BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

MICHEAL E. BOS, Claimant, vs. CLIMATE ENGINEERS, INC., Employer, and THE HARTFORD FIRE INSURANCE, Insurance Carrier, Defendants.	File No. 5044761 APPEAL DECISION Head Note No.: 1803

FILED
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WORKERS' COMPENSATION

Defendants Climate Engineers, Inc., employer, and its insurer, The Hartford Fire Insurance, appeal from an arbitration decision filed on November 12, 2014. Claimant Michael E. Bos cross-appeals. The case was heard on September 9, 2014, and it was considered fully submitted on October 14, 2014, in front of the deputy workers' compensation commissioner.

The deputy commissioner awarded claimant 40 percent industrial disability for the stipulated work-related left shoulder injury which occurred on October 31, 2012. The deputy commissioner determined the commencement date for permanency benefits is July 28, 2013. The deputy commissioner also awarded medical expenses, $1,250.00 in penalty benefits, and costs.

On appeal, defendants assert the deputy commissioner erred in awarding 40 percent industrial disability and medical expenses related to treatment of anxiety and depression. On cross-appeal, claimant asserts the deputy commissioner erred in admitting a late-served vocational expert report, in failing to find defendants admitted claimant should be awarded permanent total disability, in failing to find claimant sustained permanent total disability, and in determining the commencement date for permanency benefits is July 28, 2013.

Having performed a de novo review of the evidentiary record and the detailed arguments of the parties, I reach the same analysis, findings, and conclusions as those reached by the deputy commissioner.

Pursuant to Iowa Code sections 86.24 and 17A.5, I affirm and adopt as the final agency decision those portions of the proposed arbitration decision filed on November 12, 2014, which relate to issues properly raised on intra-agency appeal with the following analysis:

FINDINGS OF FACT

Claimant was born on September 13, 1980, and he is right hand dominant. (Transcript, page 28; Exhibit 1, page 1; Ex. A, p. 1) Claimant graduated from high school in 1999. (Tr. p. 40) Following graduation from high school claimant attended Kirkwood Community College, but he did not graduate or obtain any certificates. (Tr. pp. 40-41) At the time of the hearing, claimant was 33 years old. (Tr., p. 19)

Claimant has worked in construction and maintenance for the majority of his working career. (Tr. pp. 46-47) From June 1999 through February 2000, claimant worked for Bill Lane Construction, where he was involved with framing and roofing homes. (Tr. p. 47; Ex. 1, p. 10; Ex. 6, p. 7; Ex. G, p. 9) Claimant left Bill Lane Construction and accepted a maintenance position with Cedar Graphics. (Tr. pp. 46-47) While with Cedar Graphics, claimant operated a paper baler/shredder, he performed building maintenance and grounds keeping duties, and he obtained a forklift operator certification. (Ex. G, p. 9) Claimant worked for Cedar Graphics from 2000 through 2007. (Tr. p. 46; Ex. 1, pp. 6, 10) While working for Cedar Graphics, claimant also worked part-time as a cashier for Hawkeye Convenience Store in Cedar Rapids, from October 2005 through November 2007. (Ex. G, p. 9)

In 2007, claimant accepted a pre-apprentice sheet metal position with defendant-employer. (Tr. p. 46; Ex. 1, pp. 6, 10) Defendant-employer fabricates and installs ductwork for commercial HVAC systems. (Tr. p. 23; Ex. 1, p. 6) As a pre-apprentice, claimant was a member of the Local 263 Sheet Metal Workers Union. (Tr. p. 23) Claimant performed material handling, including unloading trucks, moving material into the barn, and "loading up the burn table." (Tr. p. 24) Claimant would help set up the installation. (Tr., p. 24) He handled large and small pieces of ductwork used in industrial settings, which required lifting and carrying. (Ex. 1, p. 6) He reported the weight of the pieces varied between 20 and 100 pounds. (Ex. 1, p. 7) Claimant estimated he spent equal time working between floor and waist level, waist to shoulder level, and above shoulder level. (Ex. 1, p. 7)

While working for defendant-employer, claimant also engaged in nonmaterial handling duties. (Ex. 1, p. 7) He estimated during an average shift, he spent between one percent and 25 percent of the time sitting and holding his hands in one position, 25 to 50 percent using vibratory tools, and 50 to 75 percent climbing ladders. (Ex. 1, p. 7) Claimant reported he spent 75 percent or more of his shift standing, walking, stooping, bending, crawling, kneeling, climbing, and gripping or grasping. (Ex. 1, p. 7)

While working as a pre-apprentice, claimant obtained a chauffer's license. (Tr. p. 24) After a period of time defendant-employer offered claimant a utility worker position in the office. (Tr. p. 25) Claimant accepted that position and he was no longer affiliated with the union. (Tr. pp. 25-26) As a utility worker, claimant was responsible for coordinating and scheduling deliveries between jobs, training employees in obtaining chauffeur's licenses, and training employees how to tie down loads and manage tools and materials for the field and shop personnel. (Tr. p. 25)

Claimant worked as a utility worker for approximately five years. (Tr. p. 26) He was involved in several accidents with company vehicles and, after being disciplined, defendant-employer returned him to the pre-apprentice position in late September or early October 2012. (Tr. pp. 26-27; Ex. J, p. 2; Ex. K, p. 1)

On October 31, 2012, claimant was out in the field working at the new Kirkwood Community College Training Center. (Tr. p. 28) He stated he was getting ready to slide a piece of plywood onto a flat roof and, as he began sliding the plywood, his left shoulder "dislocated or re-dislocated, popped out." (Tr. p. 28) Claimant finished pushing the plywood with his right arm, he climbed down, and he reported the injury to his employer. (Tr. p. 29; Ex. 1, p. 7) Claimant was taken to the emergency room at St. Luke's Hospital and his shoulder dislocation was reduced. (Ex. 1, p. 7)

Claimant previously dislocated his left shoulder at work in November 2011. (Tr. p. 29) As of October 31, 2012, claimant had not had surgery or received any permanent restrictions or limitations with respect to his left shoulder. (Tr. p. 29)

On November 2, 2012, Dr. Ann McKinstry, M.D., saw claimant at St. Luke's Work Well Clinic and referred him to James Pape, M.D., orthopedic surgeon. (Tr. p. 29; Ex. 1, p. 7) Claimant saw Dr. Pape for his prior left shoulder injury in 2011. (Tr. p. 29)

Dr. Pape ordered an MRI of claimant's left shoulder. (Ex. 1, p. 7) Dr. Pape reviewed the MRI, which revealed a subacute Hill-Sachs impaction fracture of the posterior superior aspect of the humeral head with overlying cartilage irregularity. (Ex. 1, p. 7; Ex. A, p. 1) The MRI report noted an intrasubstance peripheral partial rim rent tear of the supraspinatus portion of the rotator cuff, but no complete tears or tendon retraction. (Ex. 1, p. 7) Dr. Pape recommended an arthroscopic labral repair and prescribed Lortab for pain. (Ex. A, p. 1)

On January 4, 2013, Dr. Pape performed a left shoulder arthroscopy with labral repair and left shoulder anterior capsular plication. (Tr. p. 30; Ex. 1, p. 8) Dr. Pape ordered physical therapy and placed claimant's left arm in an UltraSling. (Ex. 1, p. 8; Ex. A, p. 2) Claimant was placed on light duty from the date of injury until his surgery. (Tr. p. 30) After the surgery claimant was off work. (Tr. p. 30)

Upon recheck six weeks following surgery, Dr. Pape noted claimant's progress was slow. (Ex. 1, p. 8; Ex. A, p. 2) Dr. Pape discontinued the UltraSling and claimant continued to receive physical therapy. (Ex. A, p. 2)

In March and April 2013, claimant complained to Dr. Pape and to his primary care physician, Bradley Beer, M.D., that he was experiencing occasional numbness in his left upper extremity. (Ex. 1, p. 8) Claimant informed Dr. Beer his left arm was "numb and tingly." (Ex. 1, p. 8) In April and May 2013, Dr. Pape noted claimant was progressing with physical therapy and his strength was improving. (Ex. A, p. 3) During claimant's May 15, 2013, appointment, Dr. Pape noted he believed claimant could increase some of his work activities, and he was "very close to being released to full duty." (Ex. A, p. 3)

Claimant was discharged from physical therapy on June 10, 2013. (Ex. D, p. 3) The physical therapist found claimant had met his goals, had near equal range of motion in both shoulders, and had reached maximum benefit. (Ex. D, p. 3) On June 13, 2013, Dr. Pape noted Claimant had advanced to a home exercise program, and should proceed with a progressive return to work over the next six weeks. (Ex. A, p. 5)

Defendant-employer intended claimant would return to work on a four-hour basis. (Tr. p. 30) Claimant did not return to work. (Tr. pp. 30-31) Defendant-employer discharged claimant on June 14, 2013. (Ex. 9, p. 1) Claimant had developed a left inguinal hernia and had surgery on June 27, 2013. (Ex. 1, p. 8)

On July 25, 2013, Dr. Pape re-evaluated claimant and noted claimant did not return to work due to restrictions related to his hernia repair. (Ex. A, p. 7) Claimant complained of discomfort in his left shoulder and noted he had ongoing stiffness because he had not been able to proceed with home exercises due to his hernia repair. (Ex. A, p. 7) Dr. Pape found claimant was doing well overall and noted, "I think that it would be reasonable for the patient to be released in terms of progressing to regular duty as previously written for his left shoulder." (Ex. A, p. 7) Dr. Pape found claimant had not reached maximum medical improvement, but released Claimant to return to work without restrictions with respect to his left shoulder effective July 25, 2013. (Ex. A, pp. 8-9)

On November 12, 2013, claimant returned to Dr. Pape and continued to complain of discomfort, numbness and tingling in his left arm, with a sense of temperature difference between the right and left upper extremities. (Ex. 5, p. 2) Dr. Pape expressed concern that claimant "may have some regional pain difficulty given his temperature difference in his upper extremity." (Ex. 5, p. 2) Dr. Pape recommended work hardening and a possible evaluation at a pain clinic. (Ex. 5, p. 2) In December 2013, claimant initiated work hardening and Dr. Pape referred claimant for a pain clinic evaluation. (Ex. 5, pp. 3-4)

On December 30, 2013, claimant saw his primary care provider, Dr. Beer, and reported he was feeling depressed because of his left shoulder injury due to financial issues and because he had been unable to return to work. (Ex. 3, p. 12) Dr. Beer noted claimant had a history of depression, but had been doing fairly well before his injury. (Ex. 3, p. 12) Dr. Beer prescribed Cymbalta. (Ex. 3, p. 12) Dr. Beer characterized claimant's depression as moderate and affecting his activities of daily living. (Ex. 3, p. 13)

On January 2, 2014, Claimant was discharged from work hardening, due to noncompliance and performance. (Tr., pp. 32, 34-35; Ex. 1, p. 9; Ex. A, p. 12; Ex. E, p. 1) The therapist noted claimant periodically arrived late for appointments, left early, and took longer breaks than indicated. (Ex. H, p. 2) Claimant reported his attendance problems with work hardening were due to issues with his bank and transportation. (Tr. pp. 33-34; Ex. 1, p. 9) Claimant stated he believes he made progress during work hardening. (Tr. p. 34)

On January 29, 2014, claimant returned to Dr. Pape. (Ex. A, p. 12) Claimant reported he still had numbness, tingling, and a temperature difference in his left upper extremity. (Ex. 5, p. 5) Dr. Pape noted claimant continued to have symptoms with his left shoulder and would benefit from evaluation and treatment at a pain clinic. (Ex. A, p. 12) Dr. Pape informed claimant he did not have much more to offer with respect to his shoulder. (Ex. A, p. 12) Dr. Pape referred claimant to Douglas Sedlacek, M.D., pain specialist. (Tr., p. 35; Ex. 2, p. 1)

Dr. Sedlacek evaluated claimant on February 28, 2014. (Ex. 2, p. 1) Dr. Sedlacek noted claimant had taken tramadol and diazepam long-term for foot and knee problems, and that the medication had been prescribed by Dr. Beer. (Ex. 2, p. 1) Claimant reported temperature changes in his left hand and described his left hand as cold, and having a "vague kind of glove distribution, numbness and discomfort." (Ex. 2, p. 2) Claimant reported most of his pain was over the deltoid and supraspinatus and infraspinatus on the left side. (Ex. 2, p. 2) Dr. Sedlacek prescribed Lidoderm patches for seven days, followed by Flector patches for seven days, and physical therapy. (Ex. 2, p. 3) Claimant reported relief from the patches. (Ex. 2, p. 4)

Claimant discontinued physical therapy in April or May 2014 and continued with home exercises and stretches. (Ex. 1, p. 9) Claimant testified the physical therapy was beneficial. (Tr. p. 36)

In March 2014, defendants referred Claimant for an independent medical examination with David Tearse, M.D. Dr. Tearse concluded that further surgery was not indicated and recommended claimant continue with a home exercise program. (Ex. 4, p. 3; Ex. F, p. 3) Dr. Tearse placed claimant at maximum medical improvement with respect to the left shoulder as of his discharge from physical therapy on January 2, 2014. (Ex. 4, p. 4; Ex. F, p. 4) Dr. Tearse concluded claimant sustained permanent physical impairment resulting from the work injury based on the AMA Guides to the Evaluation of Permanent Impairment – Fifth Edition, as follows:

> I would assign him a 6% upper extremity impairment, using Table 16-26 for mild (occult) instability. I would additionally assign him a 4% impairment rating for limited motion, using figure 16-40, 16-43, and 16-46. These are combined using the Combined Values Chart to total a 10% impairment of the upper extremity, which is converted using table 16-3, to a 6% whole person impairment.

(Ex. 4, p. 4; Ex. F, p. 4)

Dr. Tearse assigned permanent restrictions: "limit above shoulder reaching to no more than 20 lbs. on an occasional basis only, lifting from floor to waist limited to 40 lbs. with the left arm and 25 lbs. from floor to shoulder." (Ex. 4, p. 4; Ex. F, p. 4)

Claimant exercised his right to an independent medical examination (IME) with Mark Taylor, M.D. Dr. Taylor prepared a report on June 4, 2014, finding claimant

sustained permanent physical impairment based on the AMA Guides to the Evaluation of Permanent Impairment – Fifth Edition, as follows:

> Turning to Tables 16-40, 16-43 and 16-46 on pages 476-479, I would assign a 5% left upper extremity impairment rating related to decrements in range of motion compared to his normal right upper extremity. Additionally, turning to Table 16-26 on page 505, I would place Mr. Bos in the occult category and would assign a 6% left upper extremity impairment rating related to the mild instability with a positive Apprehension test. These values are then combined according to the combined values chart on page 604 and results in an 11% left upper extremity impairment rating.
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> According to Table 16-3 on page 439, an 11% left upper extremity impairment rating converts to a 7% whole person impairment rating.

(Ex. 1, p. 13)

Dr. Taylor assigned permanent restrictions, including "a 40 pound lifting limit between floor and waist level with both arms together, and a 30 pound lifting limit between waist and shoulder level," and 20 pounds or less above the shoulder level on an occasional basis. (Ex. 1, p. 13)

For non-material handling, Dr. Taylor concluded claimant can sit, stand, walk, squat, bend, and kneel without restrictions. Dr. Taylor found claimant can climb stairs occasionally, but he should avoid working above ground level because his medications can cause drowsiness. (Ex. 1, p. 13) Dr. Taylor further noted, "[h]e may tolerate going up a few steps on a stepladder, but I would generally recommend that he avoid climbing extension or vertical ladders due to the residual left shoulder symptoms." (Ex. 1, p. 13)

On July 8, 2014, Dr. Pape found Claimant had reached maximum medical improvement and released him from his care. (Ex. 5, p. 7) Using the AMA Guides to the Evaluation of Permanent Impairment – Fifth Edition, Dr. Pape opined claimant sustained "an impairment of 10% to his left upper extremity based upon table 16-26 on page 505 and table 16-35 on page 510 and figure 16-46 on page 479 of the guide. This would translate into a 6% whole person impairment." (Ex. 5, p. 7)

While working for defendant-employer, claimant earned $14.00 to $15.00 per hour. (Ex. G, p. 9) Claimant was not employed from the date of his discharge on June 14, 2013, through the date of the hearing, which was September 9, 2014. (Ex. 9, p. 1; Ex. G, p. 9)

At the hearing, claimant submitted a job search log showing he contacted eleven employers between July 22, 2014, and August 29, 2014, regarding employment. (Ex. 7) He also contacted Iowa Vocational Rehabilitation Services for help finding a job. (Tr. pp. 36-37) Claimant reported he looked at a variety of jobs including "landscaping, customer service reps, service writer, counter part sales, tank washer, semi tank washing, a tree service, Americlean, either trying to clean duct work out or cleaning

carpets." (Tr., p. 37) Claimant stated he has had four or five interviews with Americlean. (Tr. p. 38)

Claimant testified he interviewed with Kirkwood Community College for a temporary, seasonal groundskeeper helper position. (Tr. p. 38) The position involved maintaining the grounds, including mowing. (Tr. p. 38) Claimant stated he thought he could perform the position. (Tr. p. 38) During his interview, claimant disclosed his left shoulder injury and he reported he had restrictions of 40 pounds from floor to waist, 30 pounds from waist to shoulder, and 20 pounds overhead. (Tr. p. 39) Claimant testified the staff member who interviewed him at Kirkwood told him he would need to be able to lift 60-pound bags of fertilizer. (Tr. p. 40) Claimant stated he responded that he could put the fertilizer on a dolly and scoop it out as needed. (Tr. p. 40)

Claimant alleges he has experienced depression as a result of his work injury. (Tr. p. 41) Claimant testified he experienced crying spells, a short temper, he was forgetful, he had trouble focusing, and he lost his appetite and motivation. (Tr. pp. 41-42) Claimant's family physician, Dr. Beer, began treating Claimant for depression at the end of 2013 or the beginning of 2014. (Tr. p. 41) Dr. Beer prescribed Cymbalta for depression and diazepam for anxiety. (Tr. pp. 22, 41) Claimant sees Dr. Beer every three to four months. (Tr. p. 42) Claimant reports his mood has improved since he first saw Dr. Beer. (Tr. p. 43)

Claimant received treatment for depression with Dr. Beer before his work injury, following a death. (Tr. p. 43) Claimant stated his prior depression was situational. (Tr. p. 43) Dr. Beer also treated Claimant in the past for anxiety and prescribed lorazepam, xanax, and clorazepam. (Ex. P, p. 4) Claimant has not seen a psychiatrist, psychologist, or counselor for psychotherapy, counseling, or other treatment since his October 2012 shoulder injury. He has treated only with Dr. Beer.

During the hearing, claimant testified he experiences pain in his left shoulder area and numbness, and temperature changes in his left hand. (Tr. pp. 43-44) Claimant described the pain in his shoulder as "kind of all around and down my arm. It's kind of burning, sharp, numbness, achiness." (Tr. p. 44) Claimant stated he always has pain. (Tr. p. 44) Claimant reported that on a good day his pain is a two or three out of ten, and on a bad day, six to eight out of ten. (Tr. p. 44) Claimant described the pain as "throbbing, sharp, numbness, tingling. Feels like the back of my neck is burning or something." (Tr. pp. 44-45) Claimant uses ice, stretching, his pain patch, and elevates his shoulder on a pillow. (Tr. p. 45) He stated he has a bad day approximately two to three days per week. (Tr. p. 45) Claimant notes he has bad days when he lifts or reaches out, or engages in more activity with his left arm. (Tr. p. 45) Claimant testified a bad day might last a day or two. (Tr. p. 45) He stated he continues to perform home exercises, including lifting weights, and he performs shoulder blade pinches, stretches, and bicep curls. (Tr. p. 50)

Claimant does not believe he could perform his prior positions with Climate Engineers, Bill Land Construction, and Cedar Graphics. Claimant reported his job with Climate Engineers was physical, with frequent reaching out, lifting, and lifting overhead,

which are duties he can no longer perform. (Tr. p. 46) Claimant testified his position with Bill Lane Construction required him to carry wood and set up walls, which are also duties he can no longer perform. (Tr. p. 47) Claimant stated he does not believe he could perform the maintenance position at Cedar Graphics. (Tr. p. 47) Claimant believes he can engage in mowing. (Tr. pp. 47-48) Claimant testified he cares for his infant son at home, mows the grass with a riding lawnmower, and moves snow with the blade attached to his tractor. (Tr. pp. 51-52)

Two vocational experts, Kent Jayne, M.A., and James Carroll, M.Ed., rendered expert opinions on behalf of claimant, and defendants respectively. Jayne performed a records review, performed assessments, and met with Claimant. (Ex. 6) Carroll performed a records review only. (Ex. G, p. 11)

Mr. Jayne concluded Claimant is precluded from the competitive labor market, as follows:

> However, even absent his psychological and emotional difficulties, Mr. Bos' reduced ability to use his upper extremities, and his limited ability to perform manual dexterity, fine motor coordination, and minimal clerical skills are particularly devastating from a vocational standpoint. His limitations in use of the left upper extremity in lifting, carrying, and endurance, in addition to his dexterity problems, would preclude him from nearly all jobs within his previous capacities in the labor market. Significant limitations in handling or dexterities will eliminate a large number of occupations a person might otherwise do. Mr. Bos' noncompetitive performance in both fine motor coordination and manual dexterity, as well as the limitations set forth by Drs. Taylor and Tearse would preclude him from the competitive labor market. He was certainly unable to perform at a level which would permit him to return to any of his previous relevant occupations. When the limitations revealed by standardized testing in other areas in clerical perception, reasoning, and basic academic abilities are taken into account, it is eminently clear that Mr. Bos has been precluded from the competitive labor market. He has no marketable transferable skills at his current level of abilities as understood.

(Ex. 6, pp. 10-11)

When preparing his report, Mr. Jayne noted claimant's work history. (Ex. 6) Mr. Jayne did not discuss claimant's previous experience as a convenience store clerk, a position he held for two years. (Ex. 6) Mr. Jayne opined Claimant is precluded from performing "entry level clerical work, such as that of a cashier, clerk, or in retail" based on assessments he performed. (Ex. 6, p. 10) Mr. Jayne did not consider Claimant's complete work history in rendering his opinions, and specifically found claimant lacks the capacity to work as a cashier, work he performed for a period of two years. Based on this oversight, I do not find Jayne's opinion persuasive.

Mr. Carroll disagreed with Jayne, and opined Claimant is not completely vocationally disabled. (Ex. G, p. 11) Mr. Carroll found the restrictions imposed by Drs. Tearse and Taylor place claimant within in the medium physical demand level. (Ex. G, p. 11) Mr. Carroll noted claimant's work history includes work in the following occupations:

Carpenter	DOT#860.381-022	SVP 7	Medium
Groundskeeper Industrial-Commercial	DOT#406.684-014	SVP 3	Medium
Maintenance Mechanic Helper	DOT#899.684-022	SVP 5	Heavy
Baler Operator	DOT#920.685-010	SVP 2	Heavy
Industrial Truck Operator	DOT#921.683-050	SVP 3	Medium
Cashier Checker	DOT#211.462-014	SVP 3	Light
Sheet Metal Shop Helper	DOT#619.686-022	SVP 2	Heavy
Truck Driver, Heavy	DOT#905.663-014	SVP 4	Medium

(Ex. G, p. 9)

Mr. Carroll determined that pre-injury, claimant had access to 97 different occupations, with 2,085 positions in the Cedar Rapids labor market based on transferable skills from his vocational history. (Ex. G, p. 10) Mr. Carroll found the post-injury assessment revealed 69 occupations with 1,669 positions, representing a loss of employability of 29 percent, and loss of access of 20 percent of the labor market. (Ex. G, p. 10) Mr. Carroll also considered the variables of not being able to drive a work vehicle and not being able to operate machinery, which would result in a post-injury loss of employability of 35 percent as opposed to 29 percent. (Ex. G, p. 10) Based upon a review of Claimant's pre-injury earnings and post-injury earning capacity, Mr. Carroll determined Claimant has a loss of earning capacity of 22 percent. (Ex. G, pp. 10-11)

CONCLUSIONS OF LAW

I. Preclusive Effect of Permanent Total Disability Admission

In his post-hearing brief, claimant argues defendants stipulated claimant was permanently and totally disabled through their Response to Request for Admission Number 4. The deputy commissioner did not address claimant's argument in the arbitration decision and awarded claimant 40 percent industrial disability. Claimant alleges the presiding deputy erred in failing to find defendants admitted claimant was permanently and totally disabled. Defendants contend the admission is not binding.

Request for Admission Number 4 states, "[t]hat Michael Bos' claim for workers' compensation benefits from his 10/31/2012 work injury should be compensated pursuant to Iowa Code §85.34(3)." (Ex. 8, p. 2) Climate Engineers and The Hartford admitted the allegation. Iowa Code section 85.34(3) provides:

> 3. Permanent total disability.
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> a. Compensation for an injury causing permanent total disability shall be upon the basis of eighty percent per week of the employee's average spendable weekly earnings, but not more than a weekly benefit amount, rounded to the nearest dollar, equal to two hundred percent of the statewide average weekly wage paid employees as determined by the department of workforce development under section 96.19, subsection 36, and in effect at the time of the injury. The minimum weekly benefit amount is equal to the weekly benefit amount of a person whose gross weekly earnings are thirty-five percent of the statewide average weekly wage. The weekly compensation is payable during the period of the employee's disability.
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> b. Such compensation shall be in addition to the benefits provided in sections 85.27 and 85.28. No compensation shall be payable under this subsection for any injury for which compensation is payable under subsection 2 of this section. In the event compensation has been paid to any person under any provision of this chapter, chapter 85A or chapter 85B for the same injury producing a total permanent disability, any such amounts so paid shall be deducted from the total amount of compensation payable for such permanent total disability.

Defendants did not withdraw or attempt to amend Response to Request for Admission Number 4 prior to the hearing, during the hearing, or upon receiving claimant's post-hearing brief. Defendants contend they understood they were agreeing claimant sustained an injury to his body as a whole, as opposed to a scheduled injury, and argue the language of the admission does not specifically mention "permanent total disability," but only the manner in which the claim should be compensated.

Defendants further contend neither party believed defendants had stipulated claimant was permanently and totally disabled because defendants denied claimant had sustained an industrial disability, both parties retained vocational experts, and the hearing report noted the parties disputed claimant had sustained a 100 percent loss of earning capacity and was an odd-lot employee. Defendants contend that if claimant believed there was no issue to be decided concerning the degree of industrial disability, claimant should have informed the deputy commissioner and objected to inclusion of the issue in the hearing report. Defendants allege claimant's failure to raise the issue is tantamount to a withdrawal of the alleged admission.

The Iowa Rules of Civil Procedure apply to contested case proceedings before the workers' compensation commissioner unless the provisions conflict with the statutes and administrative rules governing workers' compensation. 876 IAC 4.35. The rules governing requests for admission do not conflict with the statutes and administrative rules governing workers' compensation.

During discovery, a party may serve written requests for admission upon another party, to be responded to within 30 days. Iowa R. Civ. P. 1.510. Under Iowa R. Civ. P. 1.511:

> Any matter admitted under rule 1.510 is conclusively established in the pending action unless the court on motion permits withdrawal or amendment of the admission. Subject to the provisions of rule 1.604 governing amendment of a pretrial order, the court may permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice that party in maintaining that party's action or defense on the merits. . . .

The rule provides the tribunal with discretion to allow the late filing of or amendment to a response to a request for admission. Double D Land & Cattle Co., Inc. v. Brown, 541 N.W.2d 547, 549 (Iowa 1995). When evaluating such a request, the tribunal considers "(1) whether the presentation of the merits would be subserved by a late filing, and (2) whether the party who obtained or requested the admissions failed to satisfy the court that he would be prejudiced by the late filing." Id. The court has noted, "'an admission is not improper because it relates to an ultimate fact or to an issue that is dispositive of the case.'" Id. Defendants admitted "[t]hat Michael Bos' claim for workers' compensation benefits from his 10/31/2012 work injury should be compensated pursuant to Iowa Code §85.34(3)." (Ex. 8, p. 2) In a general civil case, the admission would be binding. This is not a general civil case. Under 876 IAC 4.19(3)(f),

> Counsel and pro se litigants shall prepare a hearing report that defines the claims, defenses, and issues that are to be submitted to the deputy commissioner who presides at the hearing. The hearing report shall be signed by all counsel of record and pro se litigants and submitted to the deputy when the hearing commences.

The hearing report must be prepared prior to the commencement of the hearing and must be signed by the parties and the presiding deputy. James R. Lawyer, Iowa Practice Series – Workers' Compensation § 21.24, at 275-76. The parties can stipulate to or dispute issues, including, but not limited to the claimant's entitlement to permanency benefits. Id. at 276.

When completing the hearing report in this case, the parties stipulated to a number of issues, and identified the issues to be determined by the deputy commissioner. With respect to permanent disability, the hearing report provides:

PPD Entitlement. If no longer in dispute check here ( ).
[D] S Claimant is entitled to permanent disability benefits for ___ weeks for a 100% loss of use of the BAW or a 100% loss of earning capacity.
If the injury is found to be a cause of permanent disability,
D S the disability is a scheduled member disability to the _____.
D [S] the disability is an industrial disability.
[D] S The commencement date for permanent partial disability benefits, if they are awarded, is the 8th day of July, 2014. π
28th day of July, 2013 Δ
* * * *

Other Issues/Stipulations.
[D] S Specify:
Odd-lot
Penalties.

When the parties submitted the hearing report to the deputy commissioner, the parties reported there was a dispute as to whether claimant was totally disabled. If claimant believed there was no dispute regarding the issue because the matter had been deemed admitted, he should have raised the issue before the deputy commissioner. Instead of doing so, he waited until the filing of his post-hearing brief to raise the issue at the time the record was closed. If claimant had raised the issue at the start of the hearing, it could have been addressed by the deputy commissioner at the time of the hearing. And at that time, defendants could have moved to amend or withdraw the admission under Iowa R. Civ. P. 1.511.

Claimant's attorney signed the hearing report, agreeing there was a dispute as to whether Claimant was totally disabled. He did not raise the admission during the hearing, and not until he filed his post-hearing brief. This agency relies on hearing reports to determine the issues to be decided by the presiding deputy commissioners. Claimant waived his argument by signing the hearing report and by failing to raise the purported admission with the deputy commissioner at the start of the hearing. Cf. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181, 186-87 (Iowa 1980) (concluding claimant's attorney failed to preserve error on foundation objection by failing to object when the deposition was offered into evidence before the deputy, and by failing to afford "his adversary [with the opportunity] to remedy the alleged defect"); Hawkeye Wood Shavings v. Parrish, No. 08-1708, 2009 WL 3337613, at *4 (Iowa Ct. App. 2009) (concluding the defendants waived the issue of whether they were entitled to a credit for benefits already paid for the September 2000 injury because on the hearing report signed by the defendants, the defendants stipulated "0 weeks" of credit); Burtnett v. Webster City Custom Meats, Inc., No. 05-1265, 2007 WL 254722, at *3-4 (Iowa Ct. App. Jan. 31, 2007) (concluding the deputy commissioner did not commit an abuse of discretion by refusing the claimant's request to change dates in the joint hearing report,

and noting the agency's approach requiring claimants to list dates prior to hearing in a hearing report "is more than reasonable").

II. Admission of Vocational Expert Report

At hearing, defendants offered Exhibit G, Mr. Carroll's vocational assessment. Claimant objected to the admission of Exhibit G, claiming it is highly prejudicial and should be excluded because defendants failed to identify Mr. Carroll in their answers to interrogatories and in their witness and exhibit list. (Tr. p. 7) Counsel for claimant argued, "I think it's highly prejudicial. I don't want to have additional time and expenses to go out and do something more. We're here today and want to put on this case." (Tr. p. 7) The deputy commissioner disagreed, as follows:

> THE DEPUTY: I actually read the highlights of the report. I'm not sure I really do see prejudice because perhaps unlike some, I rarely find the vocational reports, unless they tend to agree, as being very helpful, because one usually tells me he's perm total and the other one tells me he's almost essentially unhurt. Which looks to be the case here. So I doubt that either vocational report is going to be much of a deciding factor.
>
> So I don't see much prejudice. I understand that under our technical rules it's probably to be excluded, but then the way former Commissioner Trier wrote that rule, when you get to the end of it, it really just becomes what's the prejudice and I'm not seeing it.
>
> MR. WERTZ: You're not seeing prejudice?
>
> THE DEPUTY: I'm not. I really find the report, to be honest, of very little use to me. So it's hard for it to be prejudicial if it's not very useful. I mean, it's what I would expect a defense vocational expert to tell me.
>
> MR. WERTZ: Well, that may be. But, again, I do think there are rules and there are ways these are to be conducted and from the standpoint, you know - -
>
> THE DEPUTY: I helped write the rules, so I'm going to respectfully disagree that that's what the rule means. Because the rule sets out a bunch of deadlines that at the end are really abrogated by the section that Commissioner Trier puts on that says it all boils down to prejudice, which I'm not finding.
>
> Now, you're asserting there's prejudice, there might be some. If you want to cure them you certainly can do that. But I've done this long enough now that I find the worst mistake I can make is to exclude something. So do you want to give us some form of response, cure or just - -
>
> MR WERTZ: No. That's your ruling.

THE DEPUTY: I'm asking if you want it. If you don't want it, I'll just take it in.

MR WERTZ: If I don't want what?

THE DEPUTY: A cure. If you think there's prejudice I'm willing to give you an opportunity to try and cure it. But if you're not going to tell me that you want it, I'll just take the report in.

MR WERTZ: Well, it all depends on what you would allow for the cure.

THE DEPUTY: Well, you've got a vocational expert, if you want him to respond to the report, I'd let you do that.

MR WERTZ: At their expense.

THE DEPUTY: At their expense?

Mr. Wertz: Why do I have to go do this at the last minute?

THE DEPUTY: I'm not going to order it. If you want to give me a response to their vocational expert, I'll give you 30 days to do that.

Mr. Wertz: That's fine.

(Tr. pp. 7-9)

An employer who intends to introduce evidence from an expert witness is required to certify to the claimant the expert's name, subject matter of expertise, qualifications, and provide a summary of each expert's opinion within 90 days before the hearing, and 60 days before the hearing for rebuttal experts. 876 IAC 4.19(3)(b). Certification is not required for treating physicians and vocational consultants, "if the expert witness is known by all parties to have personally provided services to the claimant and the witness's reports are served on opposing parties prior to the date when certification is required." Id.

Rule 871 IAC 4.19 governs witnesses and exhibit lists. Rule 871 IAC 4.19(3)(d) requires the parties to disclose all exhibits 30 days prior to hearing, and to provide a description of each exhibit, including the date, number of pages, and author or source. The administrative rules further provide:

> e. If evidence is offered at hearing that was not disclosed in the time and manner required by these rules, as altered by order of the workers' compensation commissioner or a deputy workers' compensation commissioner or by a written agreement by the parties, the evidence will be excluded if the objecting party shows that receipt of the evidence would be unfairly prejudicial. Sanctions may be imposed pursuant to 876—4.36(86) in addition to or in lieu of exclusion if exclusion is not an effective

remedy for the prejudice.

Exhibit G, Mr. Carroll's expert report, was not disclosed 30 days before the hearing. Claimant alleges the deputy commissioner erred in admitting the report because the report is unfairly prejudicial. Defendants have not demonstrated prejudice.

The trier of fact exercises his or her discretion in determining the admissibility of expert reports. Trade Professionals, Inc. v. Shriver, 661 N.W.2d 119, 123 (Iowa 2003). "An abuse of discretion occurs when a ruling rests on grounds or reasons clearly untenable or unreasonable." Kohlhaas v. Hog Slat, Inc., 777 N.W.2d 387, 391 (Iowa 2009). Exclusion of evidence is the most severe sanction under the Iowa Rules of Civil Procedure concerning expert discovery "and is justified only when prejudice would result." Schoenfeld v. FDL Foods, Inc., 560 N.W.2d 595, 598 (Iowa 1997).

Claimant has not established prejudice in this case. The deputy commissioner noted he found the report was of very little use to him and he provided claimant with an opportunity to submit a response to the report. Counsel for claimant declined the offer. The deputy commissioner's ruling admitting Mr. Carroll's report into evidence is affirmed.

III. Extent of Disability

The parties stipulated claimant sustained an injury to his shoulder, an industrial disability, arising out of and in the course of his employment, but disputed the extent of claimant's disability. The deputy commissioner found claimant "is not totally disabled, and he is not an odd-lot employee. Given the claimant's pain, claimant's medical impairment, training, permanent restrictions, as well as all other factors of industrial disability, the claimant has suffered a 40 percent loss of earning capacity." (Arb. Dec. p. 3) Defendants contend the deputy commissioner erred in determining claimant sustained a 40 percent loss of earning capacity. On cross-appeal, claimant contends the deputy commissioner erred in failing to find he is permanently and totally disabled or an odd-lot employee.

The determination of the extent of disability is a mixed issue of law and fact. Neal v. Annett Holdings, Inc., 814 N.W.2d 512, 525 (Iowa 2012). In Iowa, a claimant may establish permanent total disability under the statute, or through the common law odd-lot doctrine. Michael Eberhart Const. v. Curtin, 674 N.W.2d 123, 126 (Iowa 2004) (discussing both theories of permanent total disability under Idaho law and concluding the deputy's ruling was not based on both theories, rather, it was only based on the odd-lot doctrine). Under the statute, the claimant may establish the claimant is totally and permanently disabled if the claimant's medical impairment together with nonmedical factors totals 100 percent. Id. The odd-lot doctrine applies when the claimant has established the claimant has sustained something less than 100 percent disability, but is so injured that the claimant is "unable to perform services other than 'those which are so limited in quality, dependability or quantity that a reasonably stable market for them does not exist.'" Id. (quoting Boley v. Indus. Special Indem. Fund, 130 Idaho 278, 281, 939 P.2d 854, 857 (1997)).

A. Industrial Disability

"Industrial disability is determined by an evaluation of the employee's earning capacity." Cedar Rapids Community School v. Pease, 807 N.W.2d 839, (Iowa 2011). In considering the employee's earning capacity, the deputy commissioner evaluates several factors, including "consideration of not only the claimant's functional disability, but also [his] age, education, qualifications, experience, and ability to engage in similar employment." Swiss Colony, Inc. v. Deutmeyer, 789 N.W.2d 129, 137-138 (Iowa 2010). The inquiry focuses on the injured employee's "ability to be gainfully employed." Id. at 138. Claimant avers the evidence presented at hearing establishes he is permanently and totally disabled, or 100 percent disabled.

Drs. Tearse and Pape determined claimant sustained a six percent whole person impairment and Dr. Taylor found claimant sustained a seven percent whole person impairment. (Ex. 1, p. 13; Ex. 4, p. 4; Ex. 5, p. 7, Ex. F, p.4) Dr. Tearse assigned permanent restrictions limiting "above shoulder reaching to no more than 20 lbs. on an occasional basis only, lifting from floor to waist limited to 40 lbs. with the left arm and 25 lbs. from floor to shoulder." (Ex. 4, p. 4; Ex. F, p. 4) Dr. Taylor assigned permanent restrictions, including "a 40 pound lifting limit between floor and waist level with both arms together, and a 30 pound lifting limit between waist and shoulder level," and 20 pounds or less above the shoulder level on an occasional basis. (Ex. 1, p. 13)

The deputy commissioner found claimant sustained a 40 percent industrial disability based on his left shoulder injury. The deputy commissioner noted claimant "had pre-existing anxiety issues for which he had received treatment [and found while] the claimant is currently on prescriptions for depression/anxiety, he has no restrictions from work activities due to the depression/anxiety." (Arb. Dec. p. 2) Claimant contends the evidence presented at hearing supports a finding that he is permanently and totally disabled based on "work-related depression" and chronic pain. Defendants deny claimant's assertion.

An injury to one part of the body can later cause an injury to another. Mortimer v. Fruehauf Corp., 502 N.W.2d 12, 16-17 (Iowa 1993) (holding a psychological condition can be caused or aggravated by a scheduled injury). The claimant bears the burden of proving the claimant's work-related injury is a proximate cause of the claimant's disability and need for medical care. Ayers v. D & N Fence Co., Inc., 731 N.W.2d 11, 17 (Iowa 2007); George A. Hormel & Co. v. Jordan, 569 N.W.2d 148, 153 (Iowa 1997); Edwards v. Carroll Cmty. Sch. Dist., File No. 1214941, 2002 WL 32125171, at *1 (App. September 12, 2002). "In order for a cause to be proximate, it must be a 'substantial factor.'" Id. A probability of causation must exist, a mere possibility of causation is insufficient. Frye v. Smith-Doyle Contractors, 569 N.W.2d 154, 156 (Iowa App. 1997).

The question of medical causation is "essentially within the domain of expert testimony." Cedar Rapids Community School v. Pease, 807 N.W.2d 839, 844-45 (Iowa

2011). The Commissioner, as the trier of fact, must "weigh the evidence and measure the credibility of witnesses." Id. The trier of fact may accept or reject expert testimony, even if uncontroverted, in whole or in part. Frye, 569 N.W.2d at 156.

Claimant received pharmacological treatment for anxiety and depression prior to his work injury from his primary care physician, Dr. Beer. (Tr., p. 43; Ex. P, p.1) Claimant also received pharmacological treatment from Dr. Beer after his work injury. (Ex. 3, pp. 12-13) Claimant has not received an evaluation or treatment from a psychologist, psychiatrist, or counselor since his October 2012 left shoulder injury. He has not received any counseling or psychotherapy. Drs. Pape, Taylor, and Tearse did not provide any opinions regarding a connection between Claimant's employment and his anxiety or depression, nor did they provide any work restrictions related to anxiety or depression. No physician or mental health provider has opined Claimant has any permanent impairment or restrictions related to his mental health conditions. The deputy commissioner correctly rejected Claimant's assertion.

Claimant obtained a vocational rehabilitation opinion from Kent Jayne asserting Claimant is totally disabled. Defendants obtained a vocational rehabilitation opinion from James Carroll asserting claimant sustained a loss of earning capacity of 22 percent. When considering the weight of an expert opinion, the fact-finder may consider whether the examination occurred shortly after the claimant was injured, the compensation arrangement, the nature and extent of the examination, the expert's education, experience, training, and practice, and "all other factors which bear upon the weight and value" of the opinion. Rockwell Graphic Systems, Inc. v. Prince, 366 N.W.2d 187, 192 (Iowa 1985).

Mr. Jayne opined that claimant is precluded from engaging in clerical work, such as that of a cashier, clerk or in retail, based on the assessments he performed. (Ex. 6, pp. 10-11) Mr. Jayne's finding is inconsistent with claimant's prior work experience as a cashier, a position claimant held for two years, when he worked for Hawkeye Convenience Store from October 2005 through November 2007. (Ex. G, p. 9) Mr. Jayne's report does not mention this past relevant work. Based on this omission, I afford Mr. Jayne's opinion very little weight.

Mr. Carroll, on the other hand, identified all of Claimant's relevant work history and limitations when considering his residual functional capacities. (Ex. G, p. 9) Mr. Carroll determined that pre-injury, claimant had access to 97 different occupations, with 2,085 positions in the Cedar Rapids labor market based on transferable skills from his vocational history. (Ex. G, p. 10) Mr. Carroll found the post-injury assessment revealed 69 occupations with 1,669 positions, representing a loss of employability of 29 percent, and loss of access of 20 percent to the labor market. (Ex. G, p. 10) Mr. Carroll also considered the variables of not being able to drive a work vehicle or operate machinery, which would result in a post-injury loss of employability of 35 percent as opposed to 29 percent. (Ex. G, p. 10) Based upon a review of claimant's pre-injury earnings and post-injury earning capacity, Mr. Carroll determined claimant has a loss of earning capacity of 22 percent. (Ex. G, p. 10-11)

Claimant had not worked since his June 14, 2013, discharge by defendant-employer through the hearing on September 8, 2014. (Ex. 9, p. 1) He was noncompliant with work hardening. (Tr. pp. 32, 34-35; Ex. 1, pp. 9, 7; Ex. A, p. 12; Ex. E, p. 1) And at the time of the hearing Claimant had only contacted 11 employers in the Cedar Rapids area regarding employment, from July 22, 2014, through August 29, 2014. (Ex. 7)

A majority of claimant's work history involves unskilled and semi-skilled work, in the medium-to-heavy level. Claimant has permanent restrictions which preclude him from returning to many, but not all of his prior positions. And he can perform medium level work, including work where he occasionally lifts 20 pounds above his shoulders. Claimant has experienced a loss of earning capacity, but he is not totally disabled. The evidence does not support the contention that claimant is incapable of returning to work as a cashier. Claimant has received a forklift certification, a chauffer's license, and he has trained other employees in obtaining chauffer's licenses.

Claimant is a young man. At the time of the arbitration hearing he was 33 years old. Claimant is a high school graduate, and he has attended classes through Kirkwood Community College. Claimant noted on his application to Iowa Vocational Rehabilitation Services that he was interested in training and school and he was considering enrolling in Kirkwood Community College or Coe College. (Ex. 6, pp. 36, 38) Claimant works on snow removal, mowing, and yard work at home, and he cares for his son, who was an infant at the time of the hearing. Claimant believes he can engage in mowing. Claimant is not incapable of retraining. Considering claimant's age, education, qualifications, experience, his ability to engage in similar employment, and all other factors of industrial disability discussed above, I affirm the deputy commissioner's finding that claimant has sustained 40 percent industrial disability.

B. Applicability of the Odd-Lot Doctrine

Claimant asserts the deputy commissioner erred in failing to find he is an odd-lot worker. Under the odd-lot doctrine, a worker is totally disabled if the services the worker can perform "are so limited in quality, dependability, or quantity that a reasonable stable market for them does not exist." Guyton v. Irving Jensen Co., 373 N.W.2d 101, 105 (Iowa 1985) (quoting Lee v. Minneapolis Street Railway Co., 230 Minn. 315, 320, 41 N.W.2d 433, 436 (1950)). This flows from the principle that a worker who has no reasonable prospect of securing employment has no material earning capacity. Id. The trier of fact considers whether there are jobs in the community the worker can realistically compete for. Gits Mfg. Co. v. Frank, 855 N.W.2d 195, 198 (Iowa 2014) In establishing total disability, "an employee need not look for a position outside the employee's competitive labor market." Id.

Under the odd-lot doctrine, a worker must present a prima facie case of total disability "by producing substantial evidence that the worker is not employable in the competitive labor market." Guyton at 106. If the worker establishes a prima facie case, then the burden switches to the employer to present evidence of suitable employment.

Id. If the employer fails to produce evidence of suitable employment, and the deputy commissioner concludes the worker falls within the odd-lot category, the worker is entitled to a finding of total disability. Id.

Claimant has not established a prima facie case under the odd-lot doctrine. Claimant lives in an urban area, Cedar Rapids. At the time of the hearing, claimant had only applied for 11 jobs. Claimant believes he can engage in mowing. His past relevant work as a cashier is also consistent with his limitations. Claimant's own testimony reveals he believes he is employable. Mr. Carroll's report supports there are positions in the Cedar Rapids market which claimant is capable of performing, consistent with his limitations and residual functional capacities.

Claimant has sustained an industrial disability. Compensation for permanent partial disability begins at the termination of the healing period. Iowa Code section 85.34(2). Compensation is paid in relation to 500 weeks as the disability bears to the body as a whole. Id. section 85.34(2)(u). The parties stipulated claimant's weekly benefit rate is four hundred eighty-six and 94/100 dollars ($486.94). Claimant is entitled to permanent partial disability benefits for 200 weeks from July 28, 2013.

IV. Penalty Benefits

The final issue to address on appeal is whether claimant is entitled to penalty benefits under Iowa Code section 86.13 and, if so, how much.

The deputy commissioner found defendants mailed payments to claimant late, generally a day or two, on 58 occasions, for a total of $12,590.88 in late payments, and awarded a penalty of $1,250.00. (Arb. Dec., p. 7) On appeal, claimant contends the deputy commissioner should have awarded $6,295.22 in penalty benefits because defendants terminated claimant's healing period benefits prematurely twice on July 25, 2013, and again on December 12, 2013, and mailed weekly payments late on 58 occasions. Defendants did not cross-appeal the penalty award, but assert no additional penalty should be awarded because many of the payments were not late, and the two delays in July 2013 and November 2013 were minimal.

Iowa Code section 86.13 governs compensation benefits generally, and contains the following penalty provision:

> 4a. 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 of 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.

Both underpaid and late-paid benefits are subject to the penalty provisions of the statute. Meyers v. Holiday Express Corp., 557 N.W.2d 502, 505 (Iowa 1996).

Under the statute's plain language, if there is a delay in payment absent "a reasonable or probable cause or excuse", the employee is entitled to penalty benefits. Id.; see also Christensen v. Snap-On Tools Corp., 554 N.W.2d 254, 260 (Iowa 1996) (citing earlier version of the statute). "The application of the penalty provision does not turn on the length of the delay in making the correct compensation payment." Robbennolt v. Snap-On Tools Corp., 555 N.W.2d 229, 236 (Iowa 1996). If a delay occurs without a reasonable excuse, the commissioner is required to award penalty benefits in some amount to the employee. Id. (emphasis supplied)

The statute requires the employer or insurance company to conduct a "reasonable investigation and evaluation" into whether benefits are owed to the employee, the results of the investigation and evaluation must be the "actual basis" relied on by the employer or insurance company to deny, delay, or

terminate benefits, and the employer or insurance company must "contemporaneously convey the basis for the denial, delay, or termination of benefits to the employee at the time of the denial, delay, or termination of benefits. Iowa Code section 86.13(4)(c)(3). An employer may establish a "reasonable cause or excuse" if "the delay was necessary for the insurer to investigate the claim," or if "the employer had a reasonable basis to contest the employee's entitlement to benefits." Christensen, 554 N.W.2d at 260. "A 'reasonable basis' for denial of the claim exists if the claim is 'fairly debatable.'" Id. Whether the claim is "fairly debatable" turns on whether there is a factual dispute that, if resolved in favor of the employer, would support the denial of compensability. Gilbert v. USF Holland, Inc., 637 N.W.2d 194, 199 (Iowa 2001). The employer may not rely on a bare assertion the claim if fairly debatable. Meyers, 557 N.W.2d 505. The employer must set forth "*facts* upon which the commissioner could reasonably find that the claim was 'fairly debatable.'" Id.

Benefits must be paid beginning on the eleventh day after the injury, and "each week thereafter during the period for which compensation is payable, and if not paid when due," interest will be imposed. Iowa Code section 85.30. In Robbennolt, the Iowa Supreme Court noted, "[i]f the required weekly compensation is timely paid at the end of the compensation week, no interest will be imposed . . . . As an example, if Monday is the first day of the compensation week, full payment of the weekly compensation is due the following Monday." Robbennolt, 555 N.W.2d at 235. A payment is "made" when the check addressed to the claimant is mailed, or personally delivered to the claimant. Meyers, 557 N.W.2d at 505.

Exhibit 11 contains a chart of the alleged 58 late payments, including the receipt date. Claimant relies on the date of receipt to support his claim for penalty benefits. The date of receipt is not the proper standard. The date of mailing is the proper standard. Id. Exhibit 11 reveals eleven payments were made late, not 58. The majority of the allegedly late payments were mailed when due. (Ex. 11) The payments which were mailed late were mailed a day or two late. Under the circumstances a minimal penalty is appropriate.

When considering the award of penalty benefits, the commissioner considers "the length of the delay, the number of delays, the information available to the employer regarding the employee's injuries and wages, and the prior penalties imposed against the employer under section 86.13." Schadendorf v. Snap-On Tools Corp., 757 N.W.2d 330, 336 (Iowa 2008). The purposes of the statute are to punish the employer and insurance company and to deter employers and insurance companies from delaying payments. Robbennolt, 555 N.W.2d at 237. Defendants made eleven weekly payments late in this case and have not appealed the penalty determination.

There was an incorrect termination of benefits on July 25, 2013, with no notice or explanation of the termination. However, on July 25, 2013, Dr. Pape released claimant to return to work without restrictions with regard to his

shoulder. (Ex. A, pp. 7-8) Although it turned out claimant did not return to work as expected because of an unrelated hernia surgery, the payments were made up on August 30, 2013. A total of $2,434.70 was improperly terminated and delayed. (Ex. 11, pp. 1, 5) A minimal penalty is appropriate for this delay because the payments were brought current within a short period of time.

There was also a delay of three weeks of benefits in November 2013 and those benefits were paid on December 7, 2013, for a delayed amount of $1,460.82. As of August 6, 2013, Dr. Pape said he anticipated claimant would reach MMI in three months' time, which would be November 6, 2013. Although this does not excuse the delay, under the circumstances a minimal penalty is appropriate, again, because the payments were brought current within a short period of time.

The record therefore supports the deputy commissioner's award of $1,250.00 in penalty benefits, which is affirmed.

ORDER

IT IS THEREFORE ORDERED that the arbitration decision of November 12, 2014, is AFFIRMED in its entirety.

Defendants shall pay claimant two hundred (200) weeks of permanent partial disability benefits commencing July 28, 2013, at the rate of four hundred eighty-six and 94/100 dollars ($486.94) per week from July 28, 2013.

Defendants shall pay a penalty of one thousand two hundred fifty and 00/100 dollars ($1,250.00), all of which is accrued.

Defendants shall pay/reimburse claimant's medical expenses identified in Exhibit 12.

Accrued benefits shall be paid in a lump sum together with interest pursuant to Iowa Code section 85.30, with subsequent reports of injury to be filed pursuant to rule 876. IAC 3.1.

Costs of the arbitration proceeding and the costs of the appeal, including the cost of the hearing transcript, are taxed to defendants pursuant to rule 876 IAC 4.33.

Signed and filed this 22nd day of March, 2016.

JOSEPH S. CORTESE II
WORKERS' COMPENSATION
COMMISSIONER

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