BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

TONY PAZZI, Claimant, vs. EFCO/CPI Employer, and TRAVELERS INDEMNITY CO. OF CT., SENTRY INSURANCE COMPANY, Insurance Carriers, Defendants.	:	File Nos. 5053306.01, 5063852.01 REVIEW-REOPENING DECISION Head Note Nos.: 1402.40, 1802, 1804, 2501, 2905, 2907, 4000.2, 4200

STATEMENT OF THE CASE

Tony Pazzi, claimant, filed two review-reopening petitions against EFCO/CPI (hereinafter referred to as "EFCO"), as the employer. The first petition, which is agency File No. 5053306.01, alleges a February 24, 2012 injury date and names Travelers Indemnity Company of Connecticut (hereinafter referred to as "Travelers"), as the insurance carrier. The second petition, which is agency File No. 5063852.01, alleges a June 13, 2017 injury date and names Sentry Insurance Company (hereinafter referred to as "Sentry"), as the insurance carrier.

This case came before the undersigned for a review-reopening hearing on October 20, 2020. The parties filed a hearing report in each file prior to the commencement of the hearing. On the hearing reports, 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. The parties are now bound by their stipulations.

The evidentiary record includes Joint Exhibits 1 through 6, Claimant's Exhibits 1 through 13, Travelers' Exhibits A through C, including selected portions of the prior March 28, 2019, hearing transcript filed close in time to the hearing as an addition to Travelers' Exhibit A (pages 38A through 38E), and Sentry's Exhibits AA through LL. All exhibits were received at the time of hearing with the exception of Claimant's Exhibit 3, pages 7 through 9, which is an October 1, 2020, supplemental report prepared by Phil Davis, M.S. I took Sentry's objection to the supplemental report of Mr. Davis under

advisement at the time of hearing. I deal with the evidentiary objection to Mr. Davis' supplemental report below and admit only those portions of the report as detailed below.

Claimant testified on his own behalf. No other witnesses testified at trial. The evidentiary record was suspended at the conclusion of the arbitration hearing pending later receipt of supplemental exhibits from Defendant Travelers, which included transcripts of prior hearings that were administratively noticed at the time of the October 20, 2020, review-reopening hearing. The evidentiary record closed upon receipt of the additional transcripts.

However, counsel for the parties requested an opportunity to file post-hearing briefs. This request was granted and all parties filed briefs simultaneously on December 11, 2020. The case was considered fully submitted to the undersigned on that date.

ISSUES

In File No. 5053306.01, the parties submitted the following disputed issues for resolution:

1. Whether claimant is entitled to temporary total disability, temporary partial disability, or healing period benefits from April 23, 2019 through July 7, 2020.

2. Whether claimant has proven a substantial change in condition to justify a review-reopening of the prior permanent disability award of this agency.

3. Proper apportionment and indemnity between insurance carriers for benefits paid and payable to claimant pursuant to Iowa Code section 85.21.

4. Whether claimant is entitled to payment of past medical expenses contained at Claimant's Exhibit 11 and, if so, which carrier is responsible for the expenses.

5. Whether claimant is entitled to reimbursement for his independent medical evaluation pursuant to Iowa Code section 85.39.

6. Defendants' entitlement to credit for past benefits paid to claimant.

7. Whether penalty benefits should be awarded to claimant for unreasonable delay or denial of weekly benefits.

8. Whether costs should be assessed and, if so, in what amount.

In File No. 5063852.01, the parties submitted the following disputed issues for resolution:

1. Whether the untimely served supplemental vocational report of Phil Davis (Claimant's Exhibit 3, pages 7-9) should be excluded pursuant to the objection of EFCO and Sentry Insurance.

2. Whether claimant is entitled to temporary total disability, temporary partial disability, or healing period benefits from April 23, 2019 through July 7, 2020.

3. Whether claimant has proven a substantial change in condition to justify a review-reopening of the prior permanent disability award of this agency, including a challenge by defendants as to whether the claimant's current condition is causally related to the initial June 13, 2017 work injury.

4. The extent of claimant's entitlement to additional permanent disability on review-reopening, if any.

5. The proper commencement date for any additional permanent disability awarded.

6. Apportionment and indemnity between insurance carriers pursuant to Iowa Code section 85.21 for benefits paid from April 26, 2019 through December 12, 2019.

7. Whether the past medical expenses sought by claimant are causally connected to the initial June 13, 2017 work injury and allocation of liability for said expenses between the competing insurance carriers.

8. Whether claimant has established entitlement to reimbursement of his independent medical evaluation pursuant to Iowa Code section 85.39.

9. Defendants' entitlement to credit for benefits paid to date.

10. Whether claimant should be awarded penalty benefits for unreasonable delay or denial of weekly benefits.

11. Whether costs should be assessed and, if so, in what amount.

EVIDENTIARY RULING

At the commencement of hearing, defendants, EFCO and Sentry Insurance, objected to the introduction of a supplemental report prepared by claimant's vocational expert, Phil Davis. Mr. Davis' report is dated October 1, 2020 and is contained at Claimant's Exhibit 3, pages 7-9.

Defendants, EFCO and Sentry, object to the report as untimely. The report clearly was produced after the 30-day deadline for exchange of exhibits. Defendants assert that Mr. Davis reviewed additional medical records prior to preparing this report, which could have been provided to, reviewed, and commented upon by Mr. Davis prior

to the 30-day deadline. EFCO and Sentry contend that introduction of the supplemental report is prejudicial to defendants and should be excluded.

In response to the objection, claimant concedes that Mr. Davis' report was produced after the 30-day deadline for exchange of evidence. Claimant also concedes that Mr. Davis reviewed additional evidence, including new medical records, before authoring the supplemental report at issue. Claimant asserts, however, that Mr. Davis' report is rebuttal to Sentry's vocational expert and should be admitted.

Review of Mr. Davis' supplemental report discloses that he reviewed a significant amount of new materials in preparation for drafting the supplemental report. He references review of additional opinions from Steven Quam, D.O., rendered on July 8, 2020, opinions from Janae Brown, ARNP, rendered on June 24, 2020 and August 21, 2020, opinions from Chris Stalvey, D.O., offered on July 14, 2020, and letters from James Gallagher, M.D., on July 1, 2020, July 13, 2020, and July 17, 2020. In preparation for his supplemental report, Mr. Davis was also provided and reviewed a progress note from David Berg, D.O., dated April 25, 2019, a supplemental report from Dr. Stalvey dated September 21, 2020, and the independent medical evaluation performed by John Kuhnlein, M.D., and report dated September 15, 2020.

Obviously, many of these reports were known to claimant months prior to the evidentiary deadline. If claimant had desired for Mr. Davis to review these documents in advance of the evidentiary deadline and offer his analysis and opinion, claimant could have provided those and solicited a timely supplemental report. Instead, it appears that claimant waited to receive the vocational reports from defense vocational experts, Rene Haigh and Vanessa May.

I conclude that it was fair and reasonable for claimant to offer rebuttal evidence from his vocational expert in response to the reports and opinions of Ms. Haigh and Ms. May. However, claimant went much further than simply soliciting a review and rebuttal to those vocational opinions. Claimant sought to provide his vocational expert significant new medical opinions and evidence not previously reviewed by Mr. Davis. In this sense, claimant waited to marshal his evidence until after the evidentiary deadline.

I conclude that the critique offered by Mr. Davis of Ms. Haigh's vocational opinions offered in the first two paragraphs of the "Vocational" section of his report at Claimant's Exhibit 3, page 8 is a reasonable rebuttal effort and should be admitted. I conclude that the third and fourth paragraphs of the "Vocational" section of Mr. Davis' report are reasonable rebuttal and should be admitted. Similarly, I believe the first three sentences of paragraph five of the "Vocational" section of Mr. Davis' report is reasonable rebuttal. Thereafter, in the remainder of the fifth and in the sixth paragraph Mr. Davis begins a review and commentary on evidence not provided to him prior to the evidentiary deadline or previously considered. I find it is prejudicial to defendants to allow claimant to produce additional evidence to his vocational expert and solicit a supplemental report commenting on the additional evidence after the evidentiary disclosure deadline passes. Therefore, I exclude those discussions that involve

evidence not previously reviewed by Mr. Davis, which could have been provided timely to him.

Paragraphs seven and eight of the "Vocational" section and everything after the first sentence in the "Conclusion" section are reasonable rebuttal efforts. I conclude those should be admitted and cause no significant prejudice to defendants. For clarity sake, I admit only those opinions contained in Mr. Davis' supplemental report at Claimant's Exhibit 3, pages 7 through 9 that are specifically received in this section of the decision. All other portions of the October 1, 2020 report are excluded.

FINDINGS OF FACT

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

This is a review-reopening decision following two prior arbitration hearings. Claimant alleges two dates of injury. The first, February 24, 2012, resulted in an arbitration hearing on February 6, 2018 and an arbitration decision filed on April 19, 2018. The undersigned awarded claimant a 45 percent industrial disability as a result of the February 24, 2012 low back and thoracic injury. (Travelers' Exhibit A, pages 1-8)

The second injury date is December 27, 2017. That case proceeded to an arbitration hearing on March 28, 2019. In an arbitration decision filed April 23, 2019, another deputy commissioner found that claimant proved a cumulative neck injury and resulting headaches for the December 27, 2017 injury date. The April 23, 2019 arbitration decision awarded claimant an additional five percent industrial disability as a result of the December 27, 2017 work injury. (Travelers' Exhibit A, pp. 9-20) A May 17, 2019 ruling on rehearing granted a request for alternate medical care.

Neither arbitration decision nor the May 17, 2019 ruling on rehearing were appealed. Both decisions and the ruling on rehearing became final agency action. Both arbitration decisions contain detailed findings of fact that are now established fact and will not be reiterated, but those findings of fact are considered and relied upon in this review-reopening decision.

Claimant asserts that he sustained a substantial change in condition since both of the prior arbitration hearings. He asserts he sustained a substantial economic change of condition as well as a substantial physical change in condition since the prior hearings and decisions.

The initial review-reopening claim focuses on and alleges a substantial economic change in condition. Mr. Pazzi is now 52 years of age. (Transcript, p. 28) He has not obtained additional educational training and has no additional employment since the prior arbitration hearings. Following issuance of the April 23, 2019 arbitration decision, Mr. Pazzi was terminated by the employer. He testified that he last worked for the employer in April 2019. (Tr., pp. 33)

In fact, EFCO was concerned about claimant's physical condition and sought an evaluation of his capacity to work given the side effects of his medications. (Tr., p. 41) Claimant testified that the employer sought a fitness-for-duty evaluation performed by David T. Berg, D.O. on April 25, 2019. (Joint Ex. 2, pp. 16-17) Ultimately, following receipt of Dr. Berg's report, the employer terminated Mr. Pazzi because he was not able to safely perform his job at EFCO. (Tr., pp. 40-41) The employer terminated Mr. Pazzi officially on April 24, 2020 noting, "it is apparent that you are going to be unable to perform any available full-time jobs." (Claimant's Ex. 12, p. 1)

The employer clearly considered there to be a change in claimant's physical condition, which will be discussed below. More importantly, the employer terminated Mr. Pazzi, which resulted in a substantial change in his economic condition. Rather than having a steady, full-time job with the employer, Mr. Pazzi is left without a position and significant work restrictions that will be discussed below. I find that Mr. Pazzi experienced a significant and substantial change in his economic condition when the employer terminated him after the April 2019 arbitration decision. The economic change in condition is attributable and the result of both the February 24, 2012 and the December 17, 2017 work injuries. I find that claimant has proven a substantial change in condition resulting from an economic change as a result of both the February 24, 2012 and the December 17, 2017 work injuries.

Claimant also asserts he sustained a substantial physical change in condition since the prior arbitration hearings. Defendants EFCO and Travelers acknowledge causation as to the low back condition, which is reasonable given the prior arbitration decision findings of fact. Defendants EFCO and Sentry assert causation challenges to claimant's current headache and neck conditions. Sentry contends that there is no causal connection between the current neck condition and headaches and the December 27, 2017 work injury. Of course, the previous findings are final agency action and cannot be challenged or re-litigated.

Sentry relies upon the medical opinions of William Boulden, M.D. to challenge current causal connection. Dr. Boulden performed an independent medical evaluation on Mr. Pazzi on May 19, 2020. His evaluation was limited to the neck condition asserted by claimant. Dr. Boulden opined:

> I did not find proper correlation to the cumulative injury that has been stated as the cause of the patient's problem with his cervical spine. The mechanism that he described to me in what he was doing with these work restrictions from the FCE of 30 pounds would not correlate from a biomechanical standpoint as causing him to have neck problems. Once again, there is no evidence of any significant neck pathology at all that would be related to a work-related injury.

(Sentry Ex. EE, p. 4)

In his deposition, Sentry again asked Dr. Boulden to comment on causation issues. Dr. Boulden opined, "I didn't find anything biomechanically that I could correlate

with his subjective complaints of increasing neck pain based on the 30-pound weight limit." (Sentry Ex. KK, p. 7) Dr. Boulden further clarified, "the restrictions at his job did not entail enough stress on his neck to cause him to have neck problems." (Sentry Ex. KK, p. 11) Yet, these were the very issues tried and decided by the April 2019 arbitration decision. It was definitively found that claimant did prove a cumulative neck injury in that decision. The fact that Dr. Boulden disagrees with that finding is irrelevant as that finding is already final agency action and is now binding.

Dr. Boulden concedes that he believes claimant has subjective neck pain. (Sentry Ex. KK, p. 16) Dr. Boulden concedes that he found no reason during his evaluation to disbelieve claimant's report of symptoms. (Sentry Ex. KK, p. 25) He also concedes that claimant's subjective neck symptoms had worsened since 2017. (Sentry Ex. KK, p. 28)

However, neither Sentry nor Dr. Boulden identifies any intervening or traumatic events since the December 27, 2017 work injury that would terminate or end the causal connection of claimant's current neck condition and headaches. Dr. Boulden testified that there is no causal connection between claimant's work activities and his neck injury claim. (Sentry Ex. KK, pp. 7, 11) However, Dr. Boulden concedes he also does not know what is causing claimant's current neck pain. (Sentry Ex. KK, p. 13)

Realistically, Dr. Boulden's opinion contradicts the prior factual findings of the April 23, 2019 arbitration decision. Dr. Boulden does not opine that claimant's neck and headache conditions were related to work, but that something changed and broke, interrupted, or superseded that causal connection since the April 23, 2019 arbitration decision. Instead, Dr. Boulden opines that there is not a causal connection between the claimant's work activities at EFCO and his neck condition and headaches. Again, this contradicts the prior factual findings and that opinion is rejected.

However, to the extent that Dr. Boulden's opinions should be considered as addressing only issues arising or conditions since the April 23, 2019 arbitration decision, I do not find his opinion convincing. Claimant has had symptoms and ongoing treatment since the March 28, 2019 arbitration hearing and subsequent arbitration decision. There is no evidence of subsequent traumatic events or injuries to claimant's neck or different causes of the current neck symptoms or headaches.

I reject the causation opinions of Dr. Boulden as contrary to the prior factual findings of this agency and as not supported by the evidence in this case. I find that there were not subsequent injuries, traumatic events, or causes of claimant's ongoing neck symptoms and headaches. Instead, I find that claimant's ongoing neck symptoms and headaches remain causally related to the December 27, 2017 work injury.

Since the April 19, 2018 arbitration decision, Mr. Pazzi has obtained consistent and ongoing treatment for his low back. He testified that he feels as though his low back condition continues to worsen. (Tr., p. 32) He testified that his low back pain continues to radiate to his legs and that no physician has told him there is treatment

anticipated in the future that will be able to change his low back condition measurably. (Tr., pp. 32, 35)

I accept Mr. Pazzi's testimony and find that he continues to experience significant low back pain that radiates into his legs. I further find that there is not likely to be any improvement in his low back condition moving forward. Claimant experiences significant symptoms as a result of the 2012 low back injury, it has worsened since the prior arbitration hearing, and causes additional permanent disability.

Mr. Pazzi testified that he feels like his neck symptoms and headaches are worse since the 2019 hearing. (Tr., p. 37) He also noted that he has better control of his headaches with the use of medications since the 2019 hearing. However, claimant noted that if he does not catch a headache and use medication in time, the headaches are now much worse than in 2019. (Tr., p. 38) Since the April 23, 2019 arbitration decision for the neck and headache conditions, Mr. Pazzi has continued to receive treatment for his headaches and neck condition. The treatment modalities attempted include surgical consultation to rule out surgery as well as pain management consultation. (Joint Ex. 3, p. 2; Joint Ex. 5)

Claimant has commenced the use of additional medications since the 2019 arbitration hearing, including the additional of Ajovy as a medication for claimant's neck injury, as well as carbamazepine and topiramate for migraine headaches. (Claimant's Ex. 4, p.1) Mr. Pazzi testified that there is not likely to be any changes in his treatment or improvement in his neck and headache conditions moving forward. (Tr., p. 38)

Again, I accept Mr. Pazzi's testimony about his ongoing headaches and neck pain as credible and convincing. I find that he has proven his headaches are managed better at the present time. However, I also find that if claimant is not able to medicate in a timely manner, his headaches are worse now than they were at the time of the 2019 arbitration hearing. I also accept Mr. Pazzi's testimony that his neck pain radiates into his arms and limits his driving at the present time. (Tr., p. 39) I specifically find that claimant has proven his neck and headache conditions are substantially worse than at the time of the 2019 arbitration hearing and that the current condition related to his headaches and neck symptoms remain causally related to the 2017 work injury. Therefore, I find that claimant has proven a substantial change in condition as a result of the 2017 work injury since the time of the 2019 arbitration hearing.

Having found that Mr. Pazzi proved a substantial change in condition resulting from both injury dates, the question then posed is the extent of disability caused by each injury. This is a difficult question in this case because the effects of the injuries become intermingled and compound upon each other to increase claimant's disability.

First, I will begin with an analysis of claimant's current permanent disability. Although Dr. Boulden believes claimant's reports of subjective symptoms, he opines that claimant has no permanent impairment for his neck condition. This directly contradicts the findings of the prior arbitration decision. Dr. Boulden's opinion is

rejected as contrary to the prior decision and contrary to the actual symptoms and difficulties claimant testified he has as a result of his neck symptoms and headaches.

Since the 2019 arbitration hearing, the employer terminated claimant. Claimant testified that at the time he last worked for EFCO, he worked under a 10-pound lifting restriction. He also testified that he was having difficulties with forgetfulness, concentration and nodding off during work as a result of medication side effects from his injuries. (Tr., pp. 44-45, 48) I accept Mr. Pazzi's testimony in both of these respects.

In a fitness for duty evaluation requested by the employer, David T. Berg, D.O., noted that the employer was concerned about claimant's ability to continue working safely because claimant seemed disoriented at work. (Joint Ex. 2, p. 16) Dr. Berg noted that claimant was cognitively impaired, sleepy, slurred his speech and was lethargic. (Joint Ex. 2, p. 16) Dr. Berg recommended removal of claimant from work at least temporarily as a result of these concerns and symptoms. (Joint Ex. 2, p. 17) Dr. Berg also noted that claimant concurred with these assessments. (Joint Ex. 2, p. 16) Dr. Berg has not released claimant to return to work since his evaluation in April 2019.

Pain specialist, Steven Quam, D.O., opined that claimant reached maximum medical improvement for his neck on June 14, 2019. (Joint Ex. 1, p. 60) In November 2019, Dr. Quam opined that claimant was not capable of working at that time. (Joint Ex. 5, p. 1) In fact, Dr. Quam opined that it would be difficult, if not impossible, for Mr. Pazzi to maintain full-time work in his current condition. (Claimant's Ex. 6, p. 4)

Claimant's personal medical provider, Janae D. Brown, ARNP, opined in August 2019 that claimant should be off work until they were able to get claimant's pain and medications managed. (Joint Ex. 2, p. 21) Ms. Brown later opined that claimant is not capable of performing consistent, full-time work. (Claimant's Ex. 4, p. 1) Ms. Brown has not released Mr. Pazzi to return to gainful employment as of the date of the review-reopening hearing.

Another of claimant's treating physicians, Christopher Stalvey, D.O., opines that claimant cannot perform even the limited or accommodated duties he was performing at EFCO or similar industrial work for another employer. (Claimant's Ex. 5, p. 2) In June 2020, Dr. Stalvey also made it clear that any work above the sedentary level will aggravate claimant's condition, worsen his symptoms in the low back and neck, and likely lead to the necessity for additional medical treatment. (Claimant's Ex. 5, p. 3)

Mr. Pazzi obtained an independent medical evaluation performed by John Kuhnlein, D.O. Dr. Kuhnlein concurred with the declaration of maximum medical improvement for the neck in June 2019. He opined that claimant qualifies for an eight percent permanent impairment for his neck condition as well as an additional two percent permanent impairment of the whole person as a result of the headaches. He confirmed that claimant continues to qualify for a 22 percent permanent impairment resulting from the low back, similar to what claimant had at the time of the prior arbitration hearing. (Claimant's Ex. 1, pp. 15-16)

Dr. Kuhnlein noted that claimant has a spinal cord stimulator for the low back symptoms and that ongoing treatment will be required for the stimulator and that such treatment is exclusive to the 2012 low back injury. Similarly, Dr. Kuhnlein noted that claimant is now taking medications exclusively for his neck and headache conditions and that the medications noted above are specifically attributable to the headaches and neck conditions. (Claimant's Ex. 1, pp. 14, 16)

When addressing the issue of permanent restrictions, Dr. Kuhnlein opines that the restrictions cannot be separated between the two dates of injury. Rather, "the effects of each injury are, to some effect, synergistic with each other." (Joint Ex. 1, p. 16) Dr. Kuhnlein explained why a functional capacity evaluation (FCE) performed in May 2020, which demonstrated medium work capabilities, is not realistic. (Joint Ex. 1, p. 16) Dr. Kuhnlein acknowledged a separate FCE performed in August 2019. (Claimant's Ex. 2) However, Dr. Kuhnlein did not permit a return to work even within the restrictions outlined by the August 2019 FCE. Instead, Dr. Kuhnlein opines that Mr. Pazzi is not capable of performing full-time employment within the American economy. Dr. Kuhnlein opines, "Mr. Pazzi would represent a risk of harm to himself or others" if he returned to the employment setting. (Claimant's Ex. 1, p. 20)

Dr. Quam also considered the 2020 FCE. He rejected the 2020 FCE findings and opined that claimant cannot perform physical employment at the levels documented in that FCE. Instead, Dr. Quam recommended a lifting limit of 10 pounds occasionally and a 15-pound maximum lift. He recommended that claimant avoid repetitive bending, twisting, front reaching, and overhead reaching. (Claimant's Ex. 6, p. 3) However, he continued to recommend against claimant pursuing or performing full-time employment activities even at those levels. (Claimant's Ex. 6, p. 4)

In his independent medical evaluation report, Dr. Kuhnlein also noted that claimant has experienced psychological symptoms and required treatment by a psychiatrist since the prior arbitration hearings. In fact, claimant has developed psychological difficulties resulting from his pain and symptoms since the 2019 arbitration hearing. He now seeks treatment from a psychiatrist, James L. Gallagher, M.D.

Dr. Gallagher offers insight into the interaction of the two work injuries and the ability to separate out the disability caused by each injury. Dr. Gallagher opines that the pain treatments claimant received since the 2019 arbitration hearing provide relief for the full constellation of symptoms. (Travelers Ex. A, p. 35) Dr. Gallagher opines that it would be an act of sophistry to try to separate the various treatments and resulting disabilities from each injury. He refers to the intellectual struggles that would result in trying to unwind the interaction and ultimate proportional disability of the two injuries as a Gordian knot. (Travelers' Ex. A, p. 33)

Dr. Gallagher also provides unequivocal and unrebutted psychiatric opinions about claimant's ability to return to work. Dr. Gallagher opines that claimant is very close to maximum medical improvement from a psychiatric vantage point, "if not already there." He opined that no further improvement is anticipated. (Joint Ex. 4, p. 33) Dr.

Gallagher further opines, "I don't think that Mr. Pazzi is in the physical or mental condition to return to work of any type on a full-time basis now. In fact, I don't anticipate this at any time in the future." (Joint Ex. 4, p. 33) Continuing his explanation, Dr. Gallagher explained, "I don't think he will ever have the psychological resiliency to safely return to full-time work for any length of time" and that he believes it "highly unlikely" that claimant will ever return to "meaningful competitive employment." (Joint Ex. 4, p. 34) I find that, without expectation of further improvement, claimant is at maximum medical improvement for the low back, neck, headaches, and psychiatric conditions.

Considering all of the medical and psychiatric opinions on claimant's residual abilities, I find that Mr. Pazzi has proven he is permanently and totally disabled. His employer had legitimate concerns about his ability to continue working safely. They sought a medical evaluation, which confirmed that claimant should not be working at EFCO. Since that point, claimant has not returned to work. Mr. Pazzi has applied for two alternate jobs since his termination. However, he testified that he does not believe he could perform those jobs. Instead, he applied for the jobs just because he feels like he should be working. (Tr., pp. 49-50)

I do not find either of the FCEs introduced as definitive or convincing. Neither of the FCEs can or does consider claimant's psychological functioning. In fact, Dr. Gallagher is the only mental health specialist offering an opinion about claimant's cognitive functioning and psychological capabilities. Ultimately, I find that the opinions of Dr. Berg, Dr. Quam, Dr. Stalvey, Ms. Brown, Dr. Gallagher, and Dr. Kuhnlein are all convincing and substantially challenge whether claimant is capable of returning to work in any capacity.

Ultimately, my analysis concurs with Dr. Gallagher when he opined, "I think it is overreaching to think that he is suddenly going to become competitively employed at age 52." (Joint Ex. 4, p. 36) Claimant has sufficient symptoms at this juncture that he is not likely to be capable of full-time, competitive employment in any well-known branch of the labor market. His medication side effects make him cognitively slow and unable to perform more sedentary tasks that require cognitive abilities. He is not realistically going to perform manual labor at this juncture.

There are competing vocational reports in this record. The opinions offered by Sentry's vocational expert are not realistic or convincing. She opines, "It is this consultant's opinion … that Mr. Pazzi currently possesses the residual functional capacity to maintain employment in the labor market in occupations up to and including the heavy physical demand level." She further opines that claimant has experienced only a 1.3 percent loss of access to the labor market when only considering the neck issues. This is a lesser percentage than the prior industrial disability award for the neck. Claimant's condition has worsened since the prior industrial disability award. Sentry's vocational expert's opinion is absurd, contrary to the vast majority of the evidence, certainly not the most convincing vocational evidence in this record, and is rejected.

Travelers introduces a more reasonable vocational expert opinion. Travelers' expert acknowledges the opinions of the various treating providers, including those of the unrebutted psychiatrist, Dr. Gallagher. Travelers' vocational expert opines that claimant remains capable of performing sedentary work duties and recommends a work-at-home job. (Travelers' Ex. C, pp. 80-81) Again, this is a much more reasonable vocational opinion and assessment. However, I do not find it entirely convincing. Dr. Gallagher, Dr. Kuhnlein, Dr. Berg, Dr. Quam, and Ms. Brown have all essentially opined that a return to work is not realistically medically feasible at this point in time. Dr. Stalvey, Dr. Quam, Dr. Kuhnlein, and Dr. Gallagher all appear to specifically reject even a return to work at the sedentary work level.

Claimant introduced a third vocational opinion, which opines that claimant lost 100 percent of his prior job opportunities and greater than 90 percent access to all available jobs in the labor market. Claimant's vocational expert opines that realistically claimant is not employable at this time. (Claimant's Ex. 3, p. 5) While I received portions of claimant's vocational rebuttal report over Sentry's evidentiary objection, I really do not rely upon the additional portions accepted. I find that claimant has proven he is permanently and totally disabled with or without a vocational opinion in this case.

Having determined and found that Mr. Pazzi is now permanently and totally disabled, the parties ask me to determine how that disability is to be apportioned between the work injuries. Mr. Pazzi testified that he cannot say whether his low back or his neck and headaches cause him more disability at this point in time. Instead, it depends on the day and each condition causes him difficulties of greater degree on certain days. (Tr., pp. 54, 82)

However, one thing that did increase after developing neck symptoms and headaches was claimant's medication usage. Mr. Pazzi now has difficulties with the side effects of all his medications. However, claimant remains in need of medications for his low back as well as for his neck and headaches. It is difficult to impossible to differentiate the effects of pain medications on claimant's injuries. Similarly, it is difficult to impossible to ascribe medication side effects to either specific injury or medications used.

Dr. Boulden acknowledged that the pain medications claimant uses are systemic and assist with his pain symptoms resulting from the low back, neck, and headaches. (Sentry Ex. KK, p. 18) Ms. Brown separated the use of Ajovy as for claimant's neck injury and the use of carbamazepine and topiramate for migraine headaches. Claimant's spinal cord stimulator is clearly for his low back, and any treatment or adjustments for the spinal cord stimulator are related to the 2012 low back injury. However, it is difficult in this record to differentiate the effects of the 2012 injury and the 2017 injury as portions or identifiable parts of claimant's current disability.

Dr. Gallagher referred to it as an act of sophistry to try to delineate or separate the various treatments and resulting disability from each injury date at this point in time. (Travelers Ex. A, p. 33) Dr. Kuhnlein opined that claimant's restrictions for the injuries cannot be separated at this time. Rather, "the effects of each injury are, to some effect,

synergistic with each other." (Claimant's Ex. 1, p. 16) I concur with Dr. Gallagher and Dr. Kuhnlein.

Claimant has significant injuries, worsening conditions, and significant medication side effects since the 2019 arbitration hearing. Adding new medications as a result of the 2017 work injury, coupled with the underlying pain medications for the low back result in a meshing of the conditions and resulting medication side effects. If claimant could resolve and heal his low back condition, the residual effects of the neck and headaches could be assessed individually. However, claimant's low back condition is not resolved and is not going to resolve.

Similarly, if claimant's neck and headache conditions were to resolve, it would be possible to assess the total disability resulting from solely the 2012 low back injury. However, the neck and headache conditions are not resolved and are not likely to resolve. The combination of these injuries and the medications used to treat both injuries has resulted in significant side effects and physical limitations. The combination of these injuries has also resulted in significant cognitive and psychological limitations. The unrebutted psychiatrist has opined that these are intertwined and cannot be separated for purposes of assessing the disability attributable to each injury. I accept and concur with Dr. Gallagher's opinion, as well as the opinion of Dr. Kuhnlein. I find that it is the combination of both injury dates that results in claimant's current condition and his permanent total disability. I find that it is impossible to delineate or separate the disability attributable to each injury date at this time. Instead, the two injuries have combined, worsened, and caused permanent and total disability.

The parties also dispute which medical treatment is attributable to which injury date. Pain medications alleviate and treat the conditions related to both injury dates. Claimant's spinal cord stimulator and any treatment or adjustments necessary to that appliance are clearly attributable to the 2012 injury date. Ajovy is a medication that was added specifically for the neck and is attributable to the 2017 injury date. Carbamazepine and topiramate are medication treatments for migraine headaches and attributable to the 2017 injury date. Dr. Gallagher's mental health and cognitive health treatment is attributable to both injury dates.

Dr. Berg opined on April 25, 2019, that claimant was not medically fit to return to work. (Joint Ex. 2, pp. 16-17) He has not been released to return to work since that date by the employer's chosen physician. Although it took time for treatment of the various conditions to achieve maximum medical improvement for the neck and later from a psychological standpoint, I find that claimant has not been capable of performing gainful employment in a realistic and competitive branch of the labor market since Dr. Berg took him off work on April 25, 2019. Therefore, I find that claimant has proven that he has been permanently and totally disabled since April 25, 2019.

Sentry paid Mr. Pazzi weekly benefits at the rate of $505.44 from April 25, 2019 through December 12, 2019. After giving notice of their intention to terminate weekly benefits, Travelers filed an application for a consent order to pay weekly benefits to claimant. Travelers filed that application on December 6, 2019 and obtained an order

from the undersigned permitting the voluntary payment of benefits without prejudice on December 9, 2019. Travelers commenced weekly benefits at the rate of $569.82 on December 13, 2019 and continued paying weekly benefits through June 5, 2020. (Travelers' Ex. B, p. 39)

Claimant contends that penalty benefits should be assessed against defendants for unreasonable denial or delay in benefits. However, the record demonstrates that Travelers commenced payment of weekly benefits immediately upon Sentry's termination of weekly benefits. It was not unreasonable for Travelers to not pay weekly benefits while Sentry volunteered benefits. Sentry's denial was unreasonable because it relied upon the opinions of Dr. Boulden, which disputed causation of the underlying injury rather than providing evidence of some intervening cause to break causal connection to the 2017 injury date. Regardless, Travelers immediately commenced payment of weekly benefits and paid at a higher weekly rate than was owed by Sentry. Therefore, claimant was paid in full for all weeks after Sentry's denial of liability and Sentry benefits from Travelers' voluntary payment of weekly benefits through June 5, 2020.

I find that claimant was underpaid weekly benefits from April 25, 2019 through December 12, 2019. However, Sentry was voluntarily paying weekly benefits during this period of time and it was not unreasonable for Travelers to believe Sentry was admitting liability. I find it was reasonable for Travelers to believe liability rested with Sentry during this period and justified Travelers not paying additional benefits from April 25, 2019 through December 12, 2019. Once Travelers picked up the voluntary benefits on December 13, 2019, claimant was paid in full and he cannot prove any delay or denial of benefits through June 5, 2020. Rather, he received his full benefits from December 13, 2019 through June 5, 2020. Therefore, I find no unreasonable conduct justifying a penalty against either Travelers or Sentry during this period of time.

However, I find it was unreasonable to terminate weekly benefits on June 5, 2020. The evidence in this case, including several physicians' opinions and an unrebutted psychiatric opinion suggested claimant had a much worse industrial disability than was awarded in either prior arbitration decision. Though the disability appeared significant, including the removal from work through an employer-driven fitness for duty evaluation, neither carrier voluntarily paid weekly benefits to claimant from June 6, 2020, through the date of the hearing, a period of 19 weeks. I find the denial of benefits during this period of time was unreasonable and both carriers bear responsibility for that denial.

I accept Travelers' Exhibit B, pages 39-40, as accurate and find that Travelers made the payments documented therein to claimant. With regard to medical expenses, I again accept Travelers' Exhibit B, pages 41-44 as accurate and as payments made by Travelers for claimant's medical expenses.

I note Travelers' Exhibit B documents payments for medications related to both injury dates on December 17, 2019, January 14, 2020, January 21, 2020, February 4, 2020, February 11, 2020, February 25, 2020, March 3, 2020, March 10, 2020, March

31, 2020, April 7, 2020, May 5, 2020, May 26, 2020, June 2, 2020, June 9, 2020, June 23, 2020, July 7, 23020, July 14, 2020, August 4, 2020, and September 1, 2020. In total, Travelers documents that it paid $6,047.45. Sentry should have paid one-half of these expenses and will be ordered to reimburse Travelers in the amount of $3,023.72 in prescription medication expenses.

In addition, Travelers documents payment of charges for Dr. Gallagher's mental health services for treatment on March 20, 2020, April 10, 2020, June 12, 2020, and August 7, 2020. All of Dr. Gallagher's treatment is related to both injury dates. Travelers documents payment of $1,317.18 in fees to Dr. Gallagher for his treatments. Sentry is obligated to share this expense and will be ordered to reimburse Travelers in the amount of $658.59 for Dr. Gallagher's treatment.

Travelers' Exhibit B documents payments made to Metro Anesthesia for treatment with Dr. Quam on December 23, 2019. That treatment notes suggests that the primary evaluation and treatment on that date was for claimant's low back. Although Dr. Quam renewed medications and added Tramadol on that date, the primary treatment rendered was for the low back. I find that Sentry should not share in the December 23, 2019, expense because neither the headaches nor the cervical spine were primary emphasis points during this evaluation. (Joint Ex. 1, pp. 93-99)

Similarly, on March 16, 2020 and July 1, 2020, Dr. Quam provided claimant care. Although the neck issues are mentioned as problems for claimant, the primary care offered at each of these evaluations was for Mr. Pazzi's low back. I find that neither the March 16, 2020 nor the July 1, 2020 evaluation were for treatment of the neck and no reimbursement is due from Sentry to Travelers for these treatments.

Travelers also documents payment of medical expenses for "rehabilitation." I cannot ascertain whether those payments are for treatment related to specifically the low back or also include treatment for the neck. No reimbursement will be ordered for these expenses.

Finally, claimant seeks payment or reimbursement for certain past medical expenses contained at Claimant's Exhibit 11. Among the items requested in Claimant's Exhibit 11 are medications. I find that the medications Ajovy, carbamazepine, and topiramate are all related to treatment of claimant's neck injury or resulting headaches and are the responsibility of Sentry. Claimant seeks payment of the expense of sumatriptan and propranolol, which are medications for the treatment of headaches, and are also the responsibility of Sentry.

Claimant seeks payment of vitamin D, though I find no evidence this is prescribed specific to either injury. It was prescribed during a general health evaluation on April 15, 2019. Accordingly, I find claimant failed to prove entitlement to payment or reimbursement for vitamin D.

The remaining medications, including duloxetine, Tramadol, bupropion, Lyrica, pregabalin, zaleplon, meloxicam, metaxalone and zolpidem, are all medications to treat

pain, sleep difficulties from pain, anti-inflammatories, or for mental health purposes. These medications are the result of and treat both the low back and the neck conditions and should be borne equally by Travelers and Sentry.

In addition, claimant submits a medical charge from Des Moines Orthopaedic Surgeons for services rendered on August 20, 2018. This treatment was for claimant's neck condition and should be paid by Sentry.

Claimant also seeks charges for treatment at Metro Anesthesia on March 18, 2019, including a $50.00 co-pay. This treatment was primarily for the low back and should be the responsibility of Travelers.

Claimant seeks payment of medical expenses for treatment with Unity Point Family Medicine Clinic (Todd Janus, M.D. and Janae D. Brown, ARNP). Ms. Brown evaluated claimant on January 16, 2019. The corresponding medical record details that treatment on that date revolved around claimant's neck and migraine injury. Joint Ex. 2, p. 2) The co-pay associated with this treatment should be reimbursed to claimant by Sentry. (Claimant's Ex. 11, p. 6)

The treatment rendered by Dr. Janus on January 29, 2019 appears related primarily to claimant's low back injury in 2012. (Joint Ex. 2, p. 5) The charges related to this injury appear to be related to Travelers' date of injury. (Claimant's Ex. 11, p. 7) Travelers should reimburse claimant for the co-pay related to this treatment.

Medical records from Unity Point Family Medical Clinic for treatment on April 17, 2019 suggest that visit was for general wellness checks, including discussion of pre-hypertension issues, diet, and other general medical health issues, and trigeminal neuralgia, which was previously determined to be not related to either work injury. I find that the treatment rendered on April 17, 2019 is not the responsibility of either insurance carrier. (Joint Ex. 2, pp. 11-15).

CONCLUSIONS OF LAW

Mr. Pazzi filed review-reopening petitions against the employer and its respective insurance carriers for his prior February 24, 2012 low back injury and his June 13, 2017 neck injury. These cases involve claims for review-reopening and an increase in permanent disability benefits by claimant. Specifically, Mr. Pazzi asserts that his condition has worsened and he has experienced a significant change in his condition since both of the prior arbitration hearings. Mr. Pazzi now asserts a claim for permanent total disability benefits.

In File No. 5053306.01, the employer and Travelers dispute whether claimant has proven a change in condition that is casually related to the February 24, 2012 work injury. Instead, Travelers contends that claimant's treatment, including medication increases and additions resulting from claimant's neck injury and unrelated trigeminal neuralgia, are the cause of claimant's loss of employment and any increase in

permanent disability. In addition, Travelers challenges the extent of claimant's entitlement to additional permanent disability benefits, if any.

In File No. 5063852.01, the employer and Sentry Insurance challenge whether claimant's current neck and headache conditions are causally related to the June 13, 2017 work injury previously established. Sentry further challenges whether any change in condition has resulted since the prior arbitration hearing. Finally, Sentry challenges whether claimant is entitled to any additional permanent disability as a result of the June 13, 2017 work injury.

Upon review-reopening, claimant has the burden to show a change in condition related to the original injury since the original award or settlement was made. The change may be either economic or physical. Blacksmith v. All-American, Inc., 290 N.W.2d 348 (Iowa 1980); Henderson v. Iles, 250 Iowa 787, 96 N.W.2d 321 (1959). A mere difference of opinion of experts as to the percentage of disability arising from an original injury is not sufficient to justify a different determination on a petition for review-reopening. Rather, claimant's condition must have worsened or deteriorated in a substantial and discernible manner since the initial award or settlement. Bousfield v. Sisters of Mercy, 249 Iowa 64, 86 N.W.2d 109 (1957). However, it makes no difference whether the change in condition since the arbitration hearing was anticipated or unanticipated at the time of the initial award. Kohlhaas v. Hog Slat, Inc., 777 N.W.2d 387, 391-392 (Iowa 2009). Instead, the question in this review-reopening proceeding is whether there has been a substantial change in condition since the arbitration hearing that remains causally related to the initial work injury. Id. at 392. Of course, none of the parties may not re-litigate facts that were known or knowable at the time of the arbitration hearing. Id. at 393.

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).

Therefore, claimant bears the burden to prove both that he has experienced a significant change in condition since one or both of the prior arbitration hearings and that his current condition remains causally related to the initial work injury or injuries. In these cases, I found that Mr. Pazzi proved a substantial change in condition after both prior arbitration hearings and that his current condition is causally related to both prior injuries. Although Sentry challenged causal connection of the current condition, it introduced evidence from Dr. Boulden that really challenged whether the underlying condition is causally related to the work activities. In other words, Sentry was essentially attempting to re-try the underlying causation issue. Dr. Boulden's opinions were not limited to developments since the prior arbitration hearing. Moreover, there is no evidence that claimant sustained any intervening injuries or conditions that likely broke the causal connection between claimant's current neck and headache conditions and the 2017 work injury. Having found that claimant's low back, neck, and headache conditions have substantially changed since the prior arbitration hearings and that Dr. Boulden's opinions are contrary to the prior arbitration decision findings and not convincing in this situation, I conclude that Mr. Pazzi proved substantial changes in condition related to both prior work injuries.

Having found substantial changes in condition related to both injury dates, the next question to be addressed is the extent of additional permanent disability attributable to each injury, if any, and whether claimant is entitled to additional permanent disability resulting from either injury. Both injuries are unscheduled injuries and were determined to be compensable with industrial disability in the underlying arbitration decisions. Therefore, the question to be determined is claimant's current industrial disability as a result of the 2012 and/or 2017 work injuries.

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 Ry. Co. of Iowa, 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.

I considered all of the relevant, available factors outlined by the Iowa Supreme Court to assess industrial disability. Having accepted the opinions of Dr. Kuhnlein, Dr. Stalvey, and Dr. Gallagher, I found that Mr. Pazzi is permanently and totally disabled. Accordingly, I conclude that claimant is entitled to a review-reopening award that results in a permanent total disability award pursuant to Iowa Code section 85.34(3). Claimant became permanently and totally disabled after the fitness for duty evaluation by Dr. Berg and once he was removed from his employment by the employer on April 25, 2019. Therefore, I conclude that permanent total disability benefits are payable to claimant commencing on April 25, 2019, continuing through the date of the review-reopening hearing and into the future until Mr. Pazzi is no longer permanently and totally disabled. Iowa Code section 85.34(3)(a).

The next question is which carrier should be ordered to pay the permanent total disability benefits to Mr. Pazzi. This case presents a unique situation that apparently has not presented itself to this agency frequently. The undersigned was unable to identify a prior case that dealt with the same or similar facts presented in this case.

However, the undersigned ultimately found that both the 2012 injury and the 2017 injury were significant contributing factors that brought about claimant's permanent total disability. The undersigned concurred with Dr. Gallagher and Dr. Kuhnlein that it is not realistic or possible to delineate what portion of claimant's current disability should be allocated to the 2012 injury versus the 2017 injury. Instead, it is the combination of the effects and worsening of both injuries since their original arbitration hearings that has led claimant to his current condition and his permanent total disability. Accordingly, I conclude that both injury dates and both carriers should share the responsibility of paying for Mr. Pazzi's permanent total disability.

Having reached this conclusion, the undersigned is faced with yet another practical dilemma. The stipulated weekly rate in File No. 5053306.01 is $569.82. However, the stipulated weekly rate in File No. 5063852.01 is $505.44. Certainly, claimant should receive the highest weekly rate given that the purpose of the workers' compensation statutes is for the benefit of the injured worker. Therefore, weekly benefits for the permanent total disability award will be payable at the weekly rate of $569.82.

The most equitable means of dividing those weekly benefits between the competing carriers is proportionally to their potential risk and weekly rate. A proportional assessment results in Travelers being responsible for paying $302.00 per week and Sentry paying $267.82 per week. This provides claimant a full weekly benefit of $569.82 and a proportional obligation by each carrier.

In File No. 5053306.01, Travelers filed agency form number 14-0037, an application and consent order for payment of benefits under Iowa Code section 85.21,

on December 6, 2019. The undersigned approved the consent order on December 9, 2019. Travelers commenced weekly benefits pursuant to the consent order on December 13, 2019. Travelers now seeks reimbursement from Sentry for the benefits paid pursuant to the consent order.

Having determined that the insurance carriers in each file should share proportionally in payment of the permanent total disability award, I conclude that Travelers appropriately filed the application and consent order for payment of benefits under Iowa Code section 85.21. Travelers has successfully proven that Sentry is obligated to pay $267.82 per week towards the weekly benefits paid to claimant from December 13, 2019, through June 5, 2020. Therefore, Sentry will be ordered to reimburse and indemnify Travelers for these benefits. Iowa Code section 85.21(1).

Travelers documented payment of 25 weeks of permanent disability benefits between December 13, 2019 and June 5, 2020. Sentry is obligated to pay $267.82 per week under this decision. Accordingly, Travelers has proven entitlement to reimbursement from Sentry in the amount of $6,695.50 toward weekly benefits paid from December 13, 2019 through June 5, 2020.

In File No. 5063852.01, Sentry also asserts a right to indemnification and apportionment pursuant to Iowa Code section 85.21. Sentry asserts that it paid weekly benefits that should have been paid to claimant by Travelers. However, review of File No. 5063852.01 demonstrates that Sentry did not avail itself of the protections of an application and consent order pursuant to Iowa Code section 85.21. Rather, Sentry paid some voluntary benefits to claimant and subsequently elected to terminate those benefits without obtaining any orders from the agency or otherwise protecting its potential rights under Iowa Code section 85.21.

Iowa Code section 85.21 provides:

> The workers' compensation commissioner may order any number or combination of alleged workers' compensation insurance carriers and alleged employers, which are parties to a contested case or to a dispute which could culminate in a contested case, to pay all or part of the benefits due to an employee or an employee's dependent or legal representative if any of the carriers or employers agree, or the commissioner determines after an evidentiary hearing, that one or more of the carriers or employers is liable to the employee or to the employee's dependent or legal representative for benefits under this chapter or under chapter 85A or 85B, but the carriers or employers cannot agree, or the commissioner has not determined which carriers or employers are liable.

The agency has enacted an administrative rule, providing for the use of a specific form, Form 14-0037, for the preservation and assertion of a right to reimbursement under Iowa Code section 85.21. The rule states:

> This form is the application and consent order for payment of benefits under Iowa Code section 85.21 which is used by an employer or an insurance carrier to pay weekly and medical benefits without admitting liability and to be able to seek reimbursement from another carrier or employer.

Agency rule 876 IAC 3.1(11).

Agency precedent has clearly delineated that the use of Form 14-0037 is required to preserve any claim for indemnification or reimbursement under Iowa Code section 85.21. Zurich American v. Allied Mutual Insurance, File Nos. 101165, 1059572, 1059573, 1059574 (Appeal June 1998); Bromert v. Trausch Co., File No. 788831 (Appeal June 1996); Barglof v. G. W. Pete Howe, Inc., File Nos. 872409, 840249 (Appeal Nov. 1996). In Employers Mutual Cas. Co. v. Vanwyngarden & Abrahamson, File Nos. 1059572, 1059573, 1059574, 1011165 (Appeal June 1998), the commissioner held:

> Where a petitioner for reimbursement has sought an order pursuant to Iowa Code section 85.21 prior to the evidentiary hearing, reimbursement may include payments made both before and after the order was issued. But where no order under 85.21 issues before the evidentiary hearing in a case, reimbursement will not be ordered.

In File No. 5063852.01, Sentry failed to file an application and consent order for the payment of weekly benefits (Form 14-0037) prior to the evidentiary hearing. Accordingly, Sentry has no claim for reimbursement against Travelers pursuant to Iowa Code section 85.21. Claimant has been paid in full (at Sentry's weekly benefit rate) for the weeks paid by Sentry. Sentry is not due any reimbursement pursuant to Iowa Code section 85.21, given their failure to preserve their claim prior to the evidentiary hearing. However, Travelers' weekly rate exceeds Sentry's weekly rate by $64.38 per week. Claimant is owed the additional $64.38 per week from April 25, 2019 through December 12, 2019. Travelers will be ordered to satisfy this amount with interest given that Sentry has already paid the lion's share of these weekly benefits. Iowa Code section 85.30.

Claimant asserts a claim for penalty benefits against both insurance carriers. 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, 594 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).

Having found that there was an underpayment of weekly benefits from April 25, 2019 through December 12, 2019, I also found that it was reasonable for Travelers to believe Sentry was accepting liability during that period of time and that it did not owe additional benefits. Therefore, I found no factual basis for a penalty award or unreasonable conduct between April 25, 2019 and December 12, 2019.

I found that Sentry's denial of liability was unreasonable and that its termination of weekly benefits on December 12, 2019 was unreasonable. However, I also found that claimant was paid in full by Travelers commencing on December 13, 2019 through June 5, 2020. Therefore, there was no actual delay or denial of benefits to claimant from December 13, 2019 through June 5, 2020 upon which a penalty benefit award can or should be made. Iowa Code section 86.13(4).

Neither insurance carrier paid weekly benefits to Mr. Pazzi between June 5, 2020 and October 20, 2020. In spite of obtaining an order for payment of benefits, Travelers never sought to terminate that order before actually terminating benefits to claimant. Sentry attempted to re-litigate the underlying causation issue and ignored claimant's increased disability. Neither position was reasonable.

Realistically, the employer had removed claimant from work based upon a report from its own evaluator, Dr. Berg, documenting that claimant was not fit to return to work. It should have been apparent to each insurance carrier that claimant sustained significant additional industrial disability and that this claim potentially represented a permanent total disability situation. Yet, neither carrier stepped forward to pay claimant weekly benefits after June 5, 2020. I conclude that the carriers' conduct was unreasonable and that a penalty is appropriate under the circumstances.

The purpose of penalty benefits is both punitive and to encourage a correction of conduct into the future. In this instance, one or both of the carriers should have stepped forward to ensure that claimant received payment of weekly benefits. Iowa Code section 85.21 is specifically in place to permit one carrier to pay the benefits and seek reimbursement from another carrier. Travelers did so for a period of time after Sentry terminated benefits. Yet, claimant was left without benefits from June 6, 2020 through the review-reopening hearing. This is a period of 19 weeks. Claimant was unreasonably denied weekly benefits amounting to $10,826.58. I conclude that a penalty totaling $5,000.00 is appropriate under the circumstances and should serve as both a penalty and a deterrent to future similar conduct by either carrier.

Having found that both carriers conduct was unreasonable during the period of time after June 5, 2020, I conclude that each carrier should bear a portion of the

penalty. I conclude that the penalty should be borne in proportion to the carrier's liability for weekly benefits. Travelers bears 53 percent of the weekly rate burden given its higher weekly rate. Accordingly, I conclude that Travelers should be assessed a penalty of $2,650.00 and that Sentry should bear the remaining $2,350.00 of the penalty assessed.

The insurance carriers assert claims against each other pursuant to Iowa Code section 85.21 seeking reimbursement for past medical expenses each has paid. Once again, Sentry has not preserved its claim for reimbursement. Travelers did preserve its claim as noted above.

Having found that Travelers proved claimant's various prescription medications were beneficial for and provided treatment for both the low back as well as the cervical and headache conditions, I also found that Travelers proved it had paid $6,047.45 for medications that were efficacious and necessary for both injuries. Therefore, I conclude that Sentry should be ordered to reimburse Travelers $3,023.72 in prescription charges identified in Travelers' Exhibit B. I further conclude that the carriers should equally split all prescription charges after the date of the review-reopening hearing and moving forward for all prescriptions to include Cymbalta, Skelaxin, Lyrica, Ambien, Tramadol, or other medications subsequently prescribed by the treating physicians related to pain management that are not specific to either the headaches, neck, or low back. I specifically found that Ajovy, carbamazepine, topiramate, sumatriptan, and propranolol are the responsibility of Sentry moving forward. Similarly, I found that any treatment necessary for adjustment, programming, removal, or repair of the spinal cord stimulator in claimant's low back is the responsibility of Travelers.

I found that the mental health treatment provided by Dr. Gallagher is beneficial and necessitated by the combination of the injuries. I found that Travelers proved it paid $1,317.18 in charges for treatment provided by Dr. Gallagher. I conclude that Sentry should be ordered to reimburse Travelers in the amount of $658.59 for these medical expenses.

I found no other medical expenses paid by Travelers were proven to be related to the headaches or neck injury. Therefore, I conclude that none of the other medical expenses included in Travelers' Exhibit B should be ordered to be reimbursed.

Claimant's Exhibit 11 includes past medical expenses. I set forth specific findings of fact pertaining to those medical expenses, finding some related to treatment for Travelers' date of injury, some related to the date of injury for which Sentry is responsible, some medications related to both dates of injury to be borne jointly, and some expenses not proven related to either date of injury. The specific findings of fact are incorporated herein and I conclude that each defendant should be ordered to pay for the expenses related to their date of injury or jointly as the case may be. Iowa Code section 85.21; Iowa Code section 85.27.

Mr. Pazzi also asserts a claim for reimbursement of his independent medical evaluation pursuant to Iowa Code section 85.39.

Section 85.39 permits an employee to be reimbursed for subsequent examination by a physician of the employee's choice where an employer-retained physician has previously evaluated "permanent disability" and the employee believes that the initial evaluation is too low. The section also permits reimbursement for reasonably necessary transportation expenses incurred and for any wage loss occasioned by the employee attending the subsequent examination.

Defendants are responsible only for reasonable fees associated with claimant's independent medical examination. Claimant has the burden of proving the reasonableness of the expenses incurred for the examination. See Schintgen v. Economy Fire & Casualty Co., File No. 855298 (App. April 26, 1991). Claimant need not ultimately prove the injury arose out of and in the course of employment to qualify for reimbursement under section 85.39. See Dodd v. Fleetguard, Inc., 759 N.W.2d 133, 140 (Iowa App. 2008).

Amendments to Iowa Code section 85.39 in 2017 now require that claimant prove the compensability of the injury before recovering reimbursement of his IME. In this instance, the compensability of the injury was established by agency decision in the underlying arbitration proceedings. Accordingly, claimant need only prove that his impairment rating was preceded by a prior evaluation of permanent disability by a physician selected by defendants on one or both of these files and that the fee charged by his evaluator was reasonable. Iowa Code section 85.39 (2017).

Review of the evidentiary record demonstrates that Travelers did not solicit a permanent impairment rating from any of its authorized treating physicians or seek an alternate evaluation to secure a permanent impairment rating. Claimant cannot demonstrate that he met the prerequisites of Iowa Code section 85.39 to obtain reimbursement of his IME from Travelers.

However, Sentry did obtain an independent medical evaluation, performed by Dr. Boulden. Dr. Boulden performed his evaluation on May 19, 2020, and opined that claimant "would not have a permanent impairment rating to his cervical spine based on any work-related injury." (Sentry Ex. EE, p. 5) Claimant subsequently obtained an IME with Dr. Kuhnlein in July 2020. Claimant can establish the prerequisites of Iowa Code section 85.39 were met in the Sentry file prior to Dr. Kuhnlein's evaluation. Accordingly, I conclude that claimant established entitlement to reimbursement of his IME from Sentry. Given the amount of medical evidence and the complexity of the facts and issues in this case, I consider the $3,700.00 paid to Dr. Kuhnlein to be reasonable in this case. Therefore, I conclude that Sentry should be ordered to reimburse claimant for his $3,700.00 IME charges pursuant to Iowa Code section 85.39.

Mr. Pazzi also seeks reimbursement of costs from each of the files. Costs are assessed at the discretion of the agency. Iowa Code section 86.40.

Claimant has prevailed against the defendants in both files. I conclude it is reasonable to assess costs in some amount against each defendant insurance carrier.

Mr. Pazzi seeks assessment of his filing fees in each file. This is a reasonable request and an allowable cost pursuant to 876 IAC 4.33(7). Travelers and Sentry will each be ordered to reimburse claimant $100.00 representing claimant's filing fee in each file.

Claimant also seeks the cost ($350.00) of his functional capacity evaluation report written by Short Physical Therapy on August 9, 2019. However, I did not find that FCE to be convincing or rely upon it in rendering this decision. Therefore, exercising the agency's discretion, I do not assess this as a cost against either defendant carrier.

Claimant also seeks assessment of the cost of his vocational expert's report. The Iowa Supreme Court has made it clear that only the expense of drafting the expert's report is a taxable cost pursuant to 876 IAC 4.33(6). See Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839 (Iowa 2015). In this case, Mr. Davis provided an itemized billing statement that includes charges for file review, a vocational interview, and then lumps in charges for "Vocational research, file review, and vocational report." (Claimant's Ex. 13, p. 4) Mr. Davis' time spent for research and file review are not taxable costs pursuant to Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839 (Iowa 2015). It is impossible to ascertain the amount of time Mr. Davis spent specifically drafting a report. The undersigned is not willing to speculate or estimate these charges. Therefore, none of Mr. Davis' charges are taxed as costs.

Mr. Pazzi also seeks costs for conferences his counsel attended with Dr. Gallagher and Dr. Quam. (Claimant's Ex. 13, pp. 5-11) However, once again, these billing statements do not break down the charges and specify the amount charged for just drafting a report for this case in lieu of testimony. Again, the statements suggest the charges are for attendance at an attorney conference, file review, and/or report preparations. Once again, the undersigned is not willing to speculate on the charges specifically made for report preparation. Therefore, I decline to assess any of these expenses as costs. Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839 (Iowa 2015).

ORDER

THEREFORE, IT IS ORDERED:

Defendants shall pay claimant permanent total disability benefits commencing on April 25, 2019 and continuing through the present and into the future until claimant is no longer permanently and totally disabled.

Defendants EFCO and Travelers shall pay claimant sixty-four and 38/100 dollars ($64.38) per week from April 25, 2019 through December 12, 2019, representing the additional owed on permanent total disability benefits.

Defendants EFCO and Travelers shall pay claimant permanent total disability benefits commencing on December 13, 2019 at the weekly rate of three hundred two and 00/100 dollars ($302.00).

Defendants EFCO and Sentry shall pay claimant permanent total disability benefits commencing on April 25, 2019 at the weekly rate of two hundred sixty-seven and 82/100 dollars ($267.82).

Defendants shall pay accrued weekly benefits in a lump sum together with interest 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, as required by Iowa Code section 85.30.

Defendants shall be entitled to a credit for all benefits paid to date against this award.

Defendant Travelers shall pay claimant penalty benefits in the amount of two thousand six hundred fifty and 00/100 dollars ($2,650.00).

Defendant Sentry shall pay claimant penalty benefits in the amount of two thousand three hundred fifty and 00/100 dollars ($2,350.00).

Pursuant to Iowa Code section 85.21, Sentry shall reimburse Travelers in the amount of six thousand six hundred ninety-five and 50/100 dollars ($6,695.50), representing its share of weekly benefits paid by Travelers to claimant from December 13, 2019 through June 5, 2020.

Defendants EFCO and Travelers are responsible for payment for any treatment, modifications, or procedures related to claimant's spinal cord stimulator or specific to the low back injury, as more specifically set forth in the body of this decision.

Defendants EFCO and Sentry are responsible for payment of the medications Ajovy, carbamazepine, topiramate, sumatriptan, and propranolol, as well as any treatment specific to claimant's neck or headaches, all as more specifically set forth in the body of this decision.

Travelers and Sentry shall equally share the expense of all other medications and for treatment rendered by Dr. Gallagher since the date of the review-reopening hearing and moving forward.

Sentry shall reimburse Travelers for past medical expenses in the amount of three thousand six hundred eighty-two and 31/100 dollars ($3,682.31).

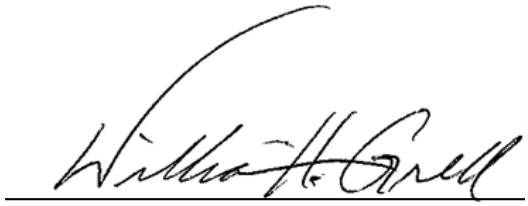
Sentry shall reimburse claimant's independent medical evaluation fee in the amount of three thousand seven hundred and 00/100 dollars ($3,700.00).

Travelers shall reimburse claimant's costs in the amount of one hundred dollars ($100.00).

Sentry shall reimburse claimant's costs in the amount of one hundred dollars ($100.00).

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 ___6th___ day of April, 2021.



WILLIAM H. GRELL
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Nick Platt (via WCES)

John Swanson (via WCES)

William Scherle (via WCES)

Michael Roling (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.