

FINDINGS OF FACT

The deputy workers' compensation commissioner having heard the testimony and considered the evidence in the record finds that:

Brandon Pelley, claimant, was 40 years old at the time of the hearing. Claimant graduated from high school and went to a community college for a year and a half. Claimant did not obtain any post-high school degrees or certifications.

Claimant's work history included fast food, working in call centers, and working briefly as a maintenance mechanic in a meat processing plant. (Transcript pages 13 – 17) Claimant worked for Bertch for about six years. At Bertch, he made countertops. (Tr. p. 17; See Exhibit 3, p. 22)

Claimant started working at John Deere in 2007. (Tr. p. 19) Claimant started doing assembly work at John Deere. Over the years, claimant has had four different assembly jobs and driven a fork truck in three different departments. (Tr. p. 21) Claimant said that hoists were available for lifting in all of his assembly jobs. Claimant worked with vibratory tools in all of his assembly jobs. (Tr. p. 21)

In 2016 claimant started to experience numbness and tingling in his hands due to his work. Claimant reported this condition to John Deere Medical. (Tr. p. 23) Claimant said John Deere reviewed the work he was doing, determined that it was not ergonomically appropriate and modified the job. (Tr. p. 23) With the changes in work claimant was not having problems with his hands.

In November 2017 claimant changed jobs at John Deere, and in the new position his hands started to have numbness and tingling. (Tr. p. 24) Claimant reported the ergonomic problem to John Deere in November 2017. (Tr. p. 25) In January 2018 claimant went to John Deere Medical for his hands. (Tr. p. 26)

Claimant said he was evaluated by Brian O'Shaughnessy, M.D. who determined he had carpal tunnel syndrome. Claimant was referred to Thomas Gorsche, M.D. Dr. Gorsche performed surgery on claimant's right hand on March 14, 2018. (Tr. pp. 26, 27)

Claimant testified his hand swelled up after the surgery; his whole hand was black and blue and he had trouble moving his finger. He said the removal of stitches was extremely painful. (Tr. p. 27) Claimant was referred for hand therapy.

Claimant saw Ashar Afzal, M.D. on May 30, 2018 and was told he had CRPS (Chronic Regional Pain Syndrome). (Tr. p. 28) Claimant was provided a prescription cream for his hand, gabapentin and therapy. Claimant had a year of physical therapy. (Tr. p. 29) Claimant was referred to Rene Recinos, M.D. in Mason City. Claimant said Dr. Recinos diagnosed him with CRPS and told claimant there was nothing he could offer. (Tr. p. 30) Claimant said Dr. Gorsche and John Deere Medical told him he had CRPS. (Tr. p. 30)

Claimant said he saw Jeffrey Clark, D.O. for a frozen shoulder. Claimant said Dr. Clark told him he would not perform manipulation under anesthesia due to CRPS. (Tr. p. 31; JE 8, p. 33) Claimant said that he declined to have any surgery on his left hand due to the risk of CRPS. (Tr. p. 31)

Claimant's last physical therapy treatment for his CRPS and carpal tunnel was in March 2019. Claimant is receiving gabapentin for his condition. (Tr. p. 32)

Claimant had a functional capacity evaluation (FCE) on March 18, 2019. The overall level of work was in the medium range. He was able to exert 20 – 50 pounds of force occasionally and/or 10 – 25 pounds of force frequently. (Joint Exhibit 9, p. 39)

Claimant had an FCE, which claimant said provided limitations of no repetitive gripping and grasping with the hands, no vibratory tools and a 20-pound weight restriction. (Tr. p. 33) Claimant said when he last saw Dr. Gorsche he reviewed the FCE, provided claimant restrictions and released him from care. (Tr. pp. 34, 55)

Claimant said he was off work from March 14, 2018 and returned to work on September 10, 2019. (Tr. pp. 34, 56) Claimant said John Deere initially was not able to find a position that was within his restrictions. John Deere did offer claimant a job driving a fork truck, which claimant accepted and was performing at the time of the hearing. (Tr. p. 35) Claimant is driving a fork truck using a joy stick. Claimant wears a winter mitten on his hand to prevent it from getting cold. (Tr. p. 36) Claimant testified he has had to modify how he operates the fork truck due to his conditions and modify how he does household tasks. (Tr. pp. 67, 68) Claimant was working four to four and one-half hours of overtime a week at the time of the hearing. (Tr. p. 41)

Claimant testified that he is not earning as much working as a fork truck driver as he was making before his surgery. Claimant said he is currently earning about \$20.00 per hour. He was earning around \$22.00 per hour before his surgery. (Tr. p. 40) Claimant is no longer eligible for the incentive payments under John Deere's CIPP bonus program. (Tr. p. 39) Claimant has received some profit sharing payments after his injury, but the payments have been significantly less. (Tr. p. 39) Claimant testified that he expected to earn approximately \$25,000.00 less this year than his earnings before his injury. (Tr. p. 67) Claimant intends to work until he is 67 years old. (Tr. p. 49) I find that claimant is receiving significantly less in earnings since he returned to work with John Deere in September 2019.

Claimant testified that he has occasional numbness in his left hand and is able to use his left hand. (Tr. p. 41) Claimant said his right hand is cold, he has sweating, his hand changes color and is extremely stiff. Claimant also has pain in his right hand. Claimant has less dexterity in his hand, and he has modified how he operates a fork truck. (Tr. p. 42)

Claimant said that he is not able to do repairs to his home due to his right hand and has given up a number of hobbies. (Tr. pp. 43, 44)

Claimant testified that he started to suffer from anxiety, more depression and received additional medications for his anxiety and depression. (Tr. p. 45) Claimant's anxiety and depression have not prevented claimant from working. (Tr. p. 46) Claimant was receiving treatment for depression before his work injury. (Tr. p. 61)

Claimant testified he was paid two PPD checks late. (Tr. p. 65; Ex. E, p. 7)

Claimant testified he did not believe he could perform his past work in fast food or in call centers due to his hands. He did not believe he could work as a maintenance mechanic or making countertops. (Tr. pp. 46, 47)

On February 9, 2018, Dr. O'Shaughnessy reviewed nerve conduction studies. Dr. O'Shaughnessy's, impression was.

This is a [sic] abnormal electrodiagnostic study of the upper extremities bilaterally. The findings are electrically compatible with moderate to significant bilateral carpal tunnel syndrome left greater than right.

(JE. 2, p. 9)

On May 30, 2018 Dr. Afzal examined claimant. Dr. Afzal noted right hand swelling and patchy erythematous discoloration. He also found hyperalgesia and the presence of dysesthesia. Dr. Afzal's impression was, "Possible complex regional pain syndrome involving right upper extremity." (JE 3, p. 13) On July 19, 2018 Dr. Afzal diagnosed claimant with CRPS. (JE 3, p. 14)

On August 16, 2018 claimant saw his primary care provider, Emily Ball, ARNP, for his right hand. ARNP Ball's assessment was bilateral carpal tunnel syndrome and impression was, "#1 RIGHT carpal tunnel release March 14, 2018. #2 Chronic regional pain syndrome postop." (JE 4, p. 16)

On November 12, 2018 claimant was examined by Dr. Recinos. Dr. Recinos found Dupuytren's contracture and CRPS. He did not recommend any additional surgery and recommended that claimant wait for an FCE for one-year post surgery. (JE 6, pp. 24, 25)

On March 27, 2019 Dr. Gorsche noted claimant was having problems with cold, discoloration and swelling after his FCE. Dr. Gorsche noted claimant had a little bit of Dupuytren's contracture in his palm and that claimant was at maximum medical improvement (MMI). (JE 4, pp. 17, 18) There is no evidence that claimant's Dupuytren's contracture was related to his work. Dr. Gorsche provided permanent restrictions of lifting up to 20 pounds occasionally above the waist, to hand carry 35 pounds occasionally, pushing up to 70 pounds occasionally, and pulling up to 60 pounds occasionally. (JE 4, pp. 19, 20)

On April 18, 2019 ARNP Ball saw claimant for a six-month follow-up for depression and anxiety. (JE 11, p. 58) His assessment was,

1. Depression with anxiety
2. Carpal tunnel syndrome of right wrist
3. Lesion of right ulnar nerve
4. Type 1 diabetes, uncontrolled, with neuropathy (HCC)

(JE 11, p. 59) ARNP Ball modified the medication for claimant's depression. (JE 11, p. 59)

On May 7, 2019 Dr. Gorsche added the restriction of "No repeated firm gripping or twisting with the Right or Left hand." (JE 4, p. 21; JE 10, p. 57) I find that the restrictions recommended by Dr. Gorsche on March 27, 2019 and May 7, 2019 are claimant's restrictions. Dr. Gorsche provided a 28 percent whole body impairment rating on May 27, 2019. (Claimant's brief, p. 12; Defendant's brief p. 4) John Deere paid claimant permanent benefits based upon this rating on June 28, 2019. (Ex. L, p. 1)

On June 12, 2019 Sarvenaz Jabbari, M.D. of John Deere Health wrote,

I have reviewed the impairment rating on Brandon Pelley dated May 27, 2019. I agree that he should be given a 28% whole body impairment rating due to his symptoms and residual symptoms of carpal tunnel in the bilateral hands.

(JE 10, p. 56)

On December 9, 2019 Stanley Mathew, M.D. performed an independent medical examination (IME). Dr. Mathew's impression was,

Complex regional pain syndrome type 1 in the right upper extremity

Bilateral carpal tunnel syndrome

s/p right carpal tunnel release procedure

Chronic right upper extremity pain

Neuropathic pain

Right Median and Ulnar Neuropathy

Left Median Neuropathy

Right upper extremity weakness

Chronic pain related worsening depression and anxiety

(Ex. 2, p. 13) Dr. Mathew stated that his diagnoses were the direct result of claimant's work injury of January 18, 2018 and subsequent surgery. Dr. Mathew assigned a 54 percent whole body impairment rating for the right upper extremity and a 10 percent whole body rating for the left carpal tunnel. (Ex. 2, p. 13)

Defendant paid the IME cost of Dr. Mathew in the amount of \$1,589.49 on January 8, 2020. (Ex. D, pp. 1, 2)

On December 13, 2019 Farid Manshadi, M.D. performed an IME and issued his report on January 2, 2020. Dr. Manshadi stated claimant suffers from bilateral carpal tunnel syndrome and that claimant had CRPS type 1 postoperatively that was a result of his work at John Deere. (Ex. 1, pp. 4, 5) Dr. Manshadi provided a 35 percent right upper extremity impairment rating. (Ex. 1, p. 5) Dr. Manshadi provided a 13 percent impairment rating to the left upper extremity. (Ex. 1, p. 5)

I find that claimant has proven bilateral carpal tunnel syndrome and CRPS to his right upper extremity that arose out of and in the course of his employment with John Deere.

On January 20, 2020 Barbara Laughlin, M.A. provided an employability assessment. (Ex. 3, pp. 18 – 34) Ms. Laughlin commented on some of the testing and conclusions from the functional capacity evaluation (FCE) of March 18, 2019. Ms. Laughlin was critical of some of the FCE reported testing results. (Ex. 3, pp. 19, 20) Ms. Laughlin reported that he has a 96 percent occupational loss. (Ex. 3, pp. 25, 26) Ms. Laughlin wrote,

It is my opinion Mr. Pelley has sustained a devastating injury. Mr. Pelley has few occupations available to him. It is my opinion that in the world of work, there are no jobs in any quality, quantity or dependability available in his labor market. As noted in the labor market survey, no employment opportunities were located. Any job requiring computer input would be difficult for him based on his statements.

(Ex. 3, p. 27)

Defendant provided a worksheet to show how the defendant calculated the weekly workers' compensation rate. (Ex. A, p. 1) Defendant calculated claimant's weekly workers' compensation rate to be \$525.15. Claimant provided copies of pay records, both pre and post-injury. (Ex. 6; Ex. 7) The claimant provided no testimony or calculation on how to interpret the information on the paystubs that could be used in calculating the weekly rate. I find claimant's weekly workers' compensation rate to be \$525.15.

On June 28, 2019 defendant notified claimant that his healing period benefits would terminate as of July 28, 2019. (Ex. M, p. 1)

On January 31, 2020 Jonathon Fields, M.D. wrote to defendant's attorney. Dr. Fields was asked to provide a medical opinion as to whether claimant could operate two types of fork trucks used by John Deere. Dr. Fields stated that claimant would be able to operate the two types of fork trucks. (Ex. F, p. 1)

Claimant has requested costs of \$100.00 filing fee, deposition transcript fee of \$64.40, the IME cost by Dr. Manshadi of \$1,800.00 and the cost of Ms. Laughlin's vocational report of \$1,120.00.

Dr. Manshadi charged \$350.00 for the IME and \$1,450.00 for the report. (Ex. 9, p. 79) Ms. Laughlin charged \$110.00 per hour and spent 4.4 hours writing her report. (Ex. 9, p. 81)

RATIONALE AND CONCLUSIONS OF LAW

Functional or industrial disability

The first issue for determination is the matter of whether claimant should be compensated as a scheduled member injury pursuant to Iowa Code section 85.34(2)(t) (2017) or whether the injury extends into the body as a whole and should be compensated pursuant to Iowa Code section 85.34(2)(v) (2017).

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).

An injury to a scheduled member may, because of after effects or compensatory change, result in permanent impairment of the body as a whole. Such impairment may in turn be the basis for a rating of industrial disability. It is the anatomical situs of the permanent injury or impairment which determines whether the schedules in section

85.34(2)(a) - (t) are applied. Lauhoff Grain v. McIntosh, 395 N.W.2d 834 (Iowa 1986); Blacksmith v. All-American, Inc., 290 N.W.2d 348 (Iowa 1980); Dailey v. Pooley Lumber Co., 233 Iowa 758, 10 N.W.2d 569 (1943). Soukup v. Shores Co., 222 Iowa 272, 268 N.W. 598 (1936).

The medical evidence is overwhelming that claimant has CRPS as well as bilateral carpal tunnel syndrome. Doctors Afzal, Gorsche, Jabbari, Recinos, Mathew and Manshadi all agreed that claimant has CRPS. The CRPS and bilateral carpal tunnel conditions arose out of and in the course of his employment with defendant.

Claimant has argued that because claimant has CRPS his injury must be evaluated as an industrial disability. The Iowa Court of Appeals in Collins v. Dep't of Human Servs., 529 N.W.2d 627 (Iowa Ct. App. 1995) held that CRPS (then called reflex sympathetic dystrophy) was to be evaluated as an industrial disability relying on a 1961 Iowa Supreme Court case of Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961).

The Court of Appeals held:

The employer also contends Collins is not entitled to industrial disability based on her diagnosis of reflex sympathetic dystrophy. It claims there is substantial evidence in the record to support the commissioner's finding that her condition did not extend beyond her hands, and thus, she suffered only a loss to a scheduled member.

Reflex sympathetic dystrophy is sometimes referred to as causalgia or Sudeck's atrophy. 3 Robert K. Ausman, M.D., & Dean E. Snyder, J.D., Medical Library § 4-278(c) (lawyer's ed. 1989). The condition of causalgia or Sudeck's atrophy was considered in Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961). There, the employee suffered an injury to the foot, which is a scheduled member. *Id.* at 287, 110 N.W.2d at 661. As a result of the injury the employee's entire nervous system became affected by causalgia. *Id.*, at 287, 110 N.W.2d at 661.

In Barton, the court held that where an employee has an injury to a scheduled member and also to a part of the body not included in the schedule, the resultant permanent disability was compensable as an unscheduled disability. *Id.* at 291, 110 N.W.2d at 663. The court concluded the employee, based on the condition of causalgia, was entitled to compensation based on industrial disability. *Id.* at 292, 110 N.W.2d at 664.

Under Barton, Collins is entitled to compensation for an industrial disability. She suffered an injury to a scheduled member, her hands, and also to a part of the body not included in the schedule, her nervous system. Reflex sympathetic dystrophy is a dysfunction of the sympathetic nervous system. Ausman & Snyder, *supra*, § 4-278(a). We affirm the

conclusion of the district court that this issue should be remanded to the commissioner for a determination of Collins' industrial disability.

Collins v. Dep't of Human Servs., 529 N.W.2d 627, 629 (Iowa Ct. App. 1995).

Under the Collins and Barton cases claimant's CRPS is to be evaluated as an industrial disability under Iowa Code section 85.34(2)(v). This means the claimant's bilateral carpal tunnel is also evaluated as an industrial disability.

Extent of disability

Iowa Code section 85.34(2)(v) (2017) provides:

In all cases of permanent partial disability other than those hereinabove described or referred to in paragraphs 'a' through 't' hereof, the compensation shall be paid during the number of weeks in relation to five hundred weeks as the reduction in the employee's earning capacity caused by the disability bears in relation to the earning capacity that the employee possessed when the injury occurred. A determination of the reduction in the employee's earning capacity caused by the disability shall take into account the permanent partial disability of the employee and the number of years in the future it was reasonably anticipated that the employee would work at the time of the injury. If an employee who is eligible for compensation under this paragraph returns to work or is offered work for which the employee receives or would receive the same or greater salary, wages, or earnings than the employee received at the time of the injury, the employee shall be compensated based only upon the employee's functional impairment resulting from the injury, and not in relation to the employee's earning capacity.

Claimant returned to work in September 2019. Claimant is driving a fork truck. Claimant is not earning the same or greater wages. Claimant's job classification has changed and he earns approximately \$2.00 per hour less and claimant is not entitled to receive earnings through the CIPP program. I previously found that claimant is earning less at John Deere after his return to work. The reduction of earnings is directly related to his work injury. Claimant's injuries are to be evaluated as an industrial disability.

One of the factors that is to be considered is how claimant's age impacts his earning capacity.

A determination of the reduction in the employee's earning capacity caused by the disability shall take into account the permanent partial disability of the employee and the number of years in the future it was reasonably anticipated that the employee would work at the time of the injury.

Iowa Code § 85.34(2)(v).

The claimant was 40 years old at the time of the hearing. He intends to work until retirement at age 67. Claimant has another 27 years of reasonably anticipated work life. Claimant's earning capacity over the 27 years has been seriously eroded by his work injuries.

Claimant requested a finding that claimant was credible. Defendant has not really challenged claimant's credibility. Defendant's primary arguments are whether the claimant's impairment should be evaluated functionally and the extent of his disability. I find claimant's testimony about his current pain and limitations consistent with the medical evidence and credible.

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.

In assessing an unscheduled, whole-body injury case, the claimant's loss of earning capacity is determined as of the time of the hearing based upon industrial disability factors then existing. The commissioner does not determine permanent disability, or industrial disability, based upon anticipated future developments. Kohlhaas v. Hog Slat, Inc., 777 N.W.2d 387, 392 (Iowa 2009).

No medical provider has opined that claimant's increased anxiety and depression is permanent nor has any provider provided a rating of any mental health condition. Claimant acknowledged in the hearing that his mental condition does not keep him from working. (Claimant's brief, p. 4) I do not consider claimant's mental health condition in evaluation of the extent of his disability.

The defendant asserts the report of Ms. Laughlin should be disregarded. I agree that her conclusion that claimant is violating his restrictions is not supported by the evidence. I also do not accept that claimant has a 96 percent occupational loss. The

vocational report does include useful information on the results of the FCE and how the various restrictions impact claimant's earning capacity.

Claimant has a very significant industrial loss. Dr. Gorsche found a 28 percent whole body impairment rating. Dr. Mathew found a 58 percent whole body impairment rating for the right upper extremity and 10 percent to the left upper extremity. Dr. Manshadi found a 21 percent whole body impairment rating for his right upper extremity and 8 percent whole body impairment rating for the left upper extremity.

Claimant is working with ergonomic fork trucks that do not require much force to steer and have a joy stick for some of the controls. John Deere took several months to find a job that claimant can perform. There was no evidence presented that ergonomic fork trucks and limited lifting positions are generally available in the labor market. The possibility that some day in the future claimant may have enough seniority to bid into an inspector position is too speculative to be relied upon. Claimant has limited ability to use a computer due to his hands. Claimant has no post-high school degrees or certifications. Claimant has shown that he has been very motivated to work. The restrictions by Dr. Gorsche limit the types of work claimant can perform. Considering all of the factors of industrial disability I find claimant has a 75 percent loss of earning capacity and has a 75 percent industrial disability. The finding considers that claimant was still employed by John Deere at the time of the hearing.

Rate

Section 85.36 states the basis of compensation is the weekly earnings of the employee at the time of the injury. The section defines weekly earnings as the gross salary, wages, or earnings to which an employee would have been entitled had the employee worked the customary hours for the full pay period in which the employee was injured as the employer regularly required for the work or employment. The various subsections of section 85.36 set forth methods of computing weekly earnings depending upon the type of earnings and employment.

Claimant's counsel stated that he would provide briefing on the claimant's gross income and weekly workers' compensation rate. (Tr. p. 6) There was no discussion of claimant's gross income or weekly rate in claimant's brief. Based upon the evidence presented I find that claimant's weekly workers' compensation rate is \$525.15.

Penalty

Claimant has requested penalty be assessed against the defendant for a number of reasons. Claimant in his testimony and deposition identified two payments that he believed were late. Claimant has argued that he is entitled to penalty due to delay in commencing of permanent partial disability.

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 eleventh 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 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.

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

The claimant has failed to prove that he received two payments late. The defendant's evidence shows the two payments were timely made. (Ex. J, p. 3)

The next issue concerning penalty is whether the defendant delayed payment of permanent partial disability. Claimant in his testimony did not know of any other reasons to explain his request for penalty. That is not dispositive, as claimants are not required to know legal theories concerning workers' compensation claims. The claimant was found by Dr. Gorsche on March 27, 2020 to be at MMI. Defendant obtained a rating on May 27, 2019 and paid claimant on June 28, 2019. The claimant has proven there was delay between the claimant being at MMI and the payment of permanent partial benefits.

The issue is whether the delay was reasonable. Defendant has the burden to show the delay was reasonable. The defendant has not explained why the delay. The delay between when claimant was at MMI and payment was over 13 weeks. I find that 9-weeks delay was not reasonable. I find that defendant should pay a penalty of approximately 25 percent for the 9-week delay. I award claimant \$1,150.00 in penalty benefits.

Costs

I award claimant \$100.00 for the filing fee pursuant to 876 IAC 4.33. I decline to order the cost of the claimant's deposition. Only one page was relevant to the case and it was offered by defendant.

The commissioner has ruled that under DART v. Young, 867 N.W.2d 839 (Iowa 2015), only the report of an IME physician—and not the examination itself—can be taxed as a cost pursuant to rule 876 IAC 4.33(6). The commissioner has applied this to reports by vocational experts. See Kirkendall v. Cargill Meat Solutions Corp., File No. 5055494 (App. December 17, 2018); Voshell v. Compass Group, USA, Inc., File No. 5056857 (App. September 27, 2019). I award \$484.00 for the cost of the report writing for the vocational report by Ms. Laughlin ($\$110.00 \times 4.4 = \484.00).

Claimant requests the complete costs of Dr. Manshadi's IME under Iowa Code section 85.39 (2017). As claimant was paid for the IME of Dr. Mathew claimant is not entitled to two IME reimbursements. See Larson Mfg. Co. v. Thorson, 763 N.W.2d 842, 861 (Iowa 2009) and Kohlhaas v. Hog Slat, Inc., 777 N.W.2d 387, 395 (Iowa 2009). I award the cost of Dr. Manshadi's report in the amount of \$1,450.00 pursuant to 876 IAC 4.33.

Total costs awarded to claimant is \$2,034.00.

ORDER

Defendant shall pay claimant three hundred seventy-five (375) weeks of permanent partial disability benefits at the weekly rate of five hundred twenty-five and 15/100 dollars (\$525.15) commencing March 27, 2019.

Defendant shall pay claimant costs in the amount of two thousand thirty-four dollars (\$2,034.00).


Defendant shall pay claimant one thousand one hundred fifty dollars (\$1,150.00) in penalty benefits.

Defendant is entitled to a credit for benefits previously paid.

Defendant shall pay accrued weekly benefits in a lump sum together with interest at the 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).

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

Signed and filed this 11th day of May, 2020.


JAMES F. ELLIOTT
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served as follows:

James Kalkhoff (via WCES)

Charles Showalter (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.