BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

DAVID REDMOND,

Claimant,

vs.

KRAFT HEINZ COMPANY,

Employer,

and

INDEMNITY INSURANCE COMPANY OF NORTH AMERICA,

Insurance Carrier,
Defendants.

File No. 5058147

ARBITRATION DECISION

Head Note Nos.: 1108, 1402, 1403, 1700; 1803, 1806, 3000, 4000

STATEMENT OF THE CASE

Claimant David Redmond filed a petition in arbitration seeking workers' compensation benefits from defendants Kraft Heinz Company, employer, and Indemnity Insurance Company of North America, insurer. The hearing occurred before the undersigned on February 26, 2019, in Des Moines, Iowa.

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

The evidentiary record consists of: Joint Exhibits 1 through 3, Claimant's Exhibits 1 through 10, and Defendants' Exhibits A through J. Claimant testified on his own behalf. Crystal Reddin-Powers testified for defendants. The evidentiary record closed on February 26, 2019. The case was considered fully submitted upon receipt of the parties' briefs on March 25, 2019.

ISSUES

The parties submitted the following disputed issues for resolution:

1. Whether claimant sustained a work-related mental injury.

2. The extent of claimant's industrial disability.

3. Whether defendants are entitled to a credit pursuant to Iowa Code section 85.34(7)(a).

4. Rate.

5. If defendants underpaid claimant's rate, the extent of defendants' underpayment.

6. If defendants overpaid claimant's rate, the extent of defendants' credit.

7. Whether claimant is entitled to penalty benefits.

8. Costs.

FINDINGS OF FACT

On April 20, 2016, claimant sustained burns to both of his legs when hot water and a chlorine-based cleaning chemical shot out of a large soup kettle as he walked by. (Hearing Transcript, page 22) Claimant was eventually taken by ambulance to St. Luke's Hospital but was then immediately transferred to the burn clinic at the University of Iowa Hospitals and Clinics (UIHC). (Tr., p. 24; Joint Exhibit 1, pp. 8-12)

Claimant received in-patient care at UIHC for the chemical burns, which totaled 5.5 percent of claimant's body surface area, until he was released on May 2, 2016. (See JE 3, pp. 22-55) During his admission, claimant underwent a debridement with a split-thickness skin graft. (JE 3, pp. 87-89)

At claimant's follow-up appointment with the burn clinic on May 19, 2016, he indicated he was having nightmares. (JE 3, p. 60) He then set up an appointment with Dwight Schroeder, M.D., a psychiatrist with whom he had an established relationship. After the April 20, 2016 work injury, claimant was seen by Dr. Schroeder twice—on June 20, 2016 and December 22, 2016. (JE 2, pp. 16-17)

When claimant returned to the UIHC on August 11, 2016, he reported shooting pain in his right leg. (JE 3, p. 65) He was prescribed Lyrica for the neuropathic pain. (JE 3, p. 67)

Claimant then presented to a walk-in clinic at the UIHC on September 1, 2016, with "uncontrolled shooting pain" in his right leg. (JE 3, p. 68) Claimant reported he was unable to tolerate the Lyrica. (JE 3, p. 68) He was given a prescription for tramadol and referred to the pain clinic. (JE 3, p. 68)

Claimant's initial visit with the pain clinic occurred on September 19, 2016, with Justin Wikle, M.D. (JE 3, p. 70) Claimant reported some relief from oxycodone, so Dr. Wikle advised him to continue his current opioid use but avoid escalating doses. (JE 3, p. 73) He also recommended two additional medications to help with the

neuropathic pain. (JE 3, pp. 73-74) Claimant, however, discontinued these additional medications after one week due to reported bowel and mental changes. (JE 3, p. 75)

When claimant returned to Dr. Wikle on October 10, 2016, he reported no change in his pain symptoms. (JE 3, p. 75) Dr. Wikle recommended one more neuropathic pain medication but also referred claimant to a pain psychologist and mentioned the possibility of a spinal cord stimulator (hereinafter "SCS"). (JE 3, p. 78)

At claimant's appointment with the pain clinic on December 15, 2016, he had not yet been seen by a pain psychologist. (JE 3, p. 81) He reported no improvement with the new neuropathic pain medication, so he was given a low-dose prescription for oxycodone. (JE 3, pp. 81, 85) Claimant was again referred to a pain psychologist. (JE 3, p. 85)

Claimant was evaluated by pain psychologist Katherine Hadlandsmyth, Ph.D., on January 6, 2017. (JE 3, p. 93) Dr. Hadlandsmyth recommended six to eight sessions of psychotherapy. (JE 3, p. 95) At the first session on February 8, 2017, claimant's score to the "PCL-C" test administered by Dr. Hadlandsmyth was suggestive of "a significant degree of PTSD symptoms." (JE 3, p. 107) At the second psychotherapy session, Dr. Hadlandsmyth listed several symptoms of PTSD and noted "[t]hese symptoms cause significant distress and impairment." (JE 3, p. 108) Notably, while claimant had been treated for mental conditions prior to the April 20, 2016 date of injury, he had never been diagnosed with PTSD. (Tr., p. 28)

At claimant's sixth psychotherapy session on March 22, 2017, Dr. Hadlandsmyth noted claimant's PCL-C score was much lower than it had been on February 8, 2017. (JE 3, p. 125) Claimant's lowered score "indicate[d] some ongoing symptoms, but too [*sic*] a much milder degree and with a significant reduction." (JE 3, p. 125) Dr. Hadlandsmyth noted claimant "demonstrated significant improvement in psychological distress symptoms through the course of therapy." (JE 3, p. 126)

Claimant returned to Dr. Hadlandsmyth on May 3, 2017. (JE 3, p. 134) Claimant reported a perceived improvement in his PTSD symptoms. (JE 3, p. 134) As a result, Dr. Hadlandsmyth indicated there were no contraindications from a psychological perspective to proceeding with the SCS. (JE 3, p. 135) Based on claimant's "significant improvement," claimant and Dr. Hadlandsmyth agreed that no additional sessions were necessary. (JE 3, p. 135)

In the meantime, claimant was released from the burn clinic as of January 19, 2017. (JE 3, pp. 103-106) It was noted that claimant's skin was "fully healed" and claimant's "only remaining issues are pain related." (JE 3, p. 106) Claimant was also kept on a low-dose of hydrocodone during the course of his psychotherapy. (See JE 3, pp. 114, 130-131)

When claimant returned to the pain clinic on May 4, 2017, after finishing his psychotherapy, Dr. Wikle indicated claimant would be a "good candidate for SCS." (JE

3, p. 139) After a successful trial, a permanent SCS was implanted on September 13, 2017. (JE 3, p. 145)

By September 20, 2017, claimant reported a pain reduction from 7/10 to 3/10. (JE 3, p. 151) At claimant's appointment with Dr. Wikle on October 25, 2017, claimant was allowed to resume work with no restrictions in two weeks. (Defendants' Ex. G, p. 63)

By January 30, 2018, after claimant's return to unrestricted work, he reported 80 percent relief of his right leg pain. (JE 3, p. 156) Despite the significant reduction in claimant's pain, claimant continued to take hydrocodone daily. (JE 3, p. 156)

Claimant continued to report significant pain relief through constant use of his SCS and daily opioid pain medication through December of 2018. (See JE 3, pp. 164-179) Claimant's most recent appointment with the pain clinic prior to hearing occurred on December 20, 2018. (JE 3, p. 176) He reported "doing well" through use of his SCS and hydrocodone. (JE 3, p. 177) The record from that appointment also states, "He is not currently working (waiting for lawsuit to be completed) but is keeping busy around the house." (JE 3, p. 177)

In addition to his medical treatment, claimant was also evaluated for purposes of independent medical examinations (IMEs).

Claimant had an IME with Joseph Chen, M.D., on April 28, 2017, before the permanent SCS was implanted. (Def. Ex. A, p. 1) After his evaluation, Dr. Chen opined that claimant sustained a six percent whole body impairment for his skin disorder. (Def. Ex. A, p. 3) Dr. Chen also opined claimant did not require any permanent work restrictions as a result of his work injury. (Def. Ex. A, p. 3)

Claimant then presented to his own IME with Mark Taylor, M.D., on August 28, 2017. (Claimant's Ex. 1, p. 1) This evaluation also occurred before claimant's SCS was permanently implanted. In a report dated September 26, 2017, Dr. Taylor assigned a whole person impairment rating for claimant's burns to his skin and his neuropathic pain. (Cl. Ex. 1, p. 9) More specifically, claimant was assigned an 11 percent whole body rating for Class 2 skin-related changes and an additional 3 percent whole body rating for ongoing pain, for a combined whole body rating of 14 percent. (Cl. Ex. 1, p. 9) Dr. Taylor also recommended restrictions of alternating sitting, standing, and walking as needed; elevating his leg if needed; and limiting his lifting to 50 pounds. (Cl. Ex. 1, p. 9) Dr. Taylor indicated any carrying should be limited to relatively short distances. (Cl. Ex. 1, p. 9)

Dr. Taylor issued a supplemental report on November 9, 2018 after a second examination on October 16, 2018. (Cl. Ex. 1, p. 11) He made no changes to his 11 percent whole body rating for claimant's skin changes, but he modified claimant's impairment rating for pain: "I would assign 2% specific to the pain and 2% related to placement of a permanent device." (Cl. Ex. 1, p. 15) Dr. Taylor did not modify his recommendations for permanent restrictions. (Cl. Ex. 1, p. 15)

Claimant returned to Dr. Chen on January 11, 2019. (Def. Ex. A, p. 4) Dr. Chen indicated his opinions from April 28, 2017 were unchanged. (Def. Ex. A, p. 8)

Dr. Wikle declined to comment on claimant's need for permanent work restrictions or whether he agreed with Dr. Taylor's restrictions. (JE 3, p. 180)

With respect to claimant's alleged mental injury, Dr. Schroeder responded to a "check-the-box" letter from claimant's counsel on July 11, 2016. (JE 2, p. 19) In the letter, Dr. Schroeder indicated claimant's "need for mental health care initially arose secondary to his [prior] neck injury on August 2, 2013 with Heinz"[1] but his "need for mental health care increased substantially following his burn injury with Heinz on April 20, 2016." (JE 2, p. 19)

Claimant's counsel sent an additional letter to Dr. Schroeder on December 14, 2017. In that letter, claimant's counsel stated, "I appreciated your response to my July 6, 2016 letter in which you stated [claimant's] mental health condition arose from his prior neck injury and substantially worsened following his traumatic burn injury." (JE 2, p. 20) This is an inaccurate summary of Dr. Schroeder's earlier response. His earlier response only provides that claimant's "need for mental health care" arose from the prior neck injury and increased substantially following the burn injuries.

Regardless, in his response to the December 14, 2017 letter, Dr. Schroeder indicated claimant sustained "anxiety and PTSD secondary to his April 20, 2016 burn injury." (JE 2, p. 20) When asked whether claimant "suffers permanent mental limitations secondary to his April 20, 2016 burn injury that will impact his employability," Dr. Schroeder checked "yes" but then wrote, "Possibly but have not seen since 12-22-16, can't answer with certainty now but as of 12-22-16 was still having significant problems." (JE 2, p. 20) Dr. Schroeder also indicated claimant would need "ongoing treatment" for his PTSD secondary to his April 20, 2016 burn injury. (JE 2, p. 21)

With this history and the expert medical opinions in mind, the first issue to be addressed is claimant's alleged mental injury.

As discussed above, Dr. Hadlandsmyth and Dr. Schroeder both indicated claimant had symptoms of PTSD as a result of the burn incident on April 20, 2016—a condition from which he had never suffered prior to April 20, 2016. (See JE 3, pp. 107-108; JE 2, p. 20; Tr., p. 28) However, neither doctor opined that claimant's PTSD was permanent in nature. To the contrary, as of January 19, 2018, Dr. Schroeder was unable to opine with any certainty whether claimant had permanent mental limitations secondary to his April 20, 2016 burn injury. (JE 2, p. 20) Then, in the spring of 2018 (after Dr. Schroeder issued his January 19, 2018 letter), claimant experienced a "significant reduction" in his PTSD symptoms. (See JE 3, p. 125) By May 3, 2017,

[1] Claimant and defendant-employer entered into a compromise settlement pursuant to Iowa Code section 85.35(3) for a 2013 injury. (See Def. Ex. E, pp. 35-38) The settlement was approved on November 10, 2016. (Def. Ex. E, p. 37).

claimant's improvement had been so significant that claimant and Dr. Hadlandsmyth agreed that no additional psychotherapy sessions were necessary. (JE 3, p. 135) For these reasons, I find claimant developed PTSD as a result of the April 20, 2015 injury, but there is insufficient evidence for me to find that claimant's PTSD is a permanent condition. In other words, I find claimant sustained only a temporary mental injury.

Having found insufficient evidence of a permanent mental injury, I now turn to the extent of claimant's industrial disability as a result of his physical injuries.

First, defendants argue in their brief that claimant is not credible. I disagree. While I acknowledge the discrepancies identified by defendants, I find claimant is generally credible.

With respect to claimant's functional impairment, I find Dr. Taylor's 11 percent whole person impairment for claimant's skin to be most persuasive. Both Dr. Taylor and Dr. Chen relied on Table 8-2 in the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition. (See Cl. Ex. 1, pp. 8-9; Def. Ex. A, p. 3) Dr. Chen, however, placed claimant in Class 1 impairment, while Dr. Taylor placed claimant in Class 2 impairment. (See Cl. Ex. 1, pp. 8-9; Def. Ex. A, p. 8) In his January 11, 2019 report, Dr. Chen indicated claimant "does **not** require intermittent to constant additional treatment"—a requirement of Class 2 impairment. (Def. Ex. A, p. 9; see Guides, p. 178) I disagree with Dr. Chen that claimant did not require intermittent to constant additional treatment. Although claimant's burn wounds had healed, claimant continued to require pain medication and regular use of his SCS at the time of the hearing. (See Tr., pp. 37-38, 40) Thus, I adopt Dr. Taylor's 11 percent whole person rating for claimant's skin-related impairment as a result of his work injury on April 20, 2016.

In his November 9, 2018 report, Dr. Taylor modified his earlier whole person impairment rating for claimant's neuropathic pain. He increased the rating from 3 percent to 4 percent; more specifically he assigned 2 percent "specific to the pain" and 2 percent "related to placement of a permanent device." (Cl. Ex. 1, p. 15) Dr. Taylor, however, offered no citation to the Guides in doing so. As such, it is unclear whether the Guides permit a rating for placement of a permanent device for pain. Thus, I find claimant has an additional 2 percent whole person impairment for his neuropathic pain. This amounts to 13 percent whole person impairment for claimant's physical injuries.

Claimant was working as a bag line cook when he was injured on April 20, 2016. (See Tr., p. 17) Claimant returned to that job without doctor-imposed restrictions in November of 2016, after being released to do so by Dr. Wikle. (Tr., p. 76; Def. Ex. G, p. 63) Claimant credibly testified, however, that he was allowed to take breaks as needed after returning to his bag line cooking position. (Tr., pp. 30-32) He estimated he took an average of three breaks a shift, all of which were allowed by his supervisor. (Tr., pp. 31-32) These breaks varied from "quick little stretches" without having to leave his job site to having to sit down and stretch in the break room for upwards of 15 to 20 minutes. (Tr., p. 31) Thus, I find that while claimant was not observing any doctor-imposed restrictions after he returned to his bag line cooking position, defendant-employer was accommodating claimant's physical limitations due to the

April 20, 2016 injury. This is consistent with Dr. Taylor's recommended restriction of alternating sitting, standing, and walking as needed. (Cl. Ex. 1, p. 9)

Dr. Taylor also recommended a 50-pound lifting restriction. (Cl. Ex. 1, p. 9) Claimant testified he believes he needs this lifting restriction. (Tr., p. 47) This is consistent with claimant's testimony that he had to ask for help from his co-workers when performing heavy lifting. (Tr., pp. 56, 68-69) For these reasons, I find Dr. Taylor's recommendations for permanent work restrictions to be more convincing than Dr. Chen's opinion that claimant does not require any permanent work restrictions.

Claimant, who was 48 years old at the time of the hearing, had been working as a bag line cook for defendant-employer since 2004. (Tr., p. 17) As a bag line cook, claimant cooked soup in giant kettles. (Tr., p. 19) He was responsible for getting the ingredients, putting the ingredients on a cart, pushing the cart to an elevator (which would then dump the ingredients into the kettle), and then spraying the cart to ensure all the ingredients were emptied into the kettle. (Tr., pp. 52-54)

Claimant performed this job through his termination in May of 2018 after getting in a shouting match with another co-worker. (Tr., p. 33) Both claimant and his co-worker were terminated after the incident. (Tr., pp. 74-75) Claimant suggests defendant-employer was looking for an opportunity to terminate claimant after his work injury. I do not find this assertion convincing. While I acknowledge claimant had never been written up prior to his termination and was awarded unemployment benefits after his termination, claimant was performing all required aspects of his job at the time of the termination and had been for months. (Tr., pp. 34, 75) He required some assistance, but as discussed above, his supervisor was aware and allowed accommodations as necessary. Claimant also testified he believes he would still be working as a full-time bag line cook if it were not for his termination. (Tr., pp. 66-67) For these reasons, I find claimant's termination was not due to a physical inability to perform his job as a result of his work-related injuries.

At the time of the hearing, claimant was unemployed and had been unemployed since being terminated by defendant-employer in May of 2018. (Tr., p. 35) Claimant named four businesses with whom he had applied, and he also testified he signed up with at least one temporary staffing agency. (Tr., p. 35) While I acknowledge these efforts, I cannot ignore the December 20, 2018 note from the UIHC pain clinic, which indicates claimant was "waiting for lawsuit to be completed" before returning to the workforce. (JE 3, p. 177) I find claimant has made some effort to return to work, but his motivation has been influenced by his workers' compensation claim.

Both claimant and defendants obtained reports from vocational specialists. Defendants' expert, Lana Sellner, M.S., opined claimant is capable of working in the medium physical demand level if utilizing Dr. Taylor's recommended restrictions. (Def. Ex. C, p. 27) Ms. Sellner identified several jobs available to claimant within these physical restrictions, but the median hourly wages for nearly all of these occupations was less than claimant's hourly wage at the time of his injury ($17.60). (Def. Ex. C, pp. 27-31; see Def. Ex. J) But for the carpentry occupation, the median hourly wages

ranged from $9.56 per hour to $16.31 per hour, which would represent a loss of earnings ranging from roughly 10 to 50 percent. (See Def. Ex. C, pp. 30-31) Ms. Sellner opined claimant sustained a "slight vocational loss" when considering Dr. Taylor's restrictions. (Def. Ex. C, p. 31)

Claimant's expert, Barbara Laughlin, M.A., had several critiques of Ms. Sellner's report, many of which are somewhat trivial. (See Cl. Ex. 2, pp. 25-26) That said, Ms. Laughlin persuasively criticizes Ms. Sellner's failure to consider whether the jobs identified in her labor market survey required a high school diploma or GED, which claimant does not have. (See Cl. Ex. 2, p. 26; Tr., p. 14) As noted by Ms. Sellner, claimant would be disqualified from many of the jobs identified by Ms. Sellner due to the fact that he does not have a high school diploma or its equivalent. (See Cl. Ex. 2, pp. 26-34) Ms. Laughlin opined claimant's occupational loss is "significant." (Cl. Ex. 2, p. 35)

Ultimately, claimant was terminated from his longtime job with defendant-employer not because he was physically unable to perform it, but because he got in a shouting match. He believes he would still be doing that job were it not for the termination. Nevertheless, claimant's work-related burns and neuropathic pain caused physical limitations that he did not have prior to April 20, 2016, and these physical limitations have negatively impacted claimant's access to the open labor market. While there is some question about claimant's motivation to return to work while his workers' compensation claim is still pending, he did make some attempt to find work. Though he had not received any job offers at the time of the hearing, it appears claimant had interviews with at least two employers. (See Tr., p. 35; Def. Ex. C, p. 26) After considering these and all other relevant factors, I find claimant sustained a 40 percent loss of earning capacity due to his April 20, 2016 work injury.

Having found claimant sustained a loss of earning capacity, the next issue to address is the rate at which claimant's weekly benefits should be paid. Claimant asserts a rate of $599.54, while defendants assert a rate of $384.82. (Cl. Ex. 8, p. 69; Def. Ex. J, p. 73)

The first rate dispute concerns a bonus payment of $3,137.33. Claimant testified the entire plant received this bonus after his plant won a competition "based on production and safety." (Tr., p. 21) Crystal Reddin-Powers, defendant-employer's safety representative, confirmed that the bonus was for a "factory championship." (Tr., p. 77) Claimant testified he received this bonus "four or five" times since he was hired by defendant-employer in 2004. (Tr., p. 21) Ms. Reddin-Powers, however, explained that this bonus is neither expected nor guaranteed and is instead based, in part, on the year's performance. (Tr., p. 78) Given that claimant only received the bonus in less than a third of the years he was employed by defendant-employer and it was not guaranteed or expected, I find this bonus was an irregular bonus.

Claimant's rate calculation also appears to include overall gross earnings without separating overtime premiums. (See Cl. Ex. 8, pp. 72-73)

Defendants assert many of the earnings used by claimant inappropriately contain paid time off (PTO) and overtime premiums. I will address these arguments below in my conclusions of law, but the following findings are pertinent to those issues.

Claimant testified he was hired as a full-time employee and would regularly work at least 40 hours per week and more depending on soup season. (Tr., pp. 17-19) If claimant worked less than 40 hours per week, it was due to personal reasons, such as health conditions. (Tr., pp. 18-19) This testimony was undisputed. In fact, it was confirmed by defendant-employer's handbook, which provides that claimant was hired to work 40 hours per week with overtime. (Cl. Ex. 10, pp. 93-94) I therefore find claimant's earnings were normally based on 40 or more paid hours per week, and a 40-hour workweek was customary.

With respect to the remainder of defendants' arguments, including whether claimant's rate calculation includes overtime premiums, I note Defendants' Exhibit J is extremely convoluted. However, it is possible from Exhibit J to discern the amount of hours for which defendant was paid and whether any of those hours were overtime.[2]

I will start first with the check date of April 22, 2016 and work backwards. The April 22, 2016 check covered April 10, 2016 through April 15, 2016. (See Def. Ex. J, p. 94) Per the "Regular Hours" column (row 353, column AJ), claimant worked 40 regular hours. (Def. Ex. J, p. 77) Per the "OT Hours" column (row 353, column AH), claimant worked 0 overtime hours. (Def. Ex. J, p. 77) I find this 40-hour workweek represents claimant's customary earnings.

The next check date is April 15, 2016, which covered April 3, 2016 through April 9, 2016. (See Def. Ex. J, pp. 93-94) Per the "Regular Hours" column (row 329, column AJ), claimant worked 31 regular hours. (Def. Ex. J, p. 77) Claimant also used 8 hours of PTO on April 8, 2019. (Def. Ex. J, p. 94) Per the "OT Hours" column (row 329, column AH), claimant worked 0 overtime hours. (Def. Ex. J, p. 77) Combining claimant's 31 worked hours plus 8 hours of PTO, I find this 39-hour workweek represents claimant's customary earnings.

The next check date is April 8, 2016, which covered March 27, 2016 through April 2, 2016. (See Def. Ex. J, p. 93) Per the "Regular Hours" column (row 321, column AJ), claimant worked 16 regular hours. (Def. Ex. J, p. 77) Claimant also used 24 hours of PTO from March 30, 2016 through April 1, 2016. (Def. Ex. J, p. 94) Per the "OT Hours" column (row 321, column AH), claimant worked 0 overtime hours. (Def. Ex. J, p. 77) Combining claimant's 16 worked hours plus 24 hours of PTO, I find this 40-hour workweek represents claimant's customary earnings.

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[2] The first several pages of Exhibit J should be read in pairs. For example, page 75 of Exhibit J represents a continuation of page 74; page 77 represents a continuation of page 76; and so on through page 85. The pairs should be read together side by side so the rows match.

The next check date is April 1, 2016, which covered March 20, 2016 through March 27, 2016. (See Def. Ex. J, pp. 92-93) Per the "Regular Hours" column (row 293, column AJ), claimant worked 40 regular hours. (Def. Ex. J, p. 79) Per the "OT Hours" column (row 293, column AH), claimant worked 5 overtime hours. (Def. Ex. J, p. 79) Combining claimant's 40 regular hours plus 5 hours of overtime, I find this 45-hour workweek represents claimant's customary earnings.

Claimant was excused from work from March 13, 2016 through March 19, 2016, so there is no paycheck for that week. (See Def. Ex. J, p. 92)

The next check date is March 18, 2016, which covered March 6, 2016 through March 12, 2016. (See Def. Ex. J, p. 92) Per the "Regular Hours" column (row 279, column AJ), claimant worked 39 regular hours. (Def. Ex. J, p. 79) Per the "OT Hours" column (row 279, column AH), claimant worked no overtime. (Def. Ex. J, p. 79) I find this 39-hour workweek represents claimant's customary earnings.

The next check date is March 11, 2016, which covered February 28, 2016 through March 5, 2016. (See Def. Ex. J, p. 91) Per the "Regular Hours" column (row 273, column AJ), claimant worked 39.5 regular hours. (Def. Ex. J, p. 79) Per the "OT Hours" column (row 273, column AH), claimant worked no overtime. (Def. Ex. J, p. 79) I find this 39.5-hour workweek represents claimant's customary earnings.

The next check date is March 4, 2016, which covered February 21, 2016 through February 27, 2016. (See Def. Ex. J, pp. 90-91) Per the "Regular Hours" column (row 243, column AJ), claimant worked 32 regular hours. (Def. Ex. J, p. 81) Claimant also used 8 hours of PTO on February 25, 2016. (Def. Ex. J, p. 91) Per the "OT Hours" column (row 243, column AH), claimant worked 0.75 hours of overtime. (Def. Ex. J, p. 81) Combining claimant's 32 regular hours, 8 hours of PTO, and 0.75 hours of overtime, I find this 40.75-hour workweek represents claimant's customary earnings.

The next check date is February 26, 2016, which covered February 14, 2016 through February 20, 2016. (See Def. Ex. J, p. 90) Per the "Regular Hours" column (row 217, column AJ), claimant worked 24 regular hours. (Def. Ex. J, p. 81) Claimant also used 16 hours of PTO on February 18, 2016 and February 19, 2016. (Def. Ex. J, p. 90) Per the "OT Hours" column (row 217, column AH), claimant worked 0.5 hours of overtime. (Def. Ex. J, p. 81) Combining claimant's 24 regular hours, 16 hours of PTO, and 0.5 hours of overtime, I find this 40.5-hour workweek represents claimant's customary earnings.

The next check date is February 19, 2016, which covered February 7, 2016 through February 13, 2016. (See Def. Ex. J, p. 90) Per the "Regular Hours" column (row 214, column AJ), claimant worked 32 regular hours. (Def. Ex. J, p. 81) Per the "OT Hours" column (row 214, column AH), claimant worked 0.25 hours of overtime. (Def. Ex. J, p. 81) Combining claimant's 32 regular hours, 0.25 hours of overtime, I find this 32.25-hour workweek does not represent claimant's customary earnings, which were closer to 40 hours per week.

The next check date is February 12, 2016, which covered January 31, 2016 through February 6, 2016. (See Def. Ex. J, pp. 89-90) Per the "Regular Hours" column (row 157, column AJ), claimant worked 24 regular hours. (Def. Ex. J, p. 83) Claimant also used 16 hours of PTO on February 4, 2016 and February 5, 2016. (Def. Ex. J, p. 89) Per the "OT Hours" column (row 157, column AH), claimant worked no overtime. (Def. Ex. J, p. 83) Combining claimant's 24 regular hours and 16 hours of PTO, I find this 40-hour workweek represents claimant's customary earnings.

The next check date is February 5, 2016, which covered January 24, 2016 through January 30, 2016. (See Def. Ex. J, p. 89) Per the "Regular Hours" column (row 133, column AJ), claimant worked 31.5 regular hours. (Def. Ex. J, p. 83) Claimant also used 8 hours for a floating holiday on January 29, 2016. (Def. Ex. J, p. 89) Per the "OT Hours" column (row 133, column AH), claimant worked no overtime. (Def. Ex. J, p. 83) Combining claimant's 31.5 regular hours and 8 holiday hours, I find this 39.5-hour workweek represents claimant's customary earnings.

The next check date is January 29, 2016, which covered January 17, 2016 through January 23, 2016. (See Def. Ex. J, pp. 88-89) Per the "Regular Hours" column (row 129, column AJ), claimant worked 31.5 regular hours. (Def. Ex. J, p. 83) Claimant also used 8 hours for a floating holiday on January 18, 2016. (Def. Ex. J, p. 88) Per the "OT Hours" column (row 129, column AH), claimant worked no overtime. (Def. Ex. J, p. 83) Combining claimant's 31.5 regular hours and 8 holiday hours, I find this 39.5-hour workweek represents claimant's customary earnings.

The next check date is January 22, 2016, which covered January 10, 2016 through January 16, 2016. (See Def. Ex. J, p. 88) Per the "Regular Hours" column (row 83, column AJ), claimant worked 22.5 regular hours. (Def. Ex. J, p. 85) Claimant also used 16 hours of PTO on January 14, 2016, and January 15, 2016. (Def. Ex. J, p. 88) Per the "OT Hours" column (row 83, column AH), claimant worked no overtime. (Def. Ex. J, p. 85) Combining claimant's 22.5 regular hours and 16 PTO hours, I find this 38.5-hour workweek represents claimant's customary earnings.

The next check date is January 15, 2016, which covered January 3, 2016 through January 9, 2016. (See Def. Ex. J, pp. 87-88) Per the "Regular Hours" column (row 73, column AJ), claimant worked 32 regular hours. (Def. Ex. J, p. 85) Per the "OT Hours" column (row 73, column AH), claimant worked 1 hour of overtime. (Def. Ex. J, p. 85) This paycheck also included two unexcused absences on January 4, 2016 and January 5, 2016. (Def. Ex. J, p. 87) I find this 33-hour workweek is not representative of claimant's customary earnings, which were closer to 40 hours per week.

The final check date is January 8, 2016, which covered December 27, 2015 through January 2, 2016. (See Def. Ex. J, p. 87) Per the "Regular Hours" column (row 62, column AJ), claimant worked 23.75 regular hours. (Def. Ex. J, p. 85) Claimant was also paid for 16 holiday hours on December 31, 2015 and January 1, 2016. (Def. Ex. J, p. 87) Per the "OT Hours" column (row 2, column AH), claimant worked no overtime. (Def. Ex. J, p. 85) Combining claimant's 23.75 regular hours and 16 holiday hours, I find this 39.75-hour workweek is representative of claimant's customary earnings.

I also find claimant was paid at an hourly rate of $17.60 per week. (See Def. Ex. J, pp. 75, 77, 79, 81, 83, 85) After multiplying claimant's hourly rate and the hours worked from the 13 representative weeks discussed above and then dividing that number by 13 I find claimant's gross weekly earnings at the time of the injury were $705.35 ($17.60 x 521 hours = $9,169.60 / 13).

Claimant also asserts a claim for penalty benefits for defendants' delay in the commencement of PPD benefits. The parties stipulated defendants previously paid 30 weeks of PPD benefits at a rate of $463.95 per week. (Hrg. Report, p. 2) These benefits, which covered the period from June 9, 2016 through January 4, 2017, were issued on May 3, 2017. (Cl. Ex. 7, p. 67) Defendants offered no justification for this delay either at hearing or in their post-hearing brief.

CONCLUSIONS OF LAW

The first issue to be decided is whether claimant sustained a mental injury as a sequela of his work-related burn injuries.

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).

In the instant case, I found claimant developed PTSD as a result of the April 20, 2016 burn incident, but I also found there was insufficient evidence to establish that claimant's PTSD is a permanent condition. Thus, I conclude claimant satisfied his burden to prove he sustained a temporary work-related mental injury, but I conclude claimant failed to carry his burden to prove he sustained a permanent work-related mental injury.

The next question to be decided is the extent of claimant's permanent disability. The parties stipulated claimant's permanent disability due to his physical injuries is industrial in nature.

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

Functional impairment is an element to be considered in determining industrial disability which is the reduction of earning capacity, but consideration must also be given to the injured employee's age, education, qualifications, experience, motivation, loss of earnings, severity and situs of the injury, work restrictions, inability to engage in employment for which the employee is fitted and the employer's offer of work or failure to so offer. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963); Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961).

Based on my fact findings above, in which I considered the relevant industrial disability factors, I found claimant sustained a 40 percent loss of earning capacity due to his April 20, 2016 work injury. I therefore conclude claimant satisfied his burden to prove he sustained a 40 percent industrial disability.

Defendants assert they are entitled to a credit against claimant's industrial disability award under Iowa Code section 85.34(7)(a)[3] based on claimant's prior 2013 injury.

Iowa Code section 85.34(7)(a) states:

> An employer is fully liable for compensating all of an employee's disability that arises out of and in the course of an employee's employment with the

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[3] Defendants concede Iowa Code section 85.34(7)(b) is not applicable in this case. I agree. Defendants note Iowa Code section 85.34(7)(b) allows apportionment only to the extent "the employee was previously compensated by the employer" for his work-related disability. Payments made pursuant to a compromise settlement, however, "shall not be construed as the payment of weekly compensation." Iowa Code § 85.35(9). Thus, because payments made under a compromise settlement by definition cannot be construed as compensation for a work-related disability, the apportionment provision in subsection (b) is not triggered.

While not necessarily relevant to the disposition of this claim given defendants' concession that subsection (b) is not applicable, I also note that "an approved compromise settlement shall constitute a final bar to any further rights arising under this chapter . . . regarding the subject matter of the compromise" and is considered "a full and final disposition of the claim." Iowa Code § 85.35(3), (9) (2016) (emphasis added). Thus, as is more fully explained in my analysis of Iowa Code section 85.34(7) on page 14, I conclude a compromise settlement serves as a final bar to defendants' further rights regarding the injury compromised, including future rights to credit or apportionment.

> employer. An employer is not liable for compensating an employee's preexisting disability that arose out of and in the course of employment with a different employer or from causes unrelated to employment.

Iowa Code § 85.34(7)(a) (2016) (emphasis added).

As mentioned above, claimant and defendants settled claimant's prior 2013 injury as a compromise settlement pursuant to Iowa Code section 85.35(3) in which they "agree[d] that bona fide disputes exist concerning whether Claimant's claimed conditions, disability and medical treatment are related to his alleged work injury(ies) . . . and his employment with [defendant-employer]." (Def. Ex. E, p. 35) Defendants essentially contend this compromise settlement makes claimant's pre-existing disability a disability "unrelated to employment" under Iowa Code section 85.34(7)(a).

Claimant continued to be employed by defendant-employer after his 2013 injury. Because claimant did not re-enter the labor market after the 2013 injury, there was no apportionment of his preexisting disability through the forces of the competitive labor market. Thus, defendants argue the fresh-start rule does not apply and I must apply the apportionment analysis and calculation set forth in Warren Properties v. Stewart, 864 N.W.2d 307 (Iowa 2015).

Because there was no reevaluation of claimant's preexisting disability in the open labor market, I agree with defendants that the Warren Properties apportionment analysis would be the correct analysis to apply if apportionment were appropriate in this case. For the reasons set forth below, however, I disagree with defendants that they are entitled to an apportionment for claimant's 2013 injury.

Iowa Code section 85.35(9) states that "an approved compromise settlement shall constitute a final bar to any further rights arising under this chapter . . . regarding the subject matter of the compromise." Iowa Code § 85.39(9) (2016) (emphasis added). Iowa Code section 85.35(3) refers to a compromise settlement as "a full and final disposition of the claim." Iowa Code § 85.35(3) (emphasis added). This bar to future rights is most often considered with respect to claimant's rights. In fact, even this agency's form for compromise settlements has a paragraph labeled "Statement of Awareness of Claimant," which requires a claimant to certify that he is aware he is barred from future claims or benefits for the injury being compromised.

The language in Iowa Code sections 85.35(3) and 85.35(9), however, is not limited to claimant's rights. See Ramirez-Trujillo v. Quality Egg, L.L.C., 878 N.W.2d 759, 770 (Iowa 2016) ("To determine legislative intent, we look to the language chosen by the legislature and not what the legislature might have said." (citation omitted)); Christiansen v. Iowa Bd. of Educ. Examiners, 831 N.W.2d 179, 190 (Iowa 2013) (noting an "additional canon of construction recognizes that 'legislative intent is expressed by omission as well as by inclusion of statutory terms'" (citation omitted)). Thus, I conclude a compromise settlement also serves as a final bar to defendants' further rights regarding the injury compromised, including future rights to credit or apportionment.

One might argue a claimant in this scenario essentially acquires a double recovery in a subsequent workers' compensation claim if defendants are not allowed under Iowa Code section 85.34(7)(a) to claim a credit or apportionment for an injury settled via compromise settlement, which is exactly what Iowa Code section 85.34(7) was intended to prevent. See 2004 Iowa Acts 1st Extraordinary Sess. Ch. 1001, § 20; Warren Properties, 864 N.W.2d at 314-16. While it is true that a claimant's industrial disability in a subsequent workers' compensation claim will not be apportioned to account for the prior injury that was compromised, this is part of the bargain into which defendants voluntarily and knowingly entered when agreeing to the compromise settlement. When entering into a compromise settlement, defendants lose the right to claim a credit or apportionment against a future injury, but they are also discharged from liability for review-reopening and medical benefits for the injury being compromised; claimants lose their rights to review-reopening and medical benefits for the injury being compromised, but they also know defendants cannot claim a credit for the injury being compromised against a future injury. This bargain of a compromise settlement is what sets it apart from the preexisting disability described in Iowa Code section 85.34(7)(a).

Further, had defendants wanted to preserve their right to apportionment or credit, other vehicles for settlement were available. See Iowa Code § 85.35(2). Thus, this is not a scenario in which defendants had no options. To the contrary, defendants weighed their choices and decided on the reciprocal bargain of a compromise settlement. I conclude they should not be allowed to circumvent the terms of that bargain through Iowa Code section 85.34(7)(a).

Defendants' argument is creative and fairly compelling, but based on the language of Iowa Code sections 85.35(3) and 85.35(9), I conclude defendants cannot claim a credit under Iowa Code section 85.34(7)(a) for a prior injury that was settled through a compromise settlement.

In their brief, defendants cite Ditsworth v. Icon Ag, File No. 5054080, an arbitration decision issued on April 4, 2017, as support for their position.[4] In Ditsworth,

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[4] While defendants neglect to mention it, the deputy commissioner's decision in Ditsworth was appealed. On appeal, the Commissioner concluded "the analysis used by the deputy in applying apportionment under the Warren case is improper" because "[b]oth of claimant's permanent partial disabilities arose from the same employer." Ditsworth, File No. 5054080 (App. Dec., Nov. 5, 2018). The Commissioner then went on to apply the apportionment provisions of Iowa Code section 85.34(7)(b). See id. The Commissioner's decision was then appealed to the Iowa District Court for Woodbury County. On April 1, 2019, a Ruling on Petition for Judicial Review affirmed the Commissioner's application of Iowa Code section 85.34(7)(b). Ditsworth, No. CVCV183838 (Ruling on Petition for Judicial Review, April 1, 2019).

Defendants in the instant case concede Iowa Code section 85.34(7)(b) is not applicable in this case, so I conclude the Commissioner's decision in Ditsworth is not controlling here.

I am certainly not at liberty to reverse the Commissioner or the Iowa District Court in an arbitration decision, and I make no attempt to do so herein. However, for the reasons set out in Footnote 3, I respectfully disagree with the conclusion that the apportionment provisions of Iowa Code section 85.34(7)(b) apply in the factual scenario in Ditsworth or this case.

the deputy commissioner applied Iowa Code section 85.34(7)(a) and the Warren Properties apportionment analysis for a prior injury that was sustained while claimant was working for the same employer but settled through a compromise settlement. I acknowledge the facts in Ditsworth are very similar to the facts of this case; however, I am not bound by another deputy commissioner's arbitration decision, and for the reasons already stated, I respectfully disagree with the deputy commissioner's rationale and conclusions in Ditsworth.

However, assuming the commissioner or appellate courts reach a different conclusion and disagree that a compromise settlement precludes future apportionment, defendants have to prove claimant's preexisting disability was "from causes unrelated to employment" before they would be entitled to apportionment under Iowa Code section 85.34(7)(a). I conclude defendants failed to do so in the instant case.

As mentioned, the parties in their settlement documents "agree[d] that bona fide disputes exist concerning whether Claimant's claimed conditions, disability and medical treatment are related to his alleged work injury(ies) . . . and his employment with [defendant-employer]." (Def. Ex. E, p. 35) In other words, there was no agreement that claimant's disability was or was not related to his alleged 2013 work injury; the only agreement was that they disagreed as to this point. I am therefore unwilling to find or conclude based on the compromise settlement documents at issue in this case that claimant's disability from his injury in 2013 was "from causes unrelated to employment."

Given the assertions to the agency in their settlement documents, it seems inappropriate to now allow defendants an opportunity via Iowa Code section 85.34(7) to litigate the causation and extent of claimant's permanent disability resulting from the 2013 injury. Even if that were the appropriate course to take, however, defendants failed to offer any evidence regarding causation for the alleged injuries to claimant's neck, back, spine, shoulders and arms in 2013. I therefore conclude defendants failed to carry their burden to prove that claimant's 2013 injury was "from causes unrelated to employment." As such, defendants failed to prove they are entitled to an apportionment under Iowa Code section 85.34(7)(a).

In summary, I conclude defendants are not entitled to an apportionment or credit under Iowa Code section 85.34(7)(a) for a prior injury that was compromised. However, even if the Commissioner or appellate courts disagree and conclude a compromise settlement does not automatically preclude apportionment, I also conclude defendants in the instant case failed to prove that claimant's preexisting disability was "from causes unrelated to employment."

Compensation for permanent partial disability (PPD) 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. Iowa Code § 85.34. Having concluded claimant sustained a 40 percent industrial disability and defendants are not entitled to an apportionment or credit, claimant is entitled to 200 weeks of PPD benefits.

Having concluded claimant is entitled to 200 weeks of PPD benefits, the next issue to be decided is the rate at which those benefits should be paid. Inclusion of claimant's bonus and PTO hours are in dispute. For the reasons that follow, I reject the rate calculations of both parties.

Iowa Code 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.

Iowa Code section 85.61(3) defines "gross earnings" and in doing so excludes irregular bonuses, retroactive pay, overtime, penalty, reimbursement of expenses or expense allowances, and the employer's contribution for welfare benefits.

Claimant argues his bonus should be included in his weekly earnings, but for the reasons set forth above, I found claimant's bonus was irregular. I therefore conclude claimant's bonus should not be included in claimant's rate calculation. See Iowa Code § 85.61(3).

I also reject claimant's rate calculation because I found claimant used earnings in his calculation that included overtime premiums. See id.

Defendants argue claimant's PTO hours should not be included in claimant's weekly earnings. Defendants argue only the hours claimant actually worked should be included. They cite an agency appeal decision from 2003 in support of their argument. See Van Hill v. American Identity, File No. 1250463 (App. Dec. 11, 2003). A decision from the Iowa Court of Appeals from 2011 holds otherwise, however. In Mercy Medical Center v. Healy, 801 N.W.2d 865 (2011), the court held that the plain language of Iowa Code section 85.36(6) contradicts the argument that claimant's rate should be determined based on the number of hours actually worked. Healy, 801 N.W.2d at 871. The court stated:

> The remedial nature of section 85.36(6) is evidenced by the second and third sentences of the paragraph. In the second sentence the legislature has determined absences of a personal nature are not to diminish an employee's "customary earnings"; instead, the employee is to be reimbursed in "the amount the employee *would have earned had the employee worked when work was available to other employees of the employer in a similar occupation.*" Iowa Code § 85.36(6) (emphasis added). Similarly, in the third sentence, the commissioner is to disregard any "week which does not fairly reflect the employee's customary earnings." Id.

Id. at 872.

In Healy, the claimant was hired to work 35 hours per week and "would often use vacation time, personal sick leave time, etc. to supplement her worked hours to make 35 hours per week." Id. at 867. At the agency level, the deputy commissioner concluded that excluding all non-worked hours would "skew [the claimant's] workers' compensation rate and would not accurately reflect her true normal earnings." Id. The deputy commissioner also noted that the record showed the claimant "normally and consistently was paid for 35 hours per week." Id. While the Court of Appeals adopted the Commissioner's slightly modified calculation, the court ultimately agreed with the deputy commissioner's rationale, noting the claimant's use of paid benefits to reach her 35-hour per week threshold instead of actually working the hours did not change the fact that her earnings were normally based on 35 hours per week. See id. at 873.

In this case, I found claimant's earnings were normally based on 40 or more paid hours per week. Thus, like in Healy, I conclude it is appropriate to include the weeks in which claimant took PTO keep his paid hours close to 40 hours per week.

Having included the PTO hours in my findings above, I found claimant had gross weekly earnings of $705.35 at the time of his injury. The parties stipulated claimant was single and entitled to two exemptions on the date of injury.

The weekly benefit amount payable to an employee shall be based upon 80 percent of the employee's weekly spendable earnings, but shall not exceed an amount, rounded to the nearest dollar, equal to 66-2/3 percent of the statewide average weekly wage paid employees as determined by the Department of Workforce Development. Iowa Code § 85.37.

The weekly benefit amount is determined under the above Code section by referring to the Iowa Workers' Compensation Manual in effect on the applicable injury date. Having found that claimant was single, entitled to two exemptions and that his gross average weekly wage was $705.35, I utilize the Iowa Workers' Compensation Manual ("rate book") with effective dates of July 1, 2015 through June 30, 2016, and determine that the applicable weekly rate for claimant's weekly benefits is $445.58.

Having concluded claimant's rate for weekly benefits is $445.58, the next issue is whether defendants underpaid or overpaid claimant's benefits to date. The parties stipulated that defendants volunteered 30 weeks of PPD benefits at a rate of $463.95. (Hrg. Report, p. 1) This is an overpayment of $18.37 per week, for a total overpayment of $551.10 ($18.37 x 30 weeks). I conclude defendants are entitled to a credit of $551.10 against their liability for a subsequent injury to claimant. See Iowa Code § 85.34(5).

Because defendants previously paid claimant's benefits at a rate higher than $445.58, I conclude there was no underpayment, and no difference is owed for past payments.

The next issue to be decided is claimant's entitlement to penalty benefits. Claimant also asserts he is entitled to penalty benefits both for defendants' failure to pay

benefits at the correct rate and for a delay in commencement of PPD benefits. Having concluded defendants previously overpaid claimant's weekly benefits, I conclude no penalty is warranted for defendants' failure to pay at the correct rate. However, claimant's penalty claim for defendants' delay in the commencement of PPD benefits has merit.

If weekly compensation benefits are not fully paid when due, section 86.13 requires that additional benefits be awarded unless the employer shows reasonable cause or excuse for the delay or denial. Robbennolt v. Snap-on Tools Corp., 555 N.W.2d 229 (Iowa 1996).

Delay attributable to the time required to perform a reasonable investigation is not unreasonable. Kiesecker v. Webster City Meats, Inc., 528 N.W.2d 109 (Iowa 1995).

It also is not unreasonable to deny a claim when a good faith issue of law or fact makes the employer's liability fairly debatable. An issue of law is fairly debatable if viable arguments exist in favor of each party. Covia v. Robinson, 507 N.W.2d 411 (Iowa 1993). An issue of fact is fairly debatable if substantial evidence exists which would support a finding favorable to the employer. Gilbert v. USF Holland, Inc., 637 N.W.2d 194 (Iowa 2001).

An employer's bare assertion that a claim is fairly debatable is insufficient to avoid imposition of a penalty. The employer must assert facts upon which the commissioner could reasonably find that the claim was "fairly debatable." Meyers v. Holiday Express Corp., 557 N.W.2d 502 (Iowa 1996).

If the employer fails to show reasonable cause or excuse for the delay or denial, the commissioner shall impose a penalty in an amount up to 50 percent of the amount unreasonably delayed or denied. Christensen v. Snap-on Tools Corp., 554 N.W.2d 254 (Iowa 1996). The factors to be considered in determining the amount of the penalty include the length of the delay, the number of delays, the information available to the employer and the employer's past record of penalties. Robbennolt, 555 N.W.2d at 238.

In this case, claimant's weekly compensation benefits were not fully paid when due, as required by Iowa Code section 86.13. More specifically, I found defendants delayed the commencement of PPD benefits for more than 46 weeks, which resulted in more than $21,000.00 of PPD benefits that were not paid when due (46 weeks x $445.58).

Defendants offered no reasonable basis—or any justification whatsoever—for the delay in commencement of PPD benefits. Defendants bore the burden to establish a reasonable basis, or excuse, and to prove the contemporaneous conveyance of those bases to the claimant. Defendants failed to carry their burden of proof on the penalty issues, and a penalty award is appropriate. Iowa Code § 86.13.

The purpose of Iowa Code section 86.13 is both punishment for unreasonable conduct but also deterrence for future cases. Id. at 237. In this regard, the Commission

is given discretion to determine the amount of the penalty imposed with a maximum penalty of 50 percent of the amount of the delayed, or denied, benefits. Christensen v. Snap-On Tools Corp., 554 N.W.2d 254, 261 (Iowa 1996). In exercising its discretion, the agency must consider factors such as the length of the delays, the number of delays, the information available to the employer regarding the employee's injury and wages, and the employer's past record of penalties. Meyers v. Holiday Express Corp., 557 N.W.2d 502, 505 (Iowa 1996).

Defendants did not present any evidence to justify why they did not commence PPD benefits until nearly a year after their stipulated commencement date. Given this failure to offer any justification, I conclude a significant penalty is warranted.

The PPD benefits that were not paid when due total roughly $21,000.00. Considering the purposes of Iowa Code section 86.13, I conclude that a penalty totaling $10,000.00 is appropriate under the facts and circumstances of this case. This amount should be sufficient to punish defendants' conduct and also deter similar future conduct.

The last issue to be decided is whether defendants should be assessed with costs. Claimant seeks an assessment of costs for the filing fee ($100.00), service fee ($6.69), deposition transcript ($78.00), and bills from Dr. Taylor ($2,872.50 and $822.50) and Ms. Laughlin ($1,398.00). (Cl. Ex. 9, p. 74)

Assessment of costs is a discretionary function of the agency. Iowa Code section 86.40. Because claimant was generally successful in his claim, I conclude it is appropriate to assess claimant's costs in some amount.

These costs for the filing fee, service fee, and deposition transcript are reasonable and are assessed to defendants pursuant to 876 IAC 4.33 subsections (1), (3), and (7).

Dr. Chen performed an evaluation of permanent disability for defendants on April 28, 2017. Dr. Taylor's first IME took place on August 28, 2017. Thus, I conclude Dr. Chen's evaluation triggered the reimbursement provisions of Iowa Code section 85.39. See Iowa Code § 85.39. As such, I conclude claimant is entitled to reimbursement for both the cost of Dr. Taylor's initial report and examination in the amount of $2,872.50. Id.; Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839, 846 (Iowa 2015) (hereinafter DART).

Dr. Chen's second evaluation of permanent disability for defendants occurred on January 11, 2019. Dr. Taylor's second IME took place on October 16, 2018, prior to Dr. Chen's second evaluation. Thus, even if Iowa Code section 85.39 allowed for the reimbursement of more than one IME, I conclude the reimbursement provisions of Iowa Code section 85.39 were not triggered because Dr. Taylor's second IME occurred before another evaluation of permanent disability had been made by Dr. Chen.

When Iowa Code section 85.39 is not triggered, only the cost of a report is taxable as a cost pursuant to rule 876 IAC 4.33. See DART, 867 N.W.2d at 847. In

other words, the only recoverable cost for Dr. Taylor's second IME under rule 876 IAC 4.33 is the cost of the report itself. Unfortunately, Dr. Taylor's bill for the second IME only charged for abstracting medical records and the follow-up examination—not the report. Thus, I conclude I am unable to assess the $822.50 under 876 IAC 4.33. See DART, 867 N.W.2d at 847.

While I am without authority to assess Dr. Taylor's $822.50 bill, I strongly encourage defendants to pay it in light of their written agreement with claimant's counsel to do so. On January 7, 2019, claimant's counsel indicated his client would agree to attend a second evaluation with IME so long as defendants agreed to reimburse claimant for the full costs of Dr. Taylor's examinations and reports. (Cl. Ex. 9, p. 84) On January 8, 2019, defendants' counsel responded, "We have a deal." (Cl. Ex. 9, p. 83) Defendants' failure to follow through on their commitment to date is disappointing and runs contrary to the behavior expected by parties appearing before this agency.

The final cost at issue is Ms. Laughlin's bill in the amount of $1,398.00. The costs for time Ms. Laughlin spent reviewing the file, interviewing the claimant, and conducting any research for the file are not reimbursable costs. See DART, 867 N.W.2d at 847. The report is billed at 4.4 hours at $110.00 per hour. Thus, I assess defendants $484.00 for the cost of Ms. Laughlin's report pursuant to 876 IAC 4.33(6).

Again, while I am without authority to award the remainder of Ms. Laughlin's bill, I strongly encourage defendants to pay it in light of their apparent agreement to do so. (See Cl. Ex. 9, p. 85)

ORDER

THEREFORE, IT IS ORDERED:

Defendants shall pay claimant two hundred (200) weeks of permanent partial disability benefits commencing on the stipulated date of June 9, 2016 at the weekly rate of four hundred forty-five and 58/100 dollars ($445.58).

Defendants are entitled to a credit for weekly benefits previously paid and for their overpayment as set forth in this decision.

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

Defendants shall pay penalty benefits in the amount of ten thousand and 00/100 dollars ($10,000.00).

Defendants shall reimburse claimant's costs totaling three thousand five hundred forty-one and 19/100 dollars ($3,541.19).

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 11th day of April, 2019.

STEPHANIE J. COPLEY
DEPUTY WORKERS'
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Right to Appeal: This decision shall become final unless you or another interested party appeals within 20 days from the date above, pursuant to rule 876 4.27 (17A, 86) of the Iowa Administrative Code. The notice of appeal must be in writing and received by the commissioner's office within 20 days from the date of the decision. The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday. The notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 1000 E. Grand Avenue, Des Moines, Iowa 50319-0209.