71, 83)

Claimant said he was also offered a job to run a crew installing sprinkler systems, but chose the job with Sabre. (Tr. p. 82)

In an August 15, 2019 report, Michael Newman, M.S., gave his opinions of claimant's condition following a vocational evaluation. Mr. Newman opined that based on claimant's experience, education and restrictions, claimant would have between a 35 to 45 percent loss of future employment opportunities. He also opined that claimant would have a loss of earning capacity between 45 to 50 percent. (Ex. B)

Claimant was evaluated by Dr. Morris on August 22, 2018. Claimant had chronic pain related to his multiple hernia surgeries. Claimant had bulging in the left groin area. He was assessed as having a recurrent left inguinal hernia. Dr. Morris indicated claimant needed to have repair surgery of the left inguinal hernia. (Jt. Ex. 9, pp. 99.1-99.2)

In a September 9, 2019 letter to claimant's counsel, Dr. Morris opined that claimant's current recurrent left inguinal hernia correlated to his original injury and not to a new lifting injury. (Ex. 15, pp. 84-85)

On the same date, Dr. Morris also wrote to defendants' counsel. He indicated claimant required surgery for his recurrent hernia. He again opined that claimant's current recurrent hernia was related to the original hernia injury. (Ex. 16, pp. 86-87)

Claimant testified he made approximately $26.50 when working with Holverson. He said at the time of hearing he earned approximately $19.00 an hour working for Sabre. (Tr. pp. 30, 70)

Claimant said he uses a non-prescribed TENS unit for pain. (Tr. p. 75)

Claimant said he is able to do repair work around his home, including electrical work, plumbing and carpentry. He said he is also able to do repair work on his car. (Tr. pp. 86, 90)

CONCLUSIONS OF LAW

The first issue to be determined is whether claimant's injury resulted in a permanent disability.

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

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

The question of causal connection is essentially within the domain of expert testimony. The expert medical evidence must be considered with all other evidence introduced bearing on the causal connection between the injury and the disability. Supportive lay testimony may be used to buttress the expert testimony and, therefore, is also relevant and material to the causation question. The weight to be given to an expert opinion is determined by the finder of fact and may be affected by the accuracy of the facts the expert relied upon as well as other surrounding circumstances. The expert opinion may be accepted or rejected, in whole or in part. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); IBP, Inc. v. Harpole, 621 N.W.2d 410 (Iowa 2001); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995). Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417 (Iowa 1994). Unrebutted expert medical

testimony cannot be summarily rejected. Poula v. Siouxland Wall & Ceiling, Inc., 516 N.W.2d 910 (Iowa App. 1994).

Claimant initially sustained an inguinal hernia on September 17, 2015. He also had a February 1, 2016 injury. As noted by the record, claimant has had four surgeries related to his inguinal hernia problems. This includes a resection of the sigmoid colon. Claimant's surgical procedures also resulted in treatment for an infection.

Dr. Kuhnlein found claimant had a permanent disability. (Ex. 2, p. 22) Dr. Martin also opined the claimant's injury resulted in a permanent impairment. (Ex. B, p. 18) Claimant has had continued limitations and pain from his inguinal hernia problems. Claimant has been given lifting restrictions. (Ex. B, p. 19; Ex. 2, p. 23) Given this record, claimant has carried his burden of proof his inguinal hernia resulted in a permanent disability.

One of the essential issues of this case is whether claimant sustained a permanent disability from the first injury, or from both injuries.

Dr. Martin evaluated claimant once for an IME. He opined that claimant's current condition was related to the 2015 injury. (Ex. B, p. 17) Dr. Kuhnlein found that claimant had a permanent impairment, but did not apportion permanent impairment between the two dates of injury. (Ex. 2, pp. 22-23) Medical and surgical records refer to a recurrent hernia, and "redo" surgeries. (Jt. Ex. 5, pp. 36-37, 39, 41) Given this record, it is found that all of claimant's permanent impairment is attributable to the September 17, 2015 date of injury.

The parties stipulate that claimant's rate regarding the September 17, 2015 date of injury is $602.26 per week. As all of claimant's permanent impairment is attributable to the first injury, it is found that claimant's rate for his injuries is $602.26 per week. The issue of rate regarding the February 1, 2016 date of injury (File No. 5063269) is therefore moot. For the same reason, the issue of apportionment, under Iowa Code section 85.34(7)(b) is also moot.

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

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

Functional impairment is an element to be considered in determining industrial disability which is the reduction of earning capacity, but consideration must also be given to the injured employee's age, education, qualifications, experience, motivation, loss of earnings, severity and situs of the injury, work restrictions, inability to engage in

employment for which the employee is fitted and the employer's offer of work or failure to so offer. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963); Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961).

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

Claimant was 39 years old at the time of hearing. He has a GED. Claimant has worked in fast-food restaurants, managed a liquor store, done maintenance work in apartments, and worked in a laundry. Since 1999, claimant has worked as a welder.

Both Dr. Martin and Dr. Kuhnlein opined that claimant has a 50 pound lifting restriction. (Ex. 2, p. 23; Ex. D, p. 19) A number of claimant's prior jobs, including his position with Holverson, require claimant to lift greater than 100 pounds. (Ex. 3, pp. 31-32) Claimant's lifting restrictions exclude claimant from performing some of his prior positions as a welder.

Two experts have opined regarding claimant's permanent impairment. Dr. Martin found claimant had a three percent permanent impairment to the body as a whole. He based his opinion on a finding that claimant's condition is best analyzed using the central nervous system section of the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition. (Ex. B, p. 18) Dr. Kuhnlein found that Table 6-9, page 136 of the Guides, relating specifically to hernias, was the proper table to evaluate claimant. (Ex. 2, p. 22) Dr. Kuhnlein also assigned a rating for the resection of claimant's colon, which Dr. Martin did not address. (Ex. 2, p. 22)

Dr. Martin's records indicate that he did not have information regarding claimant's February 1, 2016 injury. (Ex. B, pp. 18-19) He also lacked records regarding claimant's first surgery. (Ex. B, p. 12) Dr. Kuhnlein's rating is based on a rating specific to hernias. Dr. Kuhnlein's finding of permanent impairment includes a rating for claimant's colon resection. Based on these facts, it is found that Dr. Kuhnlein's opinions regarding permanent impairment are more convincing than those of Dr. Martin. Based on this, it is found that claimant has a 19 percent permanent impairment to the body as a whole due to the September 17, 2015 date of injury.

Claimant was making $26.50 an hour at Holverson. At the time of hearing, claimant was earning $19.00 an hour. Claimant was terminated from his job at Holverson for seven consecutive days of no-call, no-show. (Ex. H)

A loss of earning capacity due to voluntary choice or lack of motivation to return to work is not compensable. Malget v. John Deere Waterloo Works, File No. 5048441 (Remand Dec. May 23, 2018); Rus v. Bradley Puhrmann, File No. 5037928 (App. December 16, 2014); Gaffney v. Nordstrom, File No. 5026533 (App. September 1, 2011); Snow v. Chevron Phillips Chemical Co., File No. 5016619 (App. October 25, 2007). Copeland v. Boone's Book and Bible Store, File No. 1059319 (App. November

6, 1997). See also, Brown v. Nissen Corp., 89-90 IAWC 56, 62 (App. 1989) (no prima facie showing that claimant is unemployable when claimant did not make an attempt for vocational rehabilitation).

In a vocational report, Mr. Newman gave his opinions of claimant's loss of earning capacity. However, there is no reference in the report claimant lost his job with Holverson for repeatedly failing to call or show up for work. Ms. Diehl's report is a labor market survey of work in claimant's geographic area. Claimant was offered two jobs after leaving Holverson and chose a position with Sabre. As the record reflects claimant found work shortly after leaving Holverson, the value of a labor market survey in determining loss of earning capacity is minimal. While both vocational reports have deficiencies, they are somewhat helpful in understanding claimant's potential loss of earning capacity.

Claimant has a 19 percent permanent impairment. He has a 50 pound lifting restriction. Claimant is earning approximately 30 percent less per hour than he was earning at Holverson. He lost his job at Holverson due to his failure to show or call regarding his absences. When all relevant factors are considered, it is found that claimant has a 30 percent loss of earning capacity or industrial disability.

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

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

The parties dispute the proper commencement date for permanent disability. Permanent partial disability benefits commence on the earliest date when claimant returns to work, is medically capable of performing substantially similar work, or achieves maximum medical improvement. Iowa Code section 85.34(1); Evenson v. Winnebago Industries, Inc., 881 N.W.2d 360, 372 (Iowa 2016).

The record indicates claimant returned to work from his most recent surgery on February 21, 2019. (Jt. Ex. 12, pp. 160-161) Claimant's permanent partial disability benefits shall commence as of that date.

The next issue to be determined is penalty.

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

The supreme court has stated:

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

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

Id.

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

(6) In determining the amount of penalty, the commissioner is to consider factors such as the length of the delay, the number of delays, the information available to the employer regarding the employee's injury and wages, and the employer's past record of penalties. Robbennolt, 555 N.W.2d at 238.

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

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

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

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

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

Defendants stipulated in the hearing report in their post-hearing motion, that claimant's rate is $602.26 per week. Defendants argue in their post-hearing brief this rate is applicable for all benefits. (Defendants' Post-Hearing Brief, p. 2) As noted above, it is found that the September 17, 2015 date of injury is the cause of all of

claimant's permanent disability and that benefits should be paid at the rate of $602.26 per week.

According to the hearing report, defendants initially underpaid claimant's temporary benefits: Claimant received temporary total disability benefits from October 1, 2015 through October 28, 2015 at a rate of $582.38 per week. This is an underpayment of $19.88 per week. Multiplied by 4 weeks equals a $79.52 underpayment.

Claimant was paid temporary total disability benefits from September 15, 2016 through October 17, 2016, and from February 15, 2017 through April 11, 2017, at the rate of $501.53. This is an underpayment of $100.73 per week for 12.714 weeks. This results in a $1,280.68 underpayment.

Claimant was paid temporary total disability benefits from June 7, 2018 through February 25, 2019 at the rate of $495.18 per week. This underpayment is $107.08 per week. This underpayment was made over 35.714 weeks. This equals an underpayment of $3,824.25.

Based on claimant's post-hearing motion, these underpayments and interest have been paid. However, claimant was initially underpaid a total of temporary total disability benefits of $5,184.45.

Defendants contend penalty is not appropriate for the underpayment of rate because the February 1, 2016 date of injury was a new injury, and arguably with a different rate. (Def. Post-Hrg. Brief, p. 6) This argument is not persuasive for two different reasons. First, the record indicates defendants paid claimant at two different rates for temporary total disability benefits following the February 1, 2016 date of injury. Second, as noted in the hearing report and in defendants' post-hearing brief, defendants have stipulated that claimant should be paid at a weekly rate of $602.26 for all benefits. (Def. Post-Hrg. Brief, p. 6) Given this record, defendants' rationale for failing to pay claimant's temporary total disability benefits at the proper rate is not reasonable.

Claimant was underpaid $5,184.45 in temporary total disability benefits. A penalty of 50 percent is appropriate. Defendants are liable for penalty of an underpayment of temporary benefits of $2,592.23 ($5,184.45 x 50%).

Claimant contends defendants are also liable for underpayment of permanent partial disability benefits. (Claimant's Post-Hrg. Brief, pp. 14-16)

According to the hearing report, claimant was paid three weeks of permanent partial disability benefits from October 29, 2015 through November 18, 2015 at the rate of $582.38. Claimant was returned to work by Dr. Abraham on November 12, 2015. (Ex. 1, p. 5) There is no evidence in the record that, at that time, claimant had any permanent impairment or permanent restrictions. As such, defendants had no obligation to pay claimant permanent partial disability benefits for the period of time

through October 29, 2015 through November 18, 2015. As defendants had no obligation to pay permanent partial disability for this time, it is not appropriate to find defendants liable for penalty for underpayment of permanent partial disability benefits from October 29, 2015 through November 18, 2015.

According to the hearing report, claimant was paid permanent partial disability benefits from February 26, 2019 through August 19, 2019 at the rate of $495.18. The first evidence in the record that claimant had permanent impairment or permanent restrictions is from the May 30, 2019 report from Dr. Kuhnlein. (Ex. 2, pp. 22-23) Given this record, defendants only had an obligation to pay any permanent partial disability benefits beginning May 30, 2019. The period of time from May 30, 2019 through August 19, 2019 is approximately 11 weeks. Claimant was underpaid permanent partial disability benefits for this period at $107.08 per week. This went on for 11 weeks. This results in the total underpayment of $1,177.88 for underpayment of permanent partial disability benefits ($107.08 x 11 weeks). Defendants are liable for penalty for underpayment of permanent partial disability benefits from May 30, 2019 through August 19, 2019 of $588.94 ($1,177.88 x 50%).

The final issue to be determined is whether claimant is entitled to alternate medical care under Iowa Code section 85.27.

An employer's right to select the provider of medical treatment to an injured worker does not include the right to determine how an injured worker should be diagnosed, evaluated, treated, or other matters of professional medical judgment. Assmann v. Blue Star Foods, File No. 866389 (Declaratory Ruling, May 19, 1988).

Iowa Code section 85.27(4) provides, in relevant part:

> For purposes of this section, the employer is obliged to furnish reasonable services and supplies to treat an injured employee, and has the right to choose the care. . . . The treatment must be offered promptly and be reasonably suited to treat the injury without undue inconvenience to the employee. If the employee has reason to be dissatisfied with the care offered, the employee should communicate the basis of such dissatisfaction to the employer, in writing if requested, following which the employer and the employee may agree to alternate care reasonably suited to treat the injury. If the employer and employee cannot agree on such alternate care, the commissioner may, upon application and reasonable proofs of the necessity therefor, allow and order other care.

An application for alternate medical care is not automatically sustained because claimant is dissatisfied with the care he has been receiving. Mere dissatisfaction with the medical care is not ample grounds for granting an application for alternate medical care. Rather, the claimant must show that the care was not offered promptly, was not reasonably suited to treat the injury, or that the care was unduly inconvenient for the claimant. Long v. Roberts Dairy Co., 528 N.W.2d 122 (Iowa 1995).

Following the arbitration hearing in this matter, the parties entered into a consent decree on November 1, 2019 that defendants would authorize the hernia surgery recommended by Dr. Morris. As a result, the issue of claimant's need for another hernia repair is no longer an issue in dispute in this case.

Claimant also contends in his brief that he is due alternate medical care, that defendants provide him pain management through Midwest Pain Clinic. (Cl. Post-Hrg. Brief, p. 14)

There is no evidence in the record that any pain management has recently been authorized by a treating physician in this case. There is no evidence in the record that claimant has requested pain management with Midwest Pain Clinic and has been denied that treatment. The consent order in this matter suggests that claimant has already had hernia surgery, or will have hernia surgery in the near future. This agreed-to treatment may result in recommended treatment other than that provided through the Midwest Pain Clinic. Given this record, claimant has failed to carry his burden of proof he is entitled to alternate medical care consisting of pain management with Midwest Pain Clinic.

ORDER

THEREFORE, IT IS ORDERED:

For File No. 5063338 (date of injury September 17, 2015):

That defendants shall pay claimant one hundred fifty (150) weeks of permanent partial disability benefits at the rate of six hundred two and 26/100 dollars ($602.26) per week commencing on February 21, 2019.

Defendants shall pay interest on unpaid weekly benefits awarded herein as set forth in Iowa Code section 85.30. Defendants shall pay accrued weekly benefits in a lump sum together with interest at the rate of ten percent for all weekly benefits payable and not paid when due which accrued before July 1, 2017, and all interest on past due weekly compensation benefits accruing on or after July 1, 2017, shall be payable at an annual rate equal to the one-year treasury constant maturity published by the federal reserve in the most recent H15 report settled as of the date of injury, plus two percent. See Gamble v. AG Leader Technology, File No. 5054686 (App. Apr. 24, 2018).

That defendants shall be given a credit for benefits previously paid.

That defendants shall pay claimant a penalty of two thousand five hundred ninety-two and 23/100 dollars ($2,592.23) for underpayment of temporary benefits.

The defendants shall pay claimant a penalty of five hundred eighty-eight and 96/100 dollars ($588.96) for the underpayment of permanent partial disability benefits.

That for both File No. 5063338 (date of injury September 17, 2015) and File No. 5063269 (date of injury February 1, 2016):

That defendants shall pay costs.

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

Signed and filed this 17th day of April, 2020.

JAMES F. CHRISTENSON
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Leif Erickson (via WCES)

Jean Zetta Dickson (via WCES)

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