BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

ROGER CASTLEMAN, Claimant, vs. R A JONES & CO., INC., Employer, and PMA INSURANCE COMPANY, Insurance Carrier, Defendants.	File No. 5059232 ARBITRATION DECISION Head Notes: 1702, 1803, 2206, 2900

STATEMENT OF THE CASE

Claimant, Roger Castleman, filed a petition in arbitration seeking workers' compensation benefits from defendants, RA Jones and Co., Inc., employer, and PMA Insurance Company, insurance carrier. This matter was heard in Council Bluffs, Iowa, on September 5, 2018, by Deputy Workers' Compensation Commissioner Erica J. Fitch.

On August 7, 2019, pursuant to Iowa Code section 17A.15(2), the Iowa Workers' Compensation Commissioner delegated authority to the undersigned to enter a proposed decision in this matter due to the unavailability of Deputy Commissioner Fitch. Pursuant to the requirements of Iowa Code section 17A.15(2), I have read the entirety of the record created before Deputy Commissioner Fitch, as well as the parties' post-hearing briefs. Although there are several factual disputes between the parties, neither party argues demeanor is the operative decision making factor in this case. Thus, I conclude I can proceed to issue a proposed decision pursuant to Iowa Code section 17A.15(2).

The parties submitted a hearing report prior to the commencement of the evidentiary hearing. On that hearing report, the parties entered into certain stipulations. Deputy Commissioner Fitch accepted said hearing report and entered an order at the time of hearing noting her approval of the stipulations and disputes noted on the hearing report. I therefore accept the stipulations noted on the hearing report, and provide no factual or legal issues relative to the parties' stipulations will be raised or discussed in this decision. The parties are bound by their stipulations.

The record presented to and accepted by Deputy Commissioner Fitch at hearing consists of Joint Exhibits 1 through 16, Claimant's Exhibits 1 through 7, Defendants' Exhibits A through C, and the testimony of claimant. The evidentiary record closed on September 5, 2018. The case was considered fully submitted upon receipt of the parties' briefs on October 22, 2018.

ISSUES

1. The extent of claimant's entitlement to permanent disability benefits;
2. Whether claimant is permanently and totally disabled;
3. The commencement date for any permanent partial disability benefits awarded;
4. Credit;
5. Medical expenses;
6. Whether claimant is entitled to alternate medical care pursuant to Iowa Code section 85.27;
7. Whether claimant is entitled to penalty benefits under Iowa Code section 86.13, and, if so, how much;
8. Apportionment pursuant to Iowa Code section 85.34(7); and
9. Costs

FINDINGS OF FACT

Roger Castleman was born on April 25, 1961, making him 57 years old at the time of the evidentiary hearing. (See Exhibit A, page 5). He is single and resides in East Moline, Illinois. Castleman completed the ninth grade; however, he did not graduate from high school or obtain a high school equivalency diploma. (Hearing Transcript, p. 8). He did, however, pass all required tests for a high school equivalency diploma. Unfortunately, claimant did not complete all required tests in the appropriate timeframe. (Hr. Tr. pp. 49-50). Claimant possesses the knowledge to acquire a high school equivalency diploma; however, he does not possess the piece of paper confirming the same. His work experience consists of manual labor-type positions. He has worked as a gas station attendant, drywall installer, concrete finisher, forklift driver, warehouse attendant, machinist, and stainless steel finisher. (Id.).

R A Jones, formerly Oystar North America, and Packaging Technologies, extended an offer of employment as a stainless steel finisher to claimant in or around January 2007. (Ex. B, p. 4). R A Jones designs and manufactures packaging machinery. Claimant performed the same type of work for all three companies; however, he testified the equipment and machines utilized were consistently updated.

(See Hr. Tr., p. 10). While not independently confirmed by a formal job description, medical records suggest claimant's position required the ability to lift between 10 and 80 pounds. (See JE6, p. 35). Claimant was only required to lift 80 pounds three to four times per year. (See JE6, p. 35).

Claimant's medical history is relevant for a prior, work-related back injury on May 11, 2009. (See JE1, p. 1). Claimant presented to Genesis Occupational Health on May 14, 2009, reporting a pattern of intermittent back pain over the preceding six months. (JE1, pp. 3-4). Claimant complained of pain in the left lower back, with radiating pain into the left lower extremity. (See JE1, pp. 3-4, 10). Notably, claimant also complained of intermittent numbness in the left foot. X-rays revealed degenerative changes at L4-S1. (JE1, p. 4). A July 2009 MRI of the lumbar spine revealed multi-level degenerative disc disease and disc bulging, a left paracentral protrusion at L2-3, and a right foraminal protrusion at L5-S1. The MRI also revealed multi-level central stenosis, most severe at L2-L3, significant at L3-4 and L4-5, with right foraminal narrowing at L4-5 and L5-S1. (JE4, p. 2). Claimant believed the majority of his symptoms were located in the left low back. Claimant was eventually placed at MMI as of July 13, 2009, and provided a zero percent impairment rating by Rick Garrels, M.D. (JE1, p. 10). Dr. Garrels noted congenital stenosis throughout the lumbar spine with degenerative changes that enhanced said stenosis. (Id.). Dr. Garrels did not feel claimant's condition required surgical intervention. (JE1, pp. 12, 14). Throughout treatment, claimant questioned whether his job was too physically demanding. (JE1, p. 10; See JE1, p. 12).

Claimant sought second opinions from his chiropractor, Mark Schmall, D.C., throughout treatment. (See JE1, p. 12). Claimant has presented for chiropractic treatment off and on for at least 17 years. (Hr. Tr., p. 16).

Claimant continued to experience intermittent back pain between July 2009 and May 2012. (See JE1, pp. 12-17; See also JE3, pp. 1, 5; JE6, p. 1).

On May 22, 2012, claimant sustained a second low back injury while graining stainless steel. (Hr. Tr., pp. 11-12). Claimant complained of pain in the low back, as well as numbness and tingling in his lower extremities. Claimant described a pins and needles sensation in his right buttock, as well as numbness, radiating into his right lower extremity. (JE5, p. 1). Claimant received conservative care consisting of medications, physical therapy, and injections. (Hr. Tr., p. 13). Claimant also received two medial branch blocks and one radiofrequency ablation. (JE8, pp. 7-9). An August 2012 MRI revealed severe central stenosis at L2-L3, moderate to severe stenosis at L3-L4 and L4-L5, multi-level degenerative disc disease and disc bulging, left paracentral protrusion at L2-3, and right foraminal protrusion at L5-S1. (JE4, p. 1).

At the referral of defendants, claimant underwent an orthopedic consultation with Timothy Millea, M.D. on October 17, 2012. (JE5, p. 1). At the time, claimant was working 40 hours per week with a 10-pound lifting restriction. (Id.). Among other complaints, claimant reported the occasional feeling of numbness in his right lower extremity. (Id.). Claimant reported his symptoms interfered with his ability to work, his

ability to perform activities of daily living, and his ability to engage in recreational activities. (Id.). Dr. Millea reviewed claimant's MRI and opined there was no clear evidence of a surgically significant disc herniation. He further opined there was some evidence of a stenosis, which he thought would most likely consist of an underlying congenital stenosis with subsequent degenerative stenotic changes. (JE5, pp. 1-2). Dr. Millea opined the likelihood of surgical intervention improving claimant's prognosis was very low. (JE5, pp. 1-2). Dr. Millea recommended medication management consisting of anti-inflammatories and gabapentin. (JE5, p. 2). Dr. Millea did not recommend any follow-up appointments. (Id.).

Claimant's care was transferred to Camilla Frederick, M.D., in November 2012. (See JE3, p. 9). At the time, claimant's greatest complaints were a burning sensation in his right hip, and numbness in his right leg. (JE6, pp. 1-2). Dr. Frederick placed claimant at MMI as of February 21, 2013. Dr. Frederick noted multi-level degenerative disc disease, but felt claimant's primary issue was facet-mediated pain. (JE6, p. 42). She assigned claimant an 8 percent impairment rating to the body as a whole. (Id.). On the same date, claimant and Dr. Frederick discussed job coaching. Claimant told Dr. Frederick he would call for job coaching if he was required to work on "chubs" or other tasks that tended to bother his condition. (JE6, p. 40).

Claimant presented for physical therapy from November 19, 2012 to January 16, 2013. (See Ex. 1, p. 6; See also JE7, p. 1). Following his last physical therapy session, claimant's physical therapist believed claimant was able to lift and carry 40 pounds. (See Ex. 1, p. 6).

Claimant participated in a job analysis in January 2013. (See Ex. 1, p. 6; see also JE6, p. 30). It was determined claimant was capable of handling his regular job duties. (See JE6, p. 30). Nevertheless, claimant expressed his belief that he could not handle some of his work activities, including working on "chub" machines, pockets, and big plates. (See JE6, p. 30).

The parties settled the 2012 workers' compensation claim pursuant to an agreement for settlement. The parties agreed claimant sustained 18.9 percent industrial disability, which entitled claimant to receive 94.495 weeks of permanent partial disability (PPD) benefits. The agreement for settlement was approved by this agency on October 1, 2013. (Ex. A, p. 3).

The agreement for settlement and full commutation documents contained in Exhibit A provide a snapshot of claimant's condition as of June 2013. Claimant complained of an increase in pain after returning to full-duty work. Claimant's primary complaint was pain located in the low back, which he described as sharp and severe. He did not feel as though his condition was improving. Claimant reported a pain rating of 8 out of 10 at the completion of his nine-hour shifts. Claimant reported that if he was on his feet too long, the pain would get so bad he would become sick to his stomach. In addition, claimant reported that his right leg fell asleep if he was on it for too long. (Ex. A, pp. 5-7).

On June 12, 2015, claimant injured his low back while using a machine at work to fix chub legs. This injury is the focus of the underlying arbitration decision. The task required claimant to move a 30-pound grinder back and forth whilst bent over for an extended period of time. (Hr. Tr., p. 20). Claimant estimated he spent four hours in this position. (Hr. Tr., pp. 20-21). Claimant did, however, take breaks throughout the four hours, as he felt the task was stressing his back. (Hr. Tr., p. 21). After completing his job duties, claimant reported severe low back pain to his supervisor, Jim Hoffman. (Id.).

Defendants authorized Dr. Frederick and Quad City Occupational Health as claimant's treating physician(s). Claimant first presented to Brian Glasz, PA-C on June 16, 2015. He complained of low back pain, with numbness down the right leg, and tingling in the right foot. (JE6, p. 47). Claimant relayed the numbness in his right leg and tingling in his right foot had been present since 2012. (Id.).

Claimant returned to Mr. Glasz on June 19, 2015, and clarified his current complaints. Claimant complained of two problems. First, claimant complained of pain and numbness radiating down his right leg. Claimant relayed that these symptoms had been present since 2008, but had increased over the past two years. Second, claimant complained of a new, radiating pain across his low back. (JE6, p. 51). Claimant relayed he attempted to return to work on June 18, 2015, but had to leave early because of his pain. (Id.). Claimant expressed a reluctance to return to work. The medical record provides, "[Claimant] states he knows if he goes back to work he is just going to end up going home again and he just does not want to go to work." (Id.). Mr. Glasz told claimant he could not address claimant's prior injuries, as those cases had been closed. Following his examination, Mr. Glasz referred claimant to Sanjay Sundar, M.D. (See JE6, p. 55).

An MRI, dated June 24, 2015, revealed severe canal stenosis as well as lateral recess and neural foraminal stenosis from L2-L3 to L5-S1. (JE5, pp. 62-63).

Claimant presented to Dr. Frederick on June 26, 2015. (JE6, p. 60). Dr. Frederick discussed the MRI results with claimant. Dr. Frederick noted no real changes had occurred when compared to previous MRIs. (Id.). It is noted claimant had not presented to his chiropractor in approximately 8 months. (Id.). Dr. Frederick diagnosed claimant with lumbar sprain, low back pain, and radiculopathy. She related claimant's complaints to his work activities. (JE6, pp. 62-63).

Claimant presented to Dr. Sundar on July 8, 2015. (JE8, p. 10). It is noted Dr. Sundar had last seen claimant in 2012 for a radiofrequency ablation (RFA). Dr. Sundar explained that the 2012 RFA significantly decreased claimant's low back pain for almost two and a half years. (Id.). Dr. Sundar reviewed Dr. Frederick's notes regarding claimant's more recent work injury. Dr. Sundar opined claimant's pain complaints very closely resembled his facet mediated pain. It is noted, "He also does report radiation down the right lower extremity that has been long-standing from his spinal stenosis. This is accompanied by numbness and tingling along with progressive weakness while walking." (Id.). Dr. Sundar opined the June 2015 MRI revealed no new herniated discs.

He did, however, observe a slight progression of claimant's stenosis. (Id.). In reviewing the MRI report, Dr. Sundar provided, "Once again there is severe stenosis from L2-L5 with multiple disc bulges and facet arthropathy." (JE8, p. 10). Dr. Sundar recommended a repeat radiofrequency ablation. (JE8, p. 12).

Dr. Sundar performed the lumbar radiofrequency ablation procedure on July 23, 2015. (JE8, p. 13).

Claimant presented to Michael Dolphin, D.O. for an orthopedic consultation on September 9, 2015. (JE9, p. 1). Claimant reported numbness and tingling in his right anterior thigh and foot. He also complained of pain in the right buttocks, hip, and lateral thigh. Claimant denied experiencing any radiating pain in the left lower extremity. (Id.). Claimant reported 30% relief with the RFA procedure. (Id.). Following the consultation, Dr. Dolphin recommended claimant pursue surgical intervention on the lumbar spine. (JE9, p. 3).

Claimant underwent a laminectomy at L2-S1, and right-sided microdiscectomy at L3-L4, on October 5, 2015. (JE10, p. 1).

Unfortunately, claimant continued to complain of ongoing low back and right leg pain, with numbness and tingling in the right leg and foot. (JE9, pp. 4). Claimant also complained of pain in his low back, with radiating pain into the right buttock, hip, and lateral thigh. (Id.). At hearing, claimant could not say one way or the other if surgery relieved any of his symptoms. (Hr. Tr. p. 27).

On October 16, 2015, Dr. Dolphin opined claimant could begin lifting 20 pounds, and increase 5 pounds every week. (JE9, p. 6). Dr. Dolphin tentatively planned to discuss claimant's ability to return to light duty work at his next appointment. (Id.).

Claimant began a course of physical therapy on October 28, 2015. (See JE9, p. 7).

On November 25, 2015, claimant complained of persistent aches, dull low back pain, and right leg pain, with numbness and tingling in the right leg and foot. He rated his pain 3 to 4 out of 10. Dr. Dolphin encouraged claimant to continue with physical therapy, as his examination did not reveal any neurologic abnormalities that would prevent claimant from progressing with therapy. Claimant did not feel safe to return to work given his discomfort with prolonged standing and walking. Dr. Dolphin ordered an updated MRI to confirm there was no evidence of disc herniation. (JE9, p. 10). Dr. Dolphin refused to prescribe narcotic pain medication for claimant and he discontinued claimant's Flexeril prescription. (Id).

Claimant returned to Dr. Dolphin's office on December 4, 2015. It is noted claimant was able to carry a 30-pound box at physical therapy. (JE9, p. 11). When discussing claimant's continued pain along the sacroiliac joint on the right, Dr. Dolphin opined, "[claimant] really does not demonstrate radiculopathy but complains of

numbness in his entire right leg that does wake him up at night." (JE9, p. 12). Claimant continued to believe he could not return to work. In closing, Dr. Dolphin opined that depending on what the updated MRI revealed, he would recommend a functional capacity evaluation and neurology evaluation to determine further treatment. (Id.).

Claimant began applying for Social Security disability benefits in December 2015. As part of his application, claimant was asked to list all conditions he felt contributed to his disability. Claimant listed both his back and bilateral knee conditions. (Hr. Tr., pp. 47-48). The bilateral knee condition will be discussed following the medical summary relating to claimant's low back condition. The Social Security Administration declared claimant disabled as of June 18, 2015. (Ex. 4, p. 1).

The updated MRI, dated December 17, 2015, revealed interval laminectomies of the mid and lower lumbar spine on the right, with small post-operative fluid collection in the posterior soft tissues at L3-L4, and persistent, severe central canal narrowing at multiple levels. (JE12, pp. 3-4).

Dr. Dolphin analyzed the updated MRI on January 5, 2016, and opined there was no evidence of a new herniation. He noted some residual, degenerative bulging at L5-S1 on the right. Dr. Dolphin told claimant the residual disc bulging was secondary to degeneration and the only way of attempting to alleviate said bulging would be through indirect compression via interbody fusion. Dr. Dolphin provided he was unwilling to perform such an operation at that point in time. Dr. Dolphin wanted to first confirm whether claimant's complaints were related to the lumbar spine or an entirely separate issue. (JE9, p. 15).

At the January 5, 2016, appointment with Dr. Dolphin, claimant complained of numbness and tingling in his feet, right greater than left. (JE9, p. 13). He primarily complained of an achiness in the middle three toes of his bilateral feet. (Id.). He felt as though his entire right leg was numb. Claimant testified to the same at the evidentiary hearing. Claimant relayed that the tops of his feet, as well as his ankles, were swollen. It is noted that claimant presented to the emergency room on December 27, 2015, and December 31, 2015. (See JE9, p. 13). The ER staff provided him with hydrocodone and robaxin. On examination, claimant exhibited edema bilaterally, with shiny skin consistent with early venous stasis changes. Claimant's legs were cool to the touch. Dr. Dolphin expressed his concern that claimant's complaints were related to a circulatory issue. He encouraged claimant to follow up with his family doctor regarding the same. (JE9, pp. 14-15).

Claimant presented to Nilesh Mehta, M.D. to establish treatment with a primary care physician on January 1, 2016. Dr. Mehta ordered an ankle brachial index (ABI) to evaluate claimant's circulation in the right lower extremity. (See JE9, pp. 16-17). Dr. Mehta's medical records are not contained in the evidentiary record.

On January 12, 2016, Dr. Dolphin referred claimant to Maruti Kari, M.D. for chronic pain management. Outside of a single letter, Dr. Kari's medical records are not

contained in the evidentiary record. (See JE13, p. 1). Dr. Dolphin opined claimant's right lower extremity pain could be some type of neuropathy or perhaps related to vascular claudication. (JE9, p. 17).

Around this same time, claimant began presenting to Aaron Schulze, PA-C and John Hoffman, M.D. for treatment of his right knee condition. (See JE9, p. 24). Claimant regularly presented to Mr. Schulze or Dr. Hoffman for treatment related to the right knee between February 2016 and the date of hearing.

Claimant presented to Dr. Dolphin on March 8, 2016, complaining of dull pain in the lower back, as well as pain and numbness in the lateral right leg and toes. (JE9, p. 28). Additionally, claimant complained of numbness in the left foot. (Id.). Claimant denied significant improvement and felt the medications he was taking were merely masking his pain complaints. (Id.). Dr. Dolphin opined claimant's symptoms appeared to be chronic in nature and had not responded to surgical intervention as he would have hoped. (JE9, p. 29). Dr. Dolphin encouraged claimant to continue with pain management through Dr. Kari. (Id.). Dr. Dolphin provided that if claimant's condition did not improve over time, he would request a functional capacity evaluation to determine claimant's functional abilities and permanent restrictions. (Id.).

Claimant reinitiated chiropractic treatment with Dr. Schmall on October 3, 2016. (Ex. 7, p. 2). In addition to the normal areas of concern, claimant complained of frequent neck, upper back, and middle back pain. Claimant relayed his symptoms had increased over the past month. (Id.). Claimant received chiropractic treatment twice weekly from October 2016 to February 2017. (See Ex. 7, pp. 2-37). Treatment consisted of spinal manipulation, shockwave therapy, laser therapy, flexion/distraction therapy, muscle stimulation, and body tempering tools and exercises. (See Ex. 7, p. 26). On December 21, 2016, Dr. Schmall opined claimant had improved by 50-60 percent with chiropractic treatment. (See Ex. 7, pp. 26, 32). Claimant relayed his activities of daily living had improved with chiropractic treatment. (Ex. 7, p. 35). Dr. Schmall initially released claimant from chiropractic care on February 7, 2017. (Ex. 7, p. 35).

Claimant presented for a defense medical examination with Theron Jameson, D.O. on October 15, 2016. (JE11, p. 5). Dr. Jameson opined claimant sustained an injury to his lumbar spine on or about June 12, 2015, which aggravated his underlying spinal stenosis and necessitated surgical intervention. Dr. Jameson opined claimant had reached MMI and no further treatment was needed. Dr. Jameson recommended permanent restrictions of no lifting, pushing/pulling, or carrying greater than 30 pounds. (JE11, pp. 1-4). With respect to permanent impairment, Dr. Jameson opined claimant did not sustain any impairment above the 8 percent whole person impairment previously assigned by Dr. Frederick for the 2012 work injury. (JE11, p. 5; See JE6, p. 42).

Shortly thereafter, claimant presented for an independent medical examination with David Segal, M.D., at the request of his attorney. (Ex. 1). Dr. Segal diagnosed claimant with lumbar radiculopathy, spinal stenosis, facet arthropathy, chronic regional

pain syndrome, thoracic pain, and right sacroiliac dysfunction. (Ex. 1, pp. 11-12). Dr. Segal opined the work injury of June 12, 2015, significantly and severely, materially aggravated claimant's pre-existing condition. (Ex. 1, p. 12). Dr. Segal explained the injury in 2008 caused mild transient symptomatology that went away completely; the 2012 injury caused mild to moderate permanent symptoms; and the 2015 injury caused a permanent, severe aggravation, changing claimant's symptoms from mild-to-moderate to severe. (Id.). Dr. Segal disagreed with several aspects of Dr. Jameson's IME report. (Ex. 1, pp. 10-11). Dr. Segal did not believe claimant had reached MMI. Dr. Segal opined claimant had not been fully diagnosed or treated at the time of his examination. He provided claimant could pursue x-rays, MRIs, EMGs, pain medication, lumbar orthotics, physical therapy, ESIs, facet injections, medial branch blocks, RFAs, lumbar discectomy, lumbar fusion, and a spinal cord stimulator. (Ex. 1, pp. 13-14). He opined claimant's Oswestry Disability Index would characterize claimant as "crippled." Despite not believing claimant had reached MMI, Dr. Segal assessed claimant with 23 percent impairment of the whole person. Dr. Segal attributed 13 percent impairment to the lumbar spine, 2 percent impairment for pain, and 6 percent impairment to the thoracic spine. (Ex. 1, p. 13). Dr. Segal recommended permanent restrictions of sitting less than 30 minutes at one time, walking and standing no more than 5 minutes at a time for both, bending no more than once per hour, and lifting, pushing, and pulling no more than 10 pounds. (Id.).

I do not find Dr. Segal's opinions with respect to the thoracic spine and chronic regional pain syndrome convincing. Claimant had presented for chiropractic treatment with respect to his thoracic and cervical spine prior to the date of injury. Additionally, claimant told Dr. Segal he considered his thoracic pain minor compared to his other conditions. There is little to no evidence claimant sustained an injury to his thoracic spine as a result of the June 12, 2015, work injury. Similarly, there is little to no evidence claimant sustained CRPS as a result of the June 12, 2015, work injury. While it is true claimant's skin appeared "shiny" at an appointment with Dr. Dolphin in December 2015, Dr. Dolphin recommended claimant seek treatment for the same through his personal physician. The issue was not addressed in any other medical record. Further, claimant presented to Dr. Schmall, Dr. Jameson, and Mr. Schulze around the time he presented to Dr. Segal; none of the three providers observed shiny or discolored skin.

Claimant returned to Dr. Schmall on May 8, 2017. (Ex. 7, p. 38). He complained of continued low back and leg pain, right greater than left; however, he was only seeking treatment for his thoracic and cervical spine. (Id.). Dr. Schmall instructed claimant to present for chiropractic treatment twice per week for one month. (Ex. 7, p. 39). Dr. Schmall released claimant for a second time on July 24, 2017. (Ex. 7, p. 49). Claimant did not return to chiropractic treatment for one year.

On June 16, 2017, Dr. Kari withdrew from providing medical services to claimant due to his disruptive behavior. Dr. Kari considered claimant's behavior to be a violation of his pain contract. (JE13, p. 1). At hearing, claimant testified he refused to give Dr. Kari a urinalysis because it would have revealed that he was taking pain medication that

was not prescribed to him. (Hr. Tr. p. 56). Claimant asserts he took unauthorized pain medications because the defendant insurer took too long to authorize his medications. (Id.).

After Dr. Kari terminated his relationship with claimant, claimant presented to his family physician, Dr. Mehta. (Hr. Tr. p. 58). Claimant asked Dr. Mehta to refer him back to Dr. Sundar for treatment. (Hr. Tr. pp. 58-59).

For purposes of clarification, Drs. Sundar and Dolphin were once considered claimant's authorized treating physicians. After Dr. Kari released claimant from his care, claimant sought unauthorized treatment with his primary care physician, Dr. Mehta. (Hr. Tr. p. 58). Claimant asked Dr. Mehta to refer him back to Dr. Sundar for additional treatment. (Hr. Tr. pp. 58-59). It appears as though Dr. Sundar eventually referred claimant back to Dr. Dolphin. Defendants contend the treatment claimant received following Dr. Kari's release was unauthorized treatment, regardless of the fact the treatment was provided by former authorized treating physicians.

Claimant presented to the Quad Cities Medical Group & Weight Loss Clinic on June 21, 2018. (JE14, p. 1). Ilesh Kurani, M.D. assessed claimant with dorsalgia and radiculopathy in the lumbar region. He ordered updated x-rays of claimant's low back. (JE14, p. 3). The June 21, 2018, x-rays revealed a normal lumbar alignment without evidence of fracture, spondylosis, or spondylolisthesis. Claimant's disk spaces were mildly narrowed. The SI joints appeared normal. (JE14, p. 7).

Claimant returned to Dr. Schmall for chiropractic treatment in June 2018, nearly one year after his last visit. (Ex. 7, p. 52). The most recent chiropractic record in evidence is dated July 26, 2018. (Ex. 7, p. 54). Claimant complained of right-sided low back and hip pain. Unlike with the vast majority of Dr. Schmall's medical records that provide for follow-up adjustments twice per week, the July 26, 2018, record provides claimant can return as needed. (Ex. 7, p. 55). Dr. Schmall made similar recommendations each time claimant finished a course of treatment. (See Ex. 7).

Claimant returned to Dr. Dolphin on July 11, 2018, complaining of worsening lower back and right buttock pain. (JE9, pp. 46-47). Given claimant's ongoing complaints, Dr. Dolphin ordered an updated MRI of the lumbar spine. (JE9, p. 47).

An EMG, dated July 19, 2018, revealed no electrodiagnostic evidence for lumbosacral radiculopathy in the right lower extremity. (JE15, p. 3).

Dr. Dolphin reviewed the July 2018 MRI with claimant on August 1, 2018. (JE9, p. 48). Dr. Dolphin highlighted a right-sided disc bulge at L3-4. He opined the MRI did not reveal evidence of significant stenosis or other nerve impingement. (JE9, p. 49). Dr. Dolphin did not believe claimant's isolated right-sided disc herniation necessitated surgical intervention. (JE9, p. 50). He encouraged claimant to discuss his medications, blood flow to his lower extremities, and blood work with his personal physician to rule out other possible causes of the burning and numbness in his feet. (Id.). This is the

most recent medical file in the evidentiary record. At the time, claimant reported a pain rating between 2 and 3 out of 10. (Id.).

This case is complicated by the fact claimant treated for his unrelated, bilateral knee condition between December 2016 and the date of the evidentiary hearing in September 2018. (Hr. Tr. p. 33).

Claimant has a long-standing history of arthritis in both his right and left knee. Claimant testified his knees were "shot on the insides." (Id.). Claimant underwent right knee scopes in 1993 and 1994. (Id.). Following the 1994 scope, claimant's surgeon estimated claimant would eventually need to have his right knee replaced in 20 years, or 2014. (Id.).

Claimant presented to Mr. Schulze of Orthopedic Specialists on February 5, 2016. (JE9, p. 24). Claimant complained of deep medial, lateral pain that occurred during activities. (Id). Claimant reported swelling, stiffness, and weakness in the right knee. Claimant's symptoms were aggravated by daily activities, traversing stairs, standing, and walking. Claimant did not believe he could walk for more than 10 minutes without pain or need for support. (Id.). It is noted claimant had received Euflexxa and cortisone injections in the past. Following the examination, Mr. Schulze administered a cortisone injection to claimant's right knee. (JE9, p. 26).

Claimant returned to Mr. Schulze on December 23, 2016. (JE9, p. 30). Claimant complained of weakness, stiffness, swelling, and popping in the right knee. Following the examination, Mr. Schulze administered a second cortisone injection to claimant's right knee. (JE9, p. 32). Mr. Schulze did not believe claimant's left knee required immediate attention. (Id.). Mr. Schulze talked with claimant regarding his candidacy for a partial knee replacement and the workup that would be required in order to pursue such a procedure. (Id.).

On May 8, 2017, Claimant presented to Dr. Hoffman for treatment related to his right knee condition. (JE9, p. 33). Claimant reported right anterior leg numbness. (Id.). Claimant expressed his belief that the 2015 laminectomy could be causing the numbness in his right lower extremity. Following the examination, Dr. Hoffman administered another cortisone injection. (JE9, p. 35).

Unfortunately, the May 2017 injection did not provide claimant with much relief. (See JE9, p. 36). Imaging of the right knee, taken on September 12, 2017, revealed severe grade 4 medial compartment osteoarthritis and trace degenerative changes to the patellofemoral joint. (JE9, p. 38). Claimant reported he was not ready to proceed with total joint replacement surgery. (JE9, p. 36). As such, Dr. Hoffman administered another cortisone injection. (JE9, p. 38).

Claimant presented to physical therapy for his right knee in late October or early November 2017. (See JE9, p. 40). Claimant did not obtain the relief he was looking for through physical therapy. Claimant complained of numbness in the right knee at his

March 6, 2018, follow-up appointment with Dr. Hoffman. (JE9, p. 40). It is noted claimant had struggled with bilateral knee pain for the past four years. As such, he agreed to proceed with a right total knee replacement. (See JE9, p. 40).

Dr. Hoffman performed a right total knee arthroplasty on March 18, 2018. (See JE9, p. 40). Dr. Hoffman advised claimant he would eventually require a left total knee replacement. (JE9, p. 42).

Claimant developed cellulitis, or significant redness following surgery; fortunately, the condition had subsided with antibiotics prior to his April 24, 2018, follow-up appointment with Dr. Hoffman. (JE9, p. 43). Claimant ambulated with a cane. He was progressing well with physical therapy to the point he was able to use a stationary bike. Dr. Hoffman encouraged claimant to progress with long distance walking. (JE9, p. 46).

Claimant was approximately six months out from his right total knee arthroplasty at the time of hearing. (Hr. Tr. p. 61). He was told that the healing process would take approximately one year. (Hr. Tr. p. 33). Claimant did not utilize any assistive walking devices at hearing. (Hr. Tr. p. 61).

At the time of the evidentiary hearing, claimant was taking gabapentin, tramadol, and Tylenol for his work-related conditions. (Hr. Tr. pp. 51-52). Claimant maintains a valid driver's license. (Hr. Tr. p. 50). He drove from the Quad Cities to Des Moines on the morning of the evidentiary hearing. (Id.). Claimant has not looked for any employment opportunities. He has not submitted any applications to potential employers, as he does not believe he is physically capable of working. (Hr. Tr. pp. 30-31). Claimant has not pursued any avenues for retraining or further education. (Hr. Tr. p. 60).

REASONING & CONCLUSIONS OF LAW

The first issue for determination is the extent of claimant's permanent disability, including whether claimant is permanently and totally disabled under industrial disability principles.

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

Under the Iowa Workers' Compensation Act, permanent partial disability is compensated either for a loss or loss of use of a scheduled member under Iowa Code section 85.34(2)(a)-(t) or for loss of earning capacity under section 85.34(2)(u). The parties have stipulated claimant's disability shall be evaluated industrially.

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. Iowa Code section 85.34.

Total disability does not mean a state of absolute helplessness. Permanent total disability occurs where the injury wholly disables the employee from performing work that the employee's experience, training, education, intelligence, and physical capacities would otherwise permit the employee to perform. See McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Diederich v. Tri-City R. Co., 219 Iowa 587, 258 N.W. 899 (1935).

A finding that claimant could perform some work despite claimant's physical and educational limitations does not foreclose a finding of permanent total disability, however. See Chamberlin v. Ralston Purina, File No. 661698 (App. October 1987); Eastman v. Westwave Trading Corp., II Iowa Industrial Commissioner Report 134 (App. May 1982).

Claimant was 57 years of age on the date of the evidentiary hearing. His formal education is limited to completion of his freshman year of high school. He did complete and pass all examinations required for his high school equivalency diploma; however, he did not complete the tests within the timeframe established by the Department of Education. Claimant's work history consists almost entirely of manual labor positions. From January 2007 to June 2015, claimant worked exclusively for defendant employer as a steel finisher. As claimant worked exclusively as a steel finisher for defendant employer for approximately 8 years and 5 months, any impact upon claimant's ability to fulfill such duties negatively impacts claimant's earning capacity.

Defendants assert the evidence in this case does not indicate a severe worsening of claimant's low back condition following the June 12, 2015, work injury. I disagree. While several of claimant's symptoms were present, to some extent, prior to the June 2015 work injury, they did not prevent claimant from working. While it is true claimant has long questioned whether his job with the defendant employer was too physically demanding, claimant was able to return to his regular job duties after both his 2008 and 2012 injuries. Prior to June 2015, no physician had recommended claimant pursue surgical intervention for the symptoms in his low back and right lower extremity. In fact, defendants' own expert physician, Dr. Millea, specifically recommended against claimant's need for surgical intervention. Following the 2012 injury, injections and radiofrequency ablations successfully mitigated claimant's pain complaints. After the June 12, 2015, injury, the same RFA procedure provided minimal relief. When the RFA procedure failed to alleviate claimant's symptoms as it had done in the past, Dr. Dolphin recommended and performed surgery on the low back.

As a result of the June 12, 2015, work injury, claimant sustained a permanent aggravation of his pre-existing low back condition. Claimant's low back condition ultimately required surgical intervention. Despite surgical intervention, claimant

continued to complain of ongoing low back pain, with radiating pain, numbness, and tingling into his right lower extremity and foot. Claimant believes that surgical intervention improved his low back pain levels by 70 percent. Unfortunately, he feels his right leg pain and numbness increased following surgical intervention.

Two expert physicians have offered opinions regarding the extent of claimant's permanent impairment as a result of the June 12, 2015, work injury. Dr. Jameson did not believe claimant's permanent impairment exceeded the 8 percent impairment rating previously provided by Dr. Frederick following the May 22, 2012 injury. Dr. Segal issued an impairment rating of 23 percent to the whole person.

Both physicians offered opinions regarding claimant's need for permanent restrictions as a result of the June 12, 2015, injury. Dr. Jameson recommended limiting lifting, pushing, pulling, and carrying to 30 pounds, with no repetitive reaching away from the body and no repetitive bending or twisting at the waist. Dr. Segal provided more limiting restrictions. Dr. Segal recommended claimant limit his lifting, pushing, and pulling to no more than 10 pounds, 5 minutes at a time and no more than 1 hour per day. Dr. Segal also recommended against climbing ladders, bending, stooping, and crawling. Dr. Segal's restrictions appear to be tied to claimant's own assessment of his abilities – evidenced by the chart on page 9 of his report – as opposed to any objective medical evidence, such as physical therapy records or a functional capacity evaluation.

Claimant received relevant medical treatment following the issuance of both IME reports. Most notably, claimant underwent a right total knee arthroplasty. Updated IME reports would have allowed the undersigned to better consider the continued accuracy of Dr. Jameson and Dr. Segal's opinions in light of said treatment. This is especially true with respect to Dr. Segal's report, who opined there were several treatment options claimant could pursue, including an updated MRI and EMG, both of which subsequently occurred and returned essentially normal. Neither expert provided an opinion with respect to the potential overlap in symptoms between claimant's stipulated low back injury and the unrelated bilateral knee complaints.

Neither IME report is overwhelmingly convincing, and both reports contain notable flaws. Dr. Jameson was operating under the mistaken belief that claimant's prior impairment rating was a result of the 2008 injury. Moreover, Dr. Jameson operated under the mistaken belief that the 2012 injury required "physical therapy only. He had no injections and no surgical intervention." Lastly, Dr. Jameson provided no analysis to support his conclusions.

Dr. Segal's conclusions, while considerably more detailed, rely heavily on claimant's own subjective statements as opposed to objective medical evidence. Dr. Segal does not adequately account for claimant's pre-existing injuries and conditions. He does not address claimant's pre-existing right knee condition, and how said condition could play a role in claimant's diminished ability to perform activities of daily living such as driving, traversing stairs, transitioning from a seated to standing position, and walking.

Given the above analysis, I do not accept either expert report in its entirety. I do accept sections of Dr. Segal's report over the opinions of Dr. Jameson. This is almost done by default, as Dr. Jameson provides little to no analysis for the undersigned to rely upon. Dr. Segal's opinions are reasonable and supported by a significant amount of analysis. I accept Dr. Segal's impairment rating to the extent it addresses claimant's lumbar spine. I do not accept Dr. Segal's impairment ratings for chronic pain and the thoracic spine. As such, I find claimant sustained 13 percent impairment to the whole person as a result of the June 12, 2015, work injury.

I do not accept the restrictions as outlined and recommended by Dr. Segal. The evidentiary record does not support said restrictions, or a finding that claimant is "crippled" as a result of his injury. The evidentiary record does support the restrictions recommended by Dr. Jameson. Although no functional capacity evaluation exists in the evidentiary record, claimant demonstrated the ability to lift and carry 30 pounds through physical therapy. As such, I accept the permanent restrictions as outlined in Dr. Jameson's report, given that they more accurately represent claimant's functional abilities.

Defendants suggest in their post-hearing brief that claimant lacks motivation to be gainfully employed.

Voluntary retirement or withdrawal from the workforce unrelated to a work injury is not compensable. Copeland v. Boones Book and Bible Store, File No. 1059319 (App. Nov. 6, 1997). Loss of earning capacity due to voluntary choice or lack of motivation is not compensable. Id.

Claimant did not return to work for the defendant employer following his work-related injury. He remained unemployed at the time of the evidentiary hearing. He has not looked for alternative employment or submitted job applications to any potential employers. Claimant does not believe he is physically capable of working. He filed for, and was granted, Social Security Disability benefits. He did not submit the opinions of a vocational expert or pursue avenues for retraining or further education. He confirmed the same at hearing. I am unconvinced claimant demonstrated motivation to participate in the labor market.

Claimant asserts that for purposes of Iowa Code section 85.34(7), the 2012 injury occurred while he was working for a different employer; as such, he argues apportionment is not warranted in the instant case. This is inaccurate. A successor employer is considered to be the same employer if the employee, in this case Mr. Castleman, became part of the successor employer's workforce through a merger, purchase, or other transaction that assumes the employee into the successor employer's workforce without substantially changing the nature of the employee's employment. Iowa Code section 85.34(7)(c); See Reinhardt v. West Liberty Foods, File Nos. 5025435, 5024096 (Remand August 27, 2012). In this regard, claimant has always worked as a steel finisher. He has consistently held the same job duties, at the same business location. His position has not substantially changed despite the multiple changes in ownership. I find claimant's 2012 and 2015 injuries occurred while claimant was working for the same employer for purposes of successive disability analysis.

Iowa Code section 85.34(7) is known as the successive-disability statute. Iowa Code section 85.34(7)(a) makes defendants responsible for compensating all of an employee's disability that arises out of and in the course of the employee's employment with the employer. Iowa Code section 85.34(7)(b) governs how successive injuries are to be assessed and what credits should be given to the employer for past payments of weekly benefits.

Under 85.34(7)(b)(1), when a subsequent work injury occurs while working for the same employer and the subsequent injury is compensated under the same subsection of Iowa Code section 85.34(2), then this agency is to determine the combined disability that is caused by both injuries. The employer's liability for the combined disability shall be considered satisfied to the extent of the percentage of disability for which the employee was previously compensated.

In the instant case, claimant had a prior work injury on May 22, 2012, with the same employer for which claimant was previously compensated. Claimant had a prior industrial disability of 18.9 percent resulting from the 2012 injury. As claimant's low back claim is to be compensated as an industrial disability, claimant has sustained two industrial injuries. Therefore, the successive disabilities provisions contained in Iowa Code section 85.34(7) must be applied.

For reasons set forth in the Findings of Fact, and upon consideration of all relevant factors to industrial disability, I find claimant suffered a 45 percent loss of earning capacity as a result of both the injury on May 22, 2012, and the injury on June 12, 2015. After giving credit for the 18.9 percent industrial loss previously paid, the remaining 26.1 percent needs to be compensated in this proceeding. A 26.1 percent industrial loss entitles claimant to 130.5 weeks of permanent partial disability benefits, which is 26.1 percent of 500 weeks, the maximum allowable number of weeks for an injury to the body as a whole under Iowa Code section 85.34(2)(u).

Having found claimant sustained a 45 percent industrial disability, the next issue to be decided is the commencement date for claimant's PPD benefits.

Claimant asserts a commencement date of January 13, 2017. Defendants assert a commencement date of October 16, 2016. Claimant relies on the medical opinions of Dr. Segal. Likewise, defendants rely on the medical opinions of Dr. Jameson.

Permanent partial disability benefits commence on the earliest date when claimant returns to work, is medically capable of performing substantially similar work, or achieves maximum medical improvement. Iowa Code section 85.34(1); Evenson v. Winnebago Industries, Inc., 881 N.W.2d 360, 372 (Iowa 2016). The healing period can be considered the period during which there is a reasonable expectation of improvement of the disabling condition. See Armstrong Tire & Rubber Co. v. Kubli, 312 N.W.2d 60 (Iowa Ct. App. 1981).

Of the two expert opinions, only Dr. Jameson actually places claimant at maximum medical improvement. Dr. Segal, on the other hand, provided there were several treatment modalities claimant could pursue prior to being placed at MMI.

According to the evidentiary record, claimant did not receive any treatment between March 9, 2016, and October 15, 2016, the date of claimant's IME appointment with Dr. Jameson. It can reasonably be assumed claimant received pain management treatment through Dr. Kari during this time; however, those medical records are not in evidence. In the March 8, 2016, medical record, Dr. Dolphin opines claimant's symptoms were chronic in nature. He provides he would recommend claimant undergo a functional capacity evaluation if his condition did not improve through pain management. There is no indication claimant's condition improved with pain management. After October 15, 2016, claimant only presented for maintenance related medical treatment. Given this information, I accept Dr. Jameson's opinion and find claimant reached MMI on October 15, 2016. I therefore conclude that permanent partial disability benefits commenced on October 16, 2016.

The next issue to be determined is claimant's entitlement to alternate medical care.

In his brief, claimant seeks either alternate medical care or an order requiring defendants to provide ongoing care. Claimant is seeking ongoing and/or alternate medical care pursuant to Iowa Code section 85.27.

The employer's obligation to furnish medical treatment 85.27(1) carries with it the privilege of selecting the care. An employee who experiences dissatisfaction with the provided care should communicate the basis of the unhappiness to the employer. There is no evidence claimant communicated his dissatisfaction with the provided care to defendant employer. There is no evidence claimant requested alternate care. If claimant's condition should require further treatment, defendants have the right to choose the provider under Iowa Code section 85.27. I find claimant failed to meet his burden of proof that he is entitled to alternate medical care. He is, however, entitled to further medical treatment for his conditions as directed by defendants. Defendants are obligated to provide ongoing medical treatment, should the need for such treatment arise, pursuant to Iowa Code section 85.27. Defendants will maintain the ability to direct care.

The next issue for determination is whether claimant is entitled to payment of medical expenses.

The employer shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance, and hospital services and supplies for all conditions compensable under the workers' compensation law. The employer shall also allow reasonable and necessary transportation expenses incurred for those services. Iowa Code section 85.27. Holbert v. Townsend Engineering Co., Thirty-second Biennial Report of the Industrial Commissioner 78 (Review-Reopening October 1975).

Claimant is seeking payment of past medical expenses as outlined in Exhibits 5 and 6. Review of these exhibits reveals the disputed medical expenses occurred after the June 12, 2015, date of injury. Exhibit 5 contains a summary of services provided from several providers. A number of the services appear unrelated to the matter at

hand. For example, Exhibit 6 contains medical bills for treatment related to claimant's right knee and gastroenterology services. Exhibit 6 also demonstrates that some of the requested medical expenses are from physicians and medical providers previously authorized by defendants. In his post-hearing brief, claimant only provides argument for payment of the medical bills relating to Dr. Schmall's chiropractic care. Claimant asserts such treatment was causally related to the work injury, medically necessary, and beneficial. Defendants dispute whether the charges are reasonable, necessary, and causally related to the work injury. (Hearing Report).

The October 3, 2016, through February 7, 2017, appointments with Dr. Schmall relate to the work injury of June 12, 2015. Claimant is entitled to recover the medical expenses incurred from these appointments. The May 8, 2017, through July 24, 2017, appointments with Dr. Schmall discuss the fact claimant continues to have low back and hip pain; however, the records specifically provide claimant presented for treatment with respect to his thoracic and cervical spine. Claimant is not entitled to recover these expenses. Lastly, the June 7, 2018, through July 26, 2018, appointments with Dr. Schmall relate to the work injury of June 12, 2015. Claimant is entitled to recover the medical expenses incurred from these appointments.

The remaining medical expenses relate to treatment claimant received from once authorized physicians, or referrals from the same.

An employer who authorizes care is responsible for the cost of the care up to the time when the employer notifies the employee it is no longer authorizing care. There is no evidence in the record defendants provided claimant with notice that they were no longer authorizing all or any part of the treatment through Drs. Dolphin, Frederick, or Sundar. Ramirez-Trujillo v. Quality Egg, LLC, 878 N.W.2d 759 (Iowa 2016). With the power to choose the care comes the responsibility to monitor the care for the purpose of determining when further care will no longer be authorized. The employer's statutory burden to monitor an injured employee's care is not an onerous one. To the extent the medical bills contained in Exhibit 6 are for treatment provided by Drs. Dolphin, Frederick, or Sundar, or physicians claimant was referred to by said previously authorized physicians, claimant is entitled to recover the medical expenses incurred as a result.

The next issue for determination is whether claimant is entitled to penalty benefits under Iowa Code section 86.13 and if so, how much.

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.

c. In order to be considered a reasonable or probable cause or excuse under paragraph "*b*", an excuse shall satisfy all of the following criteria:

(1) The excuse was preceded by a reasonable investigation and evaluation by the employer or insurance carrier into whether benefits were owed to the employee.

(2) The results of the reasonable investigation and evaluation were the actual basis upon which the employer or insurance carrier contemporaneously relied to deny, delay payment of, or terminate benefits.

(3) The employer or insurance carrier contemporaneously conveyed the basis for the denial, delay in payment, or termination of benefits to the employee at the time of the denial, delay, 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.

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.

Claimant asserts penalty benefits should be imposed upon defendants for their failure to timely issue indemnity benefit checks on a number of occasions. Specifically, claimant is requesting penalty benefits in the amount of $2,587.76, or 50 percent of the total amount of late indemnity benefit checks.

Exhibit 2 establishes a pattern of late payments. Claimant addresses the length of delay in his post-hearing brief. While the periods of delay were relatively short, the statute does not require a significant delay. The delays, although short, created financial hardship for claimant. Defendants offer no argument with respect to penalty. Therefore, it is found that defendants did not have a good faith excuse to delay benefits.

In exercising its discretion, the agency must consider factors such as the length of the delays, the number of delays, the information available to the employer regarding the employee's injury and wages, and the employer's past record of penalties. Meyers v. Holiday Express Corp., 557 N.W.2d 502, 505 (Iowa 1996). In this instance, the delays were relatively short, averaging less than 10 days per delay. Information available to the employer clearly established entitlement, and no excuse was offered for the delays.

The insurance carrier is encouraged to review its internal processes and protocol to ensure compliance with the requirement to promptly issue payment to an entitled injured worker to avoid future penalty awards in similar situations. Having considered the relevant factors and the purposes of the penalty statute, I conclude that a section 86.13 penalty in the amount of $600.00 is appropriate to punish the employer for its delay in payment of benefits under these facts and should serve as a deterrent against future conduct.

The final issue for determination is a specific taxation of costs pursuant to Iowa Code section 86.40 and rule 876 IAC 4.33. Costs are to be assessed at the discretion of the deputy commissioner or workers' compensation commissioner hearing the case. 876 IAC 4.33.

Claimant requests taxation of the cost of the filing fee ($100.00). Assessment of costs is a discretionary function of this agency. Claimant was generally successful in his claim. An assessment of costs is appropriate. The cost of the filing fee is an allowable cost and is taxed to defendants.

ORDER

THEREFORE, IT IS ORDERED:

Defendants shall pay unto claimant one-hundred thirty and one-half (130.5) weeks of permanent partial disability benefits commencing on October 16, 2016, at the weekly rate of six hundred forty-six and 94/100 dollars ($646.94).

Defendants shall pay all accrued benefits in a lump sum.

Defendants shall receive credit for benefits previously paid.

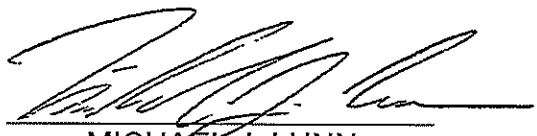
Defendants shall pay interest on unpaid weekly benefits awarded herein as set forth in Iowa Code section 85.30. Defendants shall pay accrued weekly benefits in a lump sum together with interest at the rate of ten percent for all weekly benefits payable and not paid when due which accrued before July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

Defendants shall pay claimant penalty benefits in the amount of six hundred and 00/100 dollars ($600.00).

Defendants shall provide future medical care deemed necessary to treat the low back injury of June 12, 2015, including any appliances, medications and referrals for further testing, imaging, therapy and other treatment by other providers.

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. Costs are taxed to defendants pursuant to 876 IAC 4.33 as set forth in the decision.

Signed and filed this 13th day of January, 2020.



MICHAEL J. LUNN
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Timothy Wegman (via WCES)
Robert Rosenstiel (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 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.